

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

CM (M) No. 1169/2010 & CM No. 16291/2010

% Judgment reserved on: 10th September, 2010

Judgment delivered on: 16th September, 2010

Sh. Vinay Singh
S/o Sh. Jernail Singh
J-45, Ground Floor,
Dilshad Colony,
Delhi-110095

.....Petitioner.

Through: Mr. Vinay Gupta, Advocate.

Versus

1. Mrs. Rinku Gupta
W/o Mr. Harsh Kumar,
R/o D-186, D-1, Vasant Lane,
Railway Colony,
New Delhi-110055

2. Mr. Harsh Kumar,
S/o Sh. J.C.Gupta,
R/o D-186, D-1, Vasant Lane,
Railway Colony,
New Delhi-110055

.....Respondents

Through: None

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.

By this petition under Article 227 of Constitution of India petitioner has assailed order dated 31.7.2010 passed by Senior Civil Judge, Delhi, whereby opportunity to file written statement was declined.

2. Brief facts which emerges from record are that on 1.4.2010 respondents (plaintiffs in the trial court) filed a suit for recovery of possession, arrears of rent, electricity, water and maintenance charges, mesne profits and damages against petitioner (defendant in trial court).

3. Petitioner was served with the summons on 24.4.2010, however, he did not file the written statement, within the statutory period. Accordingly, opportunity for filing written statement by petitioner was closed vide impugned order.

4. It is contended by learned counsel that no cause of action arose against petitioner in view of provisions of Order 7 Rule 11 of the Code of Civil Procedure (for short as 'Code') as admittedly the value of suit property minimum being Rs. 4.40 lacs, the Civil Judge has no jurisdiction.

5. It is also contended that after expiry of the first lease deed, tenancy of petitioner was extended by second lease deed which fact has not been disclosed by respondents in their plaint. Moreover, respondents accepted rent up to March, 2010 without any protest.

6. Another contention is that the Court is not powerless not to grant permission to file written statement even after expiry of 90 days. Petitioner has shown ample reason for not filing the written statement within the statutory period of 90 days, firstly, on account of its having preferred application under Order 7 Rule 11 of the Code and secondly, on account of petitioner being hospitalized.

7. In support, learned counsel for petitioner relied upon ***Smt. Rani Kusum vs. Kanchan Devi and Ors., (2005) 6 SCC 705.***

8. Present petition has been filed under Article 227 of the Constitution of India. It is well settled that jurisdiction of this Court under this Article is limited.

9. In ***Waryam Singh and another vs. Amarnath and another, AIR 1954, SC 215***, the court observed;

“This power of superintendence conferred by Article 227 is, as pointed out by Harries, C.J., in – ‘Dalmia Jain Airways Ltd. V. Sukumar Mukherjee’, AIR 1951 Cal 193 (SB) (B), to be exercised most sparingly and only in appropriate cases in order to keep the Subordinate Courts

within the bounds of their authority and not for correcting mere errors.”

10. In light of principles laid down in the above decision, it is to be seen as to whether present petition under Article 227 of the Constitution of India against impugned order is maintainable or not.

11. As apparent from record, petitioner was served with summons on 25.4.2010, and as per Order 8 Rule 1 of the Code, he was required to file written statement within 30 days, which is extendable upto a maximum period of 90 days. Though, petitioner has been attending hearings in the Court but he did not file the written statement, in spite of various opportunities granted to him. Instead he moved an application under Order 7 Rule 11 of the Code which is pending disposal before the trial court.

12. The main grounds taken in application under Order 7 Rule 11 of the Code are that; petitioner has undervalued the suit for the purpose of Court fees and jurisdiction and plaint has not been filed in accordance with the provisions of Order 4,6 & 7 of the Code.

13. Petitioner has deliberately not placed on record copy of the plaint filed in the trial court so that it could be seen as to whether the averments made in application under Order 7 Rule 11 of the Code are

justified or not. Be that as it may be, question to be seen in present petition is as to whether order passed by the trial court closing the right of the petitioner to file written statement, is justified or not.

14. In *Saleem Advocate Bar Association vs. Union of India*, (2005) 6 SCC 344, Supreme Court held:-

“In construing the provision of Order 8 Rule 1 and Rule 10, the doctrine of harmonious construction is required to be applied. The effect would be that under Rule 10 Order 8, the Court in its discretion would have the power to allow the defendant to file written statement even after expiry of the period of 90 days provided in Order 8 Rule 1. There is no restriction in Order 8 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 8 Rule 1 providing for the 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 8 Rule 1.”

15. In *R.N.Jadi & Brothers and Ors. vs. Subhashchandra* (2007) 6 SCC 420, Supreme Court while dealing with provisions of Order 8 Rule 1 and proviso thereto of the Code, laid down that:-

“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 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 statements, after the expiry of the period permitted by law, in a routine manner.

15. A dispensation that makes Order 8 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 emphasize 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 8 Rule 1

must be adhered to and that only in rare and exceptional cases, will 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 McAlpine & Sons* 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?

16. As per impugned order, petitioner did not file the written statement within the period of 90 days. The reason mentioned for not filing of the written statement by petitioner was that he was admitted in the hospital. Relevant findings of trial court in this regard read as under;

“Counsel for the defendant also seeks to file WS today. Perusal of the last ordersheet shows that the parties were present in person on the last date of hearing i.e. 3.6.10 and the defendant instead of filing of WS filed application U/o 7 Rule 11 CPC and defendant was directed to file WS within 30 days with copy to the plaintiff who shall file replication today.

Today Counsel for the defendant appeared and has submitted that the time was given for filing the WS till today which is contrary to the record. Even otherwise, Perusal of the record shows that defendant has been served with the summons on 25.4.10 and as per the amended CPC under Order 8 Rule 1 CPC, the defendant is required to file WS within 30 days which is extendable upto a maximum period of 90 days. Since the WS has not been filed within a period of 90 days, WS cannot be taken on record in a routine manner.

Counsel for the defendant has submitted that defendant has hospitalized and was suffering from chest pain and has also shown some documents pertaining to the treatment of the defendant. Perusal of the all these documents which have been produced by the defendant today show that defendant was admitted in the hospital only in July 2010 and not before that. There is nothing on record to show as to why WS was not filed within the prescribed period of 90 days. If the defendant could attend his other vocations, he was in a fit condition to file the WS. This fact is also substantiated by the fact that defendant was present in the court on 3.6.10 itself and prior to that on 2.6.10, he appeared before the Oath Commissioner for attestation of his affidavit which has been filed alongwith the application U/o 7 Rule 11 CPC. In these circumstances, I do not find any grounds to take the WS of the defendant on record after the statutory period has expired. Accordingly, opportunity for filing the WS by the defendant stands closed.”

17. There is no reason to disagree with the findings of the trial court that when petitioner had been appearing in person before the Oath Commissioner on 2nd June, 2010 and was also present in the Court on 3rd June, 2010, then there is no explanation as to why petitioner did not file the written statement on 3rd June, 2010. It is a fit case, where trial court has exercised its discretion in a judicious manner. Accordingly, there is no ambiguity, infirmity or error in the impugned order. Present petition under Article 227 of Constitution of India is not maintainable. Same has been filed just to delay the

proceedings pending before the trial court. Thus, there is no merit in the petition and it is hereby dismissed with costs of Rs.20,000/- (Twenty thousand only).

18. Petitioner is directed to deposit the costs with Registrar General of this court by way of cross cheque, within four weeks from today.

CM No. 16291/2010 (stay)

19. Dismissed.

20. List for compliance on 25th October, 2010.

16th September, 2010

V.B.GUPTA, J.

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