

THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment Reserved on: 04.02.2011
Judgment Pronounced on: 07.02.2011
**+ IA Nos 16386/2010, 16007/2010, 1679/2011 in
CS(OS) No. 727/2010**

**SARDAR VALLABHBHAI PATEL
SMARAK TRUST**

.....Plaintiff

- versus -

SAMARTH NANGIA

.....Defendant

Advocates who appeared in this case:

For the Plaintiff: Mr. V.P.Choudhary, Sr. Adv.
with Mr.G.Tushar, Adv.

For the Defendant: Mr. Rajiv Kumar Garg, Adv.

CORAM:-

HON'BLE MR JUSTICE V.K. JAIN

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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 Digest? | Yes |

V.K. JAIN, J

1. Vide IA No. 18634/2010, the plaintiff has sought recall of the order dated 26th August, 2010, whereby this Court noting that though as per affidavit of service the defendant was stated to have been served, the ordinary process, had been received with the report 'defendant is out of station', and further noting that Registered A.D. cover

had not been received back, directed issue of fresh process to the defendant for 02nd November, 2010. It is alleged that on 03rd July, 2010, the defendant was personally served at his residence at A-7, NDSE, Part-II, New Delhi, on identification by Shri S.S. Mishra, representative of the plaintiff. It is further alleged in the application that Senior Superintendent of Post Offices, vide his letter dated 22nd September, 2010 sent to the counsel for the plaintiff, has confirmed that Registered Letter No. 9163 received from Delhi High Court on 06.06.2010 was delivered to the addressee on 07.06.2010. In view of personal service as well as service by registered post, the plaintiff has sought recall of the order dated 26.08.2010.

2. Vide IA No. 16007/2010, the plaintiff has sought pronouncement of judgment against the defendants on the ground that despite service of summons on him, he had failed to file written statement within the time prescribed in this regard.

3. Vide IA No. 16386/2010, the defendant had sought two weeks' time to file the written statement. It is alleged in this application that the defendant has never been served with any notice from the Court. It is further that nobody

was residing at the address given in the notice for last 8 months and the said house was later vacated by the father of the defendant on 27.09.2010. On that day, the brother of the defendant went to the above-referred place for vacating the premises and at that time, the guard handed over to him a bulk of mails and couriers, wherein a summon of the above case was found along with a copy of the plaint. It is further alleged that on enquiry, the defendant came to know that the matter was fixed for 22.11.2010. Since he was not aware that the statement was required to be filed within prescribed time, he did not engage a counsel up to 20.11.2010 and, therefore, the written statement could not be filed within the stipulated period of 30 days which expired on 26.10.2010.

4. IA No. 1679/2011 has been filed by the defendant seeking condonation of delay in filing the written statement. It is alleged in the application that on account of downfall in his business, the defendant was not residing in the premises and a guard used to collect the mails. It has been requested that even if there is some delay in filing the written statement, the same may be condoned in the interest of justice.

5. During the course of arguments, it was expressly admitted by the learned counsel for the defendant that the summon sent to the defendant by registered post was actually received at A-7, NDSE Part-I, New Delhi on 07th June, 2010. He also admitted that the suit summon was also received by the defendant personally on 03rd July, 2010.

6. Order VIII Rule 1 of the Code of Civil Procedure to the extent it is relevant provides that the defendant shall within 30 days from the date of service of summons on him, present a written statement of his defence. It provides that where the defendant fails to file the written statement within the period of 30 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, but, which shall not be later than 90 days from the date of service of summon.

7. It was thus to be seen that as per the statutory provision, the normal period prescribed for filing written statement is 30 days from the date of receipt of summon though for reasons to be recorded into writing, the Court can allow the written statement to be filed at a later date, which is not beyond 90 days from the date of service of

summon by the defendant. Written statement has been filed on 08th December, 2010, i.e., more than 6 months after receipt of summon by Registered Post and more than 5 months after receipt of summon through process server.

8. In **Kailash vs. Nanhku and Ors.** (2005) 4 SCC 480, Supreme Court, inter alia, observed as under:

“Three things are clear. Firstly, a careful reading of the language in which Order VIII, Rule 1 has been drafted, shows that it casts an obligation on the defendant to file the written statement within 30 days from the date of service of summons on him and within the extended time falling within 90 days. The provision does not deal with the power of the court and also does not specifically take away the power of the court to take the written statement on record though filed beyond the time as provided for. Secondly, the nature of the provision contained in Order VIII, Rule 1 is procedural. It is not a part of the substantive law. Thirdly, the object behind substituting Order VIII, Rule 1 in the present shape is to curb the mischief of unscrupulous defendants adopting dilatory tactics, delaying the disposal of cases much to the chagrin of the plaintiffs and petitioners approaching the court for quick relief and also to the serious inconvenience of the court faced with frequent prayers for

adjournments. The object is to expedite the hearing and not to scuttle the same. The process of justice may be speeded up and hurried but the fairness which is a basic element of justice cannot be permitted to be buried.

It is also to be noted that though the power of the Court under the proviso appended to Rule 1 of Order VIII is circumscribed by the words – “shall not be later than ninety days” but the consequences flowing from non-extension of time are not specifically provided though they may be read by necessary implication. Merely, because a provision of law is couched in a negative language implying 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.

Considering the object and purpose behind enacting Rule 1 of Order VIII in the present form and the context in which the provision is placed, we are of the opinion that the provision has to be construed as directory and not mandatory. In exceptional situations, the court may extend the time for filing the written statement though the period of 30 days and 90 days, referred to in the provision, has expired. However, we may not be misunderstood as nullifying the

entire force and impact – the entire life and vigour – of the provision. The delaying tactics adopted by the defendants in law courts are now proverbial as they do stand to gain by delay. This is more so in election disputes because by delaying the trial of election petition, the successful candidates may succeed in enjoying the substantial part, if not in its entirety, the term for which he was elected even though he may lose the battle at the end. Therefore, the judge trying the case must handle the prayer for adjournment with firmness. The defendant seeking extension of time beyond the limits laid down by the provision may not ordinarily be shown indulgence.

Ordinarily, the time schedule prescribed by Order VIII, Rule 1 has to be honoured. The defendant should be vigilant. No sooner the writ of summons is served on him he should take steps for drafting his defence and filing the written statement on the appointed date of hearing without waiting for the arrival of the date appointed in the summons for his appearance in the Court. The extension of time sought for by the defendant from the court whether within 30 days or 90 days, as the case may be, should not be granted just as a matter of routine and merely for asking more so, when the period of 90 days has expired. The extension can be only by way of an exception and for reasons assigned by the defendant and also recorded in writing by the

Court to its satisfaction. It must be spelled out that a departure from the time schedule prescribed by Order VIII, Rule 1 of the Code was being allowed to be made because the circumstances were exceptional, occasioned by reasons beyond the control of the defendant and such extension was required in the interest of justice, and grave injustice would be occasioned if the time was not extended.”

(emphasis supplied)

In **Salem Advocate Bar Association, Tamil Nadu**

v. Union of India, 2005 (6) SCC, 344, Supreme Court, *inter alia*, observed as under:

“It has been common practice for the parties to take long adjournments for filing written statements. The legislature with a view to curb this practice and to avoid unnecessary delay and adjournments, has provided for the maximum period within which the written statement is required to be filed. The mandatory or directory nature of Order VIII Rule 1 shall have to be determined by having regard to the object sought to be achieved by the amendment. It is, thus, necessary to find out the intention of the legislature. The consequences which may follow and whether the same were intended by the legislature have also to be kept in view.”

The following view was taken by the Court with respect to extension of time beyond the prescribed period of 90 days:

“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 supplied)

In **R.N. Jadi & Brothers and Ors vs. Subhashchandra** (2007) 6 SCC 420 which is a judgment

relied upon by the learned counsel for the defendant, referring to its earlier decisions in the case of **Salem Advocate Bar Association, Tamil Nadu** (supra), **Kailash** (supra), **Rani Kusum v. Kanchan Devi and Ors.**, 2005(6) SCC 705 and **Shaikh Salim Haji Abdul Khayumsab v. Kumar and Ors.** 2006 (1) SCC 46, Supreme Court reiterated that the provisions of Order VIII Rule 1 of the Code of Civil Procedure are directory in nature. The Court (Hon'ble Mr. Justice P.K. Balasubramanyan), however, cautioned as under:

“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 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 8 Rule 1 must be adhered to and that only in rare and exceptional case, 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.”

In the case before Supreme Court, there was delay of two days beyond 90 days from the date of service of summon. The Trial Court had accepted the written statement, whereas the High Court had taken a view that the provisions of Order VIII Rule 1 of CPC being mandatory, the Trial Court could not have accepted the written statement filed beyond 90 days from the date of service. It was also found that the Trial Court had granted time to the defendant up to 08.06.2004 to file written statement and written statement was actually filed on 08.06.2004. The judgment of the High Court was, therefore, set aside.

In **Aditya Hotels (P) Ltd. Vs. Bombay Swadeshi Stores Ltd. and Ors.** (2007) 14 SCC 431, the Trial Court had extended the time for filing written statement without recording any reasons. The petition filed against the order of the Trial Court was dismissed by the High Court. The

matter was remitted by the Supreme Court to the Trial Court to consider it afresh in the light of the observations made by it in the case of **Kailash** (supra), wherein it was observed that extension can be only by way of an exception and for the reasons assigned by the defendant and also recorded in writing by the Court to its satisfaction.

In **Zolba Vs. Keshao and Ors.** 2008 (11) SCC 769, a judgment relied upon by the learned counsel for the defendant, Supreme Court found that the appellant under a bona fide plea and on instructions of his counsel in the Trial Court could not file written statement as he was advised by his counsel that the written statement could be filed after the decision of appeal pending before the District Court. However, when advised by the counsel, he filed an application for accepting the written statement on condonation of delay. Considering the above noted facts and circumstances, Supreme Court was of the view that it was not in a position to hold that the appellant was not entitled to file written statement even after expiring of the period mentioned in the proviso to Order VIII Rule 1 of CPC and was of the view that it would be open to the Court to permit

filing of the written statement if exceptional circumstances have been made.

In **Mohammed Yusuf Vs. Faij Mohammad and Ors.** (2009) 3 SCC 513, the application filed by the defendant/appellant for condonation of delay in filing the written statement was rejected by the High Court. The defendant in that case was served on 06th July, 2002 and appeared through counsel on 19th July, 2002. He filed applications for extension of time for filing written statement a number of times. On 31.01.2005, the plaintiff/appellant also filed an application for pronouncement judgment in terms of Order VIII Rule 10 on the premise that the defendant did not file any written statement. On the same date, the defendants filed an application for written statement without filing an application for condonation of delay in filing written statement. The application was rejected by the Trial Court. The High Court, however, permitted the defendant to contest the matter on merits subject to payment of costs of Rs 10,000/-. Referring to the observations made by it in the case of **R.N. Jadi** (supra), wherein it was observed that extension of time beyond 90 days was not automatic and 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 invoking the inherent power of the Court and that its earlier decisions in the case of **Kailash** (supra) was no authority for receiving the written statement after the expiry of the period permitted by law in a routine manner, Supreme Court was of the view that the High Court could not have allowed the writ petition, particularly when the Trial Judge as well as the Divisional Court had assigned sufficient and cogent reasons for in support of their orders .

9. The proposition of law which emerges from this case is that despite use of the word 'shall' therein though the provisions contained in Order VIII Rule 1 of CPC are not mandatory in nature, the time beyond 90 days is not automatic to be granted in course, merely on asking. Filing written statement preferably within 30 days and on reasons being given, within 90 days from the date of service of summon is the rule and extension of time beyond 90 days is the exception to be allowed only where the Court is satisfied that refusal to extend time is likely to result in miscarriage of justice.

The Court needs to guard themselves against

misuse of an unduly liberal approach in extending time beyond 90 days, lest such an approach is misused by unscrupulous litigants to deliberately withhold filing of written statement with a view to delay progress of the trial and then come out with an application for extension of time for the purpose. There is no dearth of litigants who would not hesitate in adopting dilatory tactics so as to postpone the outcome of a civil litigation, wherever they find the law and rules of procedure to be excessively soft and prone to misuse.

The defendant seeking extension of time beyond 90 days is required to disclose cogent and convincing grounds which would entitle him to invoke the inherent power of the Court for extension of time, beyond the prescribed period of 90 days. The Court needs to be satisfied that the case before it was a genuine case and refusal to grant extension of time is likely to cause grave hardship to the defendant which, in the facts and circumstances of the case, he ought not to suffer.

It is also evident from the above-referred decisions of Supreme Court that extension of time beyond 90 days cannot be granted as a matter of course and the discretion

vested in the Court needs to be exercised with due care and caution so as to ensure that an unscrupulous litigant is not able to circumvent the time limit fixed by the Legislature, unless he was prevented, on account of reasons beyond his control, from filing written statement within the prescribed period of 90 days.

10. Applying the aforesaid proposition of law to the facts of this case, I find that there is absolutely no explanation from the defendant as to why he did not file written statement within 30 days of receipt of summon from the process server on 03rd July, 2010 along with a copy of the plaint. The plea taken by the defendant that he was not aware of the requirement to file written statement within 30 days is devoid of any merit since the summon issued by the Court expressly directed him to file written statement within 30 days from the date of service and this is not the case of the defendant that he is an illiterate person or that he was not conversant with English language. This is the position if I accept the plea of the defendant that the summon received by registered post on 07th June, 2010 was lying with the guard and was given to his only in the month of September, 2010, though prima facie this does not appear to be correct

since the defendant personally received summon from the process server at the very same place on 03rd July, 2010. I, therefore, hold that the defendant had failed to make out a case for extension of time beyond 90 days, for filing written statement. Neither any exceptional circumstance justifying invoking of inherent power of the Court for extension of time beyond 90 days has been made out by him nor do I find it to be a case of genuine hardship, where a defendant, despite due diligence, was prevented by reasons beyond his control from filing written statement within the prescribed time.

11. More importantly, it has clearly been established that the defendant has made a false averment in IA No. 16386/2010 dated 25.11.2010, seeking two weeks' time to file written statement. In para 3 of the application, the defendant categorically stated that he had never been served with any notice from this Court. This statement, contained in the application, is, obviously, false since it has been admitted by him during the course of arguments that he had personally received the summon issued by this Court on 03rd July, 2010. Since IA No. 16386/2010 was supported by an affidavit dated 29th November, 2010, it is also evident that a false affidavit has been filed by the

defendant in support of this application. In fact, even in IA No. 1679/2011, the defendant did not clearly admit receipt of summon by him on 3rd July, 2010 and claimed that in the previous application he had stated that he had not been served with any notice from the Court, because he could not recollect any such summon being received by him. It is patently absurd even to suggest that the defendant had forgotten the receipt of an important document such as the summon, issued by this Court, despite his having acknowledged the receipt of the summon in writing. The endorsement dated 03rd July, 2010 made by the defendant on the summon dated 04th June, 2010 issued by this Court contains admission of the receipt of notice along with copy, meaning thereby that the copy of the plaint was also received by him along with the summon. In any case, this is not the plea of the defendant that he had received the summons without copy of the plaint. The report of the process server also shows that the copy of the plaint was delivered to the defendant along with the suit summon on that date.

12. In ***K.D. Sharma v. Steel Authority of India Ltd., (2008) 12 SCC 481***, the appellant had sought to create an

impression as if no notice was ever given to him nor was he informed about the consideration of cases of eligible and qualified bidders, in pursuance of the orders passed by the High Court in review, which had been confirmed by the Supreme Court. The true facts were found to be contrary to what the appellant had sought to be placed before the Court. Notice had been issued to him by SAIL and he had also responded to in writing. The Court felt that the appellant had not placed all the facts before the Court clearly, candidly and frankly. The Court was of the view that a person approaching the Court must disclose all material facts without any reservation even if they are against him, because "the court knows law but not facts". It was held that if the applicant does not disclose all the material facts fairly and truly but states them in a distorted manner and misleads the court, the court has inherent power in order to protect itself and to prevent an abuse of its process to discharge the rule nisi and refuse to proceed further with the examination of the case on merit. If the court does not reject the petition on that ground, the court would be failing in its duty. During the course of judgment, Supreme Court observed as under:-

“36. A prerogative remedy is not a matter of course. While exercising extraordinary power a writ court would certainly bear in mind the conduct of the party who invokes the jurisdiction of the court. If the applicant makes a false statement or suppresses material fact or attempts to mislead the court, the court may dismiss the action on that ground alone and may refuse to enter into the merits of the case by stating, “We will not listen to your application because of what you have done.”. The rule has been evolved in the larger public interest to deter unscrupulous litigants from abusing the process of court by deceiving it.”

In ***Vijay Kumar Kathuria v. State of Haryana***, (1983) 3 SCC 333, it was found that provisional admissions of the petitioners had been cancelled long ago, to their knowledge and they had obtained a favourable order by making a false representation. Deprecating the conduct of the petitioners as also their counsel, the Supreme Court, inter alia, observed as under:-

“1..... But for the misrepresentation this Court would never have passed the said order. By reason of such conduct they have disentitled themselves from getting any relief or assistance from this Court and the special leave petitions are liable to be dismissed.”

In ***Dalip Singh v. State of Uttar Pradesh and Others, (2010) 2 SCC 114***, it was found that the appellant while approaching the High Court had made misleading statement in para 3 of the writ petition by giving an impression that the tenure holder did not know of the proceedings initiated by the prescribed authority and by doing to, he succeeded in persuading the High Court to pass an interim order. Finding that it was an effort to mislead the authorities, which had transmitted to the Court, Supreme Court was of the view that the petitioners belong to category of person, who had succeeded in polluting the course of justice and, therefore, there was no justification for interfering with the order, which had been passed against them.

13. Extension of time for filing written statement, particularly beyond the period of 90 being absolute discretion of the Court, to be exercised only in exceptional and unavoidable circumstances, the Court must refuse to exercise discretion in favour of a person, who does not come to the Court with clean hands and goes to the extent of on making a false averment, denying receipt of summon personally by him. No Court would be justified in exercising

a discretion in favour of a person who has openly perjured himself, instead of coming clean, disclosing full facts and then seeking exercise of discretion in his favour. For this reason alone, the defendant is not entitled to extension of time for filing the written statement, beyond the period of 90 days.

14. For the reasons given in the preceding paragraphs, IA Nos 16386/2010 & 1679/2011 are dismissed. In the facts and circumstances of the case, the right of the defendant to file written statement is closed and his defence is struck off. I, however, do not deem it appropriate to pronounce judgment under Order VIII Rule 10 of CPC. The plaintiff, therefore, is directed to file affidavit by way of evidence, in order to satisfy the Court about the merits of its case. The affidavit be filed within four weeks from today.

The plaintiff are directed to appear before the Joint Registrar on 14th March, 2011 for exhibiting the documents of plaintiff. The matter be listed before the Court on 17th March, 2011 for arguments.

(V.K. JAIN)
JUDGE

FEBRUARY 07, 2011/bg