
(2020) 09 SHI CK 0257
In the High Court Of Himachal Pradesh
Case No : CMPMO No. 368 Of 2020

Kishori Lal And Ors

APPELLANT

Vs

Lajwanti And Ors

RESPONDENT

Date of Decision : 15-09-2020

Acts Referred:

Constitution Of India, 1950 — Article 227

Code Of Civil Procedure, 1908 — Order 8 Rule 1, Order 8 Rule 10, Order 9 Rule 7

Citation : (2020) 09 SHI CK 0257

Hon'ble Judges : Sandeep Sharma, J

Bench : Single Bench

Advocate : Naresh K. Sharma

Final Decision : Dismissed

Judgement

Sandeep Sharma, J

1. Being aggrieved and dissatisfied with order dated 27.2.2020, passed by the learned Senior Civil Judge Nadaun, District Hamirpur, H.P., whereby written statement having been filed by defendants No. 1 and 2, has been taken on record, petitioners-plaintiffs (in short "the plaintiffs") have approached this Court in the instant proceedings filed under Article 227 of the Constitution of India, praying therein to set aside order dated 27.2.2020.

2. Having heard learned counsel for the plaintiffs and perused material available on record, this Court finds no illegality and infirmity in order dated 27.2.2020, because bare perusal of the same clearly reveals that no objection, if any, ever came to be raised on behalf of the plaintiffs with regard to delay in filing the written statement by the defendants, rather order impugned before this Court itself suggests that after filing of the written statement by the respondents-defendants (in short "the defendants"), plaintiffs themselves sought time for filing replication and as such, matter came to be adjourned to 3.8.2020.

3. Precisely, grouse of the petitioner, as can be gathered from the pleadings as

well as submissions made by the learned counsel for the petitioner is that court below could not have permitted the defendants to file written statement beyond the stipulated period of 90 days that too without entertaining any application for extension of time. While referring to the zimini orders placed on record, learned counsel representing the plaintiff vehemently argued that despite there being repeated opportunities, defendants failed to file written statement, but vide impugned order dated 27.2.2020, court below without there being any request made on behalf of the defendants for extension of time allowed them to file written statement, however having carefully perused order dated 3.2.2020 passed by the court below, this Court finds that defendants No. 1 and 2 were proceeded ex-parte on 13.3.2019 and as such, they preferred two applications under Order 9 Rule 7 CPC, praying therein to set-aside ex-parte orders and this application came to be finally disposed of vide order dated 3.2.2020, whereby court below while setting aside ex-parte order permitted the defendants to file written statement on or before 27.2.2020. It is not in dispute that on 27.2.2020, when matter was listed before the court below, defendants filed written statement and as such, no illegality can be said to have been committed by the court below while permitting the defendants to file written statement. No specific challenge ever came to be laid on behalf of the plaintiffs against the order dated 3.2.2020, whereby the court below itself permitted the defendants to file written statement on or before 27.2.2020.

4. Otherwise also, it is well settled by now that whenever technicalities are pitted against substantial justice, it is the substantial justice, which is to prevail. It has been categorically held by the Hon'ble Apex Court in Salem Advocate Bar Association, T.N. versus Union of India, (2005)6 Supreme Court Cases 344, that 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. Hon'ble Apex Court has categorically held in the aforesaid judgment that the rules or procedure are handmaid of justice and not its mistress. While interpreting the word "shall" as provided Order 8 Rule 1, Hon'ble Apex Court has held that though 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 relevant paras of the judgment is reproduced herein-below:-:-

"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 or procedure are handmaid of justice and not its mistress. In the present context, the strict interpretation would defeat justice.

21. In construing this provision, support can also be had from Order 8 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 8 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 8, 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 8 Rule 1. There is no restriction in Order 8 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 8 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 8 Rule 1."

4. Consequently, in view of the above, no interference is warranted and present petition is dismissed being devoid of any merits.