

**IN THE HIGH COURT AT CALCUTTA
Civil Revisional Jurisdiction
Appellate Side**

Present:

The Hon'ble Justice Biswaroop Chowdhury

C.O. 91 of 2020

Abdul Goni & Anr.

VERSUS

Sk. Hena & Ors.

For the petitioners:

Mr. Buddhadeb Ghosal, Adv.
Mr. Musharraf Alam Sk, Adv.
Mr. Sushmita Ghorai, Adv.
Mr. Anjana Mehebab, Adv.

Judgment on : March 31, 2023

Biswaroop Chowdhury,J:

The petitioners before this Court are the defendants in the Learned Court below and is aggrieved by the order dated 21-11-2019 passed by Civil Judge (Senior Division) 1st Court Malda in P.S. 284/2015.

The case of the petitioners may be summed up thus;

1. The plaintiff/opposite party filed partition suit being P.S. No-284 of 2015 in the 1st Court of Civil Judge Senior Division Malda which is bad for non-joinder of the necessary parties and defective for non-inclusion of all the properties of the predecessor-in interest of the parties.

2. The Petitioner/Defendant no-1 is working as a daily rated labour. The petitioner/defendant no-1 had to go outside to the State and to the different States of India for earning the livelihood of himself and for his family. In the circumstances the wife of the petitioner has received the summon without understanding the purports, contents and consequences of the suit receipt. The service of the said summon was beyond the knowledge of the petitioner inasmuch as the petitioner being an uneducated person will not have understood the same, however in that case had he knowledge about the same he could take assistance of his Learned Lawyer.
3. That sometime on July 2019 while gossiping with other defendants to the said suit the petitioners gathered knowledge about the suit P.S. No. 284 of 2015 pending for disposal in the 1st Court of the Learned Civil Judge Senior Division Malda. On searching the petitioner obtained the said summon of the suit from his home. Immediately upon obtaining the same the petitioner went to his Learned Lawyer and narrated about the entire incident.
4. The Learned Lawyer of the petitioner upon conducting necessary search of the suit record came to know that the suit was fixed for ex-parte hearing against the petitioner/defendant no-1 to 5, 7 and 8 i.e. all the proforma Defendants save and except the proforma Defendant No-6.
5. That the Learned Lawyer for the petitioner on 23-07-2019 filed applications for recalling the order fixed for hearing of the suit

ex-parte and for show cause for failure to take steps in the suit and filing written statement to the plaint.

6. The application for show cause as to not taking steps in the matter and the application for recalling the order fixing the date for ex-parte hearing, were rejected overlooking that the written statement was filed by the petitioners/Defendant.

The petitioners being aggrieved by the order no-24 dated 21-11-2019 passed by Learned Civil Judge Senior Division 1st Court Malda in P.S. 284 of 2015 has come up with the instant application.

It is contended by the petitioners that the Learned Court below failed to exercise jurisdiction in dismissing the application for show cause and the application for recalling the order fixing the matter for ex-parte hearing. It is further contended that the Learned Court overlooked the fact that the written statement is already filed and dismissed the application for show cause. It is also contended that the Learned Court on one hand disallowed the petition for show cause but allowed the application for amendment of plaint.

Pursuant to the filing of this application notice was issued upon the opposite parties. As the opposite parties did not appear upon receipt of the notice the case was taken up for hearing in the absence of opposite parties.

Heard Learned Advocate for the petitioners, perused the petition filed and the materials on record. Learned Advocate for the petitioner submits that the petitioners are day labourers and were outside the state and thus the Learned Court below ought to have

accepted the show cause filed by the petitioners and permitted them to contest the suit. Learned Advocate further submits that as the suit is for partition of joint property all parties have interest and hence written statement filed ought to have been accepted. Learned Advocate further submits that the Learned Judge apart from considering the ground as mentioned in the show cause petition further failed to consider the ground for recalling order fixing the suit for ex-parte hearing in accordance with the provision as laid down under Order IX. Rule 7 of the Code of Civil Procedure.

The following decisions are relied upon by Learned Advocate for the petitioner.

Bhagwan Swaroop and others.

Vs

Mool Chand and others.

Reported in AIR-1983 S.C. P. 355.

Perumon Bhagvathy Devaswom Perinadu village

Vs

Bhargavi Amma.

Reported in (2008)8 SCC. P-321.

Sital Prasad Saxena.

Vs

Union of India.

Reported in AIR-1985 S.C

Now upon plain reading of the order passed by the learned trial Court it will appear that the said order deals with two issues. First issue involves the power of the Court to accept written statement filed beyond the statutory period of ninety days from the date of receipt of the summons and second is the power of the Court to recall the Order fixing the case for ex-parte hearing and allow the petitioners/defendants no. 1 and 2 to appear in the case, and contest the same.

Upon perusal of the order dated 21-11-2019 passed by Learned 1st Court of Civil Judge Senior Division Malda in P.S. No. 284 of 2015 it appears that the Learned Judge while disposing the application, for showing cause and application praying for recalling order fixing P.S. No-284 of 2015 for ex-parte hearing observed and directed as follows:

“I find that the defendant no 1 and 2 have filed the present show cause petition and intends to contest the suit. The defendant has also prayed for acceptance of w/s filed by them.

It appears, from the case record that the summons were duly served upon the defendants but the defendants failed to appear and contest the suit and as such the suit was fixed for ex-parte hearing on 29-06-2017 against the defendants no 1 to 5, 7 and 8. In spite of

that the defendants failed to appear at any point of time during evidence of the suit. After conclusion of the evidence the suit is now ripened and has reached the stage of hearing argument. The defendant has appeared and filed the present petition at this stage of the suit.

The lack of diligence showed by the defendant in the entire proceedings disentitle him from getting an opportunity to contest the suit. Moreover a period of two years have passed after service of summons upon the defendants and their appearance and filing of w/s.

I consider that the defendants have not shown sufficient cause for their non-appearance even after receiving summons two years ago and hence the show cause petition ought to be rejected.

Hence it is ordered that the show cause petition filed by defendants no 1 and 2 is hereby rejected on contest. The w/s – filed by defendant no 1 and 2 is also rejected.”

Now in order to consider the legality order passed by learned trial Judge involving two issues mentioned above it is necessary to consider the provisions contained in Order VIII Rule 1 of the Code of Civil Procedure and Order IX Rule 7 of the Code of Civil Procedure and some judicial pronouncements.

Rule 1 of Order VIII of Code of Civil Procedure provides as follows:

“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:”

Order IX Rule 7 of the Code of Civil Procedure provides as follows:

‘Where the Court has adjourned the hearing of the suit ex-parte and the defendant at or before such hearing appears and assigns good cause for his previous non-appearance he may upon such terms as the Court directs as to costs or otherwise be heard in answer to the suit as if he had appeared on the day fixed for his appearance.’

‘Upon plain reading of Order IX Rule 7 of CPC it will appear that the said provision empowers Court to allow the defendant to contest on good cause for his previous non-appearance being shown when at or before ex-parte hearing the defendant appears.’

In the case of (ICL Pasriya V CL. Vassessi) reported in (1978) 1 Ren CJ-292 the Hon’ble Court observed that Order IX Rule 7 comes into operation when the proceedings have not been disposed of finally and ex-parte proceeding order may be set aside and the defendant may be allowed to contest if good cause is shown. When Order IX Rule 9 and Rule 13 have used the expression sufficient

cause Order IX Rule 7 uses the expression good cause. The expression good cause is not equivalent to sufficient cause' used in Order IX Rule 9 and 13. If any justifiable good cause is shown order of ex-parte proceedings may be set aside.

In the case of Arjun Singh V Mohinder Kumar reported, in AIR – 1964 S.C. 993 the Hon'ble Supreme Court observed that on the terms of Order IX Rule 7 if the defendant appears on the adjourned date and satisfies the Court by showing good cause for his non-appearance on the previous day or days he might have the earlier proceedings recalled and have the suit heard in his presence. On the other hand he might fail in showing good cause. Even in such a case he is not penalised in the sense of being forbidden to take part in further proceedings of the suit or whatever might still remain in the trial, only he cannot be relegated to the position that he accepted at the commencement of the trial.

In the case of East Indian Cotton Manufacturing Vs S.P. Gupta reported in (1985) 28 Del. Lt. 22 it was observed by the Hon'ble Court that the law laid down by the Supreme Court makes it clear that if the defendant shows good cause for his non-appearance on previous date or dates of ex-parte hearing he can be allowed to file written statement and contest the suit and if no good cause is shown he can be allowed to take part in proceedings although he as a matter of right cannot file written statement.

Upon perusal of the Judicial decisions it will be clear that the Courts have to follow certain procedures where defendant fails to

appear on dates fixed and file written statement and subsequently appears. For example when a defendant appears and fails to file written statement within the statutory period the Court if not satisfied with the cause shown for not filing the written statement within the statutory period may refuse to accept the said written statement but cannot debar the defendant from appearing in the case. In the event the hearing of the case on evidence has not commenced the defendant has right to cross examine the witness of the plaintiff. On the other hand if the evidence of the plaintiff is complete the defendant will be entitled to appear at the time of argument and contest the case. In such a situation the suit has to be treated as un-defended suit. It is only when the defendant does not appear at all, the case is fixed for ex-parte hearing and decided ex-parte.

On perusal of the order passed by the Learned Trial Judge it will appear that the Learned Judge rejected the prayer for recalling the Order fixing the case for ex-parte hearing on the ground that the petitioner/defendant no. 1 and 2 have not shown sufficient cause. The expression of Order 9 Rule 7 provides the word good causes and not sufficient cause and it has also been held in different judicial pronouncement that the defendant is to show good cause which is not equivalent as sufficient cause. Thus the Court cannot reject the application for recalling the order fixing the case for ex-parte hearing on the ground that the cause is not sufficient. The Court is empowered to recall the Order if good cause is shown. In the event Court is not satisfied about the cause shown by the

defendant the Court may not recall the order fixing the case for ex-parte hearing and relegate the defendant to the date when the defendant did not appear but is required to permit the defendant to appear in the case from the date when the defendant made such application. In the instant case the Learned Court below neither recalled the order fixing the case for ex-parte hearing nor permitted the defendant to appear from the next date fixed although the defendants in their application stated that they are day labourer and had to go to another State for earning livelihood for which they failed to appear on the date fixed and file written statement. It also appears from record that no objection was filed to the petition for recalling ex-parte order of hearing nor any submission of objection is recorded in the order of the Learned Court below made by the plaintiff. In the facts and circumstances upon considering the judicial pronouncement and the cause shown by the Petitioners/Defendant no-1 and 2 this Court is of the view that the Order fixing the case for ex-parte hearing should be recalled and the petitioner/defendant no. 1 and 2 should be permitted to appear and contest the case.

As a written statement is required to be filed for contesting the case it is necessary to determine as to whether the written statement filed by the defendant no. 1 and 2 should be accepted as it is filed beyond the statutory period as provided under Order VIII Rule 1 of the Code of Civil Procedure. Now with regard to refusal of acceptance of written statement beyond statutory period it is necessary to consider some judicial pronouncements.

It is true that the amended Rule 1 of Order V fixes time limit for filing written statement however, no penal consequences are provided when the written statement is not filed within the stipulated period. The object of amending is to expedite hearing of such matter and to avoid unnecessary adjournment. It was held by the Hon'ble Karnataka High Court in the case of A.K. Purusottam Vs Nagaraj reported in AIR-2003 Karnataka 417 that notwithstanding the use of the word "shall" in Order V Rule 1 and Order VIII Rule 1, 8 and 9 it cannot be said that the said provision are mandatory. It has been observed in the above case in para 8 of the Judgment as follows:

"Where the statute use the word "shall" while laying down a duty which is not conclusive on the question whether it is mandatory or directory provision, in order to find out the true character of the legislation, the Court has to ascertain the objects which the provisions, of law in question is to sub serve and its design and the context in which it is enacted. If the object of law is to be defeated by the non-compliance with it, it is to be regarded as mandatory. A procedural Rule ordinarily should not be construed as mandatory."

It was also held in the above case that though the defendant loses his right to file written statement if the same is not filed within the stipulated period the Courts' power to receive it at a later date is not curtailed.

In the case of Baidyanath Singh Vs Ram Vinay Singh reported in AIR-2005 Patna P-188 the Hon'ble Court observed as follows:

'Prima facie on the plain perusal of the said provision it may appear that the said amended provision of Order VIII Rule 1 with proviso does not permit the Court to exercise a power to grant permission or to accept the written statement beyond the prescribed period. However, when one gets into reality and examine the letter and spirit the design and desideratum of the amended provision of Order VIII Rule 1 with proviso meticulously it cannot be said that the said provision firstly is mandatory. It is directory. The main purport of the newly amended provision of Order VIII Rule 1 of the CPC has been to see that unscrupulous manipulation by a defendant in lengthening or protracting the litigation in a Court of law should be carved and controlled. However it does not in any way restrict or restrain a competent Civil Court to exercises jurisdiction to accept the written statement even at the late stage beyond the period prescribed under amended provision of Order VIII Rule 1 of the CPC provided the party responsible for delay is saddled with costs with a view to discourage such a dilatory tactics of manipulative strategy to increase the of length litigation or the life of a suit and the traditional system of law wherein justice is very much protracted and lengthened.'

In the case of Kailash vs Nankhu reported in AIR 2005 SC 2441 the Hon'ble Supreme Court observed as follows:

“The purpose of providing the time schedule for filing the written statement under Order VIII Rule 1 of CPC is to expedite and not to scuttle the hearing. The provisions spells out a disability on the defendant. It does not impose or embargo on the power of the Court to extend the time. Though the language of the proviso to Rule 1 of Order VIII of the 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 procedural law it has been 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 VIII Rule 1 of the CPC is not completely taken away.”

In the case of manager (A) Hindusthan paper corporation limited Vs. Canara Bank reported in AIR 2010 Gau P-155 the Hon’ble Court observed as follows:

‘The proviso to Order VIII Rule 1 shows that Court does have power to extend period of 90 days prescribed for filing of written statement only limitation is that such period cannot be more than 90 days, however, prescribed period of 90 days is not mandatory, so the Court when satisfied with reasons assigned by a defendant that defendant could not for sufficient cause file his written statement within prescribed period of 90 days may allow further, time to file written statement. Thus the Court does not lose its power to grant extension of time for filing of written statement by taking resort to proviso to Order VIII Rule 1 of CPC.’

In the case of Mohammad Momtaz Ahamad Vaisar and another Vs. Mohammad Mozahid Imam reported in 2012 (1) Civil NZ. 218 (PAT), the Hon'ble Court observed as follows:

“The nature of provisions as contained in Order VIII Rule 1 CPC is procedural and not a part of substantive law. The purpose is only to curve the mischief of adopting dilatory tactics in delaying disposal of cases. Although the word in Order VIII Rule 1 appeared to be mandatory character the provision is directory. In the case of Mahendra Ram Vs Ashok Kumar Singh reported in AIR-2005 Patna P-169 the Hon'ble Court observed that amended provision of Order VIII Rule 1 has to be construed as directory and not mandatory as it is procedural law.

In the case of AV Purushatam Vs N.K.Nagraj reported in AIR-2003 Kant 417 the Hon'ble Court observed as follows:

‘In the absence of expressly stating what would be the penal consequences for failure to file written statement within the stipulated period notwithstanding the use of the word shall in Order VIII Rule 1 and Order VIII Rule 1 and order VIII Rule 10 it cannot be said that the said provisions are mandatory.’

In the case of Peruman Bhagvathy Devaswam Perinadu Village Vs Bhargavi Amma (supra) the Hon'ble Court observed as follows:

‘It must be remembered that in every case of delay, there can be some lapse on the part of the litigant concerned. That alone is not enough to turn down his plea and to shut the door against him. If the explanation does not smark of mala fides or it is not put forth

as part of a dilatory strategy the Court must show utmost consideration to the suitor. But when there is reasonable ground to think that the delay was occasioned by the party deliberately to gain time then the Court should lean against acceptance of the explanation.'

Thus upon considering the judicial pronouncements it is clear that the provision contended in Order V Rule 1 of the Code of Civil Procedure and Order VIII Rule 1 of the Code of Civil Procedure are directory. Thus Courts are not powerless to permit the defendant to file written statement beyond the statutory period for reasons to be recorded in writing. Upon perusal of the provisions contained in Order V Rule 1 and Order VIII Rule 1 of the Code of Civil Procedure it will appear that the said provisions do not contain any condition that the defendant has to show sufficient cause for the written statement to be accepted it only casts an obligation upon the Court to record the reasons while permitting the defendant to file written statement beyond the period provided under the provisions contained in Order V Rule 1 of the Code of Civil Procedure. Hence even if the defendant has not shown sufficient cause and it appears that the defendant was negligent, the Court may permit the defendant to file written statement if the Court is of the view that it is necessary in the interest of justice. However the Court has to record the reasons.

Every person has a right to defend any action brought against him and such right should not be taken away unless there are very exceptional circumstances. Whenever the Court is of the view that

considering the nature of the suit and the reliefs claimed it would be just and proper to permit the defendant to defend the suit the Court may permit the defendant to file written statement beyond the statutory period. It is only when it appears to the Court that the defendant has hardly any defence to the suit filed by the plaintiff and the conduct of the defendant shows that he is intentionally delaying the case to frustrate the claim of the plaintiff the Court may refuse to permit the defendant to file written statement beyond the statutory period. In the event the Court permits the defendant to file written statement inspite of adopting dilatory tactics the Court should impose exemplary costs prior to permitting the defendant to file written statement.

In the instant matter there is no finding of the Learned Court below that the defendant for the purpose of delaying the suit did not appear and file the written statement nor is any allegation of intentional delay against the defendant no-1 and 2 made by the plaintiff. Thus upon considering the fact that the suit is for partition of joint property where both plaintiffs and defendants have interest and considering the grounds shown by the Petitioners/Defendant no-1 and 2 this Court of the view that written statement should be accepted.

Hence this application stands allowed. Order no-24 dated 21-11-2019, passed by learned Civil Judge (Senior Division) 1st Court Malda in P.S. 284 of 2015 is hereby set aside.

Let the written statements filed by the Petitioners/Defendant no-1 and 2 be accepted upon payment of costs of Rs 3,000/- by the defendant no-1 and 2/Petitioners to the plaintiff within four weeks from date.

This Revisional Application stands disposed.

Urgent photostat certified copy of this order, if applied for, should be made available to the parties upon compliance with the requisite formalities.

Biswaroop Chowdhury,J: