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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Date of Decision : 04th September, 2015

CM(M) 823/2015

ABHISHEK PAHWA

..... Petitioner

Through: Mr.Shrey Chathly, Advocate

versus

M/S EBACO INDIA PVT LTD & ANR

..... Respondents

Through: None

PRATIBHA RANI, J. (Oral)

CM No.18283/2015

1. Exemption allowed, subject to all just exceptions.
2. Application stands disposed of.

CM(M) 823/2015

1. By filing the present petition the petitioner has invoked the jurisdiction of this Court under Article 227 of the Constitution of India with a prayer to set aside the order dated 14th July, 2015 whereby his application under Section 151 CPC for striking off the defence of the defendant for not filing the written statement within the statutory period, has been dismissed.
2. On behalf of the petitioner, Mr.Shrey Chathly, Advocate submitted that in this case service of summons was duly effected on the respondent on 17th December, 2014. As per provision of Order VIII Rule 1 CPC written statement should have been filed within 30 days or on being shown sufficient cause for non-filing of the written statement within the above said period, the said period could be extended by the learned Trial Court upto 90 days. Since the written statement has been filed on 91st day, the same could

not have been taken on record.

3. Learned counsel for the petitioner has placed reliance on Mohammed Yusuf Vs. Faij Mohammad & Ors., (2009) 3 SCC 513 in support of his submissions.

4. The petitioner has placed on record the copy of the proceedings before the learned Trial Court from the date the suit was instituted till the dismissal of the application under Section 151 CPC.

5. Perusal of the proceedings before the learned Trial Court reveal that a summary suit under Order XXXVII CPC was filed on 12th November, 2014 by the petitioner as plaintiff which was registered as CS No.477/14. On the first date of hearing before learned Trial Court, learned counsel for the petitioner/plaintiff made a submission that the suit be treated as an ordinary recovery suit. Thereafter treating the suit as an ordinary suit notice was sent to the respondents/defendant for date of hearing i.e. 19th December, 2014. Learned counsel for the respondents/defendant appeared on the date of hearing and sought time to file written statement which was granted by the learned Trial Court and the matter was adjourned to 23rd January, 2015.

6. 23rd January, 2015 was declared holiday and the proxy counsel appearing on behalf of the respondents/defendant sought adjournment on 21st February, 2015 (adjourned date) informing that father of the main counsel has expired on 14th February, 2015. The matter was adjourned to 18th March, 2015 for filing the written statement. Written statement has been filed on the date fixed i.e. 18th March, 2015 through proxy counsel. There was no appearance on behalf of the petitioner/plaintiff on that date and the reason may be due to lawyers strike on that date. The case was adjourned for 7th April, 2015 for replication, if any and for admission-denial of documents and issues with direction to the parties to remain present for the purpose of

admission-denial of documents & framing of issues.

7. On 7th April, 2015 at the request of the petitioner/plaintiff the matter was adjourned for replication, admission-denial of documents & framing of issues for 28th April, 2015 again directing the parties to remain present in person on that date.

8. On 28th April, 2015 again there was no appearance on behalf of the petitioner/plaintiff but proxy counsel on behalf of the respondents/defendant appeared. The case was adjourned for the same purpose on 18th May, 2015.

9. On 18th May, 2015 at the request of the petitioner/plaintiff for granting further time to file replication, the matter was adjourned to 14th July, 2015 for the said purpose.

10. On 14th July, 2015 the learned Trial Court noted that replication had been filed and the request by the counsel for the petitioner/plaintiff to supply the copy of the replication to the counsel for respondents/defendant during the course of the day was accepted and the application under Section 151 CPC filed by the petitioner/plaintiff has been dismissed by passing the following order:-

“14.07.2015

*Present : Sh.Shrey Chaitly, Counsel for the plaintiff.
Sh.NeerajGupta, Counsel for the defendant.*

Replication to the WS of defendant is already filed by the plaintiff. Counsel for the plaintiff undertakes to supply copy of the replication in due course of the day.

One more application is also moved by the plaintiff U/S.151 CPC. He also undertakes to supply copy of the same in due course of the day. By way of present application, plaintiff seeking relied of striking off the defence of the defendant as the WS has been filed by the defendant beyond the period of 90 days. As per averments made in the application, there is a delay of one day in filing the WS. Same is already

taken on record by Ld. Predecessor of this Court. In these circumstances, no reply is required to be filed. Even no explanation is required from the defendant for the delay in filing of WS. The application is without merit and same is dismissed. As prayed, now case is adjourned for admission/denial and framing of issues on 09.09.2015.”

11. The limited question raised before this Court by the learned counsel for the petitioner/plaintiff is that the Court had no power to condone the delay of one day in filing the written statement. In case of Salem Advocate Bar Association vs Union of India (2005) 6 SCC 344 the provisions of Order 8 Rule 1 have been held to be directory.

12. In the case reported as Zolba Vs. Keshao & Ors., (2008) 11 SCC 769, after noting earlier decisions, the power of the Court to permit filing of the written statement beyond prescribed time has been dealt with in para 8 of the report as under:-

“Therefore, following the principles laid down in the decision, as noted hereinabove, it would be open to the court to permit the appellant to file his written statement if exceptional circumstances have been made out. It cannot also be forgotten that in an adversarial system, no party should ordinarily be denied the opportunity of participating in the process of justice dispensation. Therefore, unless compelled by express and specific language of the statute, the provisions of Order 8 Rule 1 of CPC or any procedural enactment should not be construed in a manner, which would leave the court helpless to meet extraordinary situations in the ends of justice. Keeping this principle as laid down by this court in the case of Salem Advocate Bar Association (supra) in mind and in view of our observations made herein above, we now look into the averments made in the application for condoning the delay in filing the written statement. In the application, it has been stated that on instruction of his counsel in the trial court, the written statement was not filed within the period of limitation as the appellant was under bonafide belief that the written statement shall be filed after the decision of the appeal by the

District Court. The written statement was, however, filed and the records of the case were called from his lawyer who has been conducting his case in the appeal pending before the District Court. The facts disclose that the misc. appeal has been filed against an order of injunction before the District Court Chandrapur whereas the suit is pending before the Civil Judge, Junior Division, Nagbhid. Since the appeal was pending, the records of the appellant were then lying with the lawyer at Chandrapur. Therefore, the file was not available with the lawyer of the appellant at Nagbhid and therefore, the written statement could not be filed within the period of limitation. Such being the position, in our view, the facts stated would constitute sufficient cause for condoning the delay in filing the written statement and it has to be taken that the non-availability of records at Nagbhid had prevented the appellant from filing the written statement within the period of limitation which in our view was an exceptional case constituting sufficient cause for condoning the delay in filing the written statement. In this view of the matter, in the facts and circumstances of the case and in view of the reasoning given above, we hold that the High Court as well as the trial court had erred in rejecting the application for condoning the delay in filing the written statement. Accordingly, the application for condoning the delay is allowed and the written statement filed by the appellant is accepted and consequent thereupon, the impugned order which affirmed the order of the trial court rejecting the application for condoning the delay in filing the written statement is set aside. The trial court shall now proceed with the hearing of the suit and dispose of the same positively within one year from the date of supply of a copy of this order to it.”

13. From the gist of the proceedings before the learned Trial Court it is ample clear that the delay of one day in filing the written statement was not deliberate but due to bereavement in the family of the learned counsel for the respondents/defendant i.e. death of father of counsel for the respondents the written statement could not be filed within stipulated time and thereafter lawyers also remained on strike. Learned counsel for the petitioner/plaintiff

has not argued the conduct of the petitioner/plaintiff noted by the learned Trial Court in the proceedings and that there was no opposition for taking the written statement on record while seeking repeated adjournments for filing the replication and till filing of the replication.

14. The petitioner filed an application under Section 151 CPC invoking the inherent power of the Court for purpose of striking off the defence only on the ground that written statement has been filed on 91st day. Inherent power has to be used by the Court for the ends of justice and to prevent abuse of the process of the Court. Once the learned Trial Court permitted the respondents/defendant to file written statement, it would be traversing of justice if the written statement already taken on record is not accepted at a stage when replication has been filed and the case is at the stage of admission-denial of documents and framing of issues.

15. The proceedings before the learned Trial Court disclose the reason for delay of one day in filing of the written statement.

16. The impugned order does not suffer from any illegality or infirmity so as to warrant interference in exercise of an extraordinary power vested in this Court under Article 227 of the Constitution of India.

17. The Petition is dismissed.

18. No costs.

PRATIBHA RANI, J.

SEPTEMBER 04, 2015

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