

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

**CHAMBER SUMMONS NO. 292 OF 2015
IN
SUIT NO. 740 OF 2003**

Kamal Khimjibhai Shah & Anr. .. Applicants

In the matter between :

I.V.P. Limited .. Plaintiff

Vs.

Kamal Khimjibhai Shah & Ors. .. Defendants

Mr.Muralidharan V.C. i/b Joy Legal Consultants for plaintiff.

Mr.Manoj Harit i/b Ajay Nisar & Co. for applicant/defendant nos.1 and 2.

Ms.Ketki Gadkari i/b Jayakar & Partners for defendant no.5.

**CORAM : K.R.SHRIRAM, J.
DATED : 21ST OCTOBER, 2015**

P.C.

1 This suit was lodged in February 2003 and the plaintiff is claiming a decree in the sum of Rs.91,53,609/- together with interest at 15% p.a. on the principal amount of Rs.1,33,24,095/- from the date from the date of filing of the suit till payment and/or realization against the five defendants. The applicants of this chamber summons are defendant nos.1 and 2. This chamber summons has been lodged on 13.11.2015, i.e., 12 years after the suit came to be lodged to set aside an order passed on 14.10.2008 transferring the suit as against applicant nos.1 and 2 to the list of

undefended suit, to take the written statement on record and permit the defendant nos.1 and 2 to defend the suit against them.

2 In the affidavit in support, it is stated that the applicants entered appearance through Advocate Shri Mandhav Shetty on 10.03.2003. The reason given in the affidavit in support for not filing the written statement for 12 years after filing the Vakalatnama is because defendant nos.3 and 4 were responsible for the debt of the plaintiff and they assured him that the matter is being settled amicably. It is also stated that even the plaintiff did not prosecute the suit in right earnest because on 9.09.2010, the suit came to be listed for dismissal. Of course, the suit did not get dismissed. The applicants admit there has been negligence on their part and sometime towards the end of January 2015, defendant no.5 informed the applicants that the suit is being heard and advised them to contact their advocate. It is also stated that when the applicants contacted their advocate, the advocate was ignorant about the proceedings and also informed them that he has lost track of the entire matter and was not willing to act on behalf of the applicants.

3 The status of the suit is that the evidence of PW-1 is already complete. Between 2003 and June 2014, nothing much happened in the matter. On

11.06.2014, when the suit was listed, it came to light that writ of summons had not been served upon defendant nos.3 and 4. The suit, therefore, as against defendant nos.3 and 3 was dismissed for want of prosecution. As the written statement of defendant no.5 was on record, the suit was stood over to 27.06.2014 for framing of issues. On 23.06.2014, issues were settled and the plaintiff was directed to file their list of witnesses, affidavit in lieu of examination in chief of their first witness together with compilation of documents and the matter was stood over to 22.07.2014. The plaintiff complied with the directions and on 11.08.2014, the evidence and examination in chief of the plaintiff's first witness was taken on record and the documents received in evidence. The Commissioner was also appointed to record the evidence. The evidence of PW-1 was completed by December 2014. The counsel for the plaintiff states that he has one more witness.

4 Since the suit has reached such an advanced stage, the counsel for the plaintiff and defendant no.5 are opposing this chamber summons. According to the counsel for the plaintiff, this is nothing but to delay the trial of the matter because the applicants have realized that once the trial is over, there would be decree against them. The counsel for the plaintiff and defendant no.5 strongly opposed the chamber summons.

5 The counsel for the applicants has relied upon a judgement of the Apex Court in the matter of ***Kailash V/s. Nanhku***¹. The counsel relied on paragraphs 23 to 33 which read as under :

23 This leads us to examine the alternative contention of the learned senior counsel for the appellant that, in any event, Order VIII Rule 1 of the CPC is not mandatory but directory in nature, a submission on which both the learned counsel for the parties have forcefully argued and the learned Amicus Curiae has also made detailed submissions.

24 The CPC which consolidated and amended the laws relating to the procedure of the Courts of Civil Judicature in the year 1908, has in the recent times undergone several amendments based on the recommendations of the Law Commission displaying the anxiety of Parliament to secure an early and expeditious disposal of civil suits and proceedings but without sacrificing the fairness of trial and the principles of natural justice in-built in any sustainable procedure. The Statement of Objects and Reasons for enacting Code of Civil Procedure (Amendment) Act, 1976 (104 of 1976) records the following basic considerations which persuaded the Parliament in enacting the amendments:-

(i) that a litigant should get a fair trial in accordance with the accepted principles of natural justice;

(ii) that every effort should be made to expedite the disposal of civil suits and proceedings, so that justice may not be delayed;

(iii) that the procedure should not be complicated and should, to the utmost extent possible, ensure fair deal to the poorer sections of the community who do not have the means to engage a pleader to defend their cases.

25 By Code of Civil Procedure (Amendment) Act, 1999 (46 of 1999) the text of Order VIII, Rule 1 was sought to be substituted in a manner that the power of court

1 2005 (4) SCC 480

to extend the time for filing the written statement was so circumscribed as would not permit the time being extended beyond 30 days from the date of service of summons on the defendant. As is well- known, there was stiff resistance from the members of the Bar against enforcing such and similar other provisions sought to be introduced by way of amendment and hence the [Amendment Act](#) could not be promptly notified for enforcement. The text of the provision in the present form has been introduced by Code of Civil Procedure (Amendment) Act, 2002 (22 of 2002) with effect from 1.7.2002. The purpose of such like amendments is stated in the Statement of Objects and Reasons as "to reduce delay in the disposal of civil cases".

26 The text of Order VIII, Rule 1, as it stands now, reads as under : -

"1. Written statement.____ The defendant shall, within thirty days from the date of service of summons on him, present a written statement of his defence:

Provided that where the defendant fails to file the written statement within the said period of thirty 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 in writing, but which shall not be later than ninety days from the date of service of summons."

27 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.

28 All the rules of procedure are the handmaid of justice. The language employed by the draftsman of processual law may be liberal or stringent, but the fact remains that the object of prescribing procedure is to advance the cause of justice. In an adversarial system, no party should ordinarily be denied the opportunity of participating in the process of justice dispensation. Unless compelled by express and specific language of the Statute, the provisions of the CPC or any other procedural enactment ought not to be construed in a manner which would leave the court helpless to meet extraordinary situations in the ends of justice. The observations made by Krishna Iyer, J. in [Sushil Kumar Sen v. State of Bihar](#) (1975) 1 SCC 774, are pertinent:-

"The mortality of justice at the hands of law troubles a Judge's conscience and points an angry interrogation at the law reformer.

The processual law so dominates in certain systems as to overpower substantive rights and substantial justice. The humanist rule that procedure should be the handmaid, not the mistress, of legal justice compels consideration of vesting a residuary power in judges to act *ex debito justitiae* where the tragic sequel otherwise would be wholly inequitable. Justice is the goal of jurisprudence — processual, as much as substantive."

29 In the State of Punjab and Anr. V. Shamlal Murari & Anr. (1976) 1 SCC 719, the Court approved in no unmistakable terms the approach of moderating into wholesome directions what is regarded as mandatory on the principle that "Processual law is not to be a tyrant but a servant, not an obstruction but an aid to justice. Procedural prescriptions are the handmaid and not the mistress, a lubricant, not a resistant in the administration of justice." [In Ghanshyam Dass and Ors. v. Dominion of India and Ors.](#) (1984) 3 SCC 46, the Court reiterated the need for interpreting a part of the adjective law dealing with procedure alone in such a manner as to sub-serve and advance the cause of justice rather than to defeat it as all the laws of procedure are based on this principle.

30 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.

31 [In Sangram Singh v. Election Tribunal, Kotah & Anr.](#) (1955) 2 SCR 1, this Court highlighted 3 principles while interpreting any portion of the CPC. They are:

(i) A code of procedure must be regarded as such. It is 'procedure', something designed to facilitate justice and further its ends: not a penal enactment for punishment and penalties; not a thing designed to trip people up. Too technical a construction of sections that leaves no room for reasonable elasticity of interpretation should therefore be guarded against (provided always that justice is done to

'both' sides) lest the very means designed for the furtherance of justice be used to frustrate it.

(ii) 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.

(iii) No forms or procedure should ever be permitted to exclude the presentation of the litigant's defence unless there be an express provision to the contrary.

32 Our attention has also been invited to a few other provisions such as Rules 9 and 10 of Order VIII. In spite of the time limit appointed by Rule 1 having expired, the court is not powerless to permit a written statement being filed if the court may require such written statement. Under Rule 10, the court need not necessarily pronounce judgment against the defendant who failed to file written statement as required by Rule 1 or Rule 9. The court may still make such other order in relation to the suit as it thinks fit.

33 As stated earlier, Order VIII, Rule 1 is a provision contained in the CPC and hence belongs to the domain of procedural law. Another feature noticeable in the language of Order VIII Rule 1 is that although it appoints a time within which the written statement has to be presented and also restricts the power of the Court by employing language couched in a negative way that the extension of time appointed for filing the written statement was not to be later than 90 days from the date of service of summons yet it does not in itself provide for penal consequences to follow if the time schedule, as laid down, is not observed. From these two features certain consequences follow.

6 The counsel submits that all the rules of procedure are the handmaid of justice and the language employed by the draftsman of procedural law may be liberal or stringent, but the fact remains that the object of prescribing procedure is to advance the cause of justice. The counsel further submitted that even though defendant nos.1 and 2 have approached this Court at such a belated stage, still, no party should be denied the opportunity of participating in the process of justice dispensation. The counsel further stated that the Court is not helpless to meet such situation in the interest of justice though Order VIII Rule 1 of Code of Civil Procedure, 1908, has drafted cause of application on the defendants to file the written statement within 30 days from the date of service of summons on him and in any case within the extended filing time of 90 days, the provision 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.

7 The counsel for the applicant states that the applicants could be put to terms but they should not be barred from participating in the trial. The counsel further undertakes that the applicants will not on any ground whatsoever, seek any adjournment in the progress of the matter henceforth.

8 What in-effect, the applicants are seeking is to set the clock back to the stage when the issues were settled on 11.06.2014. The applicants had more than 11 years before the issues were settled, to file the written statement. In the affidavit in support, it is the case of the applicants that it was defendant nos.3 and 4 who were primarily liable and allegedly assured the applicants that the matter was getting settled. At the same time, if one reads the plaint, the cause of action is for goods supplied and not paid for. It is averred that the plaintiff has principally sold the oil to defendant no.1. It is also averred that these amounts were payable by defendant no.1 because defendant no.1 has represented that he would be responsible and liable for the payments. It also appears that defendant nos.1 and 2 even issued cheques which got dishonoured and proceedings under Section 138 of the Negotiable Instrument Act, 1908 was filed against the applicants. Therefore, it is difficult for the Court to accept the applicants' version that they thought the matter would get settled by defendant nos.3 and defendant no.4. In my view, the applicants having realized that the trial in the matter has begun, have approached this Court, to delay the matter further. The applicants were merrily sitting doing nothing because the matter did not get listed in the Court for more than 11 years due to pendencies. Now that the trial has begun, the applicants apprehend that a decree could be passed against them. In my view, the attempt is only to delay the trial. When the Code of Civil

Procedure was amended, the basic consideration which persuaded the Parliament in negotiating the amendment was that every effort should be made to expedite the disposal of the civil suits and proceedings and that justice may not be delayed. That is why, the text of Order VIII, Rule 1 was sought to stand as it is now.

9 In the circumstances, though this Court would have, in normal circumstances been liberal in granting an extension, in my view, this is not a case where any leniency should be shown to the applicants.

10 The chamber summons stands dismissed.

11 The applicants also to pay a sum of Rs.15,000/- each to the plaintiff and to defendant no.5 as costs of this chamber summons. The amount to be paid within four weeks from today by way of cheque drawn in favour of the advocate on record for the plaintiff and advocate on record for defendant no.5.

(K.R. SHRIRAM, J.)