

Before Daya Chaudhary, J

SWARNI AND ANOTHER — *Petitioner*

versus

NITIN MUKESH AND ANOTHER — *Respondent*

CR No. 2404 of 2017

April 21, 2017

Constitution of India — Article 227 — Code of Civil Procedure — Order 8 & Rule 1 — Revision petition for setting aside order dated 12.09.2016 vide which defence of petition was struck off — Setting aside order dated 03.02.2017 vide which application for recalling dismissed — Plaintiff — Respondent 1 filed a suit for permanent injunction — written statement could not be filed by petitioners/Defendants in time — Defence was struck off after giving one effective opportunity for filing written statement — Application to recall the order dismissed — Revision Allowed with Rs.10000/- as cost.

Held, that Order VIII Rule 1 providing for upper limit of 90 days to file written statement is directory. Having said so, we wish to make it clear that the order extending time to file written statement cannot be made in routine. The time can be extended only in exceptionally hard cases. While extending time, it has to be borne in mind that the legislature has fixed file written statement is directory. Having said so, we wish to make it clear that the order extending time to file written statement cannot be made in routine. The time can be extended only in exceptionally hard cases. While extending time, it has to be borne in mind that the legislature has fixed the upper time limit of 90 days. The discretion of the Court to extend the time shall not be so frequently and routinely exercised so as to nullify the period fixed by Order VIII Rule 1.

(Para 7)

Further Held, that The extension of time should not be granted as a matter of routine and merely for asking especially when the time is beyond the period of 90 days. In case any extension is to be granted, the same could be for good reasons to be recorded in writing may be in brief.

(Para 12)

Sandeep Sharma, Advocate

for the petitioners.

DAYA CHAUDHARY, J.

(1) This application has been moved for placing on record zimni orders w.e.f. 19.3.2016 to 20.7.2016 as Annexure P-3 (colly).

(2) Application is allowed. Zimni orders attached with the application are taken on record.

C.R. No. 2404 of 2017

(1) The present revision petition has been filed under Article 227 of the Constitution of India for setting aside impugned order dated 12.9.2016 (Annexure P-1) vide which the defence of the petitioners was struck off and impugned order dated 3.2.2017 (Annexure P-2) whereby the application filed by the petitioners for re-calling of order dated 12.9.2016 was dismissed.

(2) Briefly the facts of the case are that plaintiff-respondent No.1 filed a suit for permanent injunction restraining the defendant-petitioners themselves or through their attorneys/agents/servants from interfering into his peaceful possession or from dispossessing him over the property in dispute and also restraining the defendants from changing the nature of the property in question. Written statement to said could not be filed by the present petitioners and their defence was struck off vide order dated 12.9.2016. Thereafter, the petitioners moved an application for recalling of order dated 12.9.2016 whereby their defence was struck off. Reply to that application was filed and thereafter the application was dismissed vide order dated 3.2.2017. Aggrieved by aforesaid two orders, petitioners have filed the present revision petition.

(3) Learned counsel for the petitioners submits that the trial Court has not taken into consideration the fact that the petitioners had wrongly noted down the date of hearing and, therefore, they could not file written statement. No prejudice is going to be caused to the plaintiff-respondents if only one effective opportunity is granted to the petitioners for filing written statement. It is also the argument of learned counsel for the petitioners that filing of written statement is necessary for just decision and proper adjudication of the case.

(4) Heard arguments of learned counsel for the petitioners and have also perused the impugned orders and other documents available on the file.

(5) Notice in the suit was issued on 19.3.2016 for 29.3.2016 and thereafter, vide order dated 12.9.2016, the defence of the petitioners was struck off. As per stand taken by the petitioners, the case was listed for hearing on 12.9.2016 and they had noted down the date as 12.10.2016 and their defence was struck off. The petitioners moved an application for recalling of order dated 12.9.2016 but the application was dismissed without considering the stand taken in the application. It is the argument of learned counsel for the petitioners that no prejudice is going to be caused to plaintiff-respondents in case the petitioners are allowed to file written statement. They even undertook to file written statement on one single date and also to compensate the party opposite by means of costs.

(6) On perusal of impugned order dated 12.9.2016, it is apparent that correct address of defendant No.1 was not filed despite last opportunity which shows that plaintiff-respondent No.1 did not want to proceed further against defendant No.1, and the suit filed against him under Order 9 Rule 5 CPC, was dismissed. It was also mentioned therein that the statutory period for filing written statement had already elapsed and there was no justification to adjourn the case for filing written statement and, as such, defence of defendants No. 2 and 3 was struck off. The application for recalling of aforesaid order was also dismissed vide order dated 3.2.2017 on the ground that no written statement was filed till 12.9.2016, and by that time more than 5 months' period had elapsed.

(7) Undisputedly, as per provisions of Order 8 Rule 1 CPC, the written statement is to be filed within a period of 90 days but the Court has discretion to allow the defendant to file written statement even after expiry of 90 days under exceptional circumstances as Order 8 Rule 1 is directory. opportunities/adjournments in case of special and extraordinary circumstances which are beyond the control of the party. Similar view has been observed by Hon'ble the Apex Court in case ***Salem Advocate Bar Association, Tamil Nadu*** versus ***Union of India***¹ which is as under:-

¹ 2005(3) R.C.R. (Civil) 530

“In construing this provision, support can also be had from Order VIII Rule 10 which provides that where any party from whom a written statement is required under Rule 1 or Rule 9, fails to present the same within the time permitted or fixed by the Court, the Court shall pronounce judgment against him, or make such other order in relation to the suit as it thinks fit. On failure to file written statement under this provision, the Court has been given the discretion either to pronounce judgment against the defendant or make such other order in relation to suit as it thinks fit. In the context of the provision, despite use of the word 'shall', the court has been given the discretion to pronounce or not to pronounce the judgment against the defendant even if written statement is not filed and instead pass such order as it may think fit in relation to the suit. In construing the provision of Order VIII Rule 1 and Rule 10, the doctrine of harmonious construction is required to be applied. The effect would be that under Rule 10 of Order VIII, the court in its discretion would have power to allow the defendant to file written statement even after expiry of period of 90 days provided in Order VIII Rule 1. There is no restriction in Order VIII Rule 10 that after expiry of ninety days, further time cannot be granted. The Court has wide power to 'make such order in relation to the suit as it thinks fit'. Clearly, therefore, the provision of Order VIII Rule 1 providing for upper limit of 90 days to file written statement is directory. Having said so, we wish to make it clear that the order extending time to file written statement cannot be made in routine. The time can be extended only in exceptionally hard cases. While extending time, it has to be borne in mind that the legislature has fixed the upper time limit of 90 days. The discretion of the Court to extend the time shall not be so frequently and routinely exercised so as to nullify the period fixed by Order VIII Rule 1.”

(8) Similarly, in another judgment of Hon'ble the Apex Court in case *Kajaria Iron Castings Limited* versus *Aswini Kumar More*², by considering the relevant provisions, the defendant was allowed to file written statement by granting one more opportunity and impugned order was set aside.

² 2002 (10) SCC 292

(9) The question is as to whether under the facts and circumstances of the case, the petitioner deserves to be granted any further opportunity for filing of written statement while setting aside the order passed by the Court below whereby defence of the petitioner was struck-off on account of non-filing of written statement.

(10) Comprehensive amendments were made in CPC in the year 2002 in Order VIII Rule 1 CPC. The relevant provision is reproduced below:-

“Written Statement:- The defendant shall, within thirty days from the date of service of summons on him, present a written statement of his defence:

Provided that where the defendant fails to file the written statement within the said period of thirty days, he shall be allowed to file the same on such other day, as may be specified by the court, for reasons to be recorded in writing, but which shall not be later than ninety days from the date of service of summons.”

(11) Aforesaid provision provides that the defendant shall, within thirty days from the date of service of summons on him, present a written statement of his defence, provided that where the defendant fails to file written statement within the said period of thirty days, he shall be allowed to file the same within such further time, as may be specified by the court, for reasons to be recorded in writing, but which shall not be later than ninety days from the date of service of summons.

(12) The issue as to whether the period so provided under Order VIII Rule 1 CPC for filing the written statement is mandatory or directory, came up for consideration before Hon'ble the Supreme Court in *Kailash* versus *Nanhku and others*³, wherein it was opined that the purpose of amendment is to expedite and not to scuttle the hearing. This does not impose an embargo on the power of the court to extend the time further, as no penal consequences as such have been provided, the provisions being in the domain of the procedural law are not mandatory. However, it was further opined that keeping in view the need for expeditious trial of the civil cases, ordinarily the time schedule should be followed as a rule and departure therefrom would be by way of exception. The extension of time should not be granted as a matter of

³ 2005 (2) RCR (Civil) 379

routine and merely for asking especially when the time is beyond the period of 90 days. In case any extension is to be granted, the same could be for good reasons to be recorded in writing may be in brief. Relevant paras from the aforesaid judgment are extracted below:-

“45 (i) to (iii) x x x x

(iv) The purpose of providing the time schedule for filing the written statement under Order VIII, Rule 1 of CPC is to expedite and not to scuttle the hearing. The provision spells out a disability on the defendant. It does not impose an embargo on the power of the Court to extend the time. Though, the language of the proviso to Rule 1 of Order VIII of the CPC is couched in negative form, it does not specify any penal consequences flowing from the non-compliance. The provision being in the domain of the Procedural Law, it has to be held directory and not mandatory. The power of the Court to extend time for filing the written statement beyond the time schedule provided by Order VIII, Rule 1 of the CPC is not completely taken away.

(v) Though Order VIII, Rule 1 of the CPC is a part of procedural Law and hence directory, keeping in view the need for expeditious trial of civil causes which persuaded the Parliament to enact the provision in its present form, it is held that ordinarily the time schedule contained in the provision is to be followed as a rule and departure therefrom would be by way of exception. A prayer for extension of time made by the defendant shall not be granted just as a matter of routine and merely for asking, more so when the period of 90 days has expired. Extension of time may be allowed by way of an exception, for reasons to be assigned by the defendant and also be placed on record in writing, howsoever briefly, by the Court on its being satisfied. Extension of time may be allowed if it was needed to be given for the circumstances which are exceptional, occasioned by reasons beyond the control of the defendant and grave injustice would be occasioned if the time was not extended. Costs may be imposed and affidavit or documents in support of the grounds pleaded by the defendant for extension of time may be demanded, depending on the facts and circumstances of a given case.”

(13) The issue regarding filing of belated written statement came up for consideration before Hon'ble the Supreme Court in view of objection raised by the plaintiff therein, in *M. Srinivasa Prasad and others* versus *The Comptroller & Auditor General of India and others*⁴, wherein Hon'ble the Supreme Court while setting aside the order passed by the trial court as well as the High Court, remitted the matter back for consideration afresh, as there were no reasons forthcoming for allowing the written statement to be filed after expiry of period of 90 days. Relevant para thereof is extracted below:-

“7. Since neither the trial Court nor the High Court have indicated any reason to justify the acceptance of the written statement after the expiry of time fixed, we set aside the orders of the trial Court and that of the High Court. The matter is remitted to the trial Court to consider the matter afresh in the light of what has been stated in *Kailash's* case(supra). The appeal is allowed to the aforesaid extent with no order as to costs.”

(14) Subsequently the same issue again came up for consideration before Hon'ble the Supreme Court in *R.N. Jadi* versus *Subhashchandra*⁵, wherein it was opined that the grant of extension of time beyond 30 days is not automatic. The power of the court has to be exercised with caution and for adequate reasons to be recorded and extension of time beyond 90 days of service of summons must be granted only based on a clear satisfaction of the justification for granting such extension. The period prescribed under Order VIII Rule 1 CPC should generally be adhered to and the extension should be in exceptional cases. The relevant paras thereof are extracted below:-

“14. It is true that procedure is the handmaid of justice. The court must always be anxious to do justice and to prevent victories by way of technical knock-outs. But how far that concept can be stretched in the context of the amendments brought to the Code and in the light of the mischief that was sought to be averted is a question that has to be seriously considered. I am conscious that I was a party to the decision in ***Kailash vs. Nankhu and others, 2005 (4) SCC 480*** which held that the provision was directory and not

⁴ 2007 (4) SCT 380

⁵ 2007 (3) RCR (Civil) 588

mandatory. But there could be situations where even a procedural provision could be construed as mandatory, no doubt retaining a power in the court, in an appropriate case, to exercise a jurisdiction to take out the rigour of that provision or to mitigate genuine hardship. It was in that context that in **Kailash vs. Nankhu and others** (supra) it was stated that the extension of time beyond 90 days was not automatic and that the court, for reasons to be recorded, had to be satisfied that there was sufficient justification for departing from the time limit fixed by the Code and the power inhering in the court in terms of Section 148 of the Code. *Kailash* is no authority for receiving written statements, after the expiry of the period permitted by law, in a routine manner.

15. A dispensation that makes Order VIII Rule 1 directory, leaving it to the courts to extend the time indiscriminately would tend to defeat the object sought to be achieved by the amendments to the Code. It is, therefore, necessary to emphasise that the grant of extension of time beyond 30 days is not automatic, that it should be exercised with caution and for adequate reasons and that an extension of time beyond 90 days of the service of summons must be granted only based on a clear satisfaction of the justification for granting such extension, the court being conscious of the fact that even the power of the court for extension inhering in Section 148 of the Code, has also been restricted by the legislature. It would be proper to encourage the belief in litigants that the imperative of Order VIII 1 must be adhered to and that only in rare and exceptional cases, the breach thereof will be condoned. Such an approach by courts alone can carry forward the legislative intent of avoiding delays or at least in curtailing the delays in the disposal of suits filed in courts. The lament of Lord Denning in **Allen v. Sir Alfred Mc Alpine & Sons, (1968) 1 All ER 543** that law's delays have been intolerable and last so long as to turn justice sour, is true of our legal system as well. Should that state of affairs continue for all times?"

(15) Similar view was expressed by Hon'ble the Surpeme Court in *Mohammed Yusuf* versus *Faij Mohammed and others*⁶ and in *Sandeep Thapar* versus *SME Technologies Private Limited*⁷.”

(16) In view of facts, circumstances and the law position as discussed above, the present petition deserves to be allowed. Impugned orders dated 12.9.2016 (Annexure P-1) and 3.2.2017 (Annexure P-2) are hereby set aside and the petitioners are granted one effective opportunity to file written statement, however, subject to payment of costs amounting to Rs.10,000/-, to be paid to the party opposite by way of demand draft.

Amit Aggarwal

⁶ 2009 (1) RCR (Civil) 633

⁷ 2014 (1) RCR (Civil) 729