

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.15520 of 2010

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Satyendra Tiwary S/o Late Raghunath Tiwary, Resident of village & P.O.
Mohmadpur Nirmal Tola, P.S. Sidhawalia, District- Gopalganj

..... Defendant No.1/Petitioner.

... .. Petitioner/s

Versus

1. Sita Ram Tiwary @ Baij Nath Tiwary S/o Late Gokhula Tiwary, Resident
of village Mohamadpur P.S. Sidhawalia, District- Gopalganj

.....Plaintiff/Respondent 1st Set.

2. Mankeshwar Tiwary.
3. Harendra Tiwary, both sons of late Gopal Tiwary, Resident of village
Mohamadpur P.S. Sidhawalia, Distt. Gopalganj.
4. Shanti Devi w/o Surendra Pandey,
5. Uma Devi w/o Manishanker Pandey.
6. Renu Devi w/o Upendra Pandey,
7. Geeta Devi w/o Parshuram Pandey, all resident of village Bamo Patti tola,
P.O. Usari, P.S.Baikunthpur, Distt. Gopalganj
8. Hamid Miyan S/o Liyakat Miyan,
9. Mirhassan Miyan S/o Late Khalil Miyan,
10. Nabihassan Miyan S/o late Khalil Miyan,
11. Bibi Buna Khatoon D/o late Khalil Miyan and W/o Samir Alam,
12. Maksud Miyan S/o Safi Miyan,
13. Bibi Hamidan, W/o Hasim Miyan,
14. Parbatia W/o Jayshree Sah,
15. Rajalal Sah,
16. Babu Lal Sah both are sons of Jayshree Sah,
17. Sursatia Devi W/o Nathuni Sah,
18. Sheoratia Devi W/o Raj Bansi Sah, all resident of village Belsand, P.S.
Barauli, District-Gopalganj.

.....Defendants/Respondents 2nd Set.

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Appearance :

For the Petitioner/s : Mr.Suresh Pd.Singh I, Advocate
For the Respondent/s : Mr.

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CORAM: HONOURABLE MR. JUSTICE MOHIT KUMAR SHAH
ORAL JUDGMENT
Date: 17-02-2023

The present writ petition has been filed for
quashing the order dated 24.05.2010, passed in



Title Suit No. 60 of 2000, by the learned Sub-Judge-3rd, Gopalganj, whereby and whereunder the petitioner has been debarred from filing written statement.

2. The brief facts of the case are that the plaintiff/respondent no. 1 herein had filed a suit for partition vide Partition Suit No. 60 of 2000, *inter alia* raising a dispute relating to the properties of one Gokhula Tiwary, who had two wives and out of the wedlock with the first wife, the said Gokhula Tiwary had two sons, namely, Raghunath Tiwary and Gopal Tiwary and a daughter, namely, Bachhiya Devi, while out of the wedlock with his second wife, whom he married after the death of his first wife, he was blessed with a son, namely, Sitaram Tiwary. It has also been pleaded in the plaint by the plaintiff that though the defendants no. 1 to 3 had also been separate in mess but their landed properties were not partitioned, nonetheless, they were possessing some of the plots as per their convenience but without proper partition, thus the suit land mentioned in the



appendix are the subject matter of partition. The plaintiff had further stated in the plaint that he used to stay at his *Nanihal*, as such taking advantage of his absence, Raghunath Tiwary and Gopal Tiwary (sons from the first wife of Gokhula Tiwary), had not only executed a sale deed in the name of one Fulena Pandey i.e. the husband of Bachhiya Devi (daughter from first wife of Gokhula Tiwary), but had also executed a sale deed in the name of the brother-in-law of Gopal Tiwary on 15.05.1958, without knowledge of Gokhula Tiwary. Subsequently, the said Fulena Pandey is stated to have executed a sale deed on 22.07.1971, transferring the said land in favour of the defendant no. 1 as also one Ram Subhag Tiwary had executed a deed of gift in favour of his nephew (Bhagina, namely, Mankeshwar Tiwary and Surendra Tiwary, both sons of Gopal Tiwary) on 22.06.1992, although the plaintiff is having possession over the land till date. It has also been pleaded in the plaint that Surendra Tiwary and Mankeshwar Tiwary, in connivance with the



defendant no. 1 have filed a testamentary suit for issuance of probate with respect to one bigha, three katha and 02.10 dhurs of land appertaining to Khata No. 503 vide Suit No. 105 of 1992 which is pending adjudication before the learned Court of Sub-Judge-6th, Gopalganj. Nonetheless, the plaintiff came to know that defendant no. 1 is contemplating to enter into a forged transaction with anti-social element with a view to grab the suit property necessitating filing of the instant partition suit.

3. The learned counsel for the petitioner has submitted that before service of notice, original defendant no. 1 died, thereafter, plaintiff substituted the petitioner and his mother in place of the defendant no. 1 and upon service of notice the petitioner and his mother had filed a Vakalatnama after engaging a counsel but on account of sudden demise of the father of the petitioner herein and his mother having fallen ill seriously, who also died in the month of November, 2007, during the course of treatment, the



petitioner could not file the written statement in time. It is further submitted that after inspection of the records of the learned court below, it transpired that the petitioner had been debarred on 06.01.2006, itself from filing the written statement, whereafter he filed an application before the learned Sub-Judge-5th, Gopalganj on 17.12.2007, for recalling the order dated 06.01.2006, and permitting him to file written statement, however, the same has been rejected by the impugned order dated 24.05.2010. The learned counsel for the petitioner has submitted by referring to the provisions contained in Order VIII Rule 1 of the Code of Civil Procedure, 1980 that the provisions contained therein are not mandatory but directory, hence the provision contained in Order VIII Rule 1 being procedural, the petitioner herein should not be denied the opportunity of participating in the process of justice dispensation, hence the learned Court below ought to have allowed the application of the petitioner dated 17.12.2007, and recalled the order dated



06.01.2006, whereby and whereunder the petitioner herein has been debarred from filing the written statement. In this connection, the learned counsel for the petitioner has referred to a judgment rendered by the Hon'ble Apex Court in the case of ***Shaikh Salim Haji Abdul Khayumsab versus Kumar & Ors.*** reported in ***(2006) 1 SCC 46.***

4. I have heard the learned counsel for the parties and perused the materials on record. At the outset, it would be relevant to reproduce herein below, Order VIII Rule 1 of the Code of Civil Procedure, 1908:-

“Written statement.-The defendant shall, within thirty days from the date of service of summons on him, present a written statement of his defence:

**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.]”

5. The facts relevant for the present case lie in a narrow encompass inasmuch as the suit was filed in the year 2000, whereafter ample opportunity was granted to the defendants to file the written statement, however, it appears that the father of the petitioner, who was defendant no. 1 in the aforesaid suit had died and upon him being substituted by the petitioner herein and his mother as also notices being issued, the petitioner and his mother had entered appearance in the aforesaid suit by filing Vakalatnama on 23.08.2004. Apparently, thereafter also the petitioner herein had failed to file the written statement, hence the learned Court below by an order dated 06.01.2006 had debarred the petitioner from filing the written statement. Only on 17.12.2007, the petitioner had filed a recall petition praying therein to recall the order dated 06.01.2006, whereby and whereunder he had been debarred from filing the written statement, however, the same has stood dismissed by the impugned order dated



24.05.2010, on the ground that despite grant of ample opportunities the petitioner had failed to file the written statement apart from the fact that the recall petition filed by the petitioner on 17.12.2007, was not supported by his affidavit and no proof regarding the illness of his father/mother had been enclosed with the said petition.

6. At this juncture, it would be relevant to refer to the various judgments rendered by the Hon'ble Apex Court with regard to the issue under consideration in the present writ petition herein below:-

- (i) (2005) 6 SCC 344 (*Salem Advocate Bar Association, Tamil Nadu vs. Union of India*);
- (ii) (2005) 4 SCC 480 (*Kailash vs. Nanhku & Ors.*)
- (iii) (2005) 6 SCC 705 (*Rani Kusum vs. Kanchan Devi*)
- (iv) (2006) 1 SCC 46 (*Shaikh Salim Haji Abdul Khayumsab vs. Kumar & Ors.*)
- (v) (2007) 6 SCC 420 (*R.N. Jadi Brothers vs. Subhash Chandra*)
- (vi) (2008) 11 SCC 469 (*Zolba vs. Keshao & Ors.*)



(vii) (2009) 3 SCC 513 (*Md. Yusuf vs. Faij Md. & Anr.*)

(viii) (2008) 17 SCC 117 (*Sambhaji & Ors. vs. Gangabai & Anr.*)

7. At this juncture, it would be relevant to reproduce relevant paragraphs of certain judgments delivered by the Hon'ble Apex Court, herein below:-

I. **(2006) 1 SCC 46 (*Shaikh Salim Haji Abdul Khayumsab versus Kumar & Ors.*)**; paragraphs no. 18 to 20 thereof are reproduced herein below:-

"18. The matter can be looked at from another angle. Undisputedly the trial court had granted time up to 19-2-2004 which undisputedly fell beyond the 90 days' period. Since 19-2-2004 happened to be a holiday, the written statement was filed on the next day. Had the written statement been filed on 19-2-2004, obviously the court could not have refused to accept the written statement as it was within the time granted by it. Merely because of a fortuitous circumstance the written statement came to be filed on the next day i.e. on account



of the date fixed being a holiday that cannot make the written statement filed, unacceptable.

19. Learned counsel for the respondent submitted that the court could not have granted time beyond 90 days. This plea is untenable in view of what has been stated in Kailash case [(2005) 4 SCC 480] and Rani Kusum case [(2005) 6 SCC 705] . Additionally a party cannot be made to suffer if the court has committed a mistake, if for the sake of argument it is held that the court had mistakenly granted time.

20. In the facts and circumstances of the case, the maxim of equity, namely, actus curiae neminem gravabit, an act of court shall prejudice no man, shall be applicable. This maxim is founded upon justice and good sense which serves a safe and certain guide for the administration of law. The other maxim is, lex non cogit ad impossibilia, the law does not compel a man to do what he cannot possibly perform. The law itself and its administration is understood to disclaim as it does in its general aphorism, all intention of compelling impossibilities, and the administration of law must adopt



that general exception in the consideration of particular cases. The applicability of the aforesaid maxims has been approved by this Court in Raj Kumar Dey v. Tarapada Dey [(1987) 4 SCC 398], Gursharan Singh v. New Delhi Municipal Committee [(1996) 2 SCC 459] and Mohd. Gazi v. State of M.P. [(2000) 4 SCC 342] “

II. **(2005) 4 SCC 480 (Kailash vs. Nanhku)**; paragraphs no. 40 to 46 thereof are reproduced herein below:-

“40. We find some merit in the submissions made by the learned counsel for both the parties. In our opinion, the solution — and the correct position of law — lie somewhere midway and that is what we propose to do placing a reasonable construction on the language of Order 8 Rule 1.

41. Considering the object and purpose behind enacting Rule 1 of Order 8 in the present form and the context in which the provision is placed, we are of the opinion that the provision has to be construed as directory and not mandatory. In exceptional situations, the court may extend the time for filing the



written statement though the period of 30 days and 90 days, referred to in the provision, has expired. However, we may not be misunderstood as nullifying the entire force and impact—the entire life and vigour—of the provision. The delaying tactics adopted by the defendants in law courts are now proverbial as they do stand to gain by delay. This is more so in election disputes because by delaying the trial of election petition, the successful candidate may succeed in enjoying the substantial part, if not in its entirety, the term for which he was elected even though he may lose the battle at the end. Therefore, the judge trying the case must handle the prayer for adjournment with firmness. The defendant seeking extension of time beyond the limits laid down by the provision may not ordinarily be shown indulgence.

42. Ordinarily, the time schedule prescribed by Order 8 Rule 1 has to be honoured. The defendant should be vigilant. No sooner the writ of summons is served on him he should take steps for drafting his defence and filing the written statement on the appointed date of



hearing without waiting for the arrival of the date appointed in the summons for his appearance in the court. 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. It must be spelled out that a departure from the time schedule prescribed by Order 8 Rule 1 of the Code was being allowed to be made because the circumstances were exceptional, occasioned by reasons beyond the control of the defendant and such extension was required in the interest of justice, and grave injustice would be occasioned if the time was not extended.

43. A prayer seeking time beyond 90 days for filing the written statement ought to be made in writing. In its judicial discretion exercised on well-settled parameters, the court may indeed put the defendants on terms including



imposition of compensatory costs and may also insist on an affidavit, medical certificate or other documentary evidence (depending on the facts and circumstances of a given case) being annexed with the application seeking extension of time so as to convince the court that the prayer was founded on grounds which do exist.

44. The extension of time shall be only by way of exception and for reasons to be recorded in writing, howsoever brief they may be, by the court. In no case, shall the defendant be permitted to seek extension of time when the court is satisfied that it is a case of laxity or gross negligence on the part of the defendant or his counsel. The court may impose costs for dual purpose: (i) to deter the defendant from seeking any extension of time just for the asking, and (ii) to compensate the plaintiff for the delay and inconvenience caused to him.

45. However, no straitjacket formula can be laid down except that the observance of time schedule contemplated by Order 8 Rule 1 shall be the rule and departure therefrom an exception, made for satisfactory reasons only. We hold that



Order 8 Rule 1, though couched in mandatory form, is directory being a provision in the domain of processual law.

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

(i) The trial of an election petition commences from the date of the receipt of the election petition by the court and continues till the date of its decision. The filing of pleadings is one stage in the trial of an election petition. The power vesting in the High Court to adjourn the trial from time to time (as far as practicable and without sacrificing the expediency and interests of justice) includes power to adjourn the hearing in an election petition, affording opportunity to the defendant to file a written statement. The availability of such power in the High Court is spelled out by the provisions of the Representation of the People Act, 1951 itself and rules made for purposes of that Act and a resort to the provisions of CPC is not called for.

(ii) On the language of Section 87(1) of the Act, it is clear that the applicability of the procedure provided for the trial of suits to the trial of election petitions is not attracted with all its rigidity and technicality. The rules of procedure



contained in CPC apply to the trial of election petitions under the Act with flexibility and only as guidelines.

(iii) In case of conflict between the provisions of the Representation of the People Act, 1951 and the rules framed thereunder or the Rules framed by the High Court in exercise of the power conferred by Article 225 of the Constitution on the one hand, and the rules of procedure contained in CPC on the other hand, the former shall prevail over the latter.

(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."

8. A careful appreciation of the law laid



down by the Hon'ble Apex Court in the aforesaid judgments rendered in various cases would show that it is not in dispute that Order VIII Rule 1 of the Code of Civil Procedure, 1908 is directory, however, assessment of the gravity of the circumstances in which judicial discretion warrants an exercise in favour of extension of time for the purposes of filing of written statement beyond additional 90 days would depend on the following principles enunciated by the Hon'ble Apex Court, as has been culled out by this Court from the aforesaid judgments, referred to in paragraph no. 6, herein above:-

(i) Order VIII Rule 1 provides automatic extension of time beyond 30 days of service of summons on behalf of the defendant for filing a written statement of his defence inasmuch as the defendant, under the proviso thereof, is allowed to file the written statement on such other day, as may be prescribed by the Court, for reasons to be recorded in writing, but which shall not be later than 90 days from the date of service of summons. However, any further



extension of time beyond 90 days is permissible only if the Court is “clearly satisfied” that there exists cogent reason that prevented the defendant from filing the written statement;

(ii) If the Court is satisfied that there are sufficient reasons to extend the 90 days time period for filing the written statement, it should record its satisfaction;

(iii) The time to be extended must be reasonable considering the circumstances of the case and the reasons cited by the defendants;

(iv) The Court may impose cost upon the defendant in lieu of extension of time provided the Court is clearly satisfied that cogent reasons exists which has prevented the defendant from filing the written statement within time;

(v) The Court may extend the time for filing the written statement though the period of 30 days and 90 days, referred to in Order VIII Rule 1, has expired but such extension should only be by way of an exception and for the reasons assigned by the defendants and also recorded in writing by the Court to its satisfaction, as also the Court should record that the



debarment from the time schedule prescribed by Order VIII Rule 1 of the Code of Civil Procedure, 1908 was being allowed to be made because the circumstances were exceptional.

9. Now, coming back to the present case, this Court finds that though the suit was filed in the year 2000, summons were served on the father of the petitioner herein, who died later on and upon the petitioner and his mother being substituted, they had entered appearance by filing Vakalatnama on 23.08.2004, however, still no written statement was filed compelling the learned court below to debar the petitioner from filing the written statement by an order dated 06.01.2006, whereupon belatedly a petition dated 17.12.2007, was filed for recalling the said order dated 06.01.2006, and that too without an affidavit of the petitioner in support thereof and without any documentary proof regarding illness of his mother, hence it was not just and legal to recall the order dated 06.01.2006, thus the said petition filed by the petitioner dated 17.12.2007 was rejected by



the impugned order dated 24.05.2010.

10. In such view of the matter, this Court finds that the facts and circumstances of the present case does not lie within the ambit of the principles laid down by the Hon'ble Apex Court in the aforesaid judgments so as to warrant exercise of judicial discretion in favour of extension of time. As far as the judgment referred to by the learned counsel for the petitioner rendered in the case of ***Shaikh Salim Haji Abdul Khayumsab*** (supra) is concerned, the same is not applicable in the facts and circumstances of the present case inasmuch as in the said case there was a delay of one day and that too on account of the date fixed by the learned Court for filing the written statement being a holiday, nonetheless, the written statement was filed on the very next date, hence the Hon'ble Apex Court had held that the maxim of equity, namely, *actus curiae neminem gravabit* i.e. an act of Court shall prejudice no man, shall be applicable, thus, it had allowed the appeals filed by the appellant therein.



11. Having regard to the facts and circumstances of the case and for the reasons mentioned herein above, I do not find any merit in the present writ petition, hence the same stands dismissed being devoid of any merit.

(Mohit Kumar Shah, J)

S.Sb/-

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