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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Date of Decision : 15th October, 2015*

+ **CM(M) 762/2015**

DR K PUGAZHENDI & ORS Petitioners
Through : Ms.Ginny J.Rautray and Ms.Harsha,
Advocates.

versus

AMBUJA BHUSHAN JAISWAL Respondent
Through : Respondent in person.

PRATIBHA RANI, J. (Oral)

CM(M) 762/2015

1. By this petition filed under article 227 of Constitution of India the petitioners have impugned the order dated 01.04.2015 whereby the opportunity to file the written statements beyond stipulated period has been declined by the learned Trial Court. Challenge has also been laid to the order dated 09.07.2015 whereby the prayer of the petitioner to review the order dated 01.04.2015 has been rejected.

2. Learned counsel for the petitioner has submitted that on 01.04.2015 the written statement was filed by the petitioners which has not been taken on record on the ground that there was a delay of more than 90 days without showing any sufficient cause for not filing the same within the stipulated period. It has been further submitted that the reason for not filing the written statement within the stipulated time was that the petitioners remained under the impression that the suit was going to be withdrawn. Thereafter when the opportunity was granted by learned Trial Court to file the written statement within 2 weeks, subject to cost of ₹ 2,000/- to be deposited with Delhi Legal

Services Authority, though observing that there was no sufficient ground for extension of time to file the written statement, learned counsel for petitioner remained under the impression that their clerk had already filed the written statement on 18.03.2015. Learned counsel for the petitioners has further submitted that in the given circumstances the petitioners may be given one opportunity to file the written statement subject to such terms and conditions as deemed fit by the Court.

3. Before dealing with the contentions raised on behalf of petitioners, it is necessary to refer to the proceedings dated 18.02.2015 copy of which has been placed on record by the respondent/plaintiff, who is conducting this case in person. The proceedings dated 18.02.2015 record that though respondent/ plaintiff was present in person at the first call at 10:00 AM and at the second call at 10:30 AM, as none appeared on behalf of petitioners/ defendants, the matter was kept for 02:00 PM. At 02:00 PM the learned Trial Court passed the following order:-

'18.02.2015 (2:00 PM)

Present: Plaintiff in person.

Ms. Harsha, advocate for the defendants.

The defendants were served on 19.12.2014. Written statement not filed within the statutory period. Advocate for defendants requested for some time to file the same on the ground that they were under the impression that the plaintiff may withdraw the suit today and that due to multiplicity of the litigations, they were unable to file the written statement on time. The said ground is not a sufficient ground for extension of time to file the written statement. However, two weeks time is given to file the same subject to costs of Rs. 2000/- to be deposited with DLSA. Copy of the same be supplied to the plaintiff in advance.

*To come up for filing of replication if any, examination of parties under Order X, admission/denial of documents and framing of issues on **01.04.2015**. Parties are directed to*

produce all the original documents relied upon by them on the said date. Copy of the replication be supplied in advance to the Counsel of the opposite party.'

4. On 01.04.2015 noticing that the written statement has been filed only on the date of hearing without there being any application justifying delay in filing the written statement or proof of depositing the cost with Delhi Legal Services Authority, the learned Trial Court passed the impugned order, which is extracted hereunder:

*'01.04.2015 (At 10:00 am)
Present : Plaintiff in person.*

Ms. Harsha, advocate for the defendants.

The defendants were served on 19.12.2014. The written statement is being filed today. It is pertinent to note that on the last date of hearing, advocate for the defendants requested for some time to file the written statement on the ground that they were under the impression that the suit was to be withdrawn. The Court observed that the reason for not filing the written statement was not a sufficient ground for extension of time to file the written statement beyond the statutory period of 30 days. Despite which, the Court granted two weeks' time to the defendants to file their written statement with effect from 18.02.2015, subject to costs of Rs. 2000/- to be deposited with DLSA. Neither the costs have been paid and neither was the written statement filed within the time granted by the Court.

The written statement is being filed today without any application for condonation of delay. On enquiry, advocate for the defendants stated that she was under the impression that the clerk had filed the written statement on 18.03.2015. The said ground is absolutely not a sufficient ground for not filing the written statement even within the time granted by the Court. There has been a delay of more than 90 days without any sufficient cause. The written statement is not being taken on record and the defence is struck off.

Put up for ex-parte plaintiff's evidence on 08.05.2015.'

5. The prayer of the petitioners for review of the order dated 01.04.2015 has also been declined by the learned Trial Court noting that though no sufficient ground was shown for extending the time to file the written statement, further two weeks time was granted subject to cost of ₹2000/- but neither the cost was paid nor the written statement was filed due to which defence of the petitioners/defendant was struck off. The learned Trial Court rejected the prayer of the petitioners to allow the written statement to be taken on record in the interest of justice observing that the extension of period beyond 90 days for filing the written statement can be done only in rare cases where circumstances resulting in delay were beyond the control of the party or the counsel, which were missing in this case.

6. The present petition has been filed under Article 227 of the Constitution of India and it is well settled that jurisdiction of this Court under this Article is limited. It can interfere with the orders passed by the subordinate Courts/Tribunals only on limited ground namely illegality, irrationality or procedure impropriety.

7. Inherent power cannot be exercised by the Court to come to the rescue of the party who prefers to abandon the proceedings and wait for the adverse order to be passed and then move an application for reversal of the stage of trial thereby causing prejudice to the plaintiff and delay in disposal of suit. In exercise of power under Article 227 of The Constitution of India, this Court will interfere only when error of law is apparent on the face of record which has resulted in gross injustice.

8. In the case *Mohammed Yusuf vs. Faij Mohammad & Ors. (2009) 3 SCC 513* written statement was not filed within time. After about three years, written statement was sought to be filed which application was

rejected by the Trial Court. Revision against the order of Trial Court was dismissed. However, the High Court, in exercise of writ jurisdiction, allowed the petition thereby granting an opportunity to file the written statement after such an inordinate delay. In the appeal filed before the Apex Court, it was urged that provisions of Order VIII Rule 1 CPC have been held to be directory in nature in ***Kailash vs. Nankhu & Ors. AIR 2005 SC 2441***. The Apex court, while dealing with the contention and the effect of non-filing the written statement within the stipulated period and after considering earlier decisions, held as under :-

‘13. Although in view of the terminologies used therein the period of 90 days prescribed for filing written statement appears to be a mandatory provision, this Court in Kailash (supra) upon taking into consideration the fact that in a given case the defendants may face extreme hardship in not being able to defend the suit only because he had not filed written statement within a period of 90 days, opined that the said provision was directory in nature. However, while so holding this Court in no uncertain terms stated that defendants may be permitted to file written statement after expiry of period of 90 days only on exceptional situation. The question came up for consideration before this Court in M. Srinivasa Prasad and Ors. v. The Comptroller & Auditor General of India and Ors. MANU/SC/1638/2007 : AIR2007SC1574, wherein a Division Bench of this Court upon noticing Kailash (supra) held as under:

“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.”

14. The matter was yet again considered by a three-judge Bench of this Court in R.N. Jadi & Brothers and Ors. v. Subhashchandra MANU/SC/7775/2007 : AIR2007SC2571 . P.K. Balasubramanyan J., who was also a member in Kailash(supra) in his concurring judgment stated the law thus:

“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. Nanhku 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 contest that in Kailash v. Nanhku 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 statement, after the expiry of the period permitted by law, in a routine manner.”

9. On the touchstone of above legal proposition when the case of the petitioners is tested, the learned Trial Court was right in rejecting the prayer of the petitioners for taking the written statement on record which was filed even after expiry of period of 90 days. It is not disputed that service was effected on the petitioners/defendants on 19.12.2014. The written statement

was required to be filed within a period of 30 days from the date of service. By the date of hearing 18.02.2015, period of two months had expired from the date of service of the petitioners/defendants but the written statement was not filed. The reason for not filing the written statement though not considered to be sufficient, learned Trial Court extended the time by another two weeks to enable the petitioners to file the written statement subject to cost of ₹2000/- to be deposited with Delhi Legal Service Authority. Neither the cost was deposited nor the written statement was filed till 01.04.2015. The reason given for not filing the written statement within the time granted by the Court is that the counsel remained under impression that the Clerk had filed the written statement which has rightly been rejected by the learned Trial Court. It was for the petitioners to ensure that the compliance of order dated 18.02.2015 is done in letter and spirit and written statement alongwith proof of depositing the cost is filed before the learned Trial Court within the time prescribed. Enough leniency has already been shown by the learned Trial Court when despite expiry of period of two months as on 18.02.2015 from the date of service, further two weeks time was granted subject to a reasonable cost, which the petitioners failed to avail.

10. The learned Trial Court has exercised its discretion in a judicious manner in accordance with well settled legal principles.

11. The impugned order does not suffer from any illegality, irrationality or procedure impropriety.

12. CM(M) No.762/2015 is dismissed.

CM No.15857/2015

Dismissed as infructuous.

PRATIBHA RANI, J.

OCTOBER 15, 2015/ 'st'