

IN THE HIGH COURT OF JUDICATURE AT PATNA
CIVIL MISCELLANEOUS JURISDICTION No.450 of 2018

Sanjay Kumar, Son of Kuldeep Yadav @ Kuldeep Prasad, Resident of Mohalla-Baris Khan ke talab par, Kumhrar, P.S. Agam Kuan, District- Patna.

... .. Petitioner/s

Versus

1. Jitender Kumar, Son of Kuldeep Yada @ Kuldeep Prasad.
..... Plaintiff.... Respondent 1st Set
2. Sri Kuldeep Prasad @ Kuldeep Yadav, S/o Late Mangal Pahalwan @ Mangal Gope.
3. Babloo Kumar.
4. Vikky Kumar, Both son of Kuldeep Prasad @ Kuldeep Yadav.
5. Neelu Kumari.
6. Smt Rinku Devi, Both D/o Kuldeep Prasad @ Kuldeep Yadav.
7. Smt. Sanju Devi, D/o Kuldeep Prasad @ Kuldeep Yadav, W/o Sri Ashwini Kumar,
8. Manju Kumari, D/o Kuldeep Prasad @ Kuldeep Yadav, All resident of Mohalla- Baris Khan Ke Talab Par, Kumhrar, P.S.- Agamkuan, Dist- Patna.
..... Defendant..... Respondent 2nd Set.

Appearance :

For the Petitioner/s : Mr. Dr. Harendra Nath Ojha, Advocate
For the Respondent/s : Mr. Jitendra, Advocate

CORAM: HONOURABLE MR. JUSTICE SUNIL DUTTA MISHRA
ORAL ORDER

9 17-03-2023 Heard learned counsel for the parties.

2. The instant Civil Miscellaneous application has been filed under Article 227 of the Constitution of India for setting aside the impugned order dated 08.12.2017 passed by learned Sub Judge - 1st Patna in connection with Title Partition Suit No. 1971 of 2014 whereby and whereunder the petitioner's petition dated 30.01.2017 for recalling the order dated 14.03.2016 under which he was debarred to file his written



statement and further to accept his written statement, has been rejected.

3. Learned counsel for the petitioner submits that plaintiff has filed the partition suit in which petitioner/defendant no. 3 filed his appearance through his advocate on 30.07.2015 who advised him to collect all necessary documents as earlier the partition between the parties had already done and during that period the wife of petitioner was seriously ill and was unable to meet his counsel due to which he has failed to file written statement within the prescribed time period. He further submits that delay was not intentional but it was due to circumstances which was not under his control and along with the recall petition he had filed the written statement on 14.03.2016. Further he submits that in the partition suit, the suit property is ancestral property and the petitioner is step-brother of plaintiff who is the main contesting party and it is in the interest of justice that the suit may be decided on merit and no prejudice would be cause to the respondent if his written statement may be allowed to be accepted.

4. Learned counsel for the petitioner further submits that now it is well settled that provision under Rule 1 of Order VIII CPC is directory and not mandatory. In support of his



submission he has referred and placed his reliance upon the judgment of Hon'ble Supreme Court in the case of **Kailash Vs. Nanhku and Ors.** reported as **AIR 2005 SC 2441**.

5. On the other hand, learned counsel for the respondents submits that the petitioner had not filed any time petition for filing written statement before the trial Court and many witnesses on behalf of plaintiff have also been examined and plaintiff's evidence is now closed. Further, he has submitted that petitioner is negligent and there is willful laches on his part for not filing written statement within time. He has lastly submitted that heavy cost may be imposed on the petitioner for causing delay in disposal of the partition suit.

6. The three judge Bench of the Hon'ble Supreme Court in the case of **Kailash Vs. Nanhku** reported as **AIR 2005 SC 2441** has held that Rule 1 of Order VIII CPC is directory and not mandatory. In exceptional circumstances, the Court may extend the time for filing written statement though the period of 30 days and 90 days, referred to in the provision, has expired. 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. Extension of time may be allowed if it was needed to be given for the 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 and cost may be imposed.

7. The Hon'ble Supreme Court in the case of **Salem Advocate Bar Association, T. N. Vs. Union of India (2005) 6 SCC 344** and **Atcom Technologies Limited Vs. Y. A. Chunawala and Company (2018) 6 SCC 639** has also held that provision of Order 8 Rule 1 CPC providing the upper time limit to file written statement is directory in nature but the same cannot be made in routine.

8. The object of enacting Order VIII Rule 1 CPC is to stall delaying tactics on the part of the defendant. In the present case the petitioner is a contesting party and the narration of facts to show the reason of delay in filing written statement does not point out towards delaying tactics or mala fide or deliberate negligence on the part of the petitioner. It would be travesty of justice to deny opportunity to defend the partition suit on merit. The grounds taken by the petitioner cannot be considered to be trivial or without substance. In this case the parties are close relatives and a liberal approach is required. It will be in the interest of both parties that the written statement is accepted by



the Court with appropriate cost.

9. In view of the above, this Civil Miscellaneous application is allowed, the impugned order is set aside and the written statement of the petitioner be allowed to be taken on record subject to cost of Rs. 10,000/- to be payable by the petitioner to the plaintiff within four weeks from the date of receipt/production of a copy of this order in the trial Court.

10. The trial Court is directed to make sincere efforts to adjudicate the suit expeditiously in accordance with law.

(Sunil Dutta Mishra, J)

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