

(2005) 09 BOM CK 0050

In the Bombay High Court

Case No : L.P.A. No. 40 of 2005 in W. P. No. 4597 of 2004

Anil Kushabrao Phutane

APPELLANT

Vs

Madhukar Kushabrao Phutane and Others

RESPONDENT

Date of Decision : 21-09-2005

Acts Referred:

Civil Procedure Code Amendment Act, 2002 — Order 8 Rule 1, Order 8 Rule 10, Order 8 Rule 5, Order 8 Rule 9

Civil Procedure Code, 1908 (CPC) — Order 8 Rule 1, Order 8 Rule 2

Citation : AIR 2006 Bom 1 : (2006) 1 ALLMR 555 : (2006) 1 BomCR 786 : (2006) 1 MhLj 369

Hon'ble Judges : P.S. Brahme, J;B.R. Gavai, J

Bench : Division Bench

Advocate : K.R. Lambat, for the Appellant; B.H. Dangre, for the Respondent

Final Decision : Allowed

Judgement

P.S. Brahme, J.—Heard Mr. K.R. Lambat, Adv. for the appellant.

2. Admit.

3. Mrs. B. H. Dangre, Adv. waives notice on behalf of the respondents.

4. Heard the learned Counsel for the parties by consent for final disposal.

5. The order passed by the learned Single Judge in Writ Petition No. 4597 of 2004, dated 9-12-2004 is subject-matter of challenge in this appeal. By the impugned order, the learned Single Judge dismissed the Writ Petition filed by the appellant, thereby confirming the order passed by the trial Court, dt. 20-7-2004 on the application (Exh.31) in Special Civil Suit No. 78 of 2003 rejecting the application seeking permission to file written statement.

6. The learned trial Court and the learned Single Judge found that the mandate in the time schedule prescribed in Order VIII, Rule 1 of the Code of Civil Procedure, 1908, as amended by the CPC (Amendment) Act, 2002 (in short, "the

Amendment Act, 2002") does not permit to accept the written statement filed beyond 30 days (which is the normal period) and even beyond 90 days which is the maximum period. Therefore, the question that falls for consideration is whether the Court can permit filing of written statement beyond the period of 30 days and even beyond the period of 90 days as mandated by Order VIII, Rule 1 of Amendment Act, 2002.

7. Factual position is almost undisputed and therefore, need not be elaborated. Appellant (Original defendant No. 4) was served with summons issued by the trial Court on 7-2-2004. The appellant filed his appearance and asked for date to file his written statement, which was granted and the matter was fixed for 20-3-2004. As the appellant, though written statement was ready, could not sign the same for the reasons beyond his control, on 8-4-2004, when the matter was listed for filing of written statement, another date was given and it was fixed on 21-6-2004. But then, since the written statement was ready along with affidavit on 13-4-2004, an application for urgent hearing and taking the case on board to submit written statement was filed on 16-4-2004. On that date, say of other side was asked for. It is clear that if the period of filing written statement is counted from 7-2-2004, when the appellant received the summons of the suit, the written statement sought to be filed on 16-4-2004 being of 76 days, was well within the period of 90 days. However, since no say was given by the other side, the application (Exh.31) was closed for orders on 20-7-2004. However, on the said date, an order was passed by the learned Court and it was observed that the Court has no power to take written statement on record after 90 days and the matter was fixed on 1-9-2004. On the said date, the appellant filed an application for permission to accept written statement. However, the said application was also rejected by order dt. 1-9-2004.

8. Learned Counsel for the appellant submitted that the provisions of Order VIII, Rule 1 of the Amendment Act, 2002 are directory and when written statement was ready, the trial Court should have accepted it, when it was filed within the period of 90 days, even bearing in mind the mandate under Order VIII, Rule 1. On the other hand, the learned Counsel for respondent submitted that the trial Court rightly rejected the application and refused to accept the written statement filed by the appellant.

9. The CPC enacted in 1908 has undergone several amendments keeping in view recommendations of Law Commission. Anxiety of Parliament as evident from the amendments is to secure an early and expeditious disposal of civil suits and proceedings without sacrificing the fairness of trial and the principles of natural justice in built in any sustainable procedure. The statement of objects and reasons for enacting CPC (Amendment) Act, 1976 (in short, "1976 Amendment Act") highlights following basic considerations in enacting the amendments :--

(i) with the accepted principles of natural justice that a litigant should get a fair trial in accordance;

(ii) that every effort should be made to expedite the disposal of civil suits and proceedings, so that justice may not be delayed;

(iii) that the procedure should not be complicated and should, to the utmost extent possible, ensure fair deal to the poorer sections of the community who do not have the means to engage a pleader to defend their cases.

10. By CPC (Amendment) Act, 1999 (46 of 1999) (in short "the 1999 Amendment Act"), the text of Order VIII, Rule 1 was sought to be substituted in a manner that the power of Court to extend the time for filing the written statement was so circumscribed as would not permit the time being extended beyond 30 days from the date of service of summons on the defendant. Due to resistance from the members of the Bar against enforcing such and similar other provisions sought to be introduced by way of amendment, the Amendment Act could not be promptly notified for enforcement. The text of the provision in the present form has been introduced by the Amendment Act with effect from 1-7-2002. The purpose of such like amendments is stated in the Statement of Objects and Reasons as "to reduce delay in the disposal of civil cases".

11. The text of Order VIII, Rule 1, as it stands now, reads as under :--

1. 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.

12. The scope and ambit of Order VIII, Rule 1 of the Amendment Act of 2002 has been examined in detail by the Apex Court in *Kailash Vs. Nanhku and Others*, . All the rules of procedure are the handmaid of justice. The language employed by the draftsman of procedural 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 the 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.

13. A challenge to the constitutional validity of the Amendment Act of 1999 and Amendment Act of 2002 was rejected by the Apex Court in *Salem Advocate. Bar Association, Tamil Nadu v. Union of India*, AIR 2002 SCW 4627. As regards Order VIII, Rule 1, the Committee's report was as follows :

The question is whether the Court has any power or jurisdiction to extend the period beyond 90 days. The maximum period of 90 days to file written statement has been provided but the consequences on failure to file written statement within the said period have not been provided for in Order VIII, Rule 1. The Point

for consideration is whether the provision providing for maximum period of ninety days is mandatory and, therefore, the Court is altogether powerless to extend the time in an exceptionally hard case. The mandatory or directory nature of Order VIII, 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."

14. The Apex Court in recent decision in AIR 2005 SCW 3985, Smt. Rani Kusum v. Smt. Kanchan Devi and Ors., while considering the interpretation of Order VIII, Rule 1 of the Amendment Act of 2002 observed as under :

Order VIII, Rule 1 after the amendment 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. Further, the nature of the provision contained in Order VIII, Rule 1 is procedural. It is not a part of the substantive law. Substituted Order VIII, Rule 1 intends to curb the mischief of unscrupulous defendants adopting dilatory tactics, delaying the disposal of cases causing inconvenience to 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. While justice delayed may amount to justice denied, justice hurried may in some cases amount to justice buried."

15. Though the power of the Court under the proviso appended to Rule 1 of Order VIII 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 though they may be read by necessary implication. Power of the Court to extend time under Order VIII, Rule 1 is not completely taken away the amendment made to Order VIII, Rule 1, however departure therefrom would be by way of exception.

16. It is the procedure, something designed to facilitate justice and further its ends : not a Penal enactment for punishment and penalties; not a thing designed to trip people up. Too technical construction of sections that leaves no room for reasonable elasticity of interpretation should, therefore, be guarded against (provided always that justice is done to both sides) lest the very means designed for the furtherance of justice be used to frustrate it. There must be ever present to the mind the fact that our laws of procedure are grounded on a principle of natural justice which requires that men should not be condemned unheard, that decisions should not be reached behind their backs, that proceedings that affect their lives and property should not continue in their absence and that they should not be precluded from participating in them. Of course, there must be exceptions and where they are clearly defined they must be given effect to. But taken by and large, and subject to that proviso, our laws of procedure should be

construed, wherever that is reasonably possible, in the light of that principle.

17. The use of the word "shall" in Order VIII, 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.

18. After elaborating the purpose for introduction of Order VIII, Rule 1, this Court in *Kailash's case* (supra) at paragraph 45 observed that no straight jacket formula can be laid down except that observance of time schedule contemplated by Order VIII, Rule 1 shall be the rule and departure therefrom an exception, made for satisfactory reasons only. The purpose of providing the time schedule for filing the written statement under Order VIII, 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 VIII, 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 VIII, Rule 1, CPC is not completely taken away.

19. Our High Court in *Chintaman Sukhdeo Kaklij and Others Vs. Shivaji Bhausaheb Gadhe and Others*, considered the same issue as regards interpretation of Order VIII, Rule 1 of the Amendment Act of 2002. In fact, the diverged opinions expressed by two learned Single Judge of this Court have necessitated the reference to a larger Bench to resolve the conflict as regards true and correct interpretation of Order VIII, Rule 1. This Court, elaborately considering the decision of the Apex Court on this issue, found that the time limit prescribed in Order VIII, Rule 1 of the CPC in filing the written statement cannot be construed as mandatory. A harmonious reading of Order VIII, Rules 1, 5, 9 and 10 of the CPC as amended by Act 22 of 2002 indicates that in exceptional and extraordinary cases the Court has discretion to permit the defendant to file the written statement beyond the period of 90 days stipulated under Rule 1, Order VIII of the Code of Civil Procedure. However, this does not mean that the order extending time for filing written statement can be granted casually and unmindful of provisions that extension would not exceed 90 days. The provisions of Order VIII, Rule 1 should be kept in mind while passing an order extending time for filing written statement to the suit and ordinarily such extension should not be granted except in exceptional and special circumstances.

20. We shall now consider and decide correctness of the order passed by the trial Court rejecting the application of the appellant for filing Writ Petition (sic written statement) in the light of the observations and the law laid down by the Apex Court and this Court in the decision referred above.

21. The Special Civil Suit bearing No. 78 of 2003 filed against the present appellant and his brothers and sisters by respondent No. 1 herein was a suit for partition claiming 1/6th share in the suit property. In that, the appellant filed an application on 16-4-2004, in which it is specifically stated that the appellant could not file written statement on 9-4-2004 because though, in fact, the written statement was ready, signature of the appellant and his brother-original defendant No. 2 could not be obtained. It is further stated that the appellant was required to move the application for taking the case on board and to file written statement as further date to file written statement was given as 21-6-2004 and by that time, the period of 90 days would be expired as per the mandatory provisions laid down under Order VIII, Rules 1 and 2 of the Code of Civil Procedure. It is crystal clear that and also not disputed that, on 16-4-2004 when the appellant filed the application it was well within the period of 90 days. But the learned trial Court, instead of passing order on that day granting permission to the appellant to file written statement and accepting the written statement, which was in fact filed by the appellant along with the application, it adjourned the matter and called upon the other side i.e. the plaintiff to give his say to the application. Thereafter, on 20-7-2004 the learned trial Court, by its order on that application, rejected the same. The order passed by the Court on the application reads thus :

This Court is empowered to permit defendant to file written statement within 30 days. On the just reason this Court can permit the defendant to file written statement within 90 days. But this Court has no power to take written statement on record after 90 days. Hence, rejected."

22. It is significant to note that though the Court passed the order on 16-4-2004 directing the other side (Original plaintiff) to give his say to the application, no say was filed. But, still then, the Court rejected the application by his order dt. 20-7-2004, as, obviously, on that date, the period of 90 days was already over. As pointed out earlier, when the application was filed on 16-4-2004, it was well within time in the sense that it was within the period of 90 days from receipt of the suit summons by the appellant. It is also a matter of record that, after the earlier application was rejected, the appellant filed another application on 1-9-2004 seeking permission to accept written statement that was filed by the appellant on 8-4-2004. In that application, the appellant has elaborately stated the reasons as to why there was delay in filing written statement and further as to how the appellant would suffer irreparable loss if his written statement is not accepted. On that application, say was filed by the plaintiff thereby strongly opposing the application and seeking for rejection of the same on the ground that the application was filed 10 days after the written statement was filed on

record with the earlier application. The application again came to be rejected by order dt. 1-9-2004 wherein the Court has stated "it is filed after 90 days. Rejected."

23. Reading the text of Order VIII, Rule 1 of the Amendment Act of 2002 as it stands now, it is crystal clear that defendant has to file written statement within 30 days from the date of service of summons. However, the proviso further entitles the defendant to file written statement if he has failed to file the same within the said period of 30 days and in that case, he shall be allowed to file the same on such other day as may be specified by the Court for the reasons to be recorded in writing, but which shall not be later than 90 days from the date of service of summons. Therefore, when the appellant filed the application on 16-4-2004 seeking permission of the Court to accept the written statement, which he had filed was well within the period of 90 days, it was incumbent on the trial Court to allow the application on that day itself. In this context, it is very pertinent to note that, in that application itself, the applicant has stated that the application was filed on 16-4-2004, though the matter was already kept on 21-6-2004, as on 21-6-2004 the period of 90 days was to expire. In this context, instead of allowing the application, the trial Court adjourned it for the say of other side and then passed order on 20-6-2004 rejecting the application observing that the Court has no power to take the written statement on record after 90 days. It is, thus, significant to note that, on the day when the Court passed the order i.e. on 20-7-2004, the period of 90 days expired. But, for that, no fault could be found with the appellant, as the appellant had filed the application on 16-4-2004, which was very much within the period of 90 days. That apart, the provision contained in Order VIII, Rule 1 has been interpreted by the Apex Court and this Court, which gives discretion to the Court to permit a defendant in a suit to file written statement in spite of the time schedule contained in the proviso. Therefore, it is held that the provision contained in Order VIII, Rule 1 of the CPC is a part of procedural law. It is directory; keeping in view the need for expeditious trial of civil cases, which persuaded parliament to enact the provision in its present form, 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 is not be granted just as a matter of routine and merely because it is asked for, more so when the period of 90 days has expired. Extension of time may be allowed by way of exception for the 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 in the circumstances which are exceptional, again by reasons beyond the control of the defendant and if grave injustice would be occasioned if the time is not extended.

24. We have already given text of the application filed by the appellant on 16-4-2004 seeking permission to file and accept written statement. Even in the application filed by the appellant subsequently, there is detailed reasons assigned by him expressing his inability to file the written statement in earlier point of

time. But the trial Court, ignoring the reasons assigned by the defendant in the application, simply rejected the same for the reason that the application being filed beyond the period of 90 days, the Court cannot accept the written statement. Therefore, what was construed by the trial Court was that, as per the time schedule given in Order VIII, Rule 1 of the Code of Civil Procedure, no permission can be granted at any costs to file written statement when it is filed beyond the period of 90 days. Therefore, in the facts and circumstances of the case, the trial Court has committed an error, in the first place, in rejecting the application which was filed on 16-4-2004 by its order dt. 20-7-2004 as, when the application was filed on 16-4-2004, it was within the period of 90 days. There was absolutely no justification for the trial Court to reject the application and that too, by order dt. 20-7-2004 when the period of 90 days was over, for no fault on the part of the defendant. In other words, had the trial Court passed the order on 16-4-2004, on which date the appellant filed the application under the provision of Order VIII, Rule 1, the appellant was as of right entitled to file the written statement and further the Court was enjoined to permit the appellant to file written statement as the application was well within the period of 90 days. We, therefore, say that the appellant's right to file the application seeking permission to file the written statement was frustrated because of the order passed by the Court on 20-7-2004 when the period of 90 days expired. In that context, there was no justification for the trial Court, when the Court allowed to expire the period of 90 days, to reject the application on the ground that the Court has no power to take the written statement on record after 90 days.

25. The other aspect of the matter is that, even taking into consideration interpretation of the provision of Order VIII, Rule 1, as has been laid down by the Apex Court, it is within the discretion of the Court to permit the defendant to file written statement beyond the period of 90 days on sufficient reasons being assigned. That is to say that the time schedule in the Order VIII, Rule 1 of the CPC does not straightway makes the Court powerless to permit the defendant to file written statement. That apart, besides stating that the application is filed after the period of 90 days, no other reason has been given by the trial Court while rejecting the applications. It was not a case where, from the record it could be spelt out that the appellant, by way of dilatory tactics, deliberately, with a view to protract the litigation, did not file written statement within the period of 90 days. As a matter of fact, as we have pointed out earlier, the defendant in fact had filed written statement along with the application which he filed on 16-4-2004. Therefore, even on that count, rejection of the applications by the trial Court has resulted into miscarriage of justice and that too, as a consequence of misconstruing the provisions and its implications.

26. We have, in the earlier part of the judgment, reminded of the observations of the Apex Court as to the consequences of incorrect interpretation and implications of provisions of law, particularly the procedural law. Merely because a provisions 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 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. The language employed in the procedural 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 the 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. Too technical construction of sections that leaves no room for reasonable elasticity of interpretation should, therefore, be guarded against (provided always that justice is done to both sides) lest the very means designed for the furtherance of justice be used to frustrate it. Therefore, if viewed, keeping in mind these observations of the Apex Court of interpretation and implementation of the provision, the order passed by the trial Court in rejecting the applications cannot sustain.

27. So far as the order passed by the learned Single Judge is concerned, again keeping in mind the observations of the Apex Court and this Court in the decisions referred to earlier, the order passed by the trial Court came to be confirmed by the learned Single Judge observing that the appellant has not made out extraordinary and exceptional case for granting permission to file written statement beyond the period of 90 days. As a matter of fact, as we have observed in the earlier part of the judgment, the appellant has assigned specific reasons in his application filed subsequently and in that, he has also explained how irreparable loss would be caused to him in case the written statement, which he had already filed is not accepted. The learned Single Judge has lost site of the fact that the appellant's earlier application filed on 16-4-2004 was well within the period of 90 days and along with that application the appellant had in fact filed written statement. Therefore, the appellant's case was fully covered by the provisions under Order VIII, Rule 1 of the Code of Civil Procedure. Therefore, the order passed by the learned Single Judge dismissing the Writ Petition is incorrect.

In the result, we allow the present appeal.

The impugned orders passed by the trial Court in the Regular Civil Suit No. 78 of 2003 and the learned Single Judge in Writ Petition No. 4597 of 2004 are quashed and set aside.

We direct the trial Court to accept the written statement filed by the appellant. The trial Court shall further frame appropriate issues taking into consideration the contentions raised by the appellant in his written statement and then shall proceed with the matter.