

(1)

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

**WRIT PETITION NO.12203 OF 2016
WITH
WRIT PETITION NO.12204 OF 2016
WITH
WRIT PETITION NO.12205 OF 2016
WITH
WRIT PETITION NO.12206 OF 2016
AND
12207 OF 2016**

Shrirampur Municipal Council,
Shrirampur, Dist. Ahmednagar
Through its Chief Officer
Suman s/o Ganpatrao More,
Age : 44 years, Occu. Service,
R/o Shrirampur, Tq. Shrirampur,
Dist. Ahmednagar

..PETITIONER
(Orig. Defendant)

VERSUS

Bharat Sanchan Nigam Limited
A company incorporated & Registered
Under the provisions of Companies
Act, 1956 and having its Head Office
at New Delhi and its District level
SSA Office and Telephone Exchange
At Ahmednagar through authorized
Signatory Arvind Sukhdeo Sonawane
Age : 50 years, Occu. Service,
R/o Ahmednagar, Dist. Ahmednagar

..RESPONDENT
(Orig. Plaintiff)

Mr R.A. Tambe, Advocate for petitioner;
Mrs M.A. Deshpande, Advocate for respondent

CORAM : NITIN W. SAMBRE, J.

DATE : 25th September, 2017

ORAL ORDER:

(2)

Since the issue involved in these writ petitions is common, with the consent of the parties they are heard together and are being decided finally by this common order.

2. The petitioner herein is original defendant in a suit for declaration and injunction filed by respondent-plaintiff, wherein a demand notice issued against respondent-plaintiff for payment of tax is sought to be held to be illegal, ultra vires and not binding on the plaintiff. The said suit came up for consideration before learned Civil Judge Senior Division, Shrirampur.

3. Perusal of the record indicates that in the suit, summons were issued on 10th August, 2015, served on petitioner-defendant on 19th August, 2015, first time the petitioner-defendant appeared on 4th September, 2015, Exhs.12 to 14 are the applications for grant of adjournment to file written statement, on 17th November, 2015 application Exh.15 came to be moved with a prayer for extension of time to file written statement (since period of 90 days provided under Order VIII, Rule 1 of the Code of Civil Procedure was over), which came to be rejected and suit against the petitioner-defendant was ordered to proceed "without written statement".

4. In the aforesaid background, an application came to be filed by the petitioner-defendant along with written statement, seeking permission to place on record written statement after setting aside the order of "no

(3)

written statement". The respondent-plaintiff objected the said application by stating that no legal and plausible reason is mentioned. The Trial Court rejected the said application on the ground that the Apex Court, in the matter of **New India Assurance Company Limited vs. Hilli Multipurpose Cold Storage Private Limited**, reported in **2016 AIR (SC) 86**, has held that period of 90 days cannot be extended for filing written statement. Thus, these petitions.

5. Mr Tambe, learned Counsel appearing on behalf of the petitioner-defendant would urge that the defendant is a statutory body of the State Government, which is also a planning authority for the municipal area and required to perform various statutory functions as well. Amongst others, it is submitted that the officials of the petitioner-council were busy in tax revision and as such, were unable to devote time for filing written statement in the suit, which has resulted in un-intentional delay. He submits that, it is not that by not filing written statement, the suit has made any progress, whereby it could be inferred that the trial in the suit has commenced. According Mr Tambe, delay caused in not filing written statement within a period of 90 days is very much explained and the provisions of Order VIII, Rule 1 of the Code of Civil Procedure (for short "CPC") are not mandatory but directory and Court is not divested of its power to direct acceptance of written statement, with such reasonable conditions, as may be imposed.

(4)

6. Per contra, learned Counsel appearing on behalf of the respondent-plaintiff would rely upon the judgment of the Apex Court, in the matter of **Dr. J.J. Merchant and others vs. Shrinath Chaturvedi**, reported in **(2002) 6 Supreme Court Cases 635**, which was affirmed by the Apex Court in the matter of New India Assurance Company Limited (supra). According to her, the Apex Court, while considering the legislative mandate of Order VIII, Rule 1 of CPC, has made it mandatory that the written statement must be filed within 30 days, which can maximum be extended by 60 days i.e. total 90 days. She, therefore, sought dismissal of the petitions.

7. Considered rival submissions.

8. The respondent-plaintiff, which is a corporation of the Central Government, instituted a suit for declaration and injunction, that being a Central Government is exempted from paying municipal taxes. The nature of declaration sought is, no municipal taxes could be levied against the respondent-plaintiff and an injunction to that effect is sought.

9. From the copy of the written statement shown to this Court, it is noticed that the petitioner-defendant claim that a corporation of the Central Government and Central Government are two different entities and cannot be equated in the eyes of law at par with each other. It is this factual matrix, which is required to be brought on record in the written statement, is the claim of the petitioner.

10. Though Mr Tambe has urged that the provisions of Order VIII, Rule 1 of CPC are not mandatory but directory in nature, still according to him, based on misreading of the judgment of the Apex Court, the Trial Court rejected the claim for setting aside “no written statement” order and permission to file written statement on record. The Apex Court, in the matter of **Salem Advocate Bar Association, Tamil Nadu vs. Union of India**, reported in **AIR 2005 Supreme Court 3353**, in paragraphs 21 and 22 has made following observations :-

“21. The use of the word 'shall' in Order VIII Rule 1 by itself is not conclusive to determine whether the provision is mandatory or directory. We have to ascertain the object which is required to be served by this provision and its design and context in which it is enacted. The use of the word 'shall' is ordinarily indicative of mandatory nature of 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. The rule 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 handmaid of justice and not its mistress. In the present context, the strict interpretation would defeat justice.

(6)

22. In construing this provision, support can also be had from Order VIII 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 VIII 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 VIII, 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 in Order VIII Rule 1. There is no restriction in Order VIII Rule 10 that after expiry of ninety 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 VIII Rule 1 providing for upper limit of 90 days to file written statement is directory. Having said so, we wish to make 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. While extending time, it has to be borne in mind that the legislature has fixed the upper time limit of 90

(7)

days. The discretion of the Court to extend the time shall not be so frequently and routinely exercised so as to nullify the period fixed by Order VIII Rule 1.”

11. The Apex Court, while considering the legislative mandate of amended Order VIII, Rule 1 of CPC has observed that the rules of procedure cannot be construed to defeat the object of justice but are made to advance the cause of justice. The object is to prevent the miscarriage of justice and to promote justice. It has further gone to observe that the rules of procedure are handmaid of justice and not its mistress and as such, a strict interpretation would defeat the justice. The Apex Court then noticed that though court had power to pronounce the judgment in absence of written statement being filed by the petitioner-defendant, still the same does not appear to be a case in hand, as suit has not proceeded ahead.

12. The Apex Court, in the matter of **Smt. Rani Kusum vs. Smt. Kanchan Devi and others**, reported in **AIR 2005 Supreme Court 3304**, while considering the object of the amendment to Order VIII, Rule 1 of CPC, after its amendment, noticed an obligation on the defendant to file such written statement within 30 days of service of the suit summons and within the extended time falling within 90 days. The Apex Court then considered that the said provision does not confer or take away the power of the Court to take written statement on record, though filed beyond the time provided for and as such, further proceeded to observe that it is not a part of substantive law. Paragraph 10 of the said judgment is worth

reproducing, reading thus :-

“Order VIII, Rule 1 after the amendment 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. Further, the nature of the provision contained in Order VIII, Rule 1 is procedural. It is not a part of the substantive law. Substituted Order VIII, Rule 1 intends to curb the mischief of unscrupulous defendants adopting dilatory tactics, delaying the disposal of cases causing inconvenience to 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. While justice delayed may amount to justice denied, justice hurried may in some cases amount to justice buried.”

13. In the aforesaid background, looking to the nature of objection raised by respondent-plaintiff, in response to the prayer of the petitioner-defendant for setting aside “no written statement” order and for taking on record the written statement, but for observing that the time period of 90 days has expired, no other reasons are furnished viz. whether the trial has proceeded further and whether there is any intention on the part of the petitioner in delaying the suit proceedings. No doubt, in the judgment considered by the learned Trial Court, the Apex Court has held that the extension as sought is contrary to the provisions of Order VIII, Rule 1 of

(9)

CPC and is not liable to be granted. However, in the present case, in absence of any *mala fides* on the part of the petitioner-defendant and having regard to the fact that the suit has not proceeded ahead as the trial has not commenced, the prayer of the petitioner-defendant for placing on record written statement needs to be allowed by quashing the order impugned, passed below Exh.18.

14. In the result, I pass following order :-

The orders impugned passed by the Trial Court, are set aside, subject to payment of costs of Rs.2,000/- in each petition, by petitioner-defendant to respondent-plaintiff, which would be a condition precedent before taking on record written statements.

Costs as aforesaid be deposited by petitioner-defendant before the Trial Court within a period of four weeks from today.

With above observations and directions, writ petitions stand allowed.

(NITIN W. SAMBRE, J.)

amj