

Sr.No.101

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

CR No.305 of 2021(O&M)

Date of decision:01.03.2021

Yadwinder Singh Kang

... Petitioner(s)

versus

Surjit Kaur and another

... Respondent(s)

Coram: Hon'ble Mr. Justice Jasgurpreet Singh Puri

Present: Mr. Manav Parteek, Advocate
for the petitioner.

Through Video Conference

Jasgurpreet Singh Puri, J.(Oral)

CM No.2261-CII of 2021

Learned counsel for the petitioner has sought for permission to place on record the Zimni orders as Annexure P-6 for just adjudication of the case.

Present application is allowed. Zimni orders (Annexure P-6) is directed to be taken on record.

CR No.305 of 2021

Present petition has been filed under Article 227 of Constitution

of India seeking setting aside the order dated 02.02.2021(Annexure P-5) whereby an application filed by the plaintiff-petitioner seeking striking off defence of the defendant-respondents has not been allowed by the learned Civil Judge Junior Division Samrala.

Petitioner-plaintiff had filed civil suit for declaration against the defendant-respondents on 30.07.2020 and notice of the suit alongwith application for stay was issued to the defendants on 07.08.2020. Thereafter, on 07.08.2020 one of the defendants namely, Paramjit Kaur appeared in person and the matter was adjourned for 04.09.2020 for filing power of attorney and written statement on behalf of defendants. Defendant No.2 also appeared as power of attorney of defendant No.1. Thereafter, the matter was adjourned from time to time in view of the Covid-19 epidemic and in the meanwhile, the petitioner-plaintiff filed an application under Order 8 Rule 1 CPC for striking off the defence on the ground that the defendants have not filed their written statement within a period of 90 days as envisaged under Order 8 Rule 1 CPC. However, the said application was dismissed by the learned Civil Judge Junior Division, Samrala on 02.02.2021 on the ground that although the suit was filed on 30.07.2020 and defendant No.2 had appeared on 07.08.2020 in person, the matter was adjourned for filing power of attorney and written statement of the defendants. Thereafter, on a number of dates the matter was adjourned and on 18.12.2020 power of attorney was filed on behalf of the defendants by the learned counsel and on 15.01.2021 reply to the present application was also filed by the defendants. Learned Civil Judge Junior Division, Samrala had also observed that perusal of zimni orders from dated 04.09.2020 to 05.11.2020 clearly show that file was taken

up during restricted court working situations due to Covid-19 epidemic and to protect the interest of the parties in this pandemic circumstances was the foremost duty of the Court. Furthermore, under Order 8 Rule 1 CPC although the maximum period for filing written statement is prescribed as 90 days but the same provision was not mandatory in nature but directory. Therefore, learned Civil Judge Junior Division, Samrala considering the totality of circumstances of the case directed that in order to protect the interest of the parties and in the interest of justice and equity one opportunity be granted to the defendants to file written statement and as such the application was disposed of with a direction to file written statement positively on 09.02.2021 failing which no further opportunity would be granted.

A perusal of zimni order dated 09.02.2021 would show that when the matter was taken up for hearing it was again adjourned in view of the orders passed by the learned District Judge, Ludhiana in view of the prevailing Covid-19 pandemic situation and the order also shows that the matter was fixed for filing replication. Furthermore, order dated 19.02.2021 would also show that the matter was fixed for filing replication which would mean that written statement has already been filed by the defendants in pursuance of the impugned order (Annexure P-5).

Learned counsel for the petitioner has submitted that application filed by the petitioner ought to have been allowed in view of the provisions contained under Order 8 Rule 1 CPC and further time could have been granted to the defendants to file written statement.

Provisions of Order 8 Rule 1 are reproduced as under:-

“1.Written Statement-- *The defendant shall, within thirty days from the date of service of summons on him, present a written statement of his defene.”*

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.

Learned counsel for the petitioner has relied upon the judgment of the Hon'ble Supreme rendered in ***Salem Advocate Bar Association, Tamil Nadu vs. Union of India [2005 (3) R.C.R.(Civil) 530]*** to contend that while interpreting the provisions of Order 8 Rule 1 CPC, Court has observed that the use of word '*shall*' in Order 8 Rule 1 CPC by itself is not conclusive to determine whether the provision is mandatory or directory and that the use of word '*shall*' is ordinarily indicative of mandatory nature of the provision but having regard to the context in which it is used or having regard to the intentions of the legislation, the same can be construed as directory. The Rule in question has to advance the cause of justice and not to defeat it. The relevant portion of the aforesaid judgment is reproduced as under:-

“21. The use of the word 'shall' in Order VIII Rule 1 by itself is not conclusive to determine

whether the provision is mandatory or directory. We have to ascertain the object which is required to be served by this provision and its design and context in which it is enacted. The use of the word 'shall' is ordinarily indicative of mandatory nature of the provision but having regard to the context in which it is used or having regard to the intention of the legislation, the same can be construed as directory. The rule in question has to advance the cause of justice and not to defeat it. The rules of procedure are made to advance the cause of justice and not to defeat it. Construction of the rule or procedure which promotes justice and prevents miscarriage has to be preferred. The rules or procedure are handmaid of justice and not its mistress. In the present context, the strict interpretation would defeat justice.

22. In construing this provision, support can also be had from Order VIII Rule 10 which provides that where any party from whom a written statement is required under Rule 1 or Rule 9, fails to present the same within the time permitted or fixed by the Court, the Court shall

pronounce judgment against him, or make such other order in relation to the suit as it thinks fit. On failure to file written statement under this provision, the Court has been given the discretion either to pronounce judgment against the defendant or make such other order in relation to suit as it thinks fit. In the context of the provision, despite use of the word 'shall', the court has been given the discretion to pronounce or not to pronounce the judgment against the defendant even if written statement is not filed and instead pass such order as it may think fit in relation to the suit. In construing the provision of Order VIII Rule 1 and Rule 10, the doctrine of harmonious construction is required to be applied. The effect would be that under Rule 10 of Order VIII, the court in its discretion would have power to allow the defendant to file written statement even after expiry of period of 90 days provided in Order VIII Rule 1. There is no restriction in Order VIII Rule 10 that after expiry of ninety days, further time cannot be granted. The Court has wide power to 'make such order in relation to the suit as it thinks fit'.

Clearly, therefore, the provision of Order VIII Rule 1 providing for upper limit of 90 days to file written statement is directory. Having said so, we wish to make it clear that the order extending time to file written statement cannot be made in routine. The time can be extended only in exceptionally hard cases. While extending time, it has to be borne in mind that the legislature has fixed the upper time limit of 90 days. 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.”

Learned counsel for the petitioner has however, relied upon another judgment of Hon'ble Supreme Court rendered in ***Atcom Technologies Limited vs. Y.A.Chunawala and Co.& Others 2018(2) RCR (Civil) 1001*** to contend that maximum period of 90 days prescribed under Order 8 Rule 1 CPC can not be extended. However, perusal of aforesaid judgment would show that in that case the delay was of 15 years and therefore, the condonation of delay in that case was not permissible. The aforesaid judgment would also show that rather the judgment of Hon'ble Supreme Court in ***Salem Advocate Bar Association case (supra)*** has also been discussed. Therefore, the judgment in ***Atcom Technologies Limited case (supra)*** is distinguishable from the present case. In the facts and circumstances of the present case the learned Civil Judge Junior Division,

Samrala has rightly observed that it was due to the prevailing Covid-19 epidemic that the matter was being adjourned from time to time and as such the delay was not that large so as to disentitle the defendants from filing their written statement.

For the application under Order 8 Rule 1 CPC the facts and circumstances of each and every case has to be seen and the learned Civil Judge Junior Division, Samrala has rightly concluded that in view of the facts and circumstances of the present case and in the interest of justice the defendants can not be precluded from filing written statement.

This Court does not find any perversity in the impugned orders passed by the learned Civil Judge Junior Division, Samrala dated 2.02.2021, therefore, the present revision petition is hereby, dismissed.

1st March, 2021

Shivani Kaushik

[JASGURPREET SINGH PURI]

JUDGE

Whether speaking/reasoned Yes/No

Whether Reportable Yes/No