

(2012) 10 BOM CK 0203
In the Bombay High Court
Case No : Writ Petition No. 4902 of 2009

Dhiraj Vijaykant Kudale

APPELLANT

Vs

Anita Ramchandra Raskar and Others

RESPONDENT

Date of Decision : 10-10-2012

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 8 Rule 1
Constitution of India, 1950 — Article 227

Citation : (2013) 1 ALLMR 119 : (2013) 2 BomCR 297 : (2012) 6 MhLj 832

Hon'ble Judges : R.M. Savant, J

Bench : Single Bench

Advocate : Shailendra S. Kanetkar, for the Appellant; Balasaheb Deshmukh, for the Respondent

Final Decision : Allowed

Judgement

R.M. Savant, J.—Rule, with the consent of the parties made returnable forthwith and heard. The Writ jurisdiction of this Court under Article 227 of the Constitution of India is invoked against the order dated 23.08.2007 passed below Exhibit-34, order dated 04.03.2008 passed below Exhibit-46 and another order of the same date i.e. 04.03.2008 passed below Exhibit-47. By the said orders, the applications for setting aside the "no Written Statement" order, as also the application for being permitted to file the Written Statement on behalf of the Respondent No. 8 came to be rejected. The issue in the Petition is, therefore, as to whether, the Respondent No. 8 should be allowed to file his Written Statement. The facts germane to the said issue can in brief be stated thus:-

The Suit in question has been filed by the Respondent No. 1 herein for declaration and injunction. The declaration sought is in respect of the decrees passed in Special Civil Suit No. 544 of 2004 and Special Civil Suit No. 547 of 2004. The declaration sought is to the effect that the said decrees are null and void and not binding on the Plaintiff. The injunction sought is to the effect that the Defendants be restrained permanently from creating third party interest,

alienating, transferring or withdrawing the money from the Banks and various securities of the deceased Chandrakant Shankarrao Kudale as mentioned in the compromise decree passed in Special Civil Suit No. 544 of 2004 dated 16.02.2005. The dispute, therefore, is as regards the assets of the said Chandrakant Kudale.

2. The suit summons came to be served on the Defendant No. 8 on 13th May, 2007. The Defendant appeared in the said suit on 15.06.2007 through the Advocate and filed an application Exhibit-27 that though the summons have been received by the said Defendant, the Plaintiff had not supplied the copy of the Complaint and the documents at Exhibit-3. The relief sought by the application Exhibit-27 was therefore a direction to the Plaintiff to furnish a copy of the Complaint and the documents Exhibit-3. On the said application, an order came to be passed by the learned Judge to the effect that the same is "Allowed". In spite of the said order, it was the case of the Defendant No. 8 that the copies of the Complaint and the documents covered by Exhibit-3 were not furnished to him. Hence, on the summons being served on the Defendant Nos. 6 & 7 sometime prior to 15.02.2008, the Defendant No. 8 appeared in the said Suit along with the said Defendant Nos. 6 and 7 and filed an application Exhibit-34. In the said application Exhibit-34, in paragraph no. 6, the Defendant No. 8 has averred that the said Defendant has still not received the copy of the Complaint and the documents in spite of the Court having passed an order to the said effect. It was therefore prayed that the Suit be dismissed for non compliance of the order dated 15.06.2007 passed on Exhibit-27. The said application Exhibit-34 filed by the Defendant No. 8 came to be rejected by the Trial Court inter alia on the ground that the order passed on 15.06.2007 was passed in a "casual" manner by the Court and that on perusal of the suit summons and notice of the temporary injunction application Exhibit-21, it is revealed that the Defendant No. 8 has received the notice and the suit summons along with the documents and the copy of the Complaint. It was further observed that the Defendant No. 8 cannot take advantage of an order which has been passed "in a casual manner". Thereafter, an application Exhibit-44 came to be filed by the Defendant Nos. 6, 7 and 8 for being permitted to file the Say/Written Statement. The reasons which were mentioned in the application Exhibit-34 were reiterated in paragraph no. 2 of the said application Exhibit-44. The said application Exhibit-44 was partly allowed to the extent of the Defendant Nos. 6 and 7 who were granted time to file their Written Statement and was rejected insofar as Defendant No. 8 is concerned on the ground that as per the order passed below Exhibit- 34, last chance was granted to the Defendant No. 8 to file his Written Statement by July 2007. The Defendant No. 8 thereafter moved the application Exhibit-46 for setting aside the said "no Written Statement" order. In the said application, the grounds which were set out earlier namely that the copies of the Complaint and the documents Exhibits- 1 & 3 were not furnished and since the Defendant Nos. 6 and 7 have been permitted to file a Written Statement a joint Written Statement of all the Defendants i.e. Defendant Nos. 6, 7 and 8 is being filed. It was prayed in the

said application that the "no Written Statement" order passed against the Defendant No. 8 dated 15.02.2008 be set aside and the Written Statement of the Defendant No. 8 be taken on record. The said application Exhibit-46 came to be rejected by the Trial Court by observing that the Defendant No. 8 has not filed his Written Statement within the statutory period and that no exceptional circumstances have been mentioned in the application which prevented the Defendant No. 8 from filing the Written Statement, by another order passed on the said day, on Exhibit-47. The Trial Court directed that the Written Statement filed jointly by the Defendant to be read and recorded only in respect of the Defendant Nos. 6 and 7.

3. As mentioned herein above the order dated 23.08.2007 passed on Exhibit-34 and the two orders dated 04.03.2008 passed on Exhibit Nos. 46 and 47 are the subject matter of the above Petition.

4. Heard the Learned Counsel appearing for the parties. The Learned Counsel for the Petitioner Shri Kanetkar would reiterate the case of the Defendant No. 8 which was advanced in the Trial Court namely that the Defendant No. 8 could not file the Written Statement in view of the fact that the order dated 15.06.2007 passed by the Trial Court directing the Plaintiffs to furnish a copy of the Plaint and the documents Exhibit-3 was not complied with. The Learned Counsel would contend that since the said circumstance goes to the root of the matter, the Defendant No. 8 can be said to have satisfied the condition namely that on account of the fact that the papers were not furnished to him that the Defendant No. 8 could not file the Written Statement, the Learned Counsel would contend that since by order dated 04.03.2008 the Defendant Nos. 6 and 7 have been permitted to file the Written Statement, which was a joint Written Statement on behalf of the Defendants i.e. Defendant Nos. 6, 7 and 8. The Trial Court on a hyper technical ground could not have rejected the said application.

5. Per contra, it is submitted by Shri Deshmukh, the Learned Counsel appearing for the Respondents that the Petition has been filed taking exception to two orders is not maintainable as the Petitioner would have to file two separate Petitions. The Learned Counsel would contend that no case for condonation of delay in filing the Written Statement has been made out. The Learned Counsel by relying upon the judgment of the Apex Court reported in Mohammed Yusuf Vs. Faij Mohammad and Others, , would submit that the Defendant No. 8 has not made out any ground for extension of time as contemplated under Order VIII Rule 1 of the Code of Civil Procedure, 1908.

6. Having heard the Learned Counsel for the parties, I have restored my anxious consideration to the rival contentions.

7. It is well settled by the Catena of judgments of this Court as well as the Apex Court that the provisions under Order VIII Rule 1 of the C. P.C., are directory and not mandatory and that for good and sufficient reasons, the statutory period as mentioned in Order VIII Rule 1 can be extended.

8. The issue is as to whether in the facts of the present case where indulgence can be shown to the Defendant No. 8 by extending the time. It is an undisputed position that by order dated 15.06.2007, the application Exhibit-27 filed by the Defendant No. 8 was allowed by the Trial Court thereby directing the Plaintiff to supply a copy of the Plaint as well as the documents comprised in Exhibit-3. In spite of the said order, the said documents were not complied with. The Trial Court, thereafter, by order dated 23.08.2007 rejected the application Exhibit-34 filed by the Defendant No. 8 by observing that the order passed on Exhibit-27 was passed "in a casual manner". As in fact the Plaint and the other documents were already served on the Defendant No. 8. For the said purpose, the reliance is placed on the Bailiff's Report. A copy of the Bailiff's Report has been annexed to the Affidavit-in-Reply filed on behalf of the Respondents. The said Bailiff's Report states that the summons as well as the copies of the documents have been served on the Defendant No. 8. The said Bailiff's Report, therefore, cannot in any manner further the case of the Plaintiff that the copies of the Plaint and the documents comprised in Exhibit-3 were in fact served upon the Defendant No. 8. Therefore, the Defendant No. 8, can be said to have a genuine and bonafide reason for not filing the Written Statement since the Plaint itself can be said to be not available with Defendant No. 8. It is only on 15.02.2008, by which time, the summons was served on Defendant Nos. 6 and 7 that the Plaint becomes available to the Defendant No. 8 as a consequence of which the Defendant No. 8 had filed the application Exhibit-44 along with the Defendant Nos. 6 and 7 which application has been rejected by the order dated 15.02.2008. The Trial Court has proceeded on the basis that the Plaint and the documents in question have been served on the Defendant No. 8 and has brushed aside as it were, the order dated 15.06.2007 by observing that the said order is passed "in a casual manner". In my view, it was not proper on the part of the Trial Court to dub a judicial order which is passed in a proceeding as having been passed in a casual manner. The said order had the effect of creating an obligation on the Plaintiff to serve a copy of the Plaint and the documents in question on the Defendant No. 8. The Trial Court, has brushed aside the said order and by merely observing that the Plaint and the documents have been served upon the Defendant No. 8 has passed the orders on Exhibit-44 and thereafter has refused to set aside the "no Written Statement" order passed on 15.02.2008, by the impugned order passed on Exhibit Nos. 46 and 47. The Trial Court, ought not to have rejected the said application on a hyper technical ground that the statutory period for the same was already over in view of the non compliance of the order dated 15.06.2007 passed on Exhibit-27. It is trite that procedure is always the handmaid of justice and has to be used to further the cause of substantial justice and not to oppress it. The Trial Court having deemed it appropriate to allow the Defendant Nos. 6 and 7 to file their Written Statement in the facts and circumstances of the case, ought not to have restricted the said Written statement to the said Defendants when it was a joint Written Statement on behalf of all the Defendants. At the highest, the Trial Court could have imposed costs on the Defendant No. 8 for any inconvenience or prejudice that was caused to the Plaintiff, but ought not to have

left the Defendant No. 8 defenseless .Insofar as the judgment cited on behalf of the Respondent is concerned, that is the judgment in the matter of Mohamad Yusuf(supra), the proposition of the law which is well settled by the Apex Court has been reiterated by the Apex Court in the said judgment. The said judgment reiterates the position that the written statement can be permitted to be filed after expiry of period of 90 days only in an exceptional situation. In the facts of the present case wherein there is no conclusive material on record to indicate that till 15.02.2008, the Plaint and the other documents were served upon the Plaintiff, the Trial Court has erred in rejecting the said applications Exhibit-34, 46 and 47. In that view of the matter, the impugned order dated 23.08.2007 and the two orders dated 04.03.2008 passed on Exhibits 46 and 47 are required to be quashed and set aside and are accordingly quashed and set aside and resultantly the following directions are issued:

- I) The Defendant No. 8 would be entitled to file his Written Statement.
- II) The last order dated 04.03.2008 passed below Exhibit-47 is modified to the extent that the said Written Statement be read as the Written Statement of the Defendant Nos. 6 to 8.
- III) Rule is accordingly made absolute in the aforesaid terms.
- IV) In the facts and circumstances of the case, the Defendant No. 8 to pay costs of Rs. 3000/- to the Respondent No. 1 herein within a period of four weeks from date.
- V) In the facts and circumstances of the case, the hearing of the Suit is expedited.