

* IN THE HIGH COURT OF DELHI AT NEW DELHI

+ **C.R.P. 100/2009**

Date of decision: 22.04.2010

IN THE MATTER OF :

MUSHARRAT ALI

..... Petitioner

Through: Mr. M.Hasibuddin, Advocate

versus

RAIS AZAM

..... Respondent

Through: Ms. Seema Sharma, Advocate

CORAM

*** HON'BLE MS.JUSTICE HIMA KOHLI**

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

HIMA KOHLI, J. (ORAL)

1. The present petition is directed against an order dated 12.05.2009 passed by the Civil Judge, Delhi, dismissing an application preferred by the petitioner (defendant in the court below) under Section 5 of Limitation Act read with Section 151 of the Code of Civil Procedure, seeking condonation of delay in filing his written statement in a suit instituted by the respondent (plaintiff in the court below) for recovery of possession, damages for use and occupation of suit premises, i.e., F-49, 4th Floor, Nafis Road, Batla House, Joga Bai Extn., Jamia Nagar, Okhla, New Delhi, in his favour and pass a decree for recovery of arrears.

2. The sequence of events relevant for deciding the present case at hand are that the summon of the suit was served on the petitioner/defendant on 09.02.2009 and he was directed to appear in Court on 19.02.2009. Counsel for the petitioner appeared in Court on 19.02.2009 and filed his power of attorney. The case was adjourned to 30.04.2009 for filing of written statement within the stipulated period. The written statement was filed on 30.04.2009 alongwith an application seeking condonation of delay. However, the application for condonation of delay came to be dismissed by the impugned order and the defence of the petitioner/defendant was struck off. Hence, the present revision petition.

3. Counsel for the petitioner submits that he could not file the written statement till 29.04.2009 for the reasons as set out in the application seeking condonation of delay. However, he filed the same on 30.04.2009, i.e., on the date of hearing fixed by the Court on 19.02.2009. He states that the trial court failed to consider that though the written statement was not filed within the stipulated period of 30 days, it was filed well within the period of 90 days. He contends that the learned Civil Judge erred in dismissing the application of the petitioner and refusing to condone the delay in filing the written statement and striking off the defence of the petitioner, despite the fact that adequate and satisfactory explanation had been put forward by the petitioner.

4. Counsel for the respondent supports the impugned order and argues that the delay in filing the written statement beyond the stipulated period of 30 days has not been explained satisfactorily by

the petitioner. She states that negligence on the part of the counsel in not filing the written statement within the stipulated time cannot be treated as a 'sufficient cause' as required under Order VIII of the Code of Civil Procedure.

5. Order VIII of the CPC deals with written statement, set-off and counter claim. An amendment was carried out to Rule 1 of Order VIII by Act 22 of 2002, which came into operation w.e.f. 01.07.2002. The amended Rule 1 of Order VIII stipulates that the defendant shall present a written statement of his defence within 30 days from the date of service of summons on him. The proviso to the said Rule allows such a defendant, who fails to file his written statement within the stipulated period of 30 days, to file the same on such other day, as may be specified by the Court, for reasons to be recorded in writing but requires that the written statement shall not be filed later than 90 days from the date of service of summons.

6. Order VIII Rule 1 has been discussed by the Supreme Court in Salem Advocate Bar Association.(II) Vs. Union of India reported as **(2005) 6 SCC 344** in the following words:

"20. The use of the word 'shall' in Order VIII Rule 1 by itself is not conclusive to determine whether the provision is mandatory or directory. We have to ascertain the object which is required to be served by this provision and its design and context in which it is enacted. The use of the word 'shall' is ordinarily indicative of mandatory nature of the provision but having regard to the context in which it is used or having regard to the intention of the legislation, the same can be construed as directory. The rule in question has to advance the cause of justice and not to defeat it. The rules of procedure are made to advance the cause of justice and not to defeat

it. Construction of the rule or procedure which promotes justice and prevents miscarriage has to be preferred. The rules or procedure are hand-maid of justice and not its mistress. In the present context, the strict interpretation would defeat justice.

21. 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.” (emphasis added).

7. The object of providing a time frame to file the written statement is to achieve speedy disposal of cases and avoid unnecessary adjournments. However, in the process of expediting the proceedings, the principles of natural justice have to be kept in mind. As observed by the Supreme Court in the case of Sangram Singh Vs. Election Tribunal, Kotah reported as **AIR 1955 SC 425:-**

“18. Next, there must be ever present to the mind the fact that our laws of procedure are grounded on a principle of natural justice which requires that men should not be condemned unheard, that decisions should not be reached behind their backs, that proceedings that affect their lives and property should not continue in their absence and that they should not be precluded from participating in them. Of course, there must be exceptions and where they are clearly defined they must be given effect to.”

8. Also, in the case of Kailash Vs. Nankhu reported as **(2005) 4 SCC 480**, the Supreme Court observed as below:

“30. Merely because a provision of law is couched in a negative language implying a mandatory character, the same is not without exceptions. 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.”

9. The scope of Order VIII Rule 1 has been discussed at length in the case of Kailash vs. Nankhu (supra), the relevant paras of which are extracted hereinbelow:-

"46. i. xxx

ii. xxx

iii. xxx

iv. The purpose of providing the time schedule for filing the written statement under Order 8 Rule 1 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 Order 8 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 8 Rule 1 CPC is not completely taken away.

v. Though Order 8 Rule 1 CPC is a part of procedural law and hence directory, keeping in view the need for expeditious trial of civil causes which persuaded 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 the 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 is needed to be given for 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."

10. Hence, in exercise of its discretion, the Court can condone the delay in filing the written statement, if filed within the prescribed period of ninety days, and even beyond the said period, subject to just and sufficient cause being shown by the defendant.

11. In the present case, the suit was filed on 06.12.2008. The summons was served upon the petitioner/defendant on 09.02.2009. Thirty days from the date of service of summons expired on 11.03.2009. The written statement was filed on 30.04.2009, i.e., on the date fixed by the court below after granting time to the petitioner vide order dated 19.02.2009, to file the written statement within the stipulated period of time. Thus, the written statement came to be filed 49 days after the expiry of the thirty days, which is still within the period of 90 days stipulated under Order VIII Rule 1 CPC.

12. The explanation offered by the defendant in his application for condonation of delay in filing the written statement is that although his counsel appeared before the Court on 19.02.2009 and filed his *vakalatnama* while seeking permission to file written statement, the written statement was filed only on 30.04.2009, which was the next date of hearing fixed in the suit, as the defendant had to go to his native village to attend to his ailing mother and he returned to Delhi only in the second week of March, 2009. As a result, the counsel for the petitioner could not prepare the written statement till the said date and could get the affidavit of the petitioner verified only on 20.03.2009. However, even thereafter, the counsel for the petitioner did not file the written statement right away. An explanation has been put forward on behalf of the counsel for the petitioner/defendant that

though the written statement was prepared and the affidavit in support thereof was got verified on 20.03.2009, it could not be filed within the stipulated period of 30 days, i.e., on or before 11.03.2009 or immediately after 20.03.2009, as the counsel had to rush out of town to attend to his wife, who was in the family way and that he could return to Delhi only in the second week of April, 2009.

13. The explanation offered by the petitioner for seeking condonation of delay in filing the written statement belatedly is quite plausible. It cannot be stated that no cogent reasons for the delay were offered in the application. The delay as sought to be condoned is not only on account of the petitioner, but also on account of the personal difficulty of his counsel. The circumstances explained by the counsel of having to rush to his native place to attend to his pregnant wife, cannot be brushed away. Nor can the said explanation offered by the petitioner and his counsel be termed *malafide*. No doubt, the intention behind the amendment to Rule 1 of Order VIII of the Code was to expedite the trial and ensure that the prayer for extension of time for filing the written statement made by the defendant be not granted just for the asking, but in the present case, the record reflects that the period of 30 days from the date of service of summons expired on 11.03.2009 and the written statement came to be filed on the date fixed in Court, i.e., 30.04.2009, after a period of 49 days from the date of expiry of 30 days. In any case, the written statement was filed by the petitioner/defendant within the period of 90 days. Hence, it is not a case of inordinate delay. Grave injustice would be caused to the petitioner

if he is not permitted to contest the suit of the respondent on merits, by permitting his written statement to be taken on record.

14. Having regard to the aforesaid facts and circumstances, the present petition is allowed. The written statement filed by the petitioner/defendant is permitted to be taken on the record. The petitioner is, however, mulcted with costs of Rs.2,500/- payable to the respondent within four weeks. As counsels for the parties state that the matter is listed before the trial court in the month of September, 2010, without losing further time, the respondent is directed to file the replication to the written statement within four weeks. The parties shall also file their original documents within eight weeks, while exchanging copies thereof so that admission and denial of documents and framing of issues can take place before the trial court on the next date of hearing.

15. The petition is disposed of.

(HIMA KOHLI)
JUDGE

APRIL 22, 2010
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