

THE HON'BLE SRI JUSTICE M. SATYANARAYANA MURTHY

CIVIL REVISION PETITION No.2515 OF 2016

ORDER:

This civil revision petition under Article 227 of the Constitution of India is filed challenging the order passed by the Andhra Pradesh State Wakf Tribunal at Hyderabad in I.A.No.128 of 2016 in O.S.No.51 of 2012 dated 13.04.2016, setting aside the order dated 28.08.2012 and consequential order to receive written statement of the 3rd defendant.

The revision petitioners herein were the defendants 2 & 3 before the Trial Court in I.A.No.128 of 2016 and the first respondent herein is the petitioner before the Trial Court. For the convenience of reference, the parties will be referred throughout the order as arrayed before the Trial Court I.A.No.128 of 2016.

The petitioner/third respondent/Wakf Board filed I.A.No.128 of 2016 under Order IX Rule 7 read with Section 151 C.P.C seeking permission to file written statement in O.S.No.51 of 2012 on the file of the A.P. State Wakf Tribunal and to set aside the order dated 28.08.2012, whereunder, the Tribunal forfeited the right of the petitioner/Wakf Board to file written statement. It is alleged that O.S.No.51 of 2012 was filed by the 1st respondent/plaintiff claiming right in Wakf Property which belongs to Jama Masjid situated at Jillella Village, Gospadu Mandal, Kurnool District. The suit was posted on 28.08.2012 for filing written statement of the petitioner/3rd defendant. It is the case of the petitioner/3rd

defendant that, due to bifurcation of the State, the third defendant could not file written statement and as a result, the Tribunal forfeited the right to file written statement by the petitioner/third respondent by order dated 28.08.2012. Thus, it is stated that the reason for failure to file written statement within time was neither willful nor wanton, only because of bifurcation of the State and therefore prayed to set-aside the order dated 28.08.2012.

The respondents 2 & 3 filed counter denying material allegations, *inter alia* contending that the petition is not maintainable on facts or law and that the petitioner has no *locus standi* to file the above application.

The 2nd respondent in I.A.No.128 of 2016/1st defendant in O.S.No.51 of 2012 in his counter affidavit stated that the suit schedule property in dispute is a government poramboke land (gramakantam), and it does not belong to Jama Masjid property/Wakf Board Property. It is further stated that, in the list of documents filed by the petitioner in the suit, nowhere Sy.No.607 is indicated that the suit scheduled property is Wakf property. It is stated in the counter that the plaintiff in the suit did not disclose the details of the property including survey number and that the petitioner/third defendant never exhibited any interest to prosecute the proceedings by filing written statement and the petitioner/third defendant did not approach the Court with clean hands but suppressed material facts and proceedings before the Tribunal, while setting *exparte* in the suit. It is

specifically contended that the reasons mentioned in the petition are not sufficient to set-aside the order dated 28.08.2012 and as I.A.No.128 of 2016 is not maintainable, prayed for dismissal of the petition.

Upon hearing argument of both the counsel, the Trial Court allowed I.A.No.128 of 2016 by order dated 13.04.2016 setting aside the order dated 28.08.2012 and ordered to receive written statement of the petitioner/3rd defendant. Aggrieved by the order of the Tribunal, the present civil revision petition is filed raising several contentions.

During hearing, learned counsel for the revision petitioners/respondents 2 & 3 before the Trial Court, mainly contended that, though no limitation is prescribed under Civil Procedure Code, such power to receive written statement can be exercised sparingly and not in a routine manner. In support of his contention, he placed reliance on **Salem Advocate Bar Association, Tamil Nadu v. Union of India**¹. It is further contended that the reason assigned by the petitioner before the Trial Court is not sufficient, which prevented the petitioner from appearing before the Tribunal, since the advocate appearing for the petitioner/third defendant reported no written statement and participated in the proceedings throughout. Therefore, at the stage when the suit was posted for arguments, the Tribunal is not

¹ AIR 2005 SUPREME COURT 3353(1)

supposed to receive written statement, setting aside the order. It is contended that the order is erroneous on the face of record and prayed to set aside the same.

Whereas, learned counsel appearing for the respondent/petitioner/third defendant (Wakf Board) supported the order passed by the Tribunal in all respects while contending that there is no time limit to file a petition to receive additional written statement setting aside the order of forfeiture to file written statement. Further, it is contended that the petitioner/third defendant could not file written statement due to reason which is beyond his control i.e. bifurcation of the State. Therefore, learned counsel contends that the order of the Tribunal is in accordance with law, and placed reliance on judgments of the Supreme Court and Andhra Pradesh High Court reported in **Smt. Lachi Tewari and others v. Director of Land Records and others**², **G.P. Srivastava v. R.K. Raizada and others**³, **Andari Govindaiah v. Vemula Venkatamma (died)**⁴ and prayed to confirm the order passed by the Tribunal while dismissing the present revision petition.

Upon considering rival contentions and perusing the material available on record, the point that arise for consideration is

² AIR 1984 SUPREME COURT 41

³ (2000) 3 SUPREME COURT CASES 54

⁴ 1996 (1) ALD 118

“whether the Tribunal is right in setting aside the order dated 28.08.2012 whereunder, the right to file a written statement by the petitioner setting aside the order dated 28.08.2012, in I.A.No.128 of 2016 and receiving written statement when the matter was posted for arguments after completion of Trial is in accordance with law”

In Re Point

The petition was filed before the Tribunal under Order IX Rule 9 C.P.C to set aside the *exparte* decree. In fact, no such decree was passed by the Tribunal as on the date of filing the petition. In any view of the matter, quoting wrong provision of law is not a ground to dismiss the petition, if the party is otherwise entitled to claim relief in the suit. On this ground, the petition cannot be dismissed.

When the right to file written statement was forfeited by the Court, the petitioner/third defendant in I.A.No.128 of 2016 is required to file a petition under Order VIII Rule 10 but not under Order IX Rule 9. The Tribunal passed order under Order VIII Rule 10 of C.P.C and to set aside the same, there is no specific provision in the C.P.C, except Section 151 of C.P.C.

It is an undisputed fact that the suit was filed in the year 2012 before the Tribunal and the entire Trial and marking documents was completed and the matter was posted for arguments. But the petition was filed on 21.03.2016, i.e almost

after lapse of more than 3 ½ years from the date when an order was passed by the Tribunal, forfeiting the right of the defendant to file a petition. The only ground mentioned by the petitioner/Wakf Board in the entire affidavit, more particularly in paragraph 3 of the affidavit for not filing a written statement is bifurcation of the State,. The reason assigned by the petitioner is highly unbelievable, for the reason that the suit was filed in the year 2012 and right to file written statement was forfeited on 28.08.2012, whereas, the State bifurcation of erstwhile State of Andhra Pradesh into State of Telangana and State of Andhra Pradesh took place in the year 2014. Thus, there was a gap of two years from the date of passing order and date of bifurcation. Hence, the reason assigned by the petitioner is not believable and on that ground, the order forfeiting the right of the petitioner/third defendant/Wakf Board cannot be set-aside. The Tribunal did not consider the reason assigned by the petitioner for filing the petition before the Trial Court by the petitioner/third defendant and set-aside the order dated 28.08.2012, only on the ground that no prejudice would be caused to the defendants 1 & 2, even though, if the written statement of the petitioner/Wakf Board is received.

Prejudice is not a consideration in passing such an order and the Tribunal has to interpret the provisions to achieve the object of amendment of the Civil Procedure Code. The main contention of the petitioner/third defendant/Wakf Board before the Trial Court was that the said order can be set aside at any time, as the written statement can be received so as to do complete justice

to the parties. In support of his contention, he placed reliance on the judgment reported in **Smt. Lachi Tewari's case** (referred supra). In paragraph 4 of the said judgment, the Apex Court held that the disturbing feature of the case is that under our present adversary legal system where the parties generally appear through their advocates, the obligation of the parties is to select his advocate, brief him, pay the fees demanded by him and then trust the learned advocate to do the rest of the things. The party may be a villager or may belong to a rural area and may have no knowledge of the court's procedure. After engaging a lawyer, the party may remain supremely confident that the lawyer will look after his interest. At the time of hearing of the appeal, the personal appearance of the party is not only not required but hardly useful. Therefore, the party having done everything in his power to effectively participate in the proceedings can rest assured that he has neither to go to the High Court to inquire as to what is happening in the High Court with regard to his appeal nor is he to act as a watchdog of the advocate that the latter appears in the matter when it is listed. It is no part of his job.

Taking advantage of the principle, the contention of the petitioner/third defendant/Wakf Board before the Tribunal is that, it is the duty of the Advocate appearing for Wakf Board whom it engaged to file written statement on its behalf. In fact, it is not its contention at any stage, but the contention before the Tribunal is that due to State bifurcation, the petitioner/third defendant/Wakf Board could not file written statement. Therefore, the principle laid

down in the above judgment cannot be applied. Even otherwise, it relates to writ petition pending before the High Court where the notices to persons are not necessary except in extraordinary circumstances.

Learned counsel for the petitioner/third defendant/ Wakf Board before the Tribunal further placed reliance on **G.P. Srivastava's** case (referred supra). In paragraph 7 of the judgment, the Apex Court discussed the scope of Order IX Rule 13 C.P.C i.e. to set aside the *ex parte* decree passed against a defendant and held that can be set aside upon satisfaction of the Court that either the summons were not duly served upon the defendant or he was prevented by any "sufficient cause" from appearing when the suit was called on for hearing. Unless "sufficient cause" is shown for non-appearance of the defendant in the case on the date of hearing, the Court has no power to set aside an *ex parte* decree. The words "was prevented by any sufficient cause from appearing" must be liberally construed to enable the court to do complete justice between the parties particularly when no negligence or inaction is imputable to the erring party. Sufficient cause for the purpose of Order IX Rule 13 has to be construed as an elastic expression for which no hard and fast guidelines can be prescribed. The Courts have a wide discretion in deciding the sufficient cause keeping in view the peculiar facts and circumstances of each case. The "sufficient cause" for non-appearance refers to the date on which the absence was made a ground for proceeding *ex parte* and cannot be stretched to rely upon other circumstances anterior in time. If

“sufficient cause” is made out for non-appearance of the defendant on the date fixed for hearing when *exparte* proceedings were initiated against him, he cannot be penalized for his previous negligence which had been overlooked and thereby condoned earlier. In a case where the defendant approaches the court immediately and within the statutory time specified, the discretion is normally exercised in his favour, provided the absence was not malafide or intentional. For the absence of a party in the case the other side can be compensated by adequate costs and the *lis* decided on merits.

If, ‘sufficient cause’ is shown, an *exparte* decree can be set-aside. ‘Sufficient cause’ varies from excuse and there is no straight jacket form to accept a particular cause as sufficient cause or not to accept. In the present case, the reason assigned in the affidavit is bifurcation of the State, which took place nearly two years after passing of an order, thereby forfeiting the opportunity of the petitioner/third defendant to file written statement i.e. on 28.08.2012 and even after bifurcation of the State, the present petition is filed more than after 2 ½ years and did not explain the long delay caused for filing the petition either before and after bifurcation of erstwhile Andhra Pradesh into State of Telangana and State of Andhra Pradesh. Since the property is situated in Jillela Village, Gospadu Mandal of Kurnool District, the matter pertains to the residuary State of Andhra Pradesh. In such a case, it is difficult to believe the reason assigned by the petitioner/third defendant/Wakf Board. Even if the principle laid down in the

above judgment referred supra are applied to the present facts, it is not sufficient to set-aside the order forfeiting the right of the petitioner/third defendant/Wakf Board to file a written statement.

Learned counsel for the petitioner/third respondent/ Wakf Board further drawn attention of this Court to the principle laid down in paragraph 5 of the judgment in **Andari Govindaiah's** case (referred supra). In view of propositions laid down in the above judgment, this Court and the Appellate Court, sufficient cause if shown, an *exparte* decree can be set-aside, by following the judgments pertaining to Order 9 Rule 13 and Order 9 Rule 9 where an *exparte* decree was passed against the defendant or where the writ petition was dismissed for non-appearance of the party. Therefore, in view of the judgments discussed above the circumstances under which the Court can set-aside the *exparte* decree or dismissal order for default but not an order forfeiting the right to file a written statement under Order VIII Rule 10.

Learned counsel for the revision petitioners herein before this Court and the respondents 2 & 3 before the Tribunal contended that the written statement is required to be filed within a time frame fixed under the Civil Procedure Code, as amended by Act No.2 of 2002. The petitioner/third defendant is bound to adhere to the prescribed rule and any improper interpretation to Order VIII Rule 10 would frustrate the very object of incorporating Order VIII Rule 10 of C.P.C and such liberal interpretation cannot be given to the power of the Court and if such interpretation is

accepted, the amendment brought by Act.23 of 2012 would render nugatory or otiose.

In support of his contention, learned counsel for the revision petitioners drawn attention of this Court to a full bench judgment of this Court reported in **Salem Advocate Bar Association's** case, wherein, the Apex Court in its elaborate judgment held that the provision providing for maximum period of ninety days for filing written statement is not mandatory and, therefore, the Court is not altogether powerless to extend the time even in exceptionally hard case. The use of the word 'shall' in Order 8, Rule 1 by itself is not conclusive to determine whether the provision but having regard to the context in which it is used or having regard to the intention of the legislation; the same can be construed as directory. Rule 1, in question, has to advance the cause of justice and not to defeat it. The rules of procedure are made to advance the cause of justice and not to defeat it. Construction of the rule or procedure which promotes justice and prevents miscarriage has to be preferred. The rules or procedure are hand-maid of justice and not its mistress. In the present context, the strict interpretation of Order 8 Rule 1 would defeat justice. In construing Order 8 Rule 1 support can also be had from Order 8 Rule 10 which provides that where any party from whom a written statement is required under Rule 1 or Rule 9, fails to present the same within the time permitted or fixed by the Court, the Court shall pronounce judgment against him, or make such other order in relation to the suit as it thinks fit. On failure to file written statement under this provision, the Court has

been given the discretion either to pronounce judgment against the defendant or make such other order in relation to suit as it thinks fit. In the context of the provision, despite use of the word 'shall', the Court has been given the discretion to pronounce or not to pronounce the judgment against the defendant even if written statement is not filed and instead pass such order as it may think fit in relation to the suit. In construing the provision of Order 8 Rule 1 and Rule 10, the doctrine of harmonious construction is required to be applied. The effect would be that under Rule 10 of Order 8, the Court in its discretion would have power to allow the defendant to file written statement even after expiry of period of 90 days provided under Order 8 Rule 1. There is no restriction in Order 8 Rule 10 that after expiry of 90 days, further time cannot be granted. The Court has wide power to 'make such order in relation to the suit as it thinks fit'. Clearly, therefore, the provision of Order 8 Rule 1 providing for upper limit of 90 days to file written statement is directory. The Court however made it clear that the order extending time to file written statement cannot be made in routine. The time can be extended only in exceptionally hard cases.

According to the principle laid down in the above judgment, the Court is not powerless to extend the time, but the time can be extended only in exceptionally hard cases. In the present case, the petitioner/third defendant/Wakf Board, though engaged an advocate, did not file written statement even at a belated stage where the entire Trial was over, except pronouncing judgment. Moreover the reason assigned by the petitioner to set-aside such

an order is bifurcation of State, which is highly improper and it is not sufficient cause. It is difficult to hold that the cause shown by the petitioner is sufficient cause, which is beyond the control of the petitioner to set-aside such an order. The word 'sufficient cause' is not defined anywhere, but it can be construed that, in case, which is beyond the control of the petitioner, it can be said to be sufficient cause depending upon the circumstances of the case. Time and again, the Courts held that the word 'sufficient cause' has to be construed liberally, to do substantial justice to the parties and shall not adopt pedantic approach while considering any cause as 'sufficient cause'. No doubt, the law declared by the Apex Court and the other Courts reiterated the same principle. But, in the present case, the cause shown by the petitioner is that due to bifurcation of erstwhile State of Andhra Pradesh into State of Telangana and residuary State of Andhra Pradesh, the petitioner/third defendant/Wakf Board could not file written statement. The order was passed long prior to bifurcation of the State of Andhra Pradesh. Therefore, such cause can never be construed as 'sufficient cause', since it was not beyond control and nothing prevented the petitioner to file written statement before bifurcation of the State of Andhra Pradesh into two states, i.e State of Telangana and residuary State of Andhra Pradesh.

The Supreme Court in **Lanka Venkateswarlu (D) by L.Rs. v State of A.P. and Ors.**, held as follows:

“We are at a loss to fathom any logic or rationale, which could have impelled the High Court to condone

the delay after holding the same to be unjustifiable. The concepts such as “liberal approach”, justice oriented approach”, “substantial justice” cannot be employed to jettison the substantial law of limitation, especially in cases where the Court concludes that there is no justification for the delay. In our opinion, the approach adopted by the High Court tends to show the absence of judicial balance and restraint, which a Judge is required to maintain whilst adjudicating any *lis* between the parties. We are rather pained to notice that in this case, not being satisfied with the use of mere intemperate language, the High Court resorted to blatant sarcasms. The use of unduly strong intemperate or extravagant language in a judgment has been repeatedly disapproved by this Court in a number of cases. Whilst considering applications for condonation of delay under Section 5 of the Limitation act, the Courts do not enjoy unlimited and unbridled discretionary powers. All discretionary powers, especially judicial powers, have to be exercised within reasonable bounds, known to the law. The discretion has to be exercised in a systematic manner informed by reason. Whims or fancies; prejudices or predilections cannot and should not form the basis of exercising discretionary powers.”

In view of the law declared by the Apex Court, the Courts cannot jettison substantive law of limitation on the concept of substantial justice or complete justice and set-aside the order accepting any cause shown by the petitioner as ‘sufficient cause’. By applying the principle laid down in the above judgment to the present case, allowing an application on the ground that due to

State bifurcation, the petitioner could not file written statement, directly amounts to jettisoning the procedural law i.e. Order 8 Rule 1 and Rule 10 of C.P.C and it amounts to relaxing the time frame fixed under Order 8 Rule 1 and it would directly frustrate the very intention of legislature rather than substantial justice. Justice oriented approach is to be adopted not only to the defendant, but also to the plaintiff. If such cause is accepted, it amounts to encouraging who is dormant and doing injustice to the plaintiff who diligently prosecuting the proceedings.

In the present facts, it is brought to the notice of this Court during argument by the learned counsel for the revision petitioners herein/respondents 2 & 3 before the Trial Court, that the learned counsel for the respondent reported no written statement which is not borne out from the record. If he reported no written statement, the question of forfeiting to file written statement does not arise. However, it is evident that the matter was contested throughout by the counsel and the counsel for the petitioner/third defendant before the Tribunal and reported no cross-examination of the witnesses, consciously, in such case, the cause shown by the petitioner cannot be construed or accepted as 'sufficient cause', which prevented the petitioner/third defendant to file written statement.

On an overall consideration of the material available on record, the word 'sufficient cause' assumed importance to pass any order setting aside the *exparte* decree or order and forfeiting the

right to file a written statement by the defendant. But the cause shown by the petitioner is not sufficient cause, as discussed above and by applying the principle laid down by the Apex Court in **Lanka Venkateswarlu's case** (referred supra). The Tribunal did not consider any of these requirements to set-aside the order dated 28.08.2012, but on the same ground that it would not cause any prejudice to the parties, passed the impugned order by the Tribunal, which is totally contrary to the law declared by the Courts in the judgments referred supra.

Hence, I find that the order of the Tribunal is *ex facie* erroneous and the same is liable to be set-aside. Accordingly, the point is answered in favour of the revision petitioners herein/defendants 2 & 3 before the Tribunal and against the respondents herein.

In the result, the civil revision petition is allowed, setting aside the order dated 13.04.2016 passed in I.A.No.128 of 2016 in O.S.No.51 of 2012 on the file of the Andhra Pradesh State Wakf Tribunal, Hyderabad.

Consequently, miscellaneous applications pending if any, shall stand closed. No costs.

JUSTICE M. SATYANARAYANA MURTHY

Dated: 08.09.2016

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