

OD-06

IN THE HIGH COURT AT CALCUTTA
ORIGINAL SIDE
Ordinary Original Civil Jurisdiction

C.S.No./103/2009

In

G.A.No./13/2025

ALPANA PYNE AND ORS. VERSUS MIHIR MOHAN PYNE AND ORS.

Before:

The Hon'ble Justice BISWAROOP CHOWDHURY

Date: 11th AUGUST 2025***Appearance:****Mr. Syamantak Banerjee, Adv.**Ms. Subhra Das, Adv. .**...for the plaintiff**Mr. Deepnath Roy Chowdhury, Adv.**Mr. Sourav Sengupta, Adv.**Mr. Aman Baid, Adv. .**...for the petitioner/respondent*

The Court: This application is filed by defendants nos. 1A to 1D for the following order:

- a) Delay if any in filing of the instant application be condoned;
- b) Delay if any in filing the written statement by the defendant nos. 1A to 1D be condoned.
- c) The time to file the written statement by the defendant nos. 1A to 1D in the aforesaid suit be extended by a period of 4(four) weeks.
- d) Leave be granted to the defendant nos. 1A to 1D to verify, affirm and file the written statement within a period of 4(four) weeks from such order being passed.
- e) Such other or further orders be passed as this Hon'ble Court may deem fit and proper.

It is the contention of the petitioners/Defendant no. 1A to 1D, that the instant suit was filed by the plaintiffs herein on 8th April 2009. Immediately upon filing of the suit the plaintiffs took out an application being GA No. 1083 of 2009 for an order for

appointment of Receiver to make inventory of the suit assets. Such application was heard and by an order dated 27th April the then advocate on record of the plaintiffs and defendants were appointed as joint receivers. It is further contended that since the order dated 27th April 2009 was passed the plaintiffs' did not take any steps in the suit for years together till such time the matter appeared before this Court in the year 2016. For seven years the plaintiffs did not take any steps to pursue the suit before this Court. Other than taking out an application for substitution the plaintiffs did not take any steps.

It is contended that after expiry of 8 years the original defendant no. 1 took out an application being GA No. 2511 of 2016 praying for dismissal of the suit on the ground of non issuance of writ of summons for such a long period. In counter thereof the plaintiff no. 1 to 6, and 8B took out an application being GA. No. 3685 of 2016 inter alia praying for extension of the returnable date of the writ of summons and for appropriate direction of issuance of writ of summons on the defendants. The said applications were heard analogously and disposed by a common order dated 28th February 2017, thereby extending the returnable date of the writ of summons and allowing the plaintiffs to issue the writ of summons subject to the payment of costs assessed at Rs. 50,000/- to be paid to the original defendant no-1 within a period of fortnight from the date of such order.

It is further contended that the writ of summons was finally issued on 20th March 2017 on the original defendant no.1 and was received by the original defendant no. 1 on 28th March 2017. The original defendant no. 1 was required to file the written statement within 28 days that is by 25th April 2017.

It is also contended that original defendant no. 1 was an octogenarian lady, and there were various litigations going on by and between the plaintiffs and the defendants before this Court as well as before Company Law Board. Upon receipt of the summons the original defendant no. 1 appointed Mr. Debdeep Sinha as the

advocate-on-record and entered appearance in the suit. The said advocate-on-record was instructed to draft and take steps for settling and filing the written statement within the time stipulated. Accordingly the written statement was drafted, settled and made ready within the stipulated time.

It is contended that the defendant no-1 being an octogenarian lady was ill and could not affirm the written statement within stipulated time and could not take steps for filing an application for extension of time to file written statement the health of the original defendant no.1 did not improve within time and she was constrained to appoint her younger son the deponent herein to affirm the written statement for and on her behalf. Such written statement was affirmed on 4th March 2019 but by such occasion the time to file the written statement had expired. Before application for extension of time could be made the Original defendant no-1 become seriously ill again and passed away on 10th April 2023. It is further contended that death intimation was given to the Advocate on record for plaintiff, and by order dated 1st May 2024, in IA GA No. 12 of 2024, the applicants were substituted as party defendants. It is further contended that inspite of the applicants being substituted the amended cause title was not supplied to the applicants nor was the amended plaint served upon the applicants. It is also contended that pursuant to Order dated 7th May 2025, amended cause title was supplied to the applicants but no amended plaint was served. As amended plaint is not served the time to file written statement has not commenced.

It is contended that the written statement was already affirmed by the original defendant no-1, and the legal representatives are bound by the pleadings of their predecessor-in-interest and accordingly has reiterated such the defense in their consolidated written statement.

The Plaintiffs have filed affidavit in opposition denying the contentions made by the applicants/defendants no. 1A to 1D. It is the contention of the plaintiff that the

defendant no. 1A to 1D, have failed to disclose any defence in the said suit, the purported defence if any is neither relevant nor material for the adjudication of the disputes between the parties herein. It is further contended that the plaintiffs have taken all possible steps to make the matter heard. It is the defendants who had failed to file their written statement within the time stipulated under statute inspite of service of Writ of Summons on 30th March 2017. It is further contended that the defendant at this stage cannot take a cue of another application and show the negligence of the plaintiff as the same is already decided.

It is also contended that the allegations contentions made in the application are false and should not be relied upon.

The defendant no. 1A to 1D filed Affidavit in reply denying the contentions made in affidavit in opposition and reiterating the statements made in paragraph 4 to 6 of the application. It is also contended that the grounds pleaded in GA-13 of 2025 are genuine, bona fide and pleaded to meet the ends of justice.

Heard Learned Advocate for the petitioners/Defendant No. 1A to 1D and Learned Advocate for the plaintiffs opposite parties. Perused the petition filed and materials on record.

Learned Advocate for the defendants/petitioners submits that the provisions under Order VIII Rule 1 including the Proviso thereto is directory in nature and not mandatory. The delay can be condoned and the written statement can be accepted even after expiry of 90 days from the date of service of summons. Learned Advocate further submits that the word 'Shall' in Order VIII Rule 1 of the Code of Civil Procedure 1908 is not conclusive to determine whether the provision is mandatory or directory. Learned Advocate also submits that in an adversarial system no party should be denied the opportunity of participating in the process of justice dispensation. It is submitted by the Learned Advocate that although the suit is of 2009 but the writ of summons on the original defendant no. 1 was lodged after eight

long years. The defendants nos. 1A to 1D were substituted by an order dated 1st May 2024. The plaintiffs neither served copy of the amended plaint neither denied the fact of non-service in the affidavit in opposition. Learned Advocate further submits that the suit is in the nature of a partition and administration suit amongst various branches of the Pyne family and hence the right to sue is as much with the defendants as is with the plaintiffs. Learned Advocate also submits that the written statement was already prepared and affirmed by the original defendant no-1 during her lifetime thereby putting on record the pleadings as desired to be taken by the original defendant no-1. The defense of the original defendant no.1 was never shut by an order of this Hon'ble Court nor the suit was ever listed in the ex-parte board of this Hon'ble Court. Learned Advocate submits that prayer of the petitioners be allowed.

Learned Advocate relies upon the following Judicial decisions.

Salem Advocate Bar Association T.N. VS Union of India.

Reported in (2005) 6 SCC.P 344.

Zolba VS Keshao and others.

Reported in (2008) 11 SCC. P-769.

Learned Advocate for the plaintiff submits that the Writ of Summons was served upon the defendant no.1 on 30.03.2017 at about 2 P.M. after service of such writ of summons with a copy of plaint, no written statement has been filed within the time as stipulated under the statute. No application has been filed either for extension of time to file such written statement just after the expiry of the said period. Learned Advocate further submits that no explanation or medical certificates have been annexed to explain such long delay. Learned Advocate also submits that the application may be dismissed with exemplary cost.

Before proceeding to decide the material in issue it is necessary to consider that the instant suit is a suit for administration and partition. In a suit for partition

all the parties have equal rights to get their shares declared and partitioned by metes and bounds. Thus a plaintiff in a partition suit does not proceed only for himself but also as a representative of the defendants. Thus all co-sharers should be granted reasonable opportunity to take their respective stand with regard to the suit property.

Although the words in proviso to Order VIII Rule 1 and Order V Rule 1 contains 'shall' but the same is held to be directory in different Judicial Pronouncements.

In the case of Salem Advocate Bar Association Tamil Nadu (supra) the Hon'ble Court observed as follows:

'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.

In the case of Zolba the Hon'ble Court observed as follows:

'13. Considering the facts and circumstances of the present case and the statements made in the application for condoning the delay in filing the written statement, we are not in a position to hold that the appellant was not entitled to file the written statement even after the expiry of the period mentioned in the proviso to Order 8 Rule 1 CPC. After reading the provisions, in particular the proviso to Order 8 Rule 1 CPC, we are unable to hold that the provisions under Order 8 Rule 1 are mandatory in nature.

14. In *Salem Advocate Bar. Assn. v. Union of India*¹ it has been clearly held that the provisions including the proviso to Order 8 Rule 1 CPC are not mandatory but directory. It has been held in that decision that the delay can be condoned and the written statement can be accepted even after the expiry of 90 days from the date of service of summons in exceptionally hard cases. It has also been held in that decision that the use of the word “shall” in Order 8 Rule 1 CPC by itself is not conclusive to determine whether the provision is mandatory or directory. The use of the word “shall” is ordinarily indicative of mandatory nature of the provision but having regard to the decision in that case, the same can be construed as directory. In AIR para 21 of the said decision, this Court observed as follows: (SCC p. 364, para 20)

“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. 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.”

15. Therefore, following the principles laid down in the decision, as noted hereinabove, it would be open to the court to permit the appellant to file his written statement if exceptional circumstances have been made out. It cannot also be forgotten that in an adversarial system, no party should ordinarily be denied the opportunity of participating in the process of justice dispensation. Therefore, unless compelled by express and specific language of the statute, the provisions of Order 8 Rule 1 CPC or any procedural enactment should not be construed in a manner,

which would leave the court helpless to meet extraordinary situations in the ends of justice.'

Upon considering the decisions relied upon it can be well inferred that 'shall' in Order VIII Rule 1 CPC is not mandatory but directory and Courts have discretion to permit the defendant to file written statement beyond the period of ninety days in the interest of justice if exceptional circumstances exist. However there is no straight jacket formula to ascertain exceptional circumstance and it will vary from case to case. In the event the act of the defendant appears to be mala fide and delay is caused to harass the plaintiff and frustrate his claim or it appears from the plaint that there hardly any cogent defence to contest the suit and delay is caused by defendant only to gain time and unnecessarily cause predicament in disposal of suit, the defendant may be refused permission to file written statement and if permission is granted it may be conditioned by payment of exemplary cost.

Thus all permission may not be granted in a routine manner. In the instant matter it is admitted that for a period of seven years the writ of summons was not served upon the defendants. It appears from record that the original defendant no-1 entered appearance and it is the case of the petitioners that the written statement was affirmed on 4th March 2019. The petitioners have stated the grounds for delay in appearance by defendant no-1, which was due to old age and ailments suffered by her. It will also appear that original defendant no-1 died within a period of four years from the date of entering appearance. As the defendant no-1 affirmed the written statement through her younger son on 4th March 2019 this Court does not find any further laches on the part of the defendant no-1 who was an aged lady at the material point of time rather some laches could be attributed to the then Learned Advocate for the said defendant who knowing well that the written statement cannot be filed after about two years did not make ready an application for extension of time

by giving necessary advice to the said defendant and get it affirmed and filed on the said day itself.

Thus it is apparent in this case that there was laches on the part of the then Advocate for the defendant no-1 in giving necessary advice to the said defendant and taking steps in accordance with law. Hence for the laches of Advocate, a party should not suffer. In the facts and circumstances it would not be reasonable to take a harsh view with regard to the delay in filing written statement. Thus the delay should be condoned upon payment of costs.

Let there be an order in terms of prayer a), b), c), d) and e) of the Master Summons dated 19th day of May 2025. However such order is subject to the payment of costs of 200 G.M. by defendant no. 1A to 1D to plaintiff no. 2A, 2B, and 3 to 6.

(BISWAROOP CHOWDHURY, J.)

A.Bhar(P.A)