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

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Date of Decision: May 24, 2017

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CM(M) 241/2017

SUDHIR YADAV AND ORS

..... Petitioners

Through: Mr.Nitin Khanna, Advocate.

versus

SURJEET YADAV

..... Respondent

Through: Mr.O.P.Aggarwal, Advocate.

CORAM:

HON'BLE MS. JUSTICE PRATIBHA RANI

JUDGMENT (Oral)

CM(M) 241/2017

1. The petitioners are aggrieved by the order dated 21.11.2016, whereby the application filed by the petitioners/defendant Nos.1, 2, 3 & 5 (Defendant No.2 is not petitioner before this Court) has been dismissed by the learned Trial Court and their right to file written statement has also been closed.

2. Learned counsel for the petitioners (defendant Nos.1, 3 & 5) submit that the reasons for not being able to file the written statement have been duly explained by the petitioners while filing an application for setting aside the ex-parte order and in the in the interest of justice, one opportunity may be granted to the petitioners to file written statement subject to such terms and conditions as may be deemed fit in the circumstances of this case.

3. Learned counsel for the respondents has strongly opposed the prayer submitting that the respondents have been served on 6th May, 2016. They

have been proceeded ex-parte on 1st September, 2016. Even while filing the application under Order IX Rule 7 CPC the written statement was not annexed to show their bonafide. Thus the petitioners may not be granted further opportunity to file the written statement.

4. Perusal of the record shows that the petitioners/defendant Nos.1, 3 & 5 have been served on 6th May, 2016. They were required to file the written statement within 30 days from the date of service. The petitioners failed to seek extension of time to file the written statement which could have been granted by the Court up to the period of 90 days. Learned Trial Court has proceeded ex-parte against the respondents on 1st September, 2016 though the period of 90 days had come to an end in the first week of August, 2016. The application under Order IX Rule 7 CPC has been filed only on 30th September, 2016 and following reasons for setting aside the ex-parte order have been given:

(i) On receiving the summons, the applicants approached Sh.Sandeep Puri, Advocate and handed over the papers to him in the month of May, 2016 who assured to take care of the matter.

(ii) After the date of hearing in the case, Sh.Sandeep Puri, Advocate informed them that he cannot appear on their behalf as he is appearing as counsel for the mother of the defendant Nos.1 & 2 in another case filed by their mother against these defendants. Thereafter the petitioners were unable to engage another counsel for the date of hearing i.e. 1st September, 2016.

(iii) They engaged another counsel who inspected the file and informed that the petitioners have already been proceeded ex-parte.

5. In the application there is no mention as to when the suit filed by the mother through Sh.Sandeep Puri, Advocate was instituted and whether this fact was within their knowledge when they approached Sh.Sandeep Puri,

Advocate in the month of May, 2016 to defend them in the instant suit. The application is also silent as to when Sh.Sandeep Puri, Advocate communicated his inability to appear in the matter and asked them to engage another counsel. If the counsel was not engaged till 1st September, 2106, at least the parties could have appeared in person before the Court and apprised the Court about the circumstances in which the counsel engaged by them could not prepare the written statement.

6. The application under Order IX Rule 7 CPC is totally silent on above issues.

7. The limited prayer made before this Court is only to the extent that the petitioner may be given one opportunity, limited to the extent that the written statement filed by him after a period of six months from the date of service be directed to be taken on record. The submissions need to be considered seeking guidance from the various decisions by the Supreme Court on this issue.

8. The principles governing the discretion of the Court while considering an application under Order VIII Rule 1 CPC have been detailed in the decision reported as Mohammaed Yusuf v. Faij Mohammd & ors. (2009) 3.

Paragraphs 10 and 11 of the report are extracted herein:

“ 10. The question came up for consideration before this Court in M. Srinivasa Prasad and Ors. v. The Comptroller & Auditor General of India and Ors. MANU/SC/1638/2007 : AIR2007SC1574 , wherein a Division Bench of this Court upon noticing Kailash (supra) held as under:

“7. Since neither the trial Court nor the High Court have indicated any reason to justify the acceptance of the written statement after the expiry of time fixed, we set aside the orders of the trial Court and that of the High Court. The matter is remitted to the

trial Court to consider the matter afresh in the light of what has been stated in Kailash's case(supra). The appeal is allowed to the aforesaid extent with no order as to costs."

11. The matter was yet again considered by a three-judge Bench of this Court in R.N. Jadi & Brothers and Ors. v. Subhashchandra. P.K. Balasubramanyan J., who was also a member in Kailash in his concurring judgment stated the law thus:

"14. 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 knockouts. 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. Nanhku which held that the provision was directory and not mandatory. But there could be situations where even a procedural provisional 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 rigour of that provision or to mitigate genuine hardship. It was in that contest that in Kailash v. Nanhku 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 statement, after the expiry of the period permitted by law, in a routine manner. (emphasis placed).

15. A dispensation that makes Order 8 Rule 1 directory, leaving it to the courts to extend the time indiscriminately would tend to defeat the object sought to be achieved by the amendments to the Code. It is, therefore, necessary to emphasise that the grant of extension of time beyond 30 days is not automatic, that it should be exercised with caution and for adequate reasons and that an extension of time beyond 90 days of the service of summons must be granted only based on a clear satisfaction of the justification for granting such extension, the court being conscious of the fact that even the power of the court for extension inhering in Section 148 of the Code, has also been restricted by the legislature. It would be proper to encourage the belief in litigants that the imperative of Order 8 Rule 1 must be adhered to and that only in rare and exceptional case, will the breach thereof will be condoned. Such an approach by courts alone can carry forward the legislative intent of avoiding delays or at least in curtailing the delays in the disposal of suits filed in courts. The lament of Lord Denning in Allen v. Sir Alfred McAlpine & Sons that law's delay have been intolerable and last so long as to turn justice sour, is true of our legal system as well. Should that state of affairs continue for all times?"

9. When the case of the petitioners is examined in the light of the aforesaid propositions of law I find that there is absolutely no explanation from the petitioners (defendant Nos.1, 3 & 5) as to why they failed to appear before the learned Trial Court to seek extension of time to file the written statement if Sh.Sandeep Puri, Advocate was unable to represent them.

10. If they took time in engaging another counsel, there is no explanation as to what prevented them to appear in person and seek extension of time by explaining the facts requiring extension of time.

11. Extension of time for filing the written statement particularly beyond the period of 90 days being absolute discretion, need to be exercised only in exceptional and unavoidable circumstances. The petitioners herein are not able to make out a case requiring exercise of this discretion in their favour especially the fact that when the application under Order IX Rule 7 CPC was filed on 30th September, 2016 i.e. almost after one month of they being proceeded ex-parte, when the new counsel had been engaged what prevented them to file the written statement along with the application under Order IX Rule 7 CPC. Written statement has been filed on 5th December, 2016 i.e. six months after the date of service.

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

CM No.8001/2017

Dismissed as infructuous.

PRATIBHA RANI, J.

MAY 24, 2017

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