

*** HIGH COURT OF DELHI: NEW DELHI**

CM (M) No. 761/2010

% Judgment reserved on: 5th October, 2010

Judgment delivered on: 7th October, 2010

Sh. Vasdev
S/o Sh. Bhagwan Dass,
R/o F/1/20, IInd Floor
Guru Nanak Market,
Lajpat Nagar,
New Delhi-24

....Petitioner.

Through: Mr. Avtar Singh, Advocate.

Versus

Sh. Rattan Lal @ Pinki
S/o Sh. Bhagwan Dass
R/o A-24, Gali No. 8,
Partap Nagar, Mayur Vihar,
Phase-I, Delhi – 110092.

....Respondent

Through: Mr. Sumant De, Advocate

HON'BLE MR. JUSTICE V.B. GUPTA

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| 1. Whether the Reporters of local papers may be allowed to see the judgment? | Yes |
| 2. To be referred to Reporter or not? | Yes |
| 3. Whether the judgment should be reported in the Digest? | Yes |

V.B.Gupta, J.

Present petition under Article 227 of the Constitution of India has been filed by petitioner for setting aside orders dated 31st March, 2010 & 12th May, 2010.

2. At the time of arguments, learned counsel for petitioner stated that he confines his prayer only with regard to “not taking of the written statement filed by petitioner on record”.

3. Respondent (plaintiff in the trial court) has filed suit for specific performance against the petitioner (defendant in the trial court).

4. Petitioner was duly served with summons on 1st November, 2009 to appear on 16th March, 2010 in the trial court. On 16th March, 2010, petitioner filed his written statement and matter was adjourned to 31st March, 2010. In the meanwhile, respondent filed an application under Order 8 Rule 1 & 10 of Code of Civil Procedure (for short as ‘Code’) for passing the decree, as written statement was filed beyond the prescribed period.

5. Vide impugned order dated 31st March, 2010, trial court held that since written statement was filed after 105 days from the service of the petitioner, written statement shall not form part of the record, being filed beyond the prescribed time.

6. Petitioner, thereafter filed three applications; under Order 7 Rule 11 of the Code, Section 114 of the Code and Section 5 of the Limitation Act. All these applications were dismissed vide order dated 12th May, 2010.

7. It is contended by learned counsel for petitioner that though petitioner has filed the written statement beyond the prescribed period, but there was no deliberate attempt on the part of the petitioner to delay the matter. Petitioner is an illiterate person and has no legal knowledge about the procedure and he relied upon his previous counsel, who did not give him correct advice. Since written statement has already been filed, same may be taken on record.

8. In support, learned counsel for petitioner cited following judgments:-

***a) Kailash v. Nankhu & ors.,
JT 2005 (4) SC 204;***

***b) M/s R.N.Jadi & Brothers and Ors. vs. Subhashchandra,
JT 2007 (9) SC 165 and,***

***(c) Rani Kusum (Smt.) vs. Kanchan Devi (Smt.) and Ors.,
2005 VII AD (SC) 192***

9. On the other hand, it is contended by learned counsel for the respondent that written statement was not filed within the statutory

period. Moreover, it is no ground that counsel did not give correct advice to the petitioner.

10. It is further contended that the purpose of filing of present petition is just to delay the proceedings, since petitioner did not even cross-examine the respondent's witnesses. Now matter is listed before the trial court for final arguments. There is no merit in the present petition and same should be dismissed.

11. There is no dispute about the principles of law laid down in the judgments cited by learned counsel for petitioner.

12. In *Mohd. Yusuf vs. Faij Mohammad and Ors., 2009 (3) SCC 513*, Supreme Court observed;

“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 knockouts. 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 v. Nankhu* which held that the provision was directory and not 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 v. Nankhu* 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 statement, after the expiry of the period permitted by law, in a routine manner.”

13. In the present case, petitioner was served on 1st November, 2009 for 16th March, 2009. On that very day, petitioner filed his written statement, though same was beyond the statutory period. Since, written statement has been filed by the petitioner on the very first date of hearing itself, grave injustice would be caused to him, if written statement already filed by him is not taken on record.

14. In view of the fact that matter is listed for final arguments before the trial court and in view of the loss of time attributable to the petitioner in prosecuting the suit filed by respondent/plaintiff, petitioner cannot be permitted to be let off scot free. Therefore, while setting aside the impugned order and permitting the written statement filed by petitioner to be taken on record, it is directed that petitioner shall compensate the respondent for the delay caused on account of loss of time and avoidable round of litigation by way of the present petition, by paying respondent costs of Rs.30,000/- (Rupees Thirty thousand only). The said costs shall be paid to the respondent through counsel within two weeks from today.

15. It is made clear that in case, costs are not paid within the time granted, the written statement of petitioner shall not be permitted to be taken on record.

16. Petition stands disposed of accordingly.

7th October, 2010
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V.B.GUPTA, J.