

**CM No.26674-CII of 2017 and
CR No.7947 of 2017**

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IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

**CM No.26674-CII of 2017 and
CR No.7947 of 2017
Date of decision: 16.12.2017**

Shamsher Singh

....Petitioner

V/S

Punjab National Bank & ors.

.....Respondents

CORAM: HON'BLE MR. JUSTICE B.S. WALIA

Present : Mr. Vishal Nehra, Advocate for the petitioner.

Mr. Amit Kumar Goyal, Advocate for respondent No.1.

B.S WALIA, J. (Oral)

[1] Application i.e. CM No.26674-CII of 2017 is for preponing date of hearing. Heard. For the reasons as are mentioned in the application, the same is allowed. With the consent of learned counsel for the parties, hearing of the main case is preponed to today and main case is taken up for hearing and decision today.

[2] Revision petition has been filed under Article 227 of the Constitution of India seeking setting aside of order dated 15.9.2017 (Annexure P-3) passed by the learned Civil Judge (Jr. Division), Sonapat whereby defence of the defendant-petitioner (hereinafter referred to as the petitioner) was struck off on account of failure to file the written statement and in view of application having been moved by the plaintiff-respondent (hereinafter referred to as the respondent)

for striking of the defence of the petitioner.

[3] Brief facts of the case leading to the filing of the instant revision petition are that the petitioner put in appearance before the learned trial Court on 24.5.2017 pursuant to receipt of notice whereupon the case was adjourned to 15.9.2017 for filing of written statement as well as for service of the other respondents. On the adjourned date i.e. 15.9.2017, written statement was not filed and in view of application having been filed by the respondent for striking off the defence of the petitioner, the learned trial Court was pleased to strike off the defence of the petitioner on account of expiry of statutory period for filing written statement.

[4] Learned counsel for the petitioner has raised a fourfold submission. Firstly, that only one opportunity was given for filing written statement, secondly, the other defendants had not been served, thirdly, request had been made by the petitioner to the respondent for supply of documents relied upon in the plaint, but the same had not been supplied as a result of which the written statement could not be filed. Learned counsel further contended that the learned Civil Judge (Jr. Division), Sonapat did not issue any notice to the petitioner nor gave him an opportunity to show cause against the action proposed to be taken and straightway passed the impugned order. Learned counsel contends that in the circumstances, notice of the application ought to have been given to the petitioner and some time ought to have been granted to the petitioner to file a reply to the application to show cause that the provision was not mandatory and that in the circumstances, at least one opportunity be granted by way of last opportunity, if necessary, by imposition of costs for filing written statement.

[5] Learned counsel for the petitioner relies upon the decision of the

Hon'ble Supreme Court in '**Zolba versus Keshao & others**', 2008(2) RCR (Civil) 869 to contend that the period of 90 days fixed for filing of written statement under Order 8 Rule 1 of the CPC is not mandatory and in exceptional circumstances, the Court can allow the defendant to file the written statement even beyond the period of 90 days. Relevant extract of the decision of the Hon'ble Supreme Court in **Zolba's case** (supra) is reproduced as under:

"7. Considering the facts and circumstances of the present case and the statements made in the application for condoning the delay in filing the written statement, we are not in a position to hold that the appellant was not entitled to file the written statement even after the expiry of the period mentioned in the proviso to Order 8 Rule 1 of the CPC. After reading the provisions, in particular the proviso to Order 8 Rule 1 of the CPC, we are unable to hold that the provisions under Order 8 Rule 1 are mandatory in nature. In Salem Advocate Bar Association, Tamil Nadu vs. Union of India[AIR 2005 SC 3353], it has been clearly held that the provisions including the proviso to Order 8 Rule 1 of the CPC are not mandatory but directory. It has been held in that decision that the delay can be condoned and the written statement can be accepted even after the expiry of 90 days from the date of service of summons in exceptionally hard cases. It has also been held in that decision that the use of the word "shall" in Order 8 Rule 1 of the CPC by itself is not conclusive to determine whether the provision is mandatory or directory. The use of the word "shall" is ordinarily indicative of mandatory nature of the provision but having regard to the decision in that case, the same can be construed as directory. In paragraph 21 of the said decision, this court observed as follows: -

"The use of the word 'shall' in order 8 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 hand- maid of justice and not its mistress. In the present context, the strict

interpretation would defeat justice."

[6] On the other hand, learned counsel for the respondent has reiterated the reasoning given by the learned trial Court and has stated that the documents sought by the petitioner were already available with the petitioner, therefore, no indulgence was warranted.

[7] I have considered the submissions of learned counsel for the parties and am of the view that since only one opportunity had been given and service of other defendants was yet to be effected, one more opportunity ought to have been granted by way of last opportunity for filing of the written statement as otherwise, great prejudice would be caused to the petitioner as he would not be able to put up a defence in the suit against him. The learned Civil Judge has proceeded on the assumption that the period stipulated under Order 8 Rule 1 of the CPC is mandatory whereas as per law as referred to above, the stipulated period is not mandatory and in exceptional circumstances, the Court can permit filing of written statement even beyond the period of 90 days. Besides, once an application had been moved for striking off the defence of the petitioner, the learned Civil Judge ought to have granted a short date to the petitioner to file a reply to plead that the action sought be not resorted to. In the light of the position as noted above, I am of the view that the ends of justice would be met if one opportunity is granted to the defendant-petitioner to file the written statement.

[8] In the circumstances, impugned order dated 15.09.2017 i.e. Annexure P-3, passed by the learned Civil Judge (Jr. Divn.), Sonapat, striking off the defence of the petitioner is set aside. Petitioner shall be allowed one opportunity by the learned trial Court to file the written statement within two weeks from today, subject to payment of costs of Rs.5,000/- to the plaintiff-

respondent.

[9] Revision petition stands disposed of in the manner as indicated
above.

**December 16, 2017
ps**

**(B.S. WALIA)
JUDGE**

Whether speaking/reasoned : Yes/No.
Whether reportable : Yes/No.