IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO. 925 OF 2019

MAHIMANA DESHPANDE ... Petitioner

Versus

EMERALD ELECTRONICS PVT. LTD.,
THR. REP., ANIL G. LUNKER AND ORS. ... Respondents

Shri S.D. Lotlikar, Senior Advocate with Shri Prasheen Lotlikar, Advocate for the Petitioner.

Ms. M. Viegas, Advocate for Respondent No.1.

Shri Dattaprasad Lawande and Shri Ashish Kuncoliencar, Advocates for Respondent No.4.

Ms. Tanvi Kamat Ghanekar, Advocate for Respondent No.5.

Coram:- DAMA SESHADRI NAIDU, J.

Date:- 17th December 2019

ORAL ORDER:

Facts:

The petitioner is the 1st defendant in Special Civil Suit No.59/2018 before the Civil Judge Senior Division, 'B' Court, Mapusa. The 1st respondent is the plaintiff.

2. The 1st respondent, as the plaintiff, sued the petitioner and others, alleging that the petitioner borrowed money and secured that debt by mortgaging the property belonging to the 2nd and 3rd respondents. Over time, the 2nd and 3rd respondents, the owners, entered into a development agreement with the 5th respondent, the developer. Later,

they sold the property to the 4th respondent, the purchaser. To that deed of conveyance, the developer is the consenting party. Without prejudice to the parties' contentions in the suit, I refer to them with the roles they were attributed in the suit: the lender, the borrower, the owners, the purchaser, and the developer.

3. As the mortgaged property had been sold, the lender has sued the petitioner, the borrower; the 2nd and 3rd respondents, the owners-mortgagers; the fourth defendant, the purchaser; and the fifth defendant, the developer.

4. As seen from the record, on 04.07.2018, the trial Court served the summons on the borrower. He did not appear before the court on the specified day; he set *ex parte*. Later, on his application, that *ex parte* order was recalled. Though the borrower had engaged a counsel, who represented him throughout, he took numerous adjournments to file the written statement. Indeed, the time was extended or enlarged on many an occasion. On 18.02.2029, the trial Court, once again, set him *ex parte*.

5. Over a month later, the borrower applied for the enlargement of time to file the written statement; soon after that, he also applied to have the *ex parte* set aside. Through a common order, dated 30.09.2019, the trial Court dismissed both the applications. Assailing that order, the borrower has filed this Writ Petition.

6. Heard Shri Lotlikar, the learned Senior Counsel, instructed by

Shri P.S. Lotlikar, the learned counsel for the petitioner-borrower; and Shri Dattaprasad Lawande, the learned counsel for the fourth respondent purchaser.

Discussion:

7. Before we discuss the merits of the borrower's contentions, we inevitably refer to the chronology of events a little more in detail. Chronology clutters, but the devil lies in the detail. So we should have the details of the dates.

(a) Chronology of Adjournments:

8. As seen from the record, on 04.07.2018, the trial Court served the summons on the borrower. He was to have appeared on 09.07.2018, but he absented himself. Then, on 03.08.2018, the trial Court set him *ex parte*. After engaging a counsel, the borrower applied for having the *ex parte* order set aside. All the parties reported no objection. Then, on 08.10.2018, the trial Court set aside the *ex parte* order; it gave the borrower 30 days to file the written statement. The matter stood posted to 19.10.2018. On that day, the borrower applied to have the time extended. Again, all parties reported no objection. Time was extended. Once again on 17.11.2018, he sought one more extension, and it was granted. Finally, on 07.12.2018, the borrower sought one more extension and that, too, was granted—but subject to limitation.

9. Eventually, even by 18.01.2019, the next adjournment, the

borrower filed no written statement. Once again, the matter was listed on 18.02.2019. By then, too, the borrower was not ready with the written statement, though represented by a counsel. The counsel repeatedly sought adjournments. Under those circumstances, the trial Court set the borrower *ex parte*, once again.

10. On 25.03.2019, to file the written statement, the borrower applied for the enlargement of the time the trial Court initially fixed. Soon thereafter, he has also filed another application for having the *ex parte* order set aside. All parties, except the purchaser, reported no objection. The purchaser contested the borrower's applications for the extension of time and for setting aside the *ex parte* order. Through a common order, dated 30.09.2019, the trial Court dismissed both the applications.

(b) The Excuses and their Untenability:

11. Shri P. S. Lotlikar, the learned Senior Counsel for the petitioner, has submitted that initially the developer took the borrower into confidence and assured him that he would engage a counsel for him as well, so there could be better coordination between them. Therefore, it is only the developer, according to him, that appointed the counsel for the borrower. Nothing uncommon about this practice. In any litigation, among many parties, one may take the lead and guide all others or act on their behalf, too.

12. Then comes, what seems, an unconvincing assertion—more of an excuse. In the course of time, one of the two property owners, that is the second respondent, filed his written statement. That written statement, according to the borrower, was adverse to his interest. So, he wanted to change his counsel and have his own. In this context, as Shri Lotlikar narrates, the borrower approached the developer and sought no objection. And this process took four months. By then, the trial Court set the borrower *ex parte*.

13. Let us examine how sound this assertion is. As Shri Lawande informs the Court, first, the borrower and the developer have two different counsel to represent them each—even if we accept that the developer alone chose the borrower's counsel, too. Second, the owner's counsel has nothing to do with the borrower.

14. Of course, the sole opposing party—the purchaser—asserts that the suit is collusive. According to him, all the defendants except the purchaser, a bona fide purchaser at that, have been sailing together to defeat the purchaser's interest. But that is beside the point. We need not pursue that line.

15. To begin with, the borrower pleads that he appointed no counsel on his own; instead, he simply gave the Wakalatnama to the fifth respondent, who in turn appointed the counsel. If that was so, he was derelict in his duty to defend himself diligently. For that, no other person

should suffer.

16. If we confine to the handicap, if any, the borrower is said to have suffered, we may as well assume that the owner's counsel pleaded a case adverse to the borrower's interest. In this backdrop, the borrower, it seems, wanted to change his counsel. First, as I have already noted, it is not the same counsel. Second, the borrower has no allegation against his own counsel—may be appointed by the developer. To be precise, the borrower could not have blamed his counsel for the adverse written statement someone else filed. It is not the borrower's case that he instructed his counsel in a particular way, but he refused to act that way.

17. Now, let us examine the borrower's another plea: He wanted the developer to secure an NOC from the counsel. And it was four months before the borrower had the NOC. As we may appreciate, the borrower does not complain that he asked his counsel for the NOC and that he refused to give. It seems on the borrower's request, the developer asked the counsel for the NOC, and it took four months. That said, all these months, the same counsel went on representing before the trial Court and seeking adjournments. At no point in time did the borrower plead that he could not file the written statement until he secured the NOC from his counsel and engaged another one.

18. The last plea concerns prejudice. Shri Lotlikar has stressed that the trial has not yet begun, that the borrower never held up the trial, and that no party suffers any prejudice if the borrower is allowed to file the

written statement.

The Statutory Scheme and its Spirit:

19. True, the borrower's plea on the point of prejudice is plaintive —almost convincing, too. But it has more than what meets the eye. So let us examine the statutory scheme as provided in Order VIII, Rule 1 of CPC. It reads:

> "1.Written statement. —The defendant shall, *within thirty days* from the date of service of summons on him, present a written statement of his defence:
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> Provided that where the defendant fails to file the written statement within the said period of thirty days, *he shall be allowed to file* the same on such other day, as may be specified by the court, *for reasons to be recorded in writing*, but which *shall not be later than ninety days* from the date of service of summons."
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> (italics supplied)

20. Order VIII , Rule 1 of CPC requires the defendant to present a written statement of his defence "within thirty days" after his receiving the summons. The expression employed in the provision is "the defendant shall". The provision to that provision underlines the importance of the time frame. If the defendant fails to file the written statement within thirty days, "he shall be allowed to file the same on such other day, as may be specified by the court, for reasons to be recorded in writing." This is one phase of the proviso, and it carves out an exception to the mandatory language used in the main provision—"the defendant shall . . . present a written statement."

21. In this first phase of the proviso, too, the statute uses another "shall": "[the Defendant] shall be allowed to file [the written statement]

on such other day" as the court specifies." But this enlargement of time beyond 30 days is "for reasons to be recorded in writing." Thus, in the first part, the proviso mandates that the defendant "shall be allowed to file" the written statement anytime in the next 60 days—the total period not exceeding 90 days from the day the defendant received the summons.

22. But immediately, this statutory mandate stands qualified: The trial Court must assign reasons why it is allowing the defendant to file his written statement beyond 30 days but before the 90th day. That is, the trial Court cannot allow the defendant to file the written statement during that period without its recording reasons. So recording reasons suggests that the trial Court exercises its discretion. Indeed, the legislative mandate that the defendant "shall be allowed to file" the written statement and the court's recording reasons to justify that are incompatible—perhaps, an instance of legislative incongruity.

23. In practice, now, as we see, the thirty-day period has become a dead letter. Allowing the defendant to file the written statement in 90 days is routine and recording of the reasons is a mere ritual. The trouble begins, and the true discretion sets in only if the defendant wants to file the written statement beyond 90 days. That is the case here, too.

24. Plainly read, the proviso to Order VIII, Rule 1 reads as if the defendant had no option to file the written statement beyond the 90th day —the *terminus ad quem*. But, all is said and done, the Code of Civil Procedure is, as the name suggests, procedural: not a tyrant, but a servant;

something designed to facilitate justice and further its ends: not a penal enactment for punishment and penalties; not a thing designed to trip people up[1]. Granted.

25. All the rules of procedure are the handmaids of justice. The language employed by the draftsman of processual law may be liberal or stringent, but the fact remains that the object of prescribing procedure is to advance the cause of justice. In an adversarial system, no party should ordinarily be denied the opportunity of participating in the process of justice dispensation. Unless compelled by express and specific language of the statute, the provisions of CPC or any other procedural enactment ought not to be construed in a manner which would leave the court helpless to meet extraordinary situations in the ends of justice. So holds the Supreme Court in *Sambhaji v. Gangabai*[2].

(d) The Precedential Position:

26. So, precedentially, the proviso to Rule 1 of Order VIII has come to be read as directory, rather than mandatory. In *Salem Advocate Bar Assn. (2)* v. *Union of India*[3], the Supreme Court has held that "there is no restriction in Order VIII Rule 10 that after the expiry of ninety days, further time cannot be granted." According to it, the upper limit of 90 days for filing written statement is directory. But the judgment clarifies

1 Sangram Singh v. Election Tribunal, Kotah, AIR 1955 SC 425, at 429

2 (2008) 17 SCC 117

3 (2005) 6 SCC 344

that "the order extending time to file written statement cannot be made in routine. The time can be extended only in exceptionally hard cases." It has also emphasised that "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." *Salem Advocate Bar Assn. (2)*, thus, reads down the seemingly mandatory legislative command in a permissive procedural law; yet it cautions against the dilatory devices the deviant defendants may adopt to drag the trial.

27. After quoting with approval *Salem Advocate Bar Assn. (2)*, the Supreme Court in *Atcom Technologies Ltd. v. Y.A. Chunawala & Co.*[4], has held that the onus upon the defendant is of a higher degree to plead and satisfactorily demonstrate a valid reason for not filing the written statement within thirty days. *Atcom Technologies Ltd.*, acknowledges that Order VIII Rule 1 of CPC, no doubt, is procedural and, therefore, the handmaid of justice. But that does not mean that the defendant may take as much time as he wants in filing the written statement, without explaining the delay and the High Court has to condone it mechanically. On facts, in that case the written statement was sought to be filed after five years. To condone the delay, the High Court considered the "balancing of rights and equities" and also the fact that the summons was not served for a couple of years. *Atcom Technologies Ltd.*, has rejected this approach, though.

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4 (2018) 6 SCC 639

28. Ordinarily, the time schedule prescribed by Order VIII, Rule 1 has to be honoured. The defendant should be vigilant, so holds the Supreme Court in *Kailash v. Nanhku*[5]. No sooner the writ of summons is served on him that the defendant should take steps for filing the written statement on the appointed date of hearing. According to *Kailash*, the extension of time sought for by the defendant from the court whether within 30 days or 90 days, as the case may be, should not be granted just as a matter of routine and merely for the asking; more so, when the period of 90 days has expired. The extension can be only by way of an exception and for reasons assigned by the defendant and also recorded in writing by the Court to its satisfaction.

29. The circumstances under which the delay occurred must be exceptional, occasioned by reasons beyond the defendant's control. And, as Kailash observes, the extension of time must be in the interest of justice, lest grave injustice should occasion.

30. If the defendant has not filed the written statement, that is not be all and end all. He still can participate in the trial and attack the plaintiff's case and may expose the falsity, if any, of that case. Even when the defendant is set *ex parte*, that does not result in automatic decree under Order VIII, Rule 10 of CPC. In *Maya Devi v. Lalta Prasad*[6], the Supreme

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5 (2005) 4 SCC 480

6 (2015) 5 SCC 588

Court has held that the absence of the defendant does not absolve the trial court from fully "satisfying itself of the factual and legal veracity of the plaintiff's claim; nay, this feature of the litigation casts a greater responsibility and onerous obligation on the trial court" to be fully satisfied that the plaintiff has proved and substantiated to the hilt his claim.

31. *Shantilal Gulabchand Mutha* v. *TELCO Ltd.*[7], as quoted in *Maya Devi*, holds that the defendants' failure to file a written statement, thereby bringing Order VIII Rule 10 CPC into operation, or the factum of the defendant having been set *ex parte*, does not invite punishment in the form of an automatic decree. The court is nevertheless duty-bound to diligently ensure that the plaint stands proved and the prayers are worthy of being granted.

(e) Back to Brass-tacks:

32. Here, the trial Court, first, has exercised its discretion. And I find no perversity in that exercise to upset its decision, using this Court's powers under Article 227 of the Constitution. Second, the trial Court has rightly found the borrower's explanation unconvincing. It is, in fact, not only unconvincing but also false. Third, prejudice or its absence is not a stand-alone legal concept. Delayed trials leading to docket explosions and erosion of people's faith has a public interest element, too. The delays

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7 (2013) 4 SCC 396

strike at the Rule of Law and—if we note with a touch of cynicism—may engender kangaroo courts: the muscle men or the gun barrels dispensing instant justice. The adjudication should look at not only the trees but also the forest—the larger picture; it cannot miss the woods for the trees. It is a balance between the *ex post* and the *ex ante* perspectives.

33. So we cannot countenance the borrower's plea that the trial has not begun and that his placing the defence on record causes no prejudice to others. Procedural provisions are permissive, not promiscuous. They, too, need adherence unless justice is the causality.

(f) The Palliative:

34. The defendant-borrower was dealt a double blow: He was denied the enlarged time to file the written statement; he was also set *ex parte*. I reckon, as we have discussed, the trial Court has justified its rejection on the former count—enlargement of time for the borrower to file the written statement. But not on the latter—setting the borrower *ex parte*. Throughout, the borrower's counsel was present and was seeking adjournments and extension of time, too, for filing the written statement.

35. If the defendant has failed to file the written statement within the stipulated time or extended time, it does not automatically follow that he should be set *ex parte*. He can defend himself based on the infirmities in the plaintiff's case. I see no valid reasons for the trial Court's setting the borrower *ex parte*. So I set aside the impugned order, dated 30.09.2019, to

that extent.

36. Thus, the borrower's application in Ext.45 & 46, stands allowed. He can prosecute the case as the law permits, but without the written statement on record.

The Writ Petition stands disposed of. No order on costs.

DAMA SESHADRI NAIDU, J.

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