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IN THE HIGH COURT OF ORISSA AT CUTTACK

CMP No. 529 OF 2022

Bijay Kumar Rout and others* *Petitioners

Mr. Prasanta Kumar Satapathy, Advocate

-versus-

Ashok Kumar Maity and others* *Opp. Parties

Mr. Sushant Kumar Pradhan, Advocate

CORAM:

JUSTICE K.R. MOHAPATRA

ORDER

07.09.2022

Order No.

6. 1. This matter is taken up through hybrid mode.
2. The Petitioners in this CMP seek to assail the order dated 6th February, 2020 (Annexure-1) passed in C.S. No.506 of 2014, whereby learned Civil Judge (Senior Division), Bhadrak while setting aside the *ex parte* order, refused to accept the written statement filed by the Petitioners.
3. Mr. Satapathy, learned counsel for the Petitioners submits that C.S. No. 506 of 2014 has been filed by the Plaintiff-Opposite Party No.1 in which the Petitioners are Defendant Nos.1 to 4. The Petitioners could not appear in the suit for which they were set *ex parte* on 7th March, 2018. Subsequently, on appearance, they filed an application on 5th May, 2018 to set aside the *ex parte* order dated 7th March, 2018 and to accept their written statement. Learned trial Court although set aside the *ex parte* order but refused to accept the written statement relying upon the ratio decided in the case of *M/s. SCG Contracts India Pvt. Ltd. –v- K.S. Chamankar Infrastructure Pvt. Ltd.*, reported in AIR 2019 SC 2691. He further submits that hearing of the

suit has not yet commenced. The ratio decided in *M/s. SCG Contracts India Pvt. Ltd.* (Supra) relates to a commercial suit, where the statutory period provided for filing of the written statement is mandatory. But, in non-commercial suit, like the present one, the same is directory as has been held in the case of *Kailash –v- Nanhku and others*, reported in 2005 (4) SCC 480. Learned trial Court without appreciating this material aspect and by misconstruing the law has passed the impugned order under Annexure-1. Hence, the impugned order refusing to accept the written statement filed by the Defendant Nos.1 to 4 is not sustainable in the eyes of law and the same is liable to be set aside. He further prays for a direction to learned trial Court to accept the written statement filed by the Defendant Nos.1 to 4-Petitioners.

3.1. In support of his contention, Mr. Satpathy learned counsel relied upon the case of *Desh Raj –v- Balkishan (D) through L.R. M. S. Rohini*, reported in (2020) 2 SCC 708, *Bharat Kalra -v- Raj Kishan Chabra*, reported in 2022 (I) OLR (SC) 1099, *Smt. Rani Kusum –v- Smt. Kanchan Devi and others*, reported in (2005) 6 SCC 705 and *Kailash -v- Nanhku* (supra).

4. Mr. Pradhan, learned counsel for the Plaintiff-Opposite Party No.1 vehemently objects to the same. He submits that this Court relying upon the decision in the case of *M/s. SCG Contracts India Pvt. Ltd.* (supra) has clearly held in the case of *Amulya Kumar Biswal –v- Bijaylaxmi Biswal*, reported in 2019 (II) ILR-CUT 750, that provision of Order VIII Rule 1 C.P.C. is

no longer directory. It can only be said to be mandatory. He further submits that in the case of **Kailash** (supra), the Hon'ble Apex Court has made it clear that in exceptional circumstances, the written statement may be accepted in a non-commercial suit after the statutory period. While accepting the written statement, the Court has to record its reason for doing so. In the instant case, the Defendant Nos.1 to 4 were thoroughly negligent in appearing in the suit pursuant to the summons received by them and filing their written statement within the statutory period. The explanation provided by the Defendant Nos. 1 to 4 is not at all satisfactory. Accordingly, learned trial Court has committed no error in refusing to accept the written statement while setting aside *ex parte* order and allowing the Petitioners to participate in the hearing of the suit.

4.1. To buttress his contention, Mr. Pradhan learned counsel relied upon **Amulya Kumar Biswal** (supra), **Mamata Tripathy - v- Arcon Retreat Owners Welfare Association**, reported in 2019 (II) ILR-CUT- 345, **M/s. R.N. Jadi and Brothers and others –v- Subhashchandra**, reported in 2007 (56) AIC 12 (S.C.), **Oku Tech Private Limited –v- Sangeet Agarwal and others**, reported in 2016 SCC Online Del 6601, **Sivella Yadaiah –v- V. Pruthvi**, reported in 2020 (213) AIC 409 and **State of Orissa and another –v- Smt. Sitanjali Jena**, reported in 2016 (I) ILR-CUT- 106.

5. Upon hearing learned counsel for the parties and on perusal of the case record, the question that requires consideration is that whether in a non-commercial suit, the statutory period provided under Order VIII Rule 1 C.P.C. for

filing of the written statement is mandatory and not directory. In the case of *M/s. SCG Contracts India Pvt. Ltd.* (supra), the Hon'ble apex Court has held that the provision under Order VIII Rule 1 C.P.C. is mandatory in nature. But, the said observation was made by Hon'ble Apex Court while dealing with a commercial suit. Thus, the principle decided therein is not applicable to a non-commercial suit. It has been clarified in the subsequent decision in the case of *Desh Raj* (supra), wherein it is held as under:

“11. 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 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.

12. The judgment of Oku Tech (P) Ltd. v. Sangeet Agarwal, 2016 SCC OnLine Del 6601] relied upon by the learned Single Judge is no doubt good law, as recently upheld by this Court in SCG Contracts (India) (P) Ltd. v. K.S. Chamankar Infrastructure (P) Ltd., (2019) 12 SCC 210 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 judgment was undoubtedly rendered in the context of a commercial dispute qua the amended Order 8 Rule 1 CPC.

13. As regards 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 & Co., (2018) 6 SCC 639 holds the field. The unamended Order 8 Rule 1 CPC continues to be directory and does not do away with the inherent discretion of courts to condone certain delays.”

5.1. In *Bharat Kalra* (supra), it is also held as under:

“Admittedly, the suit for injunction filed by the plaintiff is not the one which is governed by the Commercial Court Act, 2015. Therefore, the time limit for filing of the written statement under Order VIII Rule 1 of C.P.C.

is not mandatory in view of the judgment of this Court reported as ‘Kailash v. Nanhku and others.’ reported in (2005) 4 SCC 480.”

5.2. In **Kailash** (supra), Apex Court while dealing with scope of Order VIII Rule 1 C.P.C. held as under:

“46. We sum up and briefly state our conclusions as under:

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xxx

xxx

(iv) The purpose of providing the time schedule for filing the written statement under Order 8 Rule 1 CPC is to expedite and not to scuttle the hearing. The provision spells out a disability on the defendant. It does not impose an embargo on the power of the court to extend the time. Though the language of the proviso to Rule 1 Order 8 CPC is couched in negative form, it does not specify any penal consequences flowing from the non-compliance. The provision being in the domain of the procedural law, it has to be held directory and not mandatory. The power of the court to extend time for filing the written statement beyond the time schedule provided by Order 8, Rule 1 CPC is not completely taken away.

(v) Though Order 8 Rule 1 CPC is a part of procedural law and hence directory, keeping in view the need for expeditious trial of civil causes which persuaded Parliament to enact the provision in its present form, it is held that ordinarily the time schedule contained in the provision is to be followed as a rule and departure therefrom would be by way of exception. A prayer for extension of time made by the defendant shall not be granted just as a matter of routine and merely for the asking, more so when the period of 90 days has expired. Extension of time may be allowed by way of an exception, for reasons to be assigned by the defendant and also be placed on record in writing, howsoever briefly, by the court on its being satisfied. Extension of time may be allowed if it is needed to be given for circumstances which are exceptional, occasioned by reasons beyond the control of the defendant and grave injustice would be occasioned if the time was not extended.

Costs may be imposed and affidavit or documents in support of the grounds pleaded by the defendant for extension of time may be demanded, depending on the facts and circumstances of a given case.”

5.3. In **Smt. Rani Kusum** (supra), the Hon’ble Supreme Court relying upon **Kailash** (supra) held as under:

“16. It is also to be noted that though the power of the court under the proviso appended to Rule 1 Order VIII is circumscribed by the words “shall not be later than ninety days” but the consequences flowing from non-extension of

time are not specifically provided for though they may be read in by necessary implication. Merely because a provision of law is couched in a negative language implying mandatory character, the same is not without exceptions. The courts, when called upon to interpret the nature of the provision, may, keeping in view the entire context in which the provision came to be enacted, hold the same to be directory though worded in the negative form.”

6. The case laws relied upon by Mr. Pradhan, learned counsel for the Opposite Party No.1 in ***Amulya Kumar Biswal*** (supra) and ***Mamata Tripathy*** (supra) have no application to the case hand, as it cannot be held to be good law in view of the ratio in the case of ***Desh Raj*** (supra), which was apparently not taken into consideration, while laying down the ratio therein. The rest of the case laws relied upon by him relate to commercial suits and thus, have no application to the case at hand.

7. It is submitted by Mr. Satapathy, learned counsel that the Petitioners did not receive the summons of the suit from the trial Court. They only came to know about the pendency of the suit and that they were set *ex parte* on 7th March, 2018, from the villagers. It further appears that while finding sufficient cause for their non-appearance, learned trial Court has already set aside the *ex parte* order dated 7th March, 2018. Thus, there is no reason to deny the acceptance of the written statement filed by the Defendant Nos.1 to 4-Petitioners.

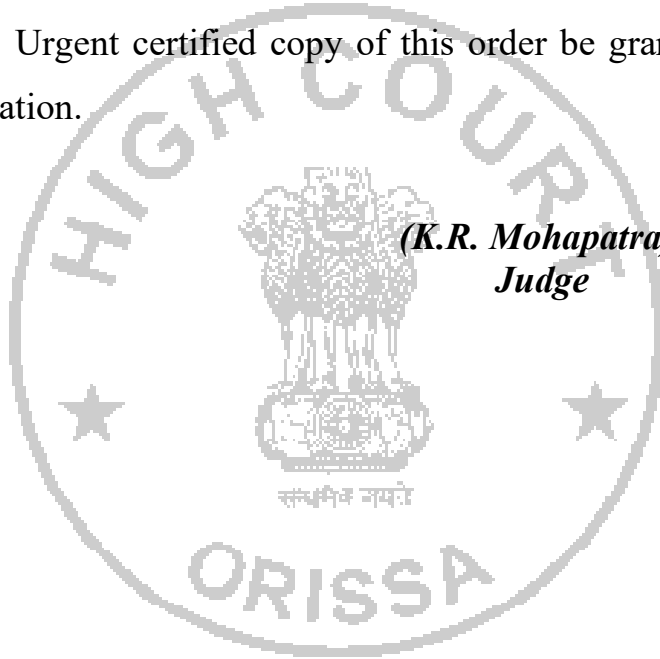
8. In view of the discussion made above, it is crystal clear that the provision of Order VIII Rule 1 C.P.C. is directory in nature in non-commercial suit. It appears that learned trial Court rejected the prayer for acceptance of the written statement

relying upon the case law in *M/s. SCG Contracts India Pvt. Ltd.* (Supra), which has no application to a non-commercial suit. Accordingly, this Court has no hesitation to set aside the impugned order refusing to accept the written statement of the Defendant Nos.1 to 4-Petitioners under Annexure-1.

9. Accordingly, the impugned order under Annexure-1 to that extent is set aside. Learned trial Court is directed to accept the written statement filed by the Defendant Nos.1 to 4-Petitioners and proceed with the matter in accordance with law.

Urgent certified copy of this order be granted on proper application.

(K.R. Mohapatra)
Judge



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