

(2005) 01 CAL CK 0001
In the Calcutta High Court

Case No : G.A. No. 2821 of 2004 and C.S. No. 282 of 2004

Motiur Rahman Mollah

APPELLANT

Vs

Sk. Ashar Ali and Others

RESPONDENT

Date of Decision : 07-01-2005

Acts Referred:

Calcutta High Court (Original Side) Rules, 1914 — Rule 2, 46
Civil Procedure Code, 1908 (CPC) — Order 8 Rule 1, 129

Citation : AIR 2005 Cal 119 : (2005) 2 CALLT 39 : (2005) 1 CHN 478

Hon'ble Judges : Subhro Kamal Mukherjee, J

Bench : Single Bench

Advocate : Sukanya Banerjee and Atish Gosh, for the defendant No. 7, for the Appellant; Pratick Prakash Banerjee, Soumen Dutt and Rajesh Updhaya, for the Respondent

Final Decision : Allowed

Judgement

Subhro Kamal Mukherjee, J.—The plaintiff institutes this suit for recovery of damages for defamation, which has been tentatively assessed at Rs. 50,00,000/- (Rupees fifty lakh) only, against the defendants named in this suit.

2. The summons of this suit has been served on the defendant No. 7 on March 11, 2004.

3. This suit has been instituted on or about January 29, 2004. Therefore, the Code of Civil Procedure, as amended by Amendment Acts of 1999 and 2002, is applicable in this case.

4. Order 8 Rule 1 of the CPC as substituted by the CPC (Amendment) Act, 2002 runs 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."

5. As I have indicated hereinabove, the writ of summons has been served on the defendant No. 7 on March 11, 2004. Therefore, the prescribed period for filing written statement by the said defendant No. 7 expires on April 10, 2004. However, as provided in the proviso to Rule 1 of Order 8 the time to file written statement by a defendant may be extended 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. Total period, therefore, cannot exceed ninety days from the date of service of summons on the defendant. Ninety days, in this case, expires on June 9, 2004.

6. The defendant No. 7, however, on July 23, 2004 files the present application for extension of time for filing his written statement. In the said application it has been stated that due to illness of his wife, the defendant No. 7 was not in a position to contact his learned advocate and as such could not give instructions to him for filing the written statement. After his wife recovered from illness, the defendant No. 7 contacted his learned advocate. The learned advocate-on-record, thereafter, briefed learned counsel to draw the written statement. The written statement has been prepared and the same has, already, been filed.

7. Ms. Sukanya Banerjee, learned advocate, appearing in support of the application filed by the defendant No. 7, submits that due to the said illness of the wife of the defendant No. 7, the written statement could not be filed in time and she prays for extension of time for filing of the written statement. When her attention was drawn to the amended provisions of Rule 1 of Order 8 of the CPC Ms. Banerjee submits that this is a suit in the ordinary original civil jurisdiction of this Court and in view of the provisions of Rule 46 of Chapter XXXVIII of the Original Side Rules, this Court has power to enlarge time.

8. The said Rule runs as under:

"46. Power to enlarge or abridge time.-The Court or a Judge shall have power to enlarge or abridge the time appointed by these rules, or fixed by any order enlarging time, for doing any act or taking any proceeding, upon such terms (if any) as the justice of the case may require, and any such enlargement may be ordered, although the application for the same is not made until after the expiration of the time appointed or allowed."

9. Ms. Banerjee, also, draws my attention to Section 129 of the CPC empowering the High Courts to make rules to regulate their own procedures in the exercise of their ordinary original civil jurisdiction.

10. Said Section 129 runs as under:

"129. Power of High Courts to make rules as to their original civil procedure.-Notwithstanding anything in this Code, any High Court not being the Court of a

Judicial Commissioner may make such rules not inconsistent with the Letters Patent or order or other law establishing it to regulate its own procedure in the exercise of its original civil jurisdiction as it shall think fit, and nothing herein contained shall affect the validity of any such rules in force at the commencement of this Code."

11. Finally, Ms. Banerjee draws my attention to an unreported decision of Jayanta Biswas, J. in G. A. No. 3791 of 2003; C. S. No. 146 of 2003, Shanti Kumar Surana v. Jaydeep Majumdar and Anr., which has been decided on January 16, 2004. Biswas, J. observes that provisions of Rule 1 of Order 8 of the CPC will not apply in view of Section 129 of the CPC inasmuch as the Original Side Rules of this Court are to govern the proceeding.

12. On the contrary, Mr. Pratick Prakash Banerjee, learned advocate, appearing for the plaintiff, submits that this application is not maintainable and the said defendant No. 7 is not entitled to file his written statement as he did not file any written statement within thirty days. Mr. Banerjee, further, submits that this Court, in view of the rigor of the provisions of Rule 1 of Order 8 of the Code of Civil Procedure, cannot grant extension of time for filing written statement beyond ninety days from the date of service of the summons. Mr. Banerjee draws my attention to the provisions of Chapter IX Rule 1 of the Original Side Rules of this Court and submits that the said Rule 1 contemplates that the provisions laid down in Order 8 of the CPC shall, also, apply to written statement. Mr. Banerjee submits that the provisions of Order 8 of the CPC have been incorporated in the Original Side Rules of this Court by reference. Mr. Banerjee draws my attention to the decision of the Supreme Court of India in the case of Dr. J.J. Merchant and Others Vs. Shrinath Chaturvedi, . The Supreme Court of India, while interpreting the provisions of Rule 1 of Order 8 of the Code of Civil Procedure, observes that there is a legislative mandate under the said Rule that the written statement of defence is to be filed within thirty days. However, if there is a failure to file such written statement within the stipulated time, the Court can at the most extend further period of sixty days and no more. Such legislative mandate is required to be strictly adhered to. Mr. Banerjee, further, draws my attention to the decision of the Karnataka High Court in the case of Liyakath Ali Vs. H.N. Lohitheshwar, . It is observed that the observations in J. J. Merchant and Ors. (supra) is not a passing observation. The Supreme Court expressed the opinion on the interpretation of the said provisions after consideration and such opinion is advisedly and deliberately given. The said opinion, therefore, is binding under Article 141 of the Constitution of India. Mr. Banerjee argues that there is no scope to entertain this application and to grant extension of time to the defendant No. 7 for filing of his written statement.

13. Rule 1 of Order 8 of the CPC provides a rule of limitation. However, this is a suit in the ordinary original civil jurisdiction of this Chartered High Court. Section 129 of the CPC empowers the High Court to make rules not inconsistent with the Letters Patent or order or other law establishing it to regulate its own procedure

in the exercise of its original civil jurisdiction as it shall think fit, and nothing contained in the CPC shall affect the validity of such rules in force at the commencement of the said Code.

14. Having regard to the language of Section 129 of the Code of Civil Procedure, the rules framed by the High Court to regulate its own procedure in the exercise of its original civil jurisdiction need not be consistent with the provisions of the Code of Civil Procedure, but they should be consistent with the Letters Patent establishing the High Court. The opening words of the section "notwithstanding anything in this Code" are self-effecting. Where a rule framed by the High Court u/s 129 of the CPC is inconsistent with the provisions of the Code, the rule shall prevail over the Code.

15. According to Rule 2 of Chapter IX of the Original Side Rules no written statement or voluntary statement shall be filed, after the time limited for filing the same by the writ of summons, or any rule, or any order, as the case may be, has expired, except under an order obtained by summons in Chambers taken out prior to the expiry of such time. This application has been filed after the time limited for filing the written statement expired. However, Rule 46 of Chapter XXXVIII of the Original Side Rules permits the Court and recognises the power of a Judge to enlarge or abridge the time appointed by the rules, or fixed by any order enlarging time, for doing any act or taking any proceeding; upon such terms as the justice of the case may require, and any such enlargement may be ordered, although the application for the same is not made until after the expiration of the time appointed or allowed.

16. Therefore, in view of the provisions of the Original Side Rules, this Court is not powerless even after the expiry of the period for filing written statement to grant extension of time in a deserving case.

17. I have carefully considered the explanations offered by the defendant No. 7 in this application. I am of the opinion that defendant No. 7 has sufficiently explained the causes for the delay in filing the written statement. In the meantime, however, the written statement has been filed. The powers of the Court to hear the respondent, where ends of justice require, are unlimited. Normally, better justice is likely to be done if the two sides are heard on merits.

18. I, therefore, allow this application and condone the delay in filing the written statement by the defendant No. 7. The written statement filed by the defendant No. 7 is accepted.

19. I make no order as to costs.

20. All parties are to act on a xerox signed copy of this judgment on usual undertakings.