
(2010) 05 KAR CK 0044
In the Karnataka High Court
Case No : Writ Petition No. 1315 of 2010

S. Chaya Devi and S. Mohan	Vs	APPELLANT
H. Manjuramaswamy Gowda, Smt. A. Shakuntalamma Murthy and Smt. Sharadamma		RESPONDENT

Date of Decision : 27-05-2010

Acts Referred:

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

Citation : (2010) ILR (Kar) 5242

Hon'ble Judges : Aravind Kumar, J

Bench : Single Bench

Advocate : T.R. Subbanna for B.V. Vidyulatha, for the Appellant; G. Manivannan, for the Respondent

Final Decision : Allowed

Judgement

Aravind Kumar, J.—Defendants 3(a) and 3(b) before the trial court in O.S. No. 4825/1999 are questioning the order dated 12.11.2009 passed by the XIth Additional City Civil Judge, Bangalore City, whereunder the interlocutory application filed under Order 8 Rule 1 of CPC by these defendants seeking leave to file written statement came to be dismissed.

2. The facts in nutshell are as follows:

A suit O.S. No. 4825/1999 came to be filed by the respondent/plaintiff seeking a direction to the first defendant to execute and register absolute sale deed in favour of the plaintiff in respect of suit schedule property and other consequential reliefs. On service of notice defendants appeared and time was sought to file the written statement. The second defendant has not filed the written statement. On 06.08.2006 third defendant expired and on 17.07.2007 the legal representatives of third defendant were brought on record and matter came to be adjourned for filing of the written statement to 17.08.2007 and thereafter to 17.09.2007. Thereafterwards two adjournments were granted by

the trial court to defendants 3(a) and 3(b) to file the written statement. In spite of sufficient opportunity having been given the defendants 3(a) and 3(b) did not file the written statement. On 04.12.2008 an application under Order 8 Rule 1 came to be filed seeking permission to file written statement. The said application came to be resisted by the plaintiffs contending inter alia that parents of applicants i.e., second and third defendant had not filed the written statement and hence these defendants cannot have a better right than what second and third defendant possessed and accordingly sought for rejection of the application. On these grounds amongst others they sought for rejection of the application.

3. The trial court considering the delay aspect rejected the application and It is this order which is now impugned in the present writ petition.

4. I have heard Sri. T.R. Subbanna, learned Senior Counsel appearing on behalf of Smt. B.V. Vidyulatha for petitioner and Sri. G. Manivannan, Learned Counsel appearing for the caveator respondent No. 2.

5. Learned Senior Counsel would submit that only ground on which the trial court had dismissed the application is on the ground of delay namely delay of 1 year 5? months from the date of defendants 3(a) and 3(b) came on record. He would submit that delay had occasioned on account of a criminal case said to have been filed by defendant No. 3(a) against her husband at Hyderabad and she was engaged in getting the same transferred to Bangalore and as such the written statement could not be filed. In support of his submission he relies upon the following decisions:

- 1) Jagdish Chander Chatterjee and Others Vs. Shri Kishan and Another,
- 2) State of A.P. and Another Vs. K. Anil Kumar etc. etc.,
- 3) ILR 2003 Kar 2459 A.V. Purushotam v. N.K. Nagaraj
- 4) 2008 AIR SCW 2739 Zolba v. Keshao and Ors.

6. Per contra Sri. Manivannan, Learned Counsel for the respondent would contend that parents of defendants 3(a) and 3(b) i.e., second and third defendant had not filed the written statement and infact she was denied the permission to file written statement against which she had filed W.P. No. 10843/2003 which was rejected by this Court and as such he would contend that what right second and third defendant did not possess same could not be pressed into service by the legal heirs of defendant No. 3 and as such he supports the order passed by the trial court and seeks for dismissal of the writ petition. He would also rely upon the decision in the case of Vidyawati Vs. Man Mohan and others, and Ramgopal and Another Vs. Khiv Raj and Others, in support of his submission.

7. Having heard the Learned Counsel for the parties and having perused the order passed by the trial court, it is seen the grounds on which trial court had rejected the claim of defendants 3(a) and 3(b) was delay of 1 year 5? months

and also on the ground that defendant No. 3(b) was a major male member could have filed the written statement and same could have been adopted by defendant No. 3(a). The Hon"ble Supreme Court in the case of Zolba v. Keshao and Ors. reported in 2008 AIR SCW 2739 has held to the following effect:

7. Considering the facts and circumstances of the present case and the statements made in the application for condoning the delay in filing the written statement, we are not in a position to hold that the appellant was not entitled to file the written statement even after the expiry of the period mentioned in the proviso to Order 8 Rule 1 of the CPC. After reading the provisions, in particular the proviso to Order 8 Rule 1 are mandatory in nature. In Salem Advocate Bar Association, Tamil Nadu Vs. Union of India (UOI), , it has been clearly held that the provisions including the proviso to Order 8 Rule 1 of the CPC are not mandatory but directory. It has been held in that decision that the delay can be condoned and the written statement can be accepted even after the expiry of 90 days from the date of service of summons in exceptionally hard cases. It has also been held in that decision that the use of the word "shall" in Order 8 Rule 1 of the CPC by itself is not conclusive to determine whether the provision is mandatory or directory. The use of the word "shall" is ordinarily indicative of mandatory nature of the provision but having regard to the decision in that case, the same can be construed as directory. In paragraph 21 of the said decision, this Court observed as follows:

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 hand-maid of justice and not its mistress. In the present context the strict interpretation would defeat justice.

(Emphasis supplied by me)

8. This Court in the case of A.V. Purushotam v. N.K. Nagaraj reported in ILR 2003 Kar 2459 has held filing of the written statement within the period stipulated under Order 8 Rule 1 is a "rule". Receiving the written statement beyond period prescribed under Order 8 Rule 1 is an exception and it is left to the discretion of the Court to exercise the power to receive the written statement beyond stipulated time. The said discretion is a judicial discretion and it cannot be considered as a matter of right. Hence, in a given set of circumstances of the case if the defendants are able to demonstrate that they would come within the exceptional circumstances and were unable to file the written statement within

the period stipulated under Order 8 Rule 1 by receiving the written statement beyond the period stipulated under CPC would (sic) the cause of justice until and unless it is demonstrated by the plaintiff that it would be prejudicial to their interest if the written statement is received on record or if any rights have vested to the plaintiff during this interregnum period. In the absence of these two ingredients, it would not prevent the trial Court from receiving the written statement in order to avoid multiplicity of proceedings. Hence, this Court is of the considered view that cause shown by the defendant for non filing of the written statement comes within the exceptional circumstances and delay by itself as held in Keshao's case referred to supra would not be fatal to receive the written statement. In view of the same, order passed by the trial court is liable to be set aside as it suffers from infirmity on facts and in law.

9. The Counsel for the respondent have relied upon the judgment of Vidyawati v. Man Mohan referred to supra whereunder it has been held that what deceased defendant possessed as right is the only right which the legal representatives can urge when they come on record. The said fact is not in dispute. In the instant case though Sri. Manivannan would contend that second and third defendant had lost right to file written statement by virtue of the order passed in W.P. No. 10843/2003 dated 24.05.2003 that would not scuttle the right of the legal representatives to step into the shoes of the deceased and represent his estate and defend their rights to that extent and not independently. The said principle enunciated cannot be in dispute. As to whether the legal representatives are setting up an independent right or not, is a matter which requires to be considered by the trial court after considering the plea put forward in their written statement. Hence, this Court is of the considered view that the judgment relied upon by the Learned Counsel for the respondents is inapplicable to the facts of the case. Accordingly the order passed by the trial court dated 12.11.2009 is hereby set aside. In view of the delay caused in filing the written statement the defendants 3(a) and 3(b) shall pay to the plaintiff a sum of Rs. 5,000/- as costs and the same shall be paid on the next date of hearing before the trial court and it shall be a condition precedent for the written statement being taken on record.

10. In the course of trial Court order it has observed in Para 8 that as per the directions given by this Court suit has to be disposed of on or before 31.12.2010. In view of the same, following directions are given to the trial Court for compliance and to expeditiously dispose of the suit:

- i) The defendant shall not seek any adjournment and shall co-operate with the trial court in expeditious disposal of the suit.
- ii) The issues if any is to be framed shall be framed by the trial court within four weeks from the date of receipt of the written statement on record,
- iii) Plaintiff is at liberty to lead further evidence if he so desires.
- iv) On completion of the examination in chief and marking of the documents, the

defendants shall be entitled for cross-examination of plaintiffs witnesses and complete the same within two weeks thereafter.

v) On conclusion of plaintiffs evidence defendants are entitled to tender their evidence and conclude their examination in chief within two weeks and plaintiffs shall cross-examine the witnesses of the defendants" within two weeks thereafterwards.

11. On conclusion of the trial as stipulated herein above, the arguments shall be heard and suit shall be disposed of within 31.12.2010 as observed by the trial court.

Accordingly, order dated 12.11.2009 (Annexure-E) passed in O.S. No. 4825/1999 by XI Additional City Civil Judge, Bangalore is quashed and writ petition is allowed.