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

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Date of Decision: May 23, 2017

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CM(M) No.144/2017

MOHD ASLAM

..... Petitioner

Through: Mr.Kamal Jindal, Advocate.

versus

MOHD AKRAM

..... Respondent

Through: None.

CORAM:

HON'BLE MS. JUSTICE PRATIBHA RANI

JUDGMENT (Oral)

1. The petitioner has invoked the extraordinary jurisdiction of this Court under Article 227 of the Constitution of India impugning the order dated 5th December, 2016 whereby the application filed by the petitioner/defendant under Order VIII Rule 1 of Code of Civil Procedure has been dismissed by the learned Trial Court.
2. Learned counsel for the petitioner submits that the delay in filing the written statement was only by 45 days and despite the delay being satisfactorily explained by the petitioner/defendant, the learned Trial Court ordered that the written statement filed by him be taken off the record and his defence was struck off.
3. Learned counsel for the petitioner has submitted that the respondent/plaintiff can be compensated by awarding cost and the petitioner should not suffer for the fault of his counsel who happened to misplace the original documents, hence could not file the written statement within the stipulated time.

4. Vide impugned order dated 5th December, 2016 the learned Trial Court has ordered the written statement to be taken off the record for the following reasons:-

*‘Applying the settled principles of law to the facts of the present case, it is evident, as above, that the power of the Court to grant extension of time for filing the **Written Statement has been curtailed by the Legislature and cannot be beyond the outer limit so provided by the Legislature.** As observed by the Hon’ble Apex Court, this provision is directory and in appropriate cases to mitigate genuine hardship the Court has inherent powers to extend the time for sufficient reasons when it departed from the time limit fixed by the Code but has emphasized that the **grant of extension of time beyond 90 days is not automatic and has been based upon a clear satisfaction/justification for granting such extension which extension has been restricted by the Code.** In the present case the defendant was validly served on 7.6.2016 after which he did not file any written statement but simply put in his appearance before this Court on 15.9.2016 (on 96th day) and requested for grant of time when his Court had granted him an extension of 30 days to file the written statement which written statement was not filed even thereafter within this extended period of 30 days. The written statement has now been filed on 175th day from the date of service i.e. 7.6.2016 (much beyond the outer limit provided by the Statute). I find no ground to grant any indulgence, the application under Order 8 Rule 1 CPC filed by the defendant is hereby dismissed and written statement of defendant is taken off the record and defence of the defendant is struck off.’*

5. The application under Order VIII Rule 1 of Code of Civil Procedure, which is dated 5th December, 2016 and filed on the date of hearing i.e. on 5th December, 2016, explains the delay in filing the written statement as under:-

(i) On the previous date of hearing, the Court granted thirty days' time to file the written statement but written statement could not be filed as counsel for the defendant kept the original documents of the defendant relating to this case in another case file by mistake.

(ii) Counsel for the defendant had no intention to delay the filing of written statement but it was for the reason that the documents could be traced only on 1st December, 2016 and on the next date, the written statement was filed by the defendant.

6. The above application is not signed by the defendant but supported with the affidavit of the defendant Mohd. Aslam and affidavit has been sworn as under:-

'2. That the contents of the accompanying _____ application u/o 8 Rule 1 CPC has been drafted by my counsel under my instructions which have been readover and explained me in my vernacular which are true and the same are not being repeated herein for the sake of brevity.'

7. It is not understandable as to why defendant's counsel did not file his affidavit when the ground for seeking condonation of delay in filing the written statement was that the counsel for defendant happened to place the documents in some other file which could be traced only on 1st December, 2016. Neither the name of the counsel nor his affidavit as to when the documents were handed over to him and in which file the same were kept by mistake and how the documents could be traced on 1st December, 2016, has been explained in the application.

8. Learned counsel for the petitioner has drawn the attention of this Court to the proceedings dated 15th September, 2016 when he appeared before the learned ADJ and informed that pages No.21 to 24 were missing.

He has submitted that the period of thirty days has to be calculated w.e.f. 15th September, 2016 and thereafter the period can be extended upto 90 days, hence there is no inordinate delay in filing the written statement.

9. I am unable to agree with the above interpretation given by learned counsel for the petitioner for calculating the period for filing the written statement. As per Order VIII Rule 1 of Code of Civil Procedure this has to be from the date of service. Undisputedly, the service has been effected on 7th June, 2016 on the petitioner/defendant. On 15th September, 2016, period of more than ninety days had already expired and by that time the written statement was not filed nor any request was made for extension of time by explaining the cause for delay. If pages No.21 to 24 were missing, the petitioner had the option either to request the counsel for the plaintiff to supply the deficient pages or to inspect the record or in the alternative to file an application before expiry of period of thirty days for requesting the Court to direct the respondent/plaintiff to make up the deficiency. For more than ninety days, none of the above steps were taken. Despite that the learned ADJ ensured that the deficient pages are supplied same day by 11.50 am. Thereafter further thirty days' time was granted to the petitioner/defendant to file the written statement with advance copy to the respondent/plaintiff.

10. Knowing fully well that the prescribed period of filing the written statement had expired long back, the petitioner/defendant did not file any application before the Court that necessary documents handed over by the defendant have been misplaced or that he was not having even the copies of the same to enable him to file the written statement. Though the period of thirty days granted by the Court had expired by 14th October, 2016, only on 5th December, 2016 the written statement was filed after almost six month from the date of service which has rightly been directed to be taken off the

record for the reasons extracted in para 4 above.

11. In the case R.N.Jadi & Brothers and Others vs. Subhashchandra (2007) SCC 420, the Supreme Court has held as under:-

'24. 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 knock-outs. 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. Nankhu and Ors. MANU/SC/0264/2005 : AIR2005SC2441 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 rigor of that provision or to mitigate genuine hardship. It was in that context that in Kailash v. Nankhu and Ors. (supra) 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 statements, after the expiry of the period permitted by law, in a routine manner.'

12. The above narration of the facts and the conduct of the petitioner/defendant if allowed to be continue, the same would amount to do violence to the language of Order VIII Rule 1 CPC which prescribes time for filing the written statement.

13. I do not find any merit in the petition and the same is hereby dismissed.

PRATIBHA RANI, J.

MAY 23, 2017/'st'