

(2012) 09 MP CK 0034

In the Madhya Pradesh High Court

Case No : Writ Petition No. 5546 of 2012

Raghuraj Singh and Others

APPELLANT

Vs

Kedar Singh and Others

RESPONDENT

Date of Decision : 17-09-2012

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 16 Rule 1, Order 16 Rule 2, Order 16 Rule 6, Order 8 Rule 1, Order 8 Rule 10
Constitution of India, 1950 — Article 227

Citation : (2012) ILR (MP) 2692 : (2012) 4 MPHT 516

Hon'ble Judges : Sujoy Paul, J

Bench : Single Bench

Advocate : Vikas Singhal, for the Appellant; N.K. Gupta, Advocate for the Respondent Nos. 1 and 2, for the Respondent

Final Decision : Allowed

Judgement

Mr. Sujoy Paul, J.—By invoking the jurisdiction of this Court under Article 227 of the Constitution, the petitioners have challenged the order dated 6-7-2012, whereby the applications preferred by the petitioners/defendants under Order 16 Rule 2, CPC and under Order 16 Rule 6 CPC, are rejected. The matter is arising out of a civil suit instituted by respondent Nos. 1 and 2/plaintiffs for declaration, injunction and for declaring the partition deed dated 6-1-2005 as illegal. It is alleged in the plaint that the defendants made the plaintiff No. 1 to execute registered partition deed, dated 6-1-2005 by playing fraud. The defendants filed their written statement and denied the averments. After completion of the evidence, defendants preferred aforesaid application for calling original record of registered partition deed from the office of Sub-Registrar and moved another application for calling the writer and stamp vendor of partition deed as defence witnesses. By impugned order, these applications were rejected by the Court below on the following grounds:-

(i) Document dated 6-1-2005 is a public document and to prove that document

the summoning of the document from the Deputy Registrar office is not justifiable.

(ii) If the concerned Clerk with the document is summoned, it will have an adverse impact on the work of public at large because of his absence at work place.

(iii) The petitioner has not preferred any application for summoning the witnesses and the plaintiff evidence is already over and, therefore, at this stage the application preferred is not justifiable.

(iv) The petitioner should have preferred an application under Order 16 Rule 1 at the relevant time, if at all he intended to summon new witnesses.

(v) The petitioner has not preferred the said application in time and adopted the procedure, which amounts to abuse of process of law.

2. Shri Vikas Singhal, learned Counsel for the petitioners, submits that the order passed by the Court below is based on hyper-technicality and runs contrary to Chotelal Vs. Sodarabai and another,

3. Per Contra, Shri N.K. Gupta, learned Counsel for the respondent Nos. 1 and 2, supported the order and submits that a bare perusal of the language of Order 16 Rule 2, CPC and Order 16 Rule 6, CPC makes it clear that such applications/prayer can be made within the time permissible in view of the statutory mandate. He heavily relied on the work "shall" employed in the said provision. It is stated that if applications are not preferred within the mandatory time fixed, the Court below has not erred in rejecting the same.

4. I have heard learned Counsel for the parties and perused the record.

5. Before appreciating the rival contentions, I deem it apt to reproduce Order 16 Rule 2 and Order 16 Rule 6, CPC, which reads as under :-

Order 16 Rule 2 : Expenses of witness to be paid into Court on applying the summons.-

(1) The party applying for a summons shall, before the summons is granted and within a period to be fixed, which shall not be later than seven days from the date of making application under sub-rule (4) of Rule 1, pay into Court such a sum of money as appears to the Court to be sufficient to defray the travelling and other expenses of the person summoned in passing to and from the Court in which he is required to attend, and for one day's attendance.

Order 16 Rule 6 : Summons to produce document.- Any person may be summoned to produce a document, without being summoned to give evidence, and any person summoned merely to produce a document shall be deemed to have complied with the summons if he causes such document to be produced instead of attending personally to produce the same."

6. This cannot be disputed that the document dated 6-1-2005 is a crucial

document, which will throw much light on the issue whether the document was executed, if executed whether it bears the signatures of the parties, whether it was done by the parties on their own volition or under any coerce or pressure. Apart from this, the said document is a relevant document to decide the real issue in the matter. Although it cannot be doubted that the petitioners have filed the said applications with little delay but the question is whether under the garb of those provisions the said applications were rightly rejected by the Court below.

7. In my considered opinion, this point is no more *res integra*. In a recent judgment in *C.N. Ramappa Gowda Vs. C.C. Chandregowda (Dead) by L.Rs. and Another*, the Apex Court had an occasion to deal with the provisions of Order 8 Rule 10 and other provisions of Code of Civil Procedure. Order 8 Rule 1 also employs the word "shall" and prescribes a time limit for the purpose of an action. The Apex Court relied its judgment reported in *Kailash Vs. Nanhku and Others*, Para 46 of the said judgment reads as under :-

46. (iv) The purpose of providing the time schedule for filing the written statement under Order 8 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 Order 8 Rule 1, CPC is couched in negative form, it does not specify and 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 8 Rule 1, CPC is not completely taken away.

On the strength of this judgment, in Para 25 of the judgment in *C.N. Ramappa Gowda (supra)*, the Apex Court held that effect of non-filing of written statement and proceeding to try the suit is clearly to expedite the disposal of the suit and is not penal in nature, wherein the defendant can be penalised for non-filing the written statement in a mechanical manner.

8. The same view was taken by the Apex Court in *Salem Advocate Bar Association, Tamil Nadu Vs. Union of India (UOI)*, , the Apex Court held as under :-

21. In construing this provision, support can also be had from Order 8 Rule 10. 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" in Order 8 Rule 1, 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 Order 8 Rule 10. 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 Order 8 Rule 10, 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 provision of Order 8 Rule 1 providing for the upper limit of 90 days to file written statement is directory.

A bare perusal of Paragraphs 20 and 21 of this judgment would show that merely because the word "shall" is used, which is ordinarily indicative of mandatory nature of the provision, it cannot be forgotten that said provision is in fact a procedure to achieve justice. No procedure can become so stringent unless it prescribes in the manner in the Statute itself that it strangles the ultimate justice. In other words, the use of word "shall" shows the intention of Legislature, which is to be read as directory.

9. In my considered opinion, the said judgment although was passed with respect to Order 8 Rule 1, CPC, but the same analogy can be applied/drawn for interpreting the aforesaid principle applicable in this case also. It cannot be forgotten that even Order 16 Rule 2 and Order 16 Rule 6, CPC are also part of the procedure. These provisions also contain the word "shall" but non-performance of a duty/ conduct/activity within the time so prescribed does not lead to forfeiture of the right. In other words, in absence of providing the consequences of not doing the act within the same time or any penal action thereupon, it will remain open for the Courts to grant further time to meet the ends of justice. In other words, the basic purpose of such cases is to see whether the delay in preferring the application is bona fide or is with a view to delay the proceedings with oblique motive. If it is not that such intention, the delay simpliciter cannot be a ground to deprive him from his right nor such right will stand automatically extinguished after the time prescribed or the event mentioned in the Statute. However, I make it clear that although those provisions are held to be directory even when the word "shall" is used, it will always open for the Courts to examine whether the delay in filing the said application is proper, justiciable and is not tainted with oblique motive etc. In the facts and circumstances of this case, in my opinion, the Court below has taken a hyper-technical view in rejecting the applications aforesaid. In the opinion of this Court, the document dated 6-1-2005 was a crucial document and petitioners have filed the applications aforesaid for justiciable reasons. The applications are not preferred with any ulterior motive or to delay the proceedings unnecessarily. Since production of said document/record is necessary, the other reasons assigned by the Court below for rejecting the applications cannot also be a ground for upholding the order impugned. Consequently, the order impugned dated 6-7-2012 (Annexure P-7) is set aside. Both the applications preferred by the petitioners/defendants are allowed. The Court below shall proceed from the aforesaid stage.

Petition is allowed. No costs.