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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Date of Decision: 05th April, 2023*

+ C.R.P. 45/2022

MR. FREDRIC GILL Petitioner
Through: Ms. Beenashaw N. Soni,
Advocate.

versus

MR. JOHN MASIH GILL Respondent
Through: Mr. Ajit Singh, Advocate.

CORAM:
HON'BLE MS. JUSTICE JYOTI SINGH

JUDGEMENT

JYOTI SINGH, J. (ORAL)

1. By this revision petition, Petitioner assails the impugned order dated 24.11.2021 by which his application under Order VIII Rule 1 CPC has been dismissed by the Trial Court. Respondent herein is the Plaintiff before the Trial Court and Petitioner herein is Defendant No.1 (hereinafter referred to as the 'Defendant') and parties are hereinafter referred to by their litigating status before the Trial Court.

2. Facts necessary for adjudicating the present petition are in a narrow compass. Plaintiff filed a suit for partition, possession and declaration with respect to plot ad-measuring 1000 sq. yards bearing No. RZG-128 situated in Khasra No. 77/13/18, Nihal Vihar, Nangloi, Delhi, allegedly purchased before 1992 jointly by the parties, who are real brothers. Both the Plaintiff and Defendant are NRIs, settled in Norway with their respective families.

3. As per the case set out in the present petition, parties to the suit resolved their family disputes amicably with respect to all properties in the presence of their lawyers/Attorney and executed an agreement

dated 12.11.1992, whereby joint ownership in the suit property came to an end and the property came to the exclusive share of the Defendant. In the year 2007-08, it is alleged that some local mischievous elements encroached upon the suit property being an open land and the Defendant had to fight several litigations on this count, with no assistance from the Plaintiff. Defendant sold the suit property in January, 2013 in favour of Mr. Rajesh and Mr. Muktesh whereafter the property changed several hands but none of the owners were impleaded as party to the suit. It is averred that in order to grab the suit property, Plaintiff filed the present suit, after a long period of over two decades, despite knowing that the suit property had fallen to the share of the Defendant. The suit is not only barred by limitation but suffers from several other legal infirmities.

4. Petitioner pleads that the summons in the suit were served on the Special Power of Attorney (SPA) holder, appointed by the Defendant to look after some other pending matters and he was never served personally and thus, the Defendant was not aware of the filing or pendency of the present suit even till January, 2019. The Attorney, on his own engaged a counsel, who filed a *vakalatnama* on 01.11.2018 and assured to supply the complete set of paper book of the suit soon, much before the date of hearing i.e. 25.02.2019. Copy of the plaint and documents were made available to the Defendant in February, 2019, by one Mr. Amit Khurana and Defendant informed them that he would be coming to India soon. Counsel prepared an informal written statement in February, 2019 but the same was finalized on 27.03.2019, after consultation with the Defendant, along with an application under Order VIII Rule 1 CPC. Written statement could not be filed before 06.05.2019 due to non-entry in the to-do list of the counsel and there was a delay on this count for which the

counsel apologised to the Defendant. In the meantime, as the Attorney was not looking after the pending litigation properly, the SPA was cancelled on 09.01.2019.

5. An application was also filed on behalf of the Defendant under Order VIII Rule 1 CPC praying for taking the written statement on record by condoning the delay of 240 days, in the interest of justice. Reply was filed to the application by the Plaintiff on 25.09.2019 and finally, the application was dismissed by the impugned order on 24.11.2021 and the defence of the Defendant was struck off. Defendant filed a review of the order dated 24.11.2021, but the same was also dismissed on 02.03.2022.

6. Counsel for the Defendant contends that the impugned order striking off the defence of the Defendant is very harsh and against the law on the subject. Trial Court failed to exercise its jurisdiction for just cause without appreciating that Defendant is an NRI residing in Norway with his family and summons of the suit were never served upon him despite his address in the memo of parties. Service was made through the Attorney, which is no service in the eyes of law, by virtue of Order V Rule 12 CPC, which provides that service has to be made on the Defendant in person, unless he has an agent empowered to accept service. Reliance is placed on the judgment in *Commissioner of Income Tax Central-III Jhandewalan Extension New Delhi v Ram Hari Ram, 2010 Legal Eagle (Del) 880*, where the Court held *albeit* in a case pertaining to the Income Tax Act, 1961, that if notice is not served upon the assessee, it is not a valid service.

7. It is further contended that Defendant had never authorized the Attorney to receive summons in the present suit and had, in fact, cancelled the SPA on 09.01.2019, as the Attorney was negligent in taking care of his pending litigation. Defendant was never informed by

the Attorney of the pending litigation at the right time and it was only in February, 2019, that Defendant came to know of the pending suit. In any case, it has been held in several judgments that provisions of Order VIII Rule 1 CPC are merely directory and procedural and if sufficient cause is shown by the Defendant, delay in filing the written statement ought to be condoned, particularly in a non-commercial suit, unlike in a commercial suit, where timelines have to be strictly followed. Reliance is placed on a recent judgment of the Supreme Court in ***Bharat Kalra v. Raj Kishan Chabra, 2022 SCC OnLine SC 613***, where the Supreme Court set aside an order passed by the High Court, declining to condone the delay of 193 days in filing the written statement. It was held by the Supreme Court that since the suit for injunction filed by the Plaintiff was not governed by the Commercial Courts Act, 2015, the time limit for filing written statement under Order VIII Rule 1 CPC was not mandatory, in view of the judgment in ***Kailash v. Nanhku and Others, (2005) 4 SCC 480***.

8. Counsel for the Respondent vehemently opposes the petition. It is submitted that summons of the suit were served on Defendant on 15.09.2018, through Sh. Sukhdev Singh, the Attorney appointed by him and *vakalatnama* was filed by the lawyer on 01.11.2018. Counsel appearing on behalf of the Defendant sought time to file written statement on 01.11.2018, but did not do so within the time granted by the Court. Written statement was admittedly filed only on 06.05.2019, after a prolonged delay. Defendant neither pleaded nor placed any material on record to show when he returned to India and there is no explanation in the application for the long delay of eight months in filing the written statement. Defendant is urging before this Court that service on Attorney is no service in the eyes of law but this was neither pleaded nor even argued before the Trial Court, besides the

fact that the delay of 270 days is far beyond the 90 days' statutory period available for condonation of delay. There is not a whisper in the application filed before the Trial Court that the SPA executed in favour of Sh. Sukhdev Singh had been cancelled and/or he was not authorized to receive the summons.

9. I have heard the learned counsels for the parties and examined their contentions.

10. Admittedly, the present suit is a non-commercial suit and the timelines for filing written statement are laid down in Order VIII Rule 1 CPC and the procedure required to be followed by the Court upon failure of the party to present a written statement within the time permitted or fixed by the Court is laid down in Order VIII Rule 10 CPC. In *Kailash (supra)*, the Supreme Court ruled that provisions of Order VIII Rule 1 CPC are procedural in nature and though couched in a negative language, Courts cannot be left helpless to exercise discretion in a given case to meet extraordinary situation in the interest of justice and have the power to condone the delay in filing the written statement, even though filed beyond the stipulated timelines. However, the Supreme Court also emphasized that the object behind enacting the said provision is to curb the mischief and delay tactics adopted by Defendants to delay the disposal of suits and such tendencies must be curbed and nipped in the bud. Relevant paras of the judgment are as follows:-

"27. Three things are clear. Firstly, a careful reading of the language in which Order 8 Rule 1 has been drafted, shows that it casts an obligation on the defendant to file the written statement within 30 days from the date of service of summons on him and within the extended time falling within 90 days. The provision does not deal with the power of the court and also does not specifically take away the power of the court to take the written statement on record though filed beyond the time as provided for. Secondly, the nature of the provision contained in Order 8 Rule 1 is procedural. It is not a part of the substantive law. Thirdly, the object behind substituting Order 8 Rule 1 in the present shape is to curb the

mischief of unscrupulous defendants adopting dilatory tactics, delaying the disposal of cases much to the chagrin of the plaintiffs and petitioners approaching the court for quick relief and also to the serious inconvenience of the court faced with frequent prayers for adjournments. The object is to expedite the hearing and not to scuttle the same. The process of justice may be speeded up and hurried but the fairness which is a basic element of justice cannot be permitted to be buried.

28. *All the rules of procedure are the handmaid of justice. The language employed by the draftsman of processual law may be liberal or stringent, but the fact remains that the object of prescribing procedure is to advance the cause of justice. In an adversarial system, no party should ordinarily be denied the opportunity of participating in the process of justice dispensation. Unless compelled by express and specific language of the statute, the provisions of CPC or any other procedural enactment ought not to be construed in a manner which would leave the court helpless to meet extraordinary situations in the ends of justice. The observations made by Krishna Iyer, J. in Sushil Kumar Sen v. State of Bihar [(1975) 1 SCC 774] are pertinent: (SCC p. 777, paras 5-6)*

“The mortality of justice at the hands of law troubles a judge's conscience and points an angry interrogation at the law reformer.

The processual law so dominates in certain systems as to overpower substantive rights and substantial justice. The humanist rule that procedure should be the handmaid, not the mistress, of legal justice compels consideration of vesting a residuary power in judges to act ex debito justitiae where the tragic sequel otherwise would be wholly inequitable. ... Justice is the goal of jurisprudence — processual, as much as substantive.”

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30. *It is also to be noted that though the power of the court under the proviso appended to Rule 1 Order 8 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.*

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32. *Our attention has also been invited to a few other provisions such as Rules 9 and 10 of Order 8. In spite of the time-limit appointed by Rule 1 having expired, the court is not powerless to permit a written statement being filed if the court may require such*

written statement. Under Rule 10, the court need not necessarily pronounce judgment against the defendant who failed to file written statement as required by Rule 1 or Rule 9. The court may still make such other order in relation to the suit as it thinks fit.

33. As stated earlier, Order 8 Rule 1 is a provision contained in CPC and hence belongs to the domain of procedural law. Another feature noticeable in the language of Order 8 Rule 1 is that although it appoints a time within which the written statement has to be presented and also restricts the power of the court by employing language couched in a negative way that the extension of time appointed for filing the written statement was not to be later than 90 days from the date of service of summons yet it does not in itself provide for penal consequences to follow if the time schedule, as laid down, is not observed. From these two features certain consequences follow.

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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.”

11. It is trite that power of a Court is not taken away by use of the words “shall not be later than 90 days” in proviso to Order VIII Rule 1 CPC, and this was reiterated by the Supreme Court in ***Atcom Technologies Limited v. Y.A. Chunawala And Company And Others, (2018) 6 SCC 639***. This Court in ***Amarendra Dhari Singh v. R.C. Nursery Private Limited, 2023 SCC OnLine Del 84***, had the occasion to deal with the issue whether delay of 149 days in filing written statement by the Defendant in a non-commercial suit could be condoned given the language of Order VIII Rule 1 CPC, followed by

amendments carried out in CPC for the purposes of Commercial Suits of Specified Value in the Commercial Courts Act, 2015. After analyzing the provisions and following the judgments of the Supreme Court in ***Kailash (supra), Salem Advocate Bar Association, T.N. v. Union of India, (2005) 6 SCC 344*** and other judgments, the Court held as follows:-

“23. A reading of the above provision would show that the written statement shall not be taken on record, unless filed within 30 days of the date of service of summons or within the time provided by the Rules, the CPC or the Commercial Courts Act, as applicable. Therefore, the time prescribed by the CPC, wherever applicable, is made expressly applicable to the filing of the written statement.

24. Rule 4 of the Rules, though in the opening part thereof states that the Court may extend the time for filing the written statement by a further period not exceeding 90 days, ‘but not thereafter’, further goes on to state that in case, no written statement is filed within the extended time also, the Registrar ‘may’ pass orders for closing the right to file the written statement. It is settled principle of law that the word ‘may’ is not a word of compulsion; it is an enabling word and implies discretion unless it is coupled with a duty or the circumstances of its use otherwise warrants. The use of word ‘may’ in Rule 4 is to confer a discretion in the Registrar in a given case not to close the right of the defendant to file the written statement even though the same has not been filed within the extended time. The discretion that was left in the Court under Order VIII Rule 1 read with Order VIII Rule 10 of the CPC as applicable to non-commercial suits, has been continued by the Rules.

25. It is to be kept in mind that the High Court of Delhi, at the time of notifying the Rules in 2018, had the benefit of the CPC as applicable to non-commercial suits as also the special provisions applicable to Commercial Suits under the Commercial Courts Act, 2015. The High Court would have been well aware of the interpretation placed by the Courts on these provisions, laying special emphasis on the words used therein. The High Court did not choose the language of the Commercial Courts Act. This shows the intent of the High Court, in its Rule making power, not to foreclose the discretion vested in the Court/Registrar to condone the delay even beyond 120 days of the service of summons if sufficient cause is shown for such non-filing. It is settled law that use of same language in a later statute as was used in an earlier one in parimateria is suggestive of the intention of the legislature that the language so used in the later statute is used in the same sense as in the earlier one, and change of language in a later statute in parimateria is suggestive that change of interpretation is intended.

26. Applying the above principle, it must be held that the High

Court, not having adopted the language of the Commercial Courts Act, but of the CPC as applicable to non-commercial suits, did not intend the Court to be completely denuded of its power to condone the delay in filing of the written statement beyond 120 days of the service of the summons.

27. *Of course, in considering the delay beyond 120 days, the court will adopt an even more harsh and strict yardstick in determining the sufficiency of cause shown, as has been held in Kailash (supra)."*

12. Therefore, what emerges from the aforementioned judgments is that unlike in a commercial suit, the Court is not denuded of its power to condone the delay in filing the written statement beyond 120 days from the service of the summons. This is, however, subject to a caveat that in considering the delay beyond 120 days, the Court will adopt a harsher and stricter yardstick in determining the sufficiency of cause shown. In ***Amarendra Dhari Singh (supra)***, the Court considered the explanation rendered by the Defendant for delay of 149 days in filing the written statement and while condoning the delay, imposed costs of Rs.1,00,000/- on the Defendant to maintain sanctity of provisions such as Order VIII Rules 1 and 10 CPC, which are meant to prevent unnecessary delays in disposal of suits.

13. The facts of the present case will have to be seen from the prism of the provision of Order VIII Rule 1 CPC and the rulings of the Supreme Court and this Court, aforementioned. As per the Plaintiff, the delay in filing the written statement is 270 days while the Defendant contends that it is 240 days. Even if the stand of the Defendant is accepted, the delay is beyond 120 days and as per the judgments, condonation of delay has to be judged on a stricter yardstick.

14. It is significant to note that before this Court, the entire emphasis of the learned counsel for the Defendant is on a legal ground that the Attorney was not authorized to accept the summons of the

suit, however, there is not a whisper of this plea in the application filed by the Defendant under Order VIII Rule 1 CPC, seeking condonation of delay. In fact, on a factual score, it is not even pleaded that the Attorney was not authorised by the Defendant to accept the summons and/or engage a counsel. In the application, it is simply stated that Defendant was unable to present his written statement within time for the reason that he is a permanent resident of Norway and his previous Attorney holder Sh. Sukhdev Singh did not provide him up-to-date information as to when he received the summons, what was the status of the case, etc. and that Defendant after coming to Delhi got the written statement prepared along with application for condonation of delay. The application runs into three paragraphs which are extracted hereunder for ready reference:-

"1. That the defendant No. 1 is filing the detailed Written Statement, the contents of which are not repeated here for the sake of brevity but the same may kindly be read as a part of this application.

2. That the replying defendant was unable to present his Written Statement under the stipulated time period as per the provision mentioned in Order VIII Rule 1 CPC for the reason that he is the permanent resident of Norway and the previous Attorney Holder Mr. Sukhdev Singh received the summons of this case from this Hon'ble Court and he did not prove the up-to-date information as to when he received the summons, what was the status of the case etc. to the replying defendant. The defendant after coming to Delhi got prepared the WS alongwith the application for Condonation of Delay in filing the WS.

3. That the delay in filing the Written Statement is neither intentional nor deliberate but due to the reason that the replying defendant was not present in Delhi being located at Oslo, Norway, nor he was personally served with any summons at that place. His permanent address in India is WZ-A-4, Gali No.8, Krishna Park Extension, Tilak Nagar, New Delhi."

15. The Trial Court examined the stand taken by the Defendant and noted that summons of the suit were issued on 17.07.2018, which were served on Defendant, as per report of the Process Server through Sh. Sukhdev Singh, his SPA holder on 15.09.2018. *Vakalatnama* was

filed on behalf of Defendant on 01.11.2018 and the counsel who appeared, sought time to file written statement, however, written statement was filed much later on 06.05.2019. Trial Court rejected the argument of Defendant that he was not aware of the Court proceedings as he was in Norway and his Attorney had not informed him about the case status, on the ground that there was no explanation as to why written statement was not filed between 01.11.2018 to 06.05.2019, though on both the dates, the same counsel had appeared. Trial Court also noted that Defendant has neither pleaded nor placed any document on record to show when he came to India and why he could not sign the written statement during the long period of more than eight months.

16. Even today, before this Court learned counsel for the Defendant is unable to controvert the fact that summons were received by the SPA holder of the Defendant as also that a counsel was engaged, who filed his *vakalatnama* on 01.11.2018 and appeared on two dates i.e. 01.11.2018 and 06.05.2019. However, considering that the plea raised by the Defendant that service on Attorney is not a valid service goes to the root of the issue and will be a mixed question of law and facts, coupled with the undisputed fact that Defendant does not reside in India and the *lis* is between real brothers, in view of the judgements that Courts must exercise the discretion in a manner that procedural law does not trump over the endeavour to ensure that justice is done, this Court is of the view that in the overall interest of justice, Defendant should not be condemned unheard and deserves to be given an opportunity to establish the plea that the SPA holder was not authorised to accept the summons and explain the delay in filing the written statement. Plaintiff, on the other hand, can be compensated by awarding him exemplary costs, as held by the Supreme Court. Since

the plea that SPA holder of the Defendant was allegedly not authorised to accept the summons was not raised before the Trial Court, matter needs to be remanded to the Trial Court as the Court of first instance as this would entail examination of SPA, *vakalatnama* and several ancillary questions pertaining to the authorization to engage the counsel, filing of *vakalatnama* etc.

17. Accordingly, the matter is remanded back to the Trial Court for reconsideration of the application filed by the Defendant under Order VIII Rule 1 CPC. Needless to state that the Trial Court shall decide the application in accordance with law and without being influenced by any observations made in the present judgment. It is made clear that this Court has not expressed any opinion on the merits of the issue arising in the present petition.

18. Revision petition is allowed to the aforesaid extent, setting aside the impugned order dated 24.11.2021, with costs of Rs. 1,00,000/- to be paid by the Defendant to the Plaintiff.

19. Revision petition stands disposed of.

JYOTI SINGH, J

APRIL 05, 2023/pkv/kks/shivam