

07.01.2021
Court No. 19
Item No.6
CP

C.O. 136 of 2020

Rima Sen @ Karmakar
vs.
Subhajit Sen

(via video conference)

Mrs. Pampa Dey (Dhabal)

....for the petitioner.

Mr. Ovik Sengupta
Mr. Vivek Basu
Mr. Arindam Paul

...for the opposite party.

The wife, respondent in Mat Suit No. 89 of 2018 pending before the learned Additional District Judge, 13th Court, Alipore, has preferred this revisional application being aggrieved by the order dated November 26, 2019. By order dated November 26, 2019, the learned court below rejected the application filed by the wife for recalling of the order dated May 30, 2019 by which the learned court below had directed the suit to proceed ex parte as the wife had failed to file the written statement despite extensions.

Records reveal that several dates were allowed for filing of the written statement between January 14, 2019 and May 30, 2019. Learned court below thereafter fixed August 5, 2019 for chief of the PW-1. On August 5, 2019 PW-1 was examined in chief. The

documents were marked exhibits I to exhibits 7. An application was filed by the husband praying for adducing further evidence and September 2, 2019 was fixed for further chief of PW-1. On August 28, 2019 the wife filed an application under Section 36 of the Special Marriage Act which was registered as Misc Case No. 415 of 2019. On September 2, 2019 the petitioner filed the written statement along with the show cause explaining the delay in filing the written statement along with an application under Section 151 of the Code of Civil Procedure praying for recalling of the order fixing the suit for ex parte hearing. The learned court below took up the matter on November 26, 2019 and upon contested hearing rejected the application filed by the petitioner holding that the petitioner had not made out a case which would warrant recalling of the order fixing the suit for ex parte hearing and acceptance of the written statement.

From the averments made in the application filed by the petitioner as also the application under Section 151 of the Code of Civil Procedure, it appears that the petitioner had appointed a learned advocate, namely, Mr. Dibyendu Bhattacharya to conduct the case on her behalf and he had assured her that he would look after the case and would take appropriate steps. On August 6, 2019 the petitioner came to know that the suit had been fixed for ex parte

hearing. Thereafter the petitioner appointed another learned advocate, namely, Mr. Ujjal Bhattacharjee with instruction to take appropriate steps. Eventually on September 2, 2019 an application was filed for recalling of the order dated May 30, 2019 along with the show cause and the written statement.

The learned court below was of the opinion that although the petitioner was present in court on two occasions, yet the petitioner failed to file the written statement on those dates and the explanation given by the petitioner was not accepted by the learned court below.

The learned advocate for the husband supports the order impugned on the ground that the learned court did not have the power to extend the time to file the written statement beyond 120 days from the date of receipt of summons in view of the amended provisions of the Code of Civil Procedure. He further submitted that it was the intention of the wife to delay the proceeding and she cannot be granted any equitable relief in view of the fact that she was present in court on those dates yet failed to file the written statement. It is further urged that the marriage has broken down irretrievably and, as such, the question of allowing the petitioner to contest the suit will delay the suit as the examination- in-chief of the husband is almost near conclusion.

I have considered the rival contentions of the parties. I have gone through the order impugned. The learned court below has placed reliance on the decisions of SCG Contracts (India) Private Limited vs. K. S. Chamankar Infrastructure Private Limited, reported in (2019) 12 SCC 210, wherein it has been held that amendments made in Order 8 Rule 1 and Rule 10 and Order 5 Rule 1(1) CPC by Act 4 of 2016 were mandatory in nature, and the court did not have any power to extend the time to file the written statement beyond 120 days from the date of service of summons upon a party. Reliance is also placed on the judgments passed in Oku Tech Private Limited vs. Sangeet Agarwal & ors reported in 2016 SCCOnline Del 6601 and also in Maja Cosmetics vs. Oasis Commercial Pvt. Ltd., reported in 2018 SCC Online Del 6698.

Having considered the decisions relied upon by the learned court below, it appears that the learned court below misdirected itself completely while relying on these decisions as these decisions were rendered in relation to commercial suits.

On the contrary, in the decisions of Salem Advocate Bar Association vs. Union of India, reported in (2005) 6 SCC 344 and in the matter of Kailash vs. Nanhku, reported in (2005) 4 SCC 480 it was held that the provisions of Order 8 Rule 1 were directory and not mandatory in nature and, as such, the court

being satisfied of the hardship and the situation which prevented a party from filing the written statement on time could extend the time beyond 120 days in exercise of its discretionary power. The principle has been clarified in the decision of the Hon'ble Three-Judge Bench of the Hon'ble Apex Court in *Desh Raj vs. Balkishan (D)* through proposed LR *Ms. Rohini*, (Civil Appeal No. 433 of 2020), dated January 20, 2020 and the relevant portions are quoted hereinbelow:-

“11. At the outset, it must be noted that the Commercial Courts Act, 2015 through Section 16 has amended the CPC in its application to commercial disputes to provide as follows:

“16. Amendments to the Code of Civil Procedure, 1908 in its application to commercial disputes.—(1) The provisions of the Code of Civil Procedure, 1908 (5 of 1908) shall, in their application to any suit in respect of a commercial dispute of a Specified Value, stand amended in the manner as specified in the Schedule. (2) The Commercial Division and Commercial Court shall follow the provisions of the Code of Civil Procedure, 1908 (5 of 1908), as amended by this Act, in the trial of a suit in respect of a commercial dispute of a specified value.

(3) Where any provision of any Rule of the jurisdictional High Court or any amendment to the Code of Civil Procedure, 1908, by the State Government is in conflict with the provisions of the Code of Civil Procedure, 1908 (5 of 1908), as amended by this Act, the provisions of the Code of Civil Procedure as amended by this Act shall prevail.”

12. Hence, it is clear that post coming into force of the aforesaid Act, there are two regimes of civil procedure. Whereas commercial disputes [as defined under Section 2(c) of the Commercial Courts Act, 2015] are governed by the CPC as amended by Section 16 of the said Act; all other non-commercial disputes fall within the ambit of the unamended (or original) provisions of CPC.

13. The judgment of Oku Tech (supra) relied upon the learned Single Judge is no doubt good law, as recently upheld by this Court in SCG Contracts India Pvt. Ltd. v. KS Chamankar Infrastructure Pvt. Ltd., 3 but its ratio concerning the mandatory nature of the timeline prescribed for filing of written statement and the lack of discretion with Courts to condone any delay is applicable only to commercial disputes, as the 3 AIR 2019 SC 2691.

judgment was undoubtedly rendered in the context of a commercial dispute qua the amended Order VIII Rule 1 CPC.

14. As regard the timeline for filing of written statement in a non commercial dispute, the observations of this Court in a catena of decisions, most recently in Atcom Technologies Ltd. v. Y.A. Chunawala and Co., 4 holds the field. Unamended Order VIII Rule I, CPC continues to be directory and does not do away with the inherent discretion of Courts to condone certain delays.

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20. Routine condonations and cavalier attitudes towards the process of law affects the administration of justice. It affects docket management of Courts and causes avoidable delays, cost escalations and chaos. The effect of this is borne not only by the litigants, but also commerce in the country and the public in general who spend decades mired in technical processes.

21. It is obvious from the record that nothing prevented the appellant from filing the written statement through counsel or in person. He has, thus, failed to give any cogent reason for the delay and is unable to satisfy due diligence on his part though he is right in his submission that the High Court erroneously relied upon the ratio of Oku Tech (supra).

22. Having held so, there could be no escape but to dismiss this appeal. However, taking a lenient view given the unique circumstances of the case, and without laying down the discretion being exercised hereinafter, as a precedent, we direct that the written statement filed by the appellant on 02.11.2017 (as claimed), be taken on record with a copy to

counsel for the respondent within one week from today and further subject to payment of costs of Rs. 25,000/ to the respondent.”

In the aforementioned case the Hon’ble Apex Court taking into consideration the conduct and the cavalier fashion in which the written statement was avoided to be filed by the appellant therein had allowed last chance to the appellant to contest the suit.

The petitioner is a working woman and may not have been in a position to attend court regularly. She reposed trust on her learned advocate which is a common practice. Thus, in the facts of this case the petitioner has made out a case of laches on the part of the learned advocates engaged by the petitioner to file the written statement on time. It appears that if the petitioner was actually in court on the relevant dates as pointed out by the learned court below, not having attended her office as she is in service, it means that she was interested to contest the proceedings. The petitioner has also filed an application under Section 36 of the Special Marriage Act. A litigant is always dependent on the learned advocate and if the learned advocate had failed to take steps promptly as per the direction of the learned court, the litigant cannot suffer. Moreover, it is a matrimonial suit. In an Indian context and Indian society a suit of this nature has serious repercussion on the family life and also in the social

status and standing of the parties and such a suit cannot be allowed to be uncontested.

Having regard to the explanation given by the wife/petitioner and also for the reasons as aforesaid, this revisional application is allowed subject to payment of cost of Rs. 25,000/- to be paid by the petitioner/wife within two weeks from date.

Such payment shall be made by an account payee cheque in the name of the husband to be handed over to Mr. Arindam Paul, learned advocate, High Court, Calcutta within the aforementioned period mandatorily. A receipt shall be granted by Mr. Paul to the learned advocate for the petitioner. Such receipt will be filed in court by way of 'Firisti' by the wife. The learned court below on being satisfied of the payment of cost within the period mentioned hereinabove, shall accept the written statement by recalling the order dated May 30, 2019 and the suit shall proceed from that stage. In case of default to pay the amount within the aforementioned period, the learned court below will proceed as already determined by the learned court below without showing any further indulgence to the petitioner.

It is made clear that the Misc. Case filed by the wife as also the suit shall proceed expeditiously. No party shall be allowed any unnecessary adjournments.

This court has not gone into the merits of the contentions of the parties. After filing of the written statement the husband shall be allowed to give further chief on the contents of the written statement and also be allowed time to file a written statement to the counter claim of the wife.

Urgent photostat certified copy of this order, if applied for, be given to the parties as expeditiously as possible subject to compliance of all usual formalities.

(Shampa Sarkar, J.)