

(2015) 02 AHC CK 0012
In the Allahabad High Court
Case No : Writ C. No. 2558 of 2015

Radha Devi

APPELLANT

Vs

Santosh Kumari

RESPONDENT

Date of Decision : 09-02-2015

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 8 Rule 1, Order 8 Rule 10

Citation : (2015) 110 ALR 377 : (2015) 128 RD 266

Hon'ble Judges : Ashwani Kumar Mishra, J.

Bench : Single Bench

Advocate : J.B. Singh and C.B. Gupta, for the Appellant; Vikas Singh, Advocates for the Respondent

Final Decision : Allowed

Judgement

Ashwani Kumar Mishra, J.—Present writ petition is directed against orders dated 14.7.2014 and 20.12.2014, passed by the courts below, whereby petitioner's prayer to belatedly accept written statement, in reply to the counter claim, has been rejected, as being grossly barred by limitation.

2. Facts in brief are that plaintiff petitioner filed Original Suit No. 169 of 2005 with the allegation that she has purchased the suit property by way of registered sale deed, which consists of a house, on 29.10.2003 from its earlier owner Rishal son of Sri Natthu, and as such, is the owner in possession of the suit property. Allegation in the plaint was that defendant is trying to forcibly enter into possession, and therefore, injunction was sought in the suit, restraining the defendant from forcibly taking possession of the suit property, and to further restrain her from interfering with petitioner's possession. Suit was contested by defendant, who filed a written statement denying plaint allegation. Along with the written statement, a counter claim was also filed with the allegation that the registered sale deed dated 29.10.2003, which was basis of plaintiff's claim, is a void document, and consequently, a declaration to this effect was sought in the counter claim. No written statement/reply to the counter claim was filed by the

plaintiff. Although on 13.4.2006 time was granted to the plaintiff to file reply to the counter claim, but no reply was filed. However, the suit proceeded, and issues were framed on 13.4.2006. Issue No. 11 was framed that whether the alleged sale deed dated 29.10.2003 is liable to be cancelled, for the reasons disclosed in the counter claim? A further issue was framed as to whether the defendant is the owner of the suit property?

3. Suit proceeded further, and parties adduced evidence in support of their claim. Thereafter, date was fixed for argument in the matter on 17.4.2014, but the matter was adjourned to subsequent dates, for some reason or the other, and no arguments could be advanced. On 3.7.2014, plaintiff moved an application stating that her counsel at the time of preparation of the matter found that no written statement to the counter claim was available in the case file, and it later transpired that actually no written statement to the counter claim had at all been filed. Accordingly, an application was moved to take on record the written statement to the counter claim. It was also submitted that evidence in respect of the counter claim has already been filed, and therefore, no delay would be caused in disposal of the proceedings. It was stated that non-filing of written statement to the counter claim was wholly due to inadvertent oversight on part of the Advocate concerned, and there was no intention on part of the plaintiff to delay the disposal of the matter.

4. The trial court after hearing the parties found that sufficient explanation was not available on record to condone the delay in filing of written statement, and therefore, the application to take on record the written statement to the counter claim was rejected. This order was put to challenge in revision, wherein revisional court found that filing of the written statement was after a gap of 8 years, for which there was no satisfactory explanation on record, and consequently, the revision was also rejected. It is these two orders dated 14.7.2014 and 20.12.2014, which are under challenge in the present writ petition.

5. Learned counsel for the petitioner submits that the plaintiff petitioner is 58 years" old lady, who had instituted suit for injunction in the year 2005, after having purchased the property by way of registered sale deed in the year 2003. It is submitted that the plaintiff petitioner had been bona fide pursuing the matter, and there has never been any act on her part, which could even remotely suggest any mala fide conduct on her part, to delay the disposal of the proceedings. It is submitted that the plaintiff has been bona fide contesting the matter, and the delay occasioned in filing of the written statement to the counter claim was entirely due to lack of proper advise by the counsel, for which plaintiff ought not to have been punished. It is further submitted that even otherwise, all evidence in connection with due execution of the sale deed had already been placed on record, and there was no occasion for either of the parties to file any further evidence on account of acceptance of the written statement. It is submitted that grave injustice would be caused to the plaintiff, in case the

written statement to the counter claim is not accepted, as all such evidence led in this regard would not be liable to be considered in the absence of any written statement to the counter claim. Contention, therefore, is that delay in moving of the written statement was wholly bona fide, and for any inconvenience caused, the defendant could have been compensated by payment of cost, but rejection by the courts below to accept the written statement to the counter claim is not liable to be sustained.

6. Per contra, learned counsel appearing for the respondent submits that there was absolutely no justification for accepting the written statement to the counter claim, after expiry of 8 years, and no justifiable cause has been brought on record to accept the written statement to the counter claim. It is also submitted that the provisions of Order 8 Rule 1 CPC clearly bars entertaining of such belated written statement, and therefore, there is no error in orders passed by the courts below, which may require any interference.

7. Having considered the respective submissions urged by learned counsel for the parties, this Court finds that the plaintiff had filed the suit for injunction in respect of the property, which she had purchased by way of registered sale deed dated 29.10.2003. A counter claim was filed in February, 2006, challenging the sale deed itself. The court had proceeded to frame issues including the question of validity of the sale deed, and whether the defendant was the owner of the suit property. The parties have already led their evidence, and a clear stand has been taken by the plaintiff petitioner that they do not intend to bring any additional evidence on record, even if the written statement was to be accepted.

8. From the materials available on record, this Court finds that conduct on part of the plaintiff petitioner was not intended to delay the proceedings, nor was she to gain anything on account of non-filing of the written statement to the counter claim. In fact, the plaintiff petitioner has adduced all evidence in support of her claim that execution of sale deed was valid and justified. Oral and documentary evidence in this regard have already been led by the parties. However, any amount of evidence in response to the counter claim cannot be entertained, or looked into by the court, in the absence of a written statement having been filed to it. Law is settled that the plaintiff has to plead and prove her case. In the absence of a pleading, no amount of proof would serve the purpose. The plaintiff has been contesting the matter for the last about 8 years, and there is no material available on record even remotely suggesting that the plaintiff has been responsible for any delay caused in the matter, or the plaintiff was to achieve some benefit on account of non-filing of the written statement to the written statement. The specific stand taken by the plaintiff petitioner was that it was due to the mistake of the counsel in informing her of the requirement of filing of the written statement to the counter claim that such a written statement was not filed earlier. In the peculiar facts and circumstances, this Court finds that the delay in filing of the written statement was not lacking in bona fide.

9. This Court further finds that in the peculiar facts and circumstances of the

present case, non-entertaining of the written statement would cause serious injustice to the plaintiff petitioner, inasmuch as all its defence in support of its title would not be seen by the civil court. The fact that plaintiff had adduced evidence in support of her sale deed goes to show that at her level, there was no intent of avoiding any adjudication on the question of due execution of the sale deed. In such circumstances, in the opinion of the Court, the explanation submitted by the plaintiff was liable to have been accepted, as a contrary view, which has been adopted by the courts below, would occasion failure of justice for the petitioner.

10. This Court further finds that on account of acceptance of the written statement to the counter claim, no delay was liable to be caused, inasmuch as the parties had already led evidence on the question of validity of the sale deed, and therefore, no prejudice would have been caused to the defendant, inasmuch as there was no possibility of proceedings be adjourned for such reason.

11. The courts below, however, have been swayed by the fact that filing of the written statement itself was after a gap of 8 years. The Code of Civil Procedure, 1908 itself had been amended by the legislature with an intent of ensuring that the proceedings before the civil court should not be unusually delayed, and for such purpose, a specific provision was introduced limiting the period, within which the written statement could be filed under Order 8 Rule 1 CPC. The legislature provided that written statement be filed within a period of one month, and not beyond a period of 90 days. A question arose as to whether such provision is directory or mandatory. The view expressed by the Apex Court in the case of *Kailash Vs. Nanhku and Others*, , in this regard, clarifying the law is as under:

"40. Considering the object and purpose behind enacting Rule 1 of Order VIII 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, 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 candidates may succeed in enjoying the substantial part, if not in its entirety, the term for which he was elected even though he may loose 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.

41. Ordinarily, the time schedule prescribed by Order VIII, 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 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 VIII, 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.

42. 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 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.

43. 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, the defendant shall 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 asking and (ii) to compensate the plaintiff for the delay and inconvenience caused to him.

44. However, no straitjacket formula can be laid down except that the observance of time schedule contemplated by Order VIII Rule 1 shall be the rule and departure therefrom an exception, made for satisfactory reasons only. We hold that Order VIII Rule 1, though couched in mandatory form, is directory being a provision in the domain of processual law.

45. We sum up and briefly state our conclusions as under:--

(iv) The purpose of providing the time schedule for filing the written statement under Order VIII, Rule 1 of 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 of Order VIII of the 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 of the CPC is

not completely taken away.

(v) Though Order VIII, Rule 1 of the CPC is a part of Procedural Law and hence directory, keeping in view the need for expeditious trial of civil causes which persuaded the Parliament to enact the provision 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 therefrom 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 was needed to be given for the 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 given case."

(emphasis supplied)

12. A similar view has been reiterated by the Apex Court in the case of Salem Advocate Bar Association, Tamil Nadu Vs. Union of India (UOI), . Paras 21 and 22 of the judgment are reproduced:--

"21. 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. 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.

22. 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 Rule 1."

(emphasis supplied)

13. The Apex Court has emphasised that procedure is a handmade for doing justice between the parties, and the procedural aspects ought not to result in injustice, being caused to litigant. The power has been conceded to the court to condone the delay in the exceptional facts and circumstances of a particular case, which may justify condonation of delay for doing justice between the parties. However, such power is to be exercised only when it is found that bona fide on part of the litigant is not lacking, and the refusal to condone the delay would cause serious injustice to the litigant. In the facts and circumstances of the present case, this Court finds that the delay in filing of the written statement to the counter claim was not actuated by any mala fide, and the refusal to condone the delay would cause serious injustice to the plaintiff petitioner, who is an elderly lady. The proceedings of the suit is also not likely to be delayed due to acceptance of written statement. In such circumstances, in the opinion of this Court, ends of justice required that the delay in filing of the written statement ought to have been condoned. For any inconvenience caused to the defendant, the plaintiff ought to have been put to adequate cost, with a further undertaking that no further evidence would be allowed to be led by it, so as to ensure that no further delay is caused. In view of the discussions made above, this Court finds that rejection of plaintiff's application to accept written statement in reply to the counter claim, vide orders impugned, are not liable to be sustained, as it suffers from errors apparent on record resulting in failure of justice, and are, consequently, set aside.

14. The writ petition succeeds, and is allowed. Trial court is directed to accept the written statement of the plaintiff in reply to the counter claim of the defendant, upon payment of cost, which is quantified at Rs. 10,000/-. It is further provided that on account of acceptance of written statement, no further opportunity would

be granted for adducing evidence, and no further adjournments in this regard would be allowed. As the suit itself has remained pending since 2005, the trial court is directed to expedite proceedings of suit, and to conclude it, without granting any unnecessary adjournment to either of the parties, by fixing short dates.