

**IN THE COURT OF SMALL CAUSES AT MUMBAI**  
**ORDER BELOW EXHIBIT NO.59**  
**IN**  
**R.A.D. SUIT NO.2136 OF 2008**  
**IN**  
**(CNR NO. MHSCA2-000346-2009)**

Abdul Kayum Mohamed Shaikh & Ors. ... Plaintiffs

V/s.

Haji Ismail Haji Allana & Ors. ... Defendants

And

Mr. Mobin S/o. Mohammed Ali Latif ... Applicant/Defendant  
 No.22

**Mr. Suhas M. Kharat, Learned Advocate for the Plaintiffs**  
**Mr. Ranjit A. Agashe, Learned Advocate for the**  
**Applicant/ Defendant No.22**

**Coram : Shri A.B. Hodawadekar**  
**Judge, C. R. No.24**  
**Date: 03.12.2018**

**ORAL ORDER :**

This Application is moved by the Defendant No.22 for seeking setting aside order dated 4<sup>th</sup> January, 2017.

2. It is contended by this Defendant that he is added as party defendant. Thereafter, the matter was posted for written statement of this Defendant, but, due to some inadvertance, written statement could not be filed. This Defendant got job in Abu Dhabi which almost lasted for year. Thereafter, there was separation of business in between his family members. Therefore, this Defendant could not convey and apprise his Advocate of the true and real facts as regards this suit. If, the delay of 1930 days in filing the written

statement of this Defendant is not condoned, then irreparable loss, prejudice and hardship will be caused to the Defendant No.22, which can not be compensated in the monetary terms. On these grounds, this Defendant prayed for setting aside the above order by condoning the delay, if any, and permitting him to file his written statement.

3. The Plaintiffs gave say Exhibit-60 and resisted the Application on various grounds. It is the contention of the Plaintiffs that there is no sufficient and reasonable cause for condonation of delay. The Application does not show any reason for condoning the delay. As per the settled principle of law, the time for filing written statement can be extended only in exceptional situation. The conduct of the Defendant is to deliberate delay the proceedings of the suit. No any document is placed on record to support the contentions raised. On these grounds, the Plaintiff prayed for dismissal of this Application with cost.

4. As no argument on behalf of this Defendant, vide order below this Application dated 14<sup>th</sup> November, 2018, matter kept for argument of the Plaintiffs without argument of the Defendant. Heard Advocate Suhas Kharat for the Plaintiffs.

5. On perusal of records, it appears that this Defendant added as party to the suit on 2<sup>nd</sup> April, 2013. Despite it, he failed to file written statement. Therefore, on 4<sup>th</sup> January, 2017, no reply order was passed. After one and half year, this Application is moved for setting aside that order. That means, almost 4 years were completed at the time of passing no reply order.

6. As regards Order-8, Rule-1 of C.P.C., it is necessary to mention that Hon'ble Apex Court in Sambhaji & Ors. V/s. Gangabai & Ors. in Civil Appeal No.6731 of 2008 decided on 20<sup>th</sup> November, 2008, in para-13 observed that, merely because a provision of law is couched in a negative language implying mandatory character, the same is not without exception. The

Courts, when called upon to interpret the nature of the provision, may, keeping in view the entire context in which the provision came to be enacted, hold the same to be directory though worded in the negative form. In the light of the ratio laid down in above judgments, the word 'shall' used in proviso to Order-8, Rule-1 is 'directory' and not 'mandatory'.

7. The Plaintiff filed his Affidavit of Evidence on 11<sup>th</sup> April, 2018. Thereafter, one Application is moved at Exhibit-58 for adjournment on 3<sup>rd</sup> August, 2018 which was allowed subject to cost Rs.1,000/-. Thus, it appears that this Defendant consistently negligent. But, in matter in hand, valuable rights of the parties are involved. This Defendant is the purchaser of the property from some of the Defendants. This Defendant is now the main contesting Defendant. If, he is not allowed to file his reply, grave prejudice will cause to his interest. Therefore, it appears necessary in the interest of justice to allow him to file his written statement, but subject to heavy cost. Hence, I proceed to pass following Order:

### **ORDER**

1. Application is allowed.
2. No reply order against this Defendant is set aside and he is allowed to file his reply condoning the delay, subject to cost Rs.5,000/- to be paid by this Defendant to the Plaintiff on or before next date.

( A.B. Hodawadekar)  
Judge, C. R. No.24  
03.12.2018

Order dictated on : 03.12.2018  
Order transcribed on : 04.12.2018  
Order checked & signed on : 04.12.2018