

(2005) 09 DEL CK 0080

In the Delhi High Court

Case No : IA 6065 of 2005 in CS (OS) No. 232 of 2004

Indradhanush T.V. Pvt. Ltd.

APPELLANT

Vs

National Film Development Corporation

RESPONDENT

Date of Decision : 08-09-2005

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 6 Rule 17, Order 8 Rule 10, 151
Consumer Protection Act, 1986 — Section 13(2)

Citation : (2005) 09 DEL CK 0080

Hon'ble Judges : Swatanter Kumar, J

Bench : Single Bench

Advocate : Chetan Sharma and Anshul Bhanot, for the Appellant; Hazufa Ahmedi and Kumud L. Das, for the Respondent

Final Decision : Dismissed

Judgement

Swatanter Kumar, J.—The plaintiff filed the present suit for recovery of Rs.1,36,00,000/- against the defendant. According to the plaintiff they had paid a sum of Rs.1,48,21,250/- to the defendant towards the advertisements telecasted of the Kunwar Ajay Group. The defendant has not only failed to abide by the terms and conditions of the Advertisement Release Orders but also failed to live up to their assurances given by their representatives. According to the plaintiff, the plaintiff had suffered loss to the tune of Rs.90 lakhs because of the negligence of the defendant as payment has been stopped by Kunwar Ajay Group. Further because of the acts of the defendant, the other group has also suffered loss of reputation. Thus, they have claimed a total sum of Rs.1,36,00,000/- out of which Rs.90 lakhs is for payments, which have been stopped by Kunwar Ajay Group, Rs. 25,00,000/- for loss on account of business ties and Rs.21,00,000/- for damages for loss of goodwill, business reputation etc.

2. Before summons in the suit could be issued, the plaintiff filed an application under Order 6 Rule 17 read with Section 151 CPC, which was allowed and para 2 of the plaint was permitted to be amended. Though the suit was instituted on 6th

January, 2004 for the first time, the summons were ordered to be issued because of the above events, vide order of the Court dated 7th October, 2004. The defendants appeared before the Court and were granted four weeks time to file written statement vide order dated 23rd February, 2005. Written statement was not filed within the time so granted and, Therefore, vide order dated 5th July, 2004, the learned Joint Registrar listed the matter before the Court for further directions. In the meanwhile, the plaintiff filed an application being is No. 6065/2005 under Order 8 Rule 10 read with Section 151 CPC on which notice was issued to the defendant for 7th October, 2005. The defendant also filed the written statement in the meanwhile. Arguments on the application were heard on 31st August, 2005. At this stage, the Court is concerned with the merit or otherwise of the application filed by the plaintiff under Order 8 Rule 10 of the Code for closing the right of the defendant to file written statement and pronouncing the judgment against the defendant in the present suit. It is averred in this application that the defendants have failed to file the written statement within a period of 4 weeks as allowed by the Court and they ought to have filed the written statement on or before 25th March, 2005 but they have failed to do so and as such the Court should pass an order in terms of Order 8 Rule 10 CPC in favor of the plaintiff and against the defendant.

3. In terms of provisions of Order 8 Rule 1 the defendant has to present a written statement of its defense within 30 days from the date of service of summons on him. Under the proviso to the said rule, if the defendant fails to file the written statement within the granted time, 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 shall not be later than 90 days from the date of service. Consequences of default are spelled out by the legislature in Rule 10 of the same order, which reads as under :-

10. Procedure when party fails to present written statement called for by Court.- 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, as the case may be, the Court shall pronounce judgment against him, or make such order in relation to the suit as it thinks fit and on the pronouncement of such judgment a decree shall be drawn up.

4. The legislative intent behind the above provisions is to ensure expeditious disposal of the suit by adherence to the provisions of the Code. Once there is a default on the part of the defendant of Rule 1 as well as the time allowable under the proviso of the said order is lapsed, the consequences thereof have been provided in Rule 10, where the Court has to apply its mind to the facts and circumstances of each case and keeping in view the settled principles of law decide whether the Court would pronounce a judgment against the defendant or it may make such orders in relation to the suit as it thinks fit. If the Court pronounces a judgment, a decree shall follow. The power of the Court, thus, is dissected into two clear compartments and inevitable consequences in every

case that default on the part of the defendant would necessarily result in passing the decree in favor of the plaintiff. What course of action the Court would adopt would depend upon the facts and circumstances of each case. Where the case of the plaintiff is so very clear on the basis of the averments made in the plaint supported by such documents as are filed by the plaintiff that it would be just, fair and equitable to pass a decree as no further proof thereof may be necessary in the opinion of the court, it may take recourse to the first action while in other cases it may direct the plaintiff to prove the case or even on account of special circumstances granted to the defendant time to file written statement subject to such terms and conditions as the Court may deem fit and proper in the circumstances of the case. The law of procedure provided a methodology, which should be adopted by the Court while determining the rights of the plaintiff to lis. Some of the provisions of the procedure would be mandatory while others would be directory. Whether the provisions of Order 8 Rules 1 and 10 of the Code are directory/regulatory or are mandatory is no more rest integra and has been squarely answered by the Supreme Court in the case of Kailash Vs. Nanhku and Others, where the Supreme Court considered at great length the historical background of introduction of the amended provisions of Order 8 in the Code and their effect. It was held by the Court :-

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 through 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 defense 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 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 there from 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.

5. Still in a more recent judgment again the Supreme Court in the case of Smt. Rani Kusum Vs. Smt. Kanchan Devi and Ors. JT 2005 (7) 409 discussed the principles governing provisions of Order 8 in the above regard with some elaboration and held as under :-

Next, 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 decision 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.

6. In Topline Shoes Ltd. Vs. Corporation Bank, , the question for consideration was whether the State Consumer Disputes Redressal Commission could grant time to the respondent to file reply beyond total period of 45 days in view of Section 13(2) of the Consumer Protection Act, 1986. It was held that the intention to provide time frame to file reply is really made to expedite the

hearing of such matters and avoid unnecessary adjournments. It was noticed that no penal consequences had been prescribed if the reply is not filed in the prescribed time. The provision was held to be directory. It was observed that the provision is more by way of procedure to achieve the object of speedy disposal of the case.

7. 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. Construction of the rule or procedure which promotes justice and prevents miscarriage has to be preferred. The rules or procedure are handmaid of justice and not its mistress. In the present context, the strict interpretation would defeat justice.

8. In construing this provision, support can also be had from Order VIII 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 suit as it thinks fit. In the context of the provision, despite use of the word `shall', the court has been given the discretion to pronounce or not to pronounce the judgment against the defendant even if 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 VIII Rule 1 and Rule 10, the doctrine of harmonious construction is required to be applied. The effect would be that under Rule 10 of Order VIII, the court in its discretion would have power to allow the defendant to file written statement even after expiry of period of 90 days provided in Order VIII Rule 1. There is no restriction in Order VIII 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 VIII Rule 1 providing for 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 VIII Rule1:-

18. The Bench in para 54 after considering the Committee's report has observed

as follows:

Having regard to the constitutional obligation to provide fair, quick and speedy justice, we direct the Central Government to examine the aforesaid suggestions and submit a report on this Court within four months.

19. After elaborating the purpose for introduction of Order VIII Rule 1, this Court in Kailash's case (supra) at paragraph 45 observed that no straightjacket formula can be laid down except that observance of time schedule contemplated by Order VIII Rule 1 shall be the rule and departure there from an exception, made for satisfactory reasons only. The conclusions have been summed up in Para 46. The relevant portion reads as follows:

(iv) 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.

(v) Though Order VIII Rule 1 CPC is a part of procedural law and hence directory, keeping in view the need for expeditious trial of civil cases which persuaded Parliament to enact the provisions 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 there from 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 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 case.

9. In view of the above recent judgments of the Supreme Court hardly any controversy need to be entertained in regard to the application of these provisions in law. What is significant is applying these provisions to the facts and circumstances of each case.

10. According to the applicant, no sufficient cause has been given for the delay and the principles enunciated by the Supreme Court in Clause (v) of para 46 of the judgment in the case of Kailash (supra) are clearly violated and as such the decree should follow.

11. It is true that the defendant has failed to file written statement within four weeks, the time allowed by the Court vide its order dated 23rd February, 2005. The defendant has filed the written statement in the registry of the Court on or about 30th August, 2005. This has been filed along with a prayer made in the affidavit for condoning the delay in filing the written statement. It has been stated that Mr. P. Varghees was the Regional Manager of defendant corporation, who was dealing with the case and was otherwise conversant with the facts of the case. The entire papers were prepared and were in the custody of the said Regional Manager. Unfortunately, in May, 2004 Mr. Verghees died and had not instructed any of his junior for delivering the complete papers along with the written statement to the counsel. Written statement, thus, could not be filed within a period of 90 days though it was prepared on 2nd March, 2005 within the time allowed by the Court. It was only after conducting a search of the record that the papers could be traced, located and retrieved from the office of the defendant on 20th July, 2005. Thereafter, written statement was given a final shape and was sent to Mumbai on 18th August, 2005, which was approved and sent back to the counsel on 26th August, 2005 and immediately thereafter was filed along with annexures. It is stated that the defendant is a Government of India Undertaking in the Ministry of Information and Broadcasting and some delay occurred because of the official activity on the part of the defendant in inter-departmental finalisation. In this regard, counsel for the defendant has relied upon a judgment of the Supreme Court in the case of State of Haryana Vs. Chandra Mani and others, . The relevant portion of the judgment reads as under :-

...but the State represents collective cause of the community. Decisions are taken by officers/agencies proverbially at slow pace and encumbered process of pushing the files from table to table and keeping it on table for considerable time causing delay - intentional or otherwise - is a routine. Considerable delay of procedural red-tape in the process of their making decision is a common feature. Therefore, certain amount of latitude is not impermissible. If the appeals brought by the State are lost for such default no person is individually affected but was in the ultimate analysis suffers, is public interest. The expression "sufficient cause" should, Therefore, be considered with pragmatism in justice-oriented approach rather than the technical detection of sufficient cause for explaining every day's delay. The factors which are peculiar to and characteristic of the functioning of the governmental conditions would be cognizant to and requires adoption of pragmatic approach in justice-oriented process. The court should decide the matters on merits unless the case is hopelessly without merit.

12. In the application filed by the plaintiff under Order 8 Rule 10 it is no where stated that the case of the plaintiff does not require any further proceedings and was a fit case where the Court should take recourse to the provisions of Order 8 Rule 10 in passing of judgment forthwith rather than any other order. The case of the plaintiff is a claim for damages and for payment of money which was not paid to the plaintiff by one of its customers because of the alleged default committed

by the defendant in carrying out the terms and conditions in completing the advertisement campaign. This certainly can be proved only by way of cogent and proper evidence and the averments made in the plaint per se would not entitle the plaintiff for a decree. The present case would be one which in all probability and in fact essentially must fall in the second category of cases where the Court would have to pass other appropriate orders and not a judgment forthwith in favor of the plaintiff and against the defendant.

13. The reasons given by the defendant are not ex-facie unbelievable. They do construe a sufficient and specific Explanation in not filing the written statement within time. Death of an individual particularly an officer to the rank of Regional Manager in whose possession the case file was is of course a reason, which can hardly be disbelieved by the Court.

14. Another facet of the present case is that grave injustice is likely to result in the event the Court directs passing of a judgment forthwith particularly keeping in mind the facts and circumstances of the present case. The concept of grave injustice can be illustrated that there will be complete denial of any opportunity to defend even where the case of the plaintiff may not prima-facie appeal to the Court worthy of a judgment forthwith. One of the basic objects of introduction of the provision of Order 8 Rule 10 of the Code is expeditious disposal of the suit by avoiding unnecessary adjournments. In the present case even the plaintiff had contributed to the further adjournment as it has filed the application under Order 8 Rule 10 after the lapse of more than 4 months, as according to the plaintiff, the time had elapsed on 25th March, 2005.

15. For the reasons afore-recorded, I am of the considered view that the Court cannot pronounce a judgment at this stage in favor of the plaintiff and against the defendant in the facts and circumstances of the present case. The defendants have been able to show not only sufficient cause but exceptional circumstances (death of personnel) for condoning the delay in filing the written statement. No irreparable prejudice will be caused to the interest of the plaintiff if the written statement filed by the defendant is permitted to be taken on record.

16. Consequently, the application under Order 8 Rule 10 is dismissed. The written statement filed by the defendant is permitted to be taken on record, subject to payment of Rs.5000, costs being conditional.

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17. In light of the above order, the replication of the plaintiff shall be filed within four weeks from today.

18. The matter be listed before the Joint Registrar for further directions on _____.