

**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

CR No.802 of 2015 (O&M)

Date of decision: 4.8.2015

Kuldeep and another

..... Petitioners

Versus

Ram Kishan and another

.....Respondents

CORAM: HON'BLE MR. JUSTICE RAJESH BINDAL

Present: Mr. Sandeep Kotla, Advocate for the petitioners.

Mr. Kulvir Narwal, Advocate, for respondent No.1.

RAJESH BINDAL, J

Challenge in the present petition is to the order dated 30.4.2014 passed by the learned court below, whereby the defence of the petitioners/defendants No.1 and 2 was struck off on account of non-filing of written statement.

In the case in hand, respondent No.1/plaintiff filed a suit for possession on 5.11.2012 claiming himself to be co-sharer in the property in dispute. After service, the petitioners had put in appearance on 22.8.2013 and thereafter, sought adjournment for filing written statement. Despite number of opportunities granted, written statement was not filed by the petitioners. As defence of the petitioners was struck off vide impugned order dated 30.4.2014, the same has been challenged in the present petition.

Learned counsel for the petitioners submitted that on account of unavoidable circumstances, the petitioners could not file the written statement. In fact, respondent No.1/plaintiff is guilty for delaying the process of court. He had not been able to serve the defendants. Even after the defence of the petitioners was struck off, respondent No.1/plaintiff has not led any evidence despite availing seven opportunities. The submission of learned counsel for the petitioners is that considering the stage of the suit, the petitioners may be permitted to file written statement, may be subject to payment of cost.

On the other hand, learned counsel for respondent No.1 submitted that in the case in hand, the petitioners are encroachers on the part of the

land. To retain their possession, initially they were avoiding service of summons. The service had to be effected by affixation. On 22.8.2013, after putting in appearance, the petitioners despite availing of number of opportunities, did not file their written statement. Even the cost imposed by the court was also not paid. Under these circumstances, there is no error in the order passed by the learned court below. The petition deserves to be dismissed.

Heard learned counsel for the parties and perused the paper book.

Respondent No.1/plaintiff filed a civil suit on 5.11.2012. A perusal of the order passed by the learned court below on 17.7.2013 shows that the summons issued for service of the petitioners/defendants No.1 and 2 were received back unserved. Fresh summons were issued for service through Munadi and by way of affixation for 22.8.2013. On 22.8.2013, the petitioners had put in appearance and requested for adjournment to file written statement. Defendant No.3 was already ex-parte. The case was adjourned to 11.10.2013. Neither on that day nor on the next date of hearing i.e. 20.12.2013, the written statement was filed. Though even the period of 90 days was over by that time on 21.12.2013, but still the court granted time to the petitioners to file written statement subject to payment of ₹ 300/- as cost. As even on that day when the written statement was not filed, the learned court below passed the following order:-

“Written statement on behalf of defendants not filed.

No further opportunity is justified to adjourn the case for filing of written statement on behalf of defendants, as number of opportunities have already been given. Therefore, defence of defendants No.1 and 2 is hereby struck off. To come up on 16.7.2014 for evidence of the plaintiff.”

The question is as to whether under these circumstances, the petitioners deserve to be granted any further opportunity for filing of written statement while setting aside the order passed by the learned court below striking off their defence on account of non-filing of written statement.

Comprehensive amendments were made in CPC in the year 2002 in Order VIII Rule 1 CPC. The relevant provision is reproduced below:-

“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.”

Aforesaid provision provides that 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 written statement within the said period of thirty days, he shall be allowed to file the same within such further time, 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:-

The issue as to whether the period so provided under Order VIII Rule 1 CPC for filing the written statement is mandatory or directory, came up for consideration before Hon'ble the Supreme Court in Kailash v. Nanhku and others 2005 (2) RCR (Civil) 379, wherein it was opined that the purpose of amendment is to expedite and not to scuttle the hearing. This does not impose an embargo on the power of the court to extend the time further, as no penal consequences as such have been provided, the provisions being in the domain of the procedural law are not mandatory. However, it was further opined that keeping in view the need for expeditious trial of the civil cases, ordinarily the time schedule should be followed as a rule and departure therefrom would be by way of exception. The extension of time should not be granted as a matter of routine and merely for asking especially when the time is beyond the period of 90 days. In case any extension is to be granted, the same could be for good reasons to be recorded in writing may be in brief. Relevant paras from the aforesaid judgment are extracted below:-

“45 (i) to (iii) x x x x

(iv) The purpose of providing the time schedule for filing the

written statement under Order VIII, Rule 1 of 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 of Order VIII of the 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 VIII, Rule 1 of the CPC is not completely taken away.

(v) Though Order VIII, Rule 1 of the CPC is a part of Procedural Law and hence directory, keeping in view the need for expeditious trial of civil causes which persuaded the 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 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 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.”

The issue regarding filing of belated written statement came up for consideration before Hon'ble the Supreme Court in view of objection

raised by the plaintiff therein, in M Srinivasa Prasad and others v. The Comptroller & Auditor General of India and others 2007 (4) SCT 380, wherein Hon'ble the Supreme Court while setting aside the order passed by the trial court as well as the High Court, remitted the matter back for consideration afresh, as there were no reasons forthcoming for allowing the written statement to be filed after expiry of period of 90 days. Relevant para thereof is extracted below:-

" 7. 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 time fixed, we set aside the orders of the trial Court and that of the High Court. The matter is remitted to the trial Court to consider the matter afresh in the light of what has been stated in Kailash's case(supra). The appeal is allowed to the aforesaid extent with no order as to costs."

Subsequently the same issue again came up for consideration before Hon'ble the Supreme Court in R.N. Jadi v. Subhashchandra 2007 (3) RCR (Civil) 588, wherein it was opined that the grant of extension of time beyond 30 days is not automatic. The power of the court has to be exercised with caution and for adequate reasons to be recorded and extension of time beyond 90 days of service of summons must be granted only based on a clear satisfaction of the justification for granting such extension. The period prescribed under Order VIII Rule 1 CPC should generally be adhered to and the extension should be in exceptional cases. The relevant paras thereof are extracted below:-

"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 knock-outs. 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 vs. Nankhu and others**, 2005 (4) SCC 480 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 vs. Nankhu and others* (supra) 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 VIII 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 VIII 1 must be adhered to and that only in rare and exceptional cases, 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 Mc Alpine & Sons**, (1968) 1 All ER 543 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?"

Similar view was expressed by Hon'ble the Surpeme Court in Mohammed Yusuf v. Faij Mohammed and others 2009 (1) RCR (Civil) 633 and in Sandeep Thapar v. SME Technologies Private Limited 2014 (1) RCR (Civil) 729.

In the facts of the case in hand, there is no date available on record, on which service of summons was effected on the petitioners, which should be recorded on the file, so as to calculate the period of 30 days as well as the period of 90 days for the purpose of permitting petitioners/defendants No.1 and 2 to file their written statement. Still it is not in dispute that the petitioners had put in appearance on 22.8.2013. Period of 30 days expired on 21.9.2013. However, the court below adjourned the case for filing the written statement by the petitioners on 22.8.2013 to 11.10.2013, a date beyond the period of 30 days, which was totally erroneous. In fact, a perusal of the orders passed by the learned court below would be relevant, as the same show total non application of mind while adjourning the case on a number of occasions for filing the written statement:-

“Order dated 22.8.2013

Service completed. Now written statement on behalf of the contesting defendants be filed on 11.10.2013 as requested.

Order dated 11.10.2013

Written statement not filed. Same be filed on 20.12.2013.

Order dated 20.12.2013

Written statement not filed. Same be filed on 21.2.2014 being last opportunity.

Order dated 21.2.2014

Written statement again not filed. Same be filed on 30.4.2014 subject to costs of Rs.300/- to be deposited in SDLSC.”

Even after expiry of period of 30 days, the case was adjourned for a period of two months at a single stretch giving time to petitioners/defendants No.1 and 2 to file written statement without stating

any reason. The date of hearing was beyond even 90 days from the date, the petitioners had first put in appearance before the court. Even if the period of 90 days is calculated from 22.8.2013, the same would be over by 22.11.2013, but the date of hearing given was December 20, 2013. Again on 20.12.2013, two months time was granted for filing the written statement without stating any reasons whatsoever. Again on 21.2.2014, the case was adjourned to 30.4.2014 subject to payment of cost of ₹ 300/-, for filing the written statement. Even that order does not contain any reason why the time was granted for filing the written statement. On 30.4.2014, neither the written statement was filed nor the cost was paid, hence, defence of the petitioners was struck off. It was already more than 8 months from the date, the petitioners had first put in appearance.

If the facts of the case are considered in the light of the enunciation of law as referred to above, it is clear that there is no ground made out for granting time to the petitioners for filing the written statement beyond 90 days, what to talk of beyond 30 days. There was no good reason for seeking further time, which may be justifiable to the satisfaction of the court below. The petitioners have not even pleaded any ground before this Court, which could justify grant of extension of time beyond 90 days for filing the written statement.

For the reasons mentioned above, I do not find any merit in the present petition. The same is accordingly dismissed.

(RAJESH BINDAL)
JUDGE

4.8.2015

sharmila

(Refer to Reporter)