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

+ C.R.P. 113/2017

SMT.MEENAKSHI PURIYA

..... Petitioner

Through: Mr.Virendra Singh, Advocate.

versus

SH. ARUN JAIN

..... Respondents

Through: None.

CORAM:

HON'BLE MS. JUSTICE PRATIBHA RANI

ORDER

% **12.05.2017**

CM No.18063/17 (delay in re-filing) & CM No.18064/17 (delay in filing)

1. For the reasons stated in the applications, 34 days in re-filing and 421 days in filing the petition is condoned.
2. The applications are disposed of.

C.R.P. 113/2017

1. Petitioner has invoked the jurisdiction of this Court under Article 227 of the Constitution of India by assailing the order dated 29th September, 2015 and 14th December, 2016 whereby after closing the opportunity to file the written statement within stipulated time, on 29th September, 2015, the application filed under Order IX Rule 7 read with Section 151 CPC for recalling order dated 29th September, 2015 and for providing an opportunity to file the written statement has also been declined.

2. Learned counsel for the petitioner has submitted that perusal of the

proceeding dated 29th September, 2015 reveals that it was the first date of appearance for the petitioner/defendant and learned counsel for the defendant informed the Court that page No.13 of the document is illegible and page Nos. 15 & 16 have not been supplied to him, due to which written statement has not been prepared.

3. Learned Trial Court closed the opportunity observing that the date of service was 24th July, 2015 and period of 30 days has expired long back. The defendant failed to file any application within the prescribed time for getting another set of documents not legible/deficient.

4. On 14th December, 2016 the application under Order IX Rule 7 CPC read with Section 151 CPC has been dismissed for the following reasons:

(i) The defendant has put the entire blame on his counsel claiming that the counsel did not inform the defendant that the opportunity to file the written statement has been closed or what was the next date of hearing.

(ii) When the new counsel was engaged by the petitioner, he inspected the file on 8th September, 2016 then the defendant came to know that the liberty to file the written statement has been closed. However, no action has been taken against the previous counsel.

(iii) Though the defendant was served on 24th July, 2015 and written statement was required to be filed within 30 days from the date of service, the previous counsel was engaged only on 29th September, 2015 and by that time the period prescribed for filing the written statement had already expired.

(iv) After the opportunity to file the written statement was closed on 29th September, 2015, the second counsel was engaged only on 8th February, 2016 and there is no explanation as to why the defendant had been negligent for a

period of more than four months.

(v) The written statement has not been filed within these 90 days. Rather it was placed on record after lapse of more than 10 months. Even at the time of filing the application under Order IX Rule 7 read with Section 151 CPC which was filed on 11th February, 2016, the written statement was not filed to show sincerity in the matter.

5. The limited issue that needs attention of this Court is whether learned Trial Court was justified in denying the opportunity to the petitioner/defendant to file the written statement. The provision of Order VIII Rule 1 CPC have been held to be directory in nature in ***Kailash vs. Nankhu & Ors. AIR 2005 SC 2441.***

6. The matter was yet again considered by a three-judge Bench of this Court in ***R.N. Jadi & Brothers and Ors. v. Subhashchandra*** MANU/SC/7775/2007 : AIR2007SC2571 . P.K. Balasubramanyan J., who was also a member in Kailash(supra) 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 context 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.”

7. On the touchstone of above legal proposition when the case of the petitioners is tested, the learned Trial Court was right in rejecting the prayer of the petitioners for taking the written statement on record which was filed even after expiry of period of 10 months. It is not disputed that service was effected on the petitioners/defendants on 24th July, 2015. The written statement was required to be filed within a period of 30 days from the date of service.

8. No doubt on the date of first appearance before the Court on 29th September 2015, learned counsel for the petitioner pointed out deficiency in the copy of the documents but by that time two months period had already expired from the date of service.

9. If there was any deficiency in the document either the learned counsel for the plaintiff could have been requested to supply the deficient pages and if that was not possible then he could have inspected the case file of the Civil Suit No.124/2015 and file the written statement or atleast file the application for seeking extension of time to file the written statement.

10. In this case the petitioner/defendant was not proceeded exparte hence the application under Order IX Rule 7 CPC was not required to be filed. Even if the provision under which the application was filed is ignored, not only the application filed was belated but it was also not accompanied by the written statement.

11. The learned Trial Court has exercised its discretion in a judicious manner in accordance with well settled legal principles.
12. The impugned order does not suffer from any illegality, irrationality or procedure impropriety.
13. The petition is dismissed.

PRATIBHA RANI, J.

MAY 12, 2017
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