

Mr. V. G. Indrale for Petitioner.

P.C. :

2. By this Petition under Article 227 of the Constitution of India, original plaintiff has challenged the order dated 10.08.2015 passed by the learned IV Joint Civil Judge, Junior Division, Alibaug below exhibit-24 in Regular Civil Suit No.140 of 2013. By that order, the learned trial Judge allowed the application made by original defendants No.1 and 2 for setting aside No W.S. Order and for taking written statement on record.

4. Mr. Indrale submitted that though Order VIII Rule 1 of Code of

Civil Procedure, 1908 (for short 'C.P.C.') is construed as directory and not mandatory, nonetheless, the time schedule contained in proviso to Order VIII, Rule 1 C.P.C. is to be followed as a rule and departure would be by way of exception. The reasons to be assigned by the defendants should be convincing and satisfactory. Extension of time may be allowed if it was needed to be given for the circumstances which are exceptional and occasioned by the reasons beyond the control of the defendants and grave injustice would be occasioned if the time was not extended. In the present case, the learned trial Judge himself has recorded that the reasons given for delay in filing written statement and say are not sufficient and reasonable. However, the application was allowed on the ground that defendants No.1 and 2 prayed that in the interest of justice, last chance be given to them to file written statement. He submitted that the learned trial Judge ought to have rejected the application after recording a finding that there are no sufficient and reasonable grounds for condoning the delay. In support of this submission, he relied upon the decisions in the case of - (i) ***Kailash Vs. Nanhku*, 2005 (4) SCC 480**; (ii) ***M/s. Aditya Hotels (P) Ltd. Vs. Bombay Swadeshi Stores Limited*, (2007) 14 SCC 431** and (iii) ***Mohammed Yusuf Vs. Faij Mohammad*, (2009) 3 SCC 513**.

5. I have considered the submissions advanced by Mr. Indrale. I have also perused the material on record. Perusal of paragraph 1 of the application exhibit-24 shows that defendants No.1 and 2 contended that defendant No.1 is resident of Mumbai and he visits Village Dhokavade occasionally, where suit property is situate. Defendant No.2 is Power of Attorney Holder of defendant No.1 and he also goes out of Alibaug on account of his vocation. As defendants No.1 and 2 are busy with their professional work, they could not file written statement within the period of limitation. In paragraph 2, it is further asserted that because of

the ex-parte ad-interim injunction obtained by the plaintiff, they also cannot use the road which causes immense prejudice to them.

6. In the case of **Kailash** (*supra*), the Apex Court has held that time limit stipulated in Order VIII, Rule 1 is directory and ordinarily, time schedule contained in proviso thereof is to be followed as a rule and departure would be by way of exception. Reasons to be assigned by the defendant should be convincing and Court should be satisfied about the reasons given by the defendant. Proviso to Order 8 Rule 1, being in domain of Procedural Law, has to be held directory and not mandatory. 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.** (emphasis supplied)

7. In the present case, defendants have specifically given reasons in paragraphs 1 and 2 of the application exhibit-24, they have made out a case that if they are precluded from filing written statement, grave injustice would be occasioned to them.

8. In the case of **M/s. Aditya Hotels (P) Limited** (*supra*), the Apex Court recorded that 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 the time fixed, the orders of the trial Court and that of the High Court were set aside and the matter was remitted to the trial Court to consider it afresh in the light of the what has been stated in **Kailash's case** (*supra*).

9. Insofar as the decision of **Mohammed Yusuf** (*supra*) is concerned, respondents before the Apex Court had instituted Writ Petition questioning the validity of the order passed by the learned Additional District Judge, Mathura in Civil Revision No.322 of 2005 affirming the order dated 24.10.2005 passed by the trial Court. Respondents questioned these orders in the High Court and by order dated 20.09.1997, the learned Single Judge of the High Court allowed the Petition and interfered with the trial Court's as well as revisional Court's order.

10. In the present case, in my opinion, the said case is not applicable to the fact of the present case. I have already indicated the grounds set out by defendants No.1 and 2 in their application. The contention advanced by Mr. Indrale is that the said grounds are not considered by the learned trial Judge as sufficient and reasonable, and merely in the interest of justice, the learned trial Judge has allowed the application. In my opinion, if the defendants are not allowed to file written statement, they will not be in a position to effectively participate in the trial Court, meaning thereby they will be deprived from putting forth their case and also leading their evidence. At the highest, they will be entitled to cross-examine the defendants. Understood thus as also for the reasons given in application at exhibit-24, I do not find that the learned trial Judge has committed any error in allowing the application subject to payment of costs of Rs.500/-. Hence, no case is made out for invocation of powers under Article 227 of the Constitution of India. Petition fails and the same is dismissed.

11. It is, however, expressly made clear that where a decree is appealed from by the petitioner, any error, defect or irregularity in the impugned order, affecting the decision of the case, may be set forth as a

ground of objection in the memorandum of appeal as contemplated by
Section 105(1) C.P.C.

(R. G. KETKAR, J.)

Minal Parab