

Chaitali Ekke

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO. 6989 OF 2008

1 Shriram Transport Finance Co. Ltd.
A Company Registered under company
Act, having office at 101-105,
Shiv Chambers, B Wing, Sector 11
CBD Belapur, Navi Mumbai – 400 614

2 Citi Corp. Finance India Ltd.
Having their office at Ground Floor,
Citi Tower, 61, Dr. S.S. Rao Road,
Parel, Mumbai

..Petitioners

V/s.

1 The State of Maharashtra
Through Government Pleader
High Court (AS), Mumbai

2 Major Singh Najar Singh
Residing at C/4/03, Sector 4
CBD Belapur, Konkan Nagar
Navi Mumbai

..Respondents

....

Mr. S.P. Bharti, Advocate for Petitioners.

Mr. Sachin H. Kankal, AGP for Respondent No.1.

....

CORAM : RAJESH S PATIL, J.

DATED : 27th JANUARY 2023

ORAL JUDGMENT :

1 This Writ Petition is filed by Original Defendants challenging the judgment and order dated 18.06.2008 passed by the City Civil Court, Mumbai, thereby refusing to condone the delay of 31

months and 16 days, in filing the Written Statement.

2 The learned Judge of the City Civil Court, Bombay heard both the sides and on the basis of argument advanced by both the sides dismissed the delay condonation Application by order dated 18.06.2008. The impugned order has been challenged by the Defendants by way of the present Writ Petition.

3 ‘Rule’ was issued in the present Writ Petition. However, nobody has filed appearance on behalf of Respondent No. 2. On the last date of hearing and today, nobody appeared for Respondent No.2. Therefore, without any assistance of Respondent No.2, the submission of Petitioners’ Advocate was heard.

4 It is the case of the Defendant that suit was filed by Plaintiff (Borrower). The Plaintiff after filing of the suit preferred an Interim Application in the form of Notice of Motion No. 3909 of 2007. It is the case of the Petitioners that in the said suit Writ of Summons was served on Defendant No.1 on 23.12.2004 and Defendant No.2 on 28.12.2004. As per the contents of the Writ of Summons, Defendant accepted to file their written statement by 17.01.2005. However, as per the Petitioners even though the written statement was affirmed on 17.01.2005 the same could not be tendered in the court, as the Notice of Motion filed by the Plaintiff was pending for hearing and disposal.

5 The Petitioners state that Notice of Motion was ultimately disposed off on 02.11.2007. Immediately thereafter the Petitioners (Original Defendants) made effort to tender the written statement in the court, as per the practice followed in City Civil Court at Bombay. However, according to the Petitioners, the court refused to accept the written statement as there was objection by the Plaintiffs, since the time limit according to the Plaintiff for filing the written statement was 30 days, and the same had expired long back. The Advocate for the Petitioners state that even today there is caption on the board of City Civil Court, Bombay “for filing of written statement”.

6 Hence, the Defendants / Petitioners had no option but to file Notice of Motion to condone the delay in lodging / tendering the written statement. The original written statement was also enclosed to the Affidavit in support of Notice of Motion.

7 The City Civil Court, Bombay, without considering the correct position of law, rejected the delay condonation Application. Hence, the impugned order should be quashed and set aside, in the interest of justice.

8 To Buttress his submissions, the Advocate for the Petitioners

also referred to three judgments on the same issue viz. 1) **Kailash vs. Nanhku & Ors., reported in (2005) 4 SCC 480**, 2) **Zolba vs. Keshao and Others reported in (2008) 11 Supreme Court cases page 769** and 3) **Raj Process Equipments Systems Pvt. Ltd. & Ors. vs. Honest Derivatives Pvt. Ltd. reported in Civil Appeal No. 8089 of 2022.**

9 I have heard the Advocate for Petitioners and after going through the documents on record it can be seen that written statement in fact was affirmed within 30 days of service of writ of summons and as per the case of Petitioner (Original Defendant) the same could not be tendered in court, as the practice followed in City Civil Court, Bombay is that only when the matter is on board, the documents are tendered across the bar.

10 The City Civil Court, Bombay, rejected the delay condonation Application, relying upon the judgment of Salem Advocate Bar Association vs. Union of India, (2005) 6 SCC 344.

However, the Judge of City Civil Court, Bombay, failed to take into consideration paragraph No.20 and 21 of the Salem (Supra) judgment, the same are reproduced below :

“20. The use of the word ‘shall’ in Order 8 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 of procedure are the handmaid of justice and not its mistress. In the present context, the strict interpretation would defeat justice.

21. In construing this provision, support can also be had from Order 8 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 the suit as it thinks fit. In the context of the provision, despite use of the word “shall”, the court has been given the discretion either to pronounce or not to pronounce the judgment against the defendant even if the 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 8 Rule 1 and Rule 10, the doctrine of harmonious construction is required to be applied. The effect would be that under Rule 10 order 8, the court in its discretion would have the power to allow the defendant to file written statement even after expiry of the period of 90 days provided in Order 8 Rule 1. There is no restriction in Order 8 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 8 Rule 1 providing for the 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 8 Rule 1.”

Therefore, the 3 member Bench of Supreme Court in Salem (Supra) judgment, held, that there is no restriction in Order 8, Rule 10 that after expiry of ninety days, further time cannot be granted. Time can

be extended in exceptional cases.

11 The first judgment referred from Petitioner's side Kailash (Supra), the Supreme Court condoned the delay in filing written statement, when the High Court had felt it had no power to do so. One of the reason for delay was, on account of lack of understanding on the part of the registered clerk. Paragraph No. 46 (iv) and (v) are reproduced below :

“(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 therefore 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.”

12 In the second judgment referred by Petitioner’s Advocate Zolba (Supra), the facts were almost identical to the present matter. Wherein, the trial court during pendency of suit, granted temporary injunction, against the said order. Defendant preferred Miscellaneous Appeal before the District Court, due to which the Written Statement couldn’t be filed in time. The delay condonation application was rejected. However, the Supreme Court, while taking into consideration Salem Bar judgment, held that it was an exceptional case constituting sufficient cause for condoning the delay in filing the Written Statement. Paragraph No. 16 is reproduced below :

“16. It has been common practice for the parties to take long adjournments for filing written statements. The legislature with a view to curb this practice and to avoid unnecessary delay and adjournments, has provided for the maximum period within which the written statement is required to be filed. The mandatory or directory nature of Order 8 Rule 1 shall have to be determined by having regard to the object sought to be achieved by the amendment. It is, thus, necessary to find out the intention of the legislature. The consequences which may follow and whether the same were intended by the legislature have also to be kept in view.”

13 The third judgment referred by Petitioner’s Advocate of Raj Process (Supra), differentiates between Commercial Suits and normal Civil Court Suits, and allowed the delay condonation Application in

filing written statement. Paragraph No. 14 of the said judgment is reproduced here in below :

“14. In fact the decision in SCG Contracts India Private Limited is by a 2-member Bench, which was dealing with the second proviso to sub-rule (1) of Rule 1 of Order V. Therefore, when the decision of the 3-member Bench in Salem Advocate Bar Association was cited before this Court in SCG Contracts India Private Limited, this court held in paragraph 11 that the earlier law on Order VIII Rule 1 has now been set at naught. Therefore, what is to be applied to normal Civil Court is Order VIII Rule 1 and the interpretation given to the same in Salem Advocate Bar Association.”

14 The present case, is a ordinary suit and not a commercial suit. In the case in hand, it is a matter of fact that written statement were actually affirmed on 17.01.2005, which can be seen from the photo copy of the affirmed written statement which is part of the document annexed to the Writ Petition. Therefore, according to me there was no ulterior motive for the Petitioners (Original Defendants) not to file the written statement in the Registry.

15 Taking into consideration the law laid down by Supreme Court in the above mentioned judgments and peculiar facts in the present case, where the Written Statement was in fact affirmed within one month from the date of service of Written Statement, I hold that Petitioner should not be deprived of an opportunity to context the claim on merits. Hence, I hereby conclude that the Written Statement should have been taken on record and delay should have been condoned.

16 Therefore, 'Rule' is made absolute in terms of prayer clause (a).

17 The impugned order dated 18.06.2008 passed by the City Civil Court, Bombay in S.C.Suit No. 2543 of 2004 is quashed and set aside.

18 The Notice of Motion No. 3909 of 2007 is allowed in terms of prayer clause (a). The Original affirmed written statement which was enclosed to the Affidavit in support of the Notice of Motion No. 3909 of 2007 be taken on record and the suit should proceed further with hearing on merits in the City Civil Court, Bombay.

(RAJESH S. PATIL, J.)