
(2010) 06 GAU CK 0040

In the Gauhati High Court

Case No : Civil Revision Petition No. 118 of 2010

Manager (Finance) Hindustan Paper Corporation Ltd.

APPELLANT

Vs

Canara Bank

RESPONDENT

Date of Decision : 16-06-2010

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 8 Rule 1, Order 8 Rule 10, Order 8 Rule 9
Constitution of India, 1950 — Article 227
Limitation Act, 1963 — Section 2, 5

Citation : AIR 2010 Guw 155 : (2010) 4 GLT 848

Hon'ble Judges : I.A. Ansari, J

Bench : Single Bench

Advocate : J. Roy, R. Borpujari, S. Sarma, Rinku Hazarika and M. Sarma, for the Appellant; S. Dutta, D. Chakraborty and N. Choudhury, for the Respondent

Final Decision : Allowed

Judgement

I.A. Ansari, J.—I have heard Mr. Roy. learned Counsel for the Defendant-Petitioners, and Mr. S. Dutta. learned Counsel for Plaintiff-opposite party.

2. The opposite party hererin instituted Money Suit No. 20/09 for realization of money allegedly given, by way of loan, to the Defendants, who are Petitioners in this revision petition, summons were issued, on 28.10.2009 to the Defendant. The statutory period of 90 days, meant for filing of the written statement expired on 26-1-2010.

However on the basis of a petition filed by the Defendants, the learned Munsiff No. 1, Morigaon. passed an order, on 8-2-2010, allowing time to the Defendants up to 6-3-2010 to file their written statement. On the date so fixed, i.e. on 6-3-2010, the Defendants filed their written statement. Along with their written statement, the Petitioners also filed an application, u/s 5 of the Limitation Act, seeking condonation of delay in fling the written statement. This application, made u/s 5 of the Limitation Act, came to be registered as Misc. (J) Case No. 4/10. By an order, dated 11-3-2010, the learned Court below rejected the said

application on the ground that the Defendants had failed to "make out any case for condonation of delay. The written statement of the Defendants were accordingly not accepted. Aggrieved by the order, dated 11-3-2010, the Petitioners have impugned the same by filing this application under Article 227 of the Constitution of India.

3. While considering the revision petition, it should be noted that the statutory period for filing of written statement, in a suit, is 90 days. Ordinarily, a written statement shall be filed within the statutory period of 90 days from the date on which the summons is received by the Defendant. However, in exceptional circumstances, the Courts have the power to extend the period for the purpose of enabling a Defendant to file his written statement.

4. I may pause here to point out that the CPC (in short, "the Code") stands, broadly speaking, divided into two parts and while the main body of the Code, which consists of Sections, creates jurisdiction for the civil Courts, the Rules, framed under various Orders, indicate the procedure for exercise of such jurisdiction. To put it differently, the Rules, framed under various Orders of the Code, lay down the procedure for exercise of the powers conferred on such Courts by various Sections embodied in the Code.

5. Order VIII, Rule 1 as well as Order 8, Rule 10 of the Code, which warrant filing of written statement within a period of 90 days from the date of service of summons on the Defendant, are part of the procedural law. The procedural law is handmaid of justice and cannot override the necessity to do justice between the parties to the suit. No part of the procedural law and not even Order 8, Rule 1 or Order 8, Rule 10 can, in the absence of any explicit legislative intendment, be treated to have disempowered the Court or can be said to stand in the way of the Court to make exception in an appropriate case and accept a written statement beyond the period of 90 days, though, ordinarily and except in rare and compelling circumstances, acceptance of written statement beyond the requisite period of 90 days is not permissible. (See *Sreenivas Basudev Vs. Vineet Kumar Kothari*,

6. Making it clear in *Kailash Vs. Nanhku and Others*, that ordinarily, the time schedule prescribed by Order 8, Rule 1 has to be honoured, the Apex Court has made it clear that a Court may, for reasons to be recorded, in writing, by way of exception, extend the prescribed period of 90 days if the Court is satisfied, on a prayer made, in writing by the Defendant, that the circumstances were exceptional, occasioned by reasons 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.

41. Considering the object and purpose Wednesday, January 05, 2011 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 though the period of 30 days and 90 days, 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....

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 defence 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 made because the circumstances were exceptional, occasioned by reasons 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 found 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 therefrom 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.

7. Expressing that all the rules of procedure are the handmaid of justice and unless compelled by express and specific language of a statute, the provisions of

the Code and of other procedural enactment ought not to be construed in a manner, which leave the Court helpless to do what is necessary, in the ends of justice, to meet extraordinary situations, the Supreme Court, in Smt. Rani Kusum Vs. Smt. Kanchan Devi and Others, observed as follows:

9. 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.

10. 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.

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13. No person has a vested right in any course of procedure. He has only the right of prosecution or defence in the manner for the time being by or for the Court in which he case is pending, and if, by an Act of Parliament the mode of procedure is altered, he has no other right than to proceed according to the altered mode. (See Blyth v. Blyth 1966 (1) All ER 524 (HL). A procedural law should not ordinarily be construed as mandatory, the procedural law is always subservient to and is in aid to justice. Any interpretation which eludes or frustrates the recipient of justice is not to be followed (See Shreenath and Another Vs. Rajesh and Others,

14. Processual law is not to be a tyrant but a servant, not an obstruction but on aid to justice. Procedural prescriptions are the handmaid and not the mistress, a lubricant, not a resistant in the administration of justice.

8. Cautioning the Courts that the rules of procedure are made to advance the cause of justice and not to defeat it, construction of a 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 and that 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, the Apex Court, in Salem Advocate Bar Association, Tamil Nadu Vs. Union of India (UOI), laid down that the "time" can be extended only in exceptionally hard cases. This is clear from the observations made thus:

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.

21. In construing this provision, support can also be had from Order 8, Rule 10 which provides that where any party from whom a writ - ten 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 the 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 the 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, Order 8, the Court in its discretion would have the power to allow the Defendant to file written statement even after expiry of the 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 provisions of Order 8, Rule 1 providing for the 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.

9. Having taken note of its decisions in *Smt. Rani Kusum Vs. Smt. Kanchan Devi and Others*, , *Salem Advocate Bar Association, Tamil Nadu Vs. Union of India (UOI)*, and *Kailash Vs. Nanhku and Others*, the Supreme Court, in *Mr. Shaikh Salim Haji Abdul Khayumsab Vs. Mr. Kumar and Others*, has reiterated what have already been clarified in *Kailash (supra)*, *Rani Kusum (supra)* and *Salem Advocate Bar Association (supra)* as regard the ambit of Order 8, Rule 1 and whether it is possible for the Court to extend the time for filing of the written statement beyond the period of 90 days from the date of service of the notice on the Defendant.

10. What crystallizes from the above discussion is that while it is necessary that a Defendant is made to file written statement within, at best, the extended time of 90 days from the date of service of the summons, the Courts do have the power, in an appropriate case, to accept the written statement beyond the period of 90 days, though such acceptance is not possible except in rare cases and special circumstances.

11. In the case at hand, the learned Court below had itself allowed the Defendants by its Order, dated 8-2-2010, to file written statement fixing 6-3-2010 as the date for filing of the written statement. The correctness of the order, dated 8-2-2010, granting time to file written statement, till 6-3-2010, was never questioned by the Plaintiff-opposite party. Therefore, in terms of the order, dated 8-2-2010, the Defendants could have filed their written statement on the date so fixed, i.e. 6-3-2010. No application, u/s 5 of the Limitation Act, was necessary for seeking condonation of delay in filing the written statement.

12. While considering the question as to whether an application u/s 5 of the Limitation Act, 1963, was necessary for the purpose of enabling the learned trial Court grant time beyond the said period of 90 days to file written statement, it needs to be carefully noted that the Limitation Act comes into force, when the period, prescribed for admitting an appeal or an application, other than an application under Order XXI of the Code, cannot be extended by the Court, the Court may, subject to the scheme of the Code and/or the relevant statute, as the case may be, extend the period for admission of an appeal or an application, by taking resort to, and tracing its source from, Section 5 of the Limitation Act. In other words, when the period prescribed by the statute for filing an appeal or an application cannot be extended by a Court, Section 5 may be taken resort to for extending the period for filing of such application provided that such extension, if granted, would not defeat the scheme of the statute.

13. An application, as defined in Section 2(b) of the Limitation Act, includes a petition. A written statement is a pleading and not an application or petition. This apart, as already indicated above, notwithstanding the fact that the statutory period, prescribed for filing of a written statement, is 90 days, the Court does have the power to extend this period if the Defendant can make out an exceptional case that for reason beyond his control, he could not file or could not have filed his written statement. Every petition, filed during the progress of a suit

seeking time, does not need an application or condonation of delay unless the Court does not, otherwise, have the power to extend the period for filing of such a petition. At the first blush, it may appear that a petition, seeking extension of time for filing of written statement beyond the period of 90 days, as statutorily prescribed, would require condonation of delay so that the prescribed period of 90 days can be extended by the Court by taking resort to Section 5 of the Limitation Act. However, when deeply examined, it clearly emerges that under the scheme, as embodied in Order 8, Rule 1, a Defendant shall file written statement, in his defence, within 30 days from the date of service of summons on him. Where, however, the Defendant fails to file written statement within the said period of 30 days, he shall be allowed to file his written statement on such other days as the Court may, in the light of the proviso to Rule 1 of Order VIII, for the reasons to be recorded in writing, specify. The proviso to Rule 1 of Order 8 lays down that the filing of written statement shall not be later than 90 days from the date of service of summons meaning thereby that the written statement must, ordinarily, be filed within the period aforementioned, and a Court must not, ordinarily, allow, a written statement to be filed if a period of 90 days from the date of service of summons to the Defendant(s) expires.

14. Thus, a careful reading of the proviso to Rule 1 of Order VIII shows that the Court does have the power to extend the period of 90 days, prescribed for filing of written statement, the only limitation being that such period cannot be more than 90 days. When, thus, the power to grant extension of time to file written statement is already vested in the Court, the question is as to whether the prescribed limit of 90 days is mandatory or directory. Since the prescribed period of 90 days is not mandatory, as discussed above, it logically follows that a Court, when satisfied with the reasons assigned by a Defendant that the Defendant could not, for sufficient cause, file his written statement within the prescribed period of 90 days, may allow further time to file written statement. Consequently, because of the fact that the period of 90 days has expired, the Court does not lose its power to grant extension of time for filing of written statement by taking resort to the proviso to Rule 1 itself inasmuch as the proviso does give the power to the Court to extend the period for filing of written statement. Had the period of 90 days, as prescribed, been mandatory, the question of taking resort to Section 5 of the Limitation Act could have, perhaps, arisen.

15. In the case at hand, since nothing has been brought on record, and nothing has been stated by the Court, to show that the Defendants had not been able to assign good reasons for seeking extension of time and when the learned Court below itself had extended the period for filing written statement till 6-3-2010, the question of filing of an application u/s 5 of the Limitation Act, seeking extension of the period for filing of written statement, did not arise at all. Hence, rejection of the application, made u/s 5, on the ground that it does not disclose sufficient reason, is misconceived and untenable in law. However, because of the fact that an application u/s 5 of the Limitation Act was filed by the Defendants, as advised

by their counsel, the learned Court below appears to have considered the said application and rejected the prayer made by the Defendants by disallowing them to file their written statement after expiry of the said statutory period of 90 days.

16. Coupled with the above, it cannot be denied that the application, seeking condonation of delay, clearly indicates that the counsel for the Defendants acknowledged the fact that it is the counsel, who had inadvertently omitted to advise the Defendants to file their written statement before the expiry of the said statutory period of 90 days. In such circumstances and, particularly, when the learned Court below had itself allowed, in exercise of the power, which it has, time, till 6-3-2010, for filing of the written statement, the learned Court below could not have, and ought not to have, refused to accept the written statement filed by the Defendants.

17. Because of what have been discussed and pointed out above, the impugned order, dated 11-3-2010, is, in the considered view of this Court, untenable in law and needs to be interfered with.

18. In the result, this revision petition is allowed. The impugned order, dated 11-3-2010, is hereby set aside. The learned Court below shall pass necessary order(s) bringing the written statement on record and proceed with the suit in accordance with law.

19. In the facts and circumstances of the case, the parties are left to bear their own costs.