
(2008) 07 BOM CK 0077

In the Bombay High Court

Case No : Appeal No. 272 of 2008 in Notice of Motion No. 1303 of 2008 In Suit No. 855 of 2001

Saga Department Stores Limited

APPELLANT

Vs

Falak Home Developers Pvt. Limited

RESPONDENT

Date of Decision : 10-07-2008

Acts Referred:

Civil Procedure Code, 1882 — Order 37 Rule 3, Order 43 Rule 1A, Order 8 Rule 1, Order 8 Rule 10, Order 8 Rule 9
Civil Procedure Code, 1908 (CPC) — Section 105(1), 2(9), 97
Constitution of India, 1950 — Article 225, 227
Consumer Protection Act, 1986 — Section 13(2)
Government of India Act, 1935 — Section 107, 108
Industrial Disputes Act, 1947 — Section 17B

Citation : (2008) 5 ALLMR 565 : (2008) 6 BomCR 59 : (2008) 110 BOMLR 2370

Hon'ble Judges : Swatanter Kumar, C.J.;V.M. Kanade, J

Bench : Division Bench

Advocate : Janak Dwarkadas and Rahul Narichania, instructed by B. Amin and Co, for the Appellant; Zubair Dada, instructed by S. Mahomedbhai and Co., for the Respondent

Final Decision : Dismissed

Judgement

Swatanter Kumar, C.J.—A simple but question of some legal importance falls for consideration in the present Appeal. What is the scope of judicial discretion of a Court trying a Suit on the Original Side of this Court with reference to Rules 89 to 91 and 265 of the High Court, Original Side, Rules, 1980 (hereinafter referred to as "the Rules") read with Order VIII Rules 1 and 10 of the Code of Civil Procedure, 1908 ? It is a settled canon of civil jurisprudence that wide discretion is vested with the Court and with the aid of its inherent powers Court can pass orders which may be necessary to achieve the ends of justice. The rules of procedural law are not to scuttle the rights of the parties at the threshold of the proceedings unless an indefeasible right is vested in the other side and it will cause great injustice or prejudice to that party. Exercise of such judicial

discretion has to be in consonance with the settled principles of law, amongst which, it is also a settled principle of law that power of the appellate court to examine the legality, correctness or otherwise of a discretionary order is a limited one and unless such order was perverse, contrary to the statute or where the discretion had been exercised in patent violation to the settled percepts of law, Appellate Court may not interfere.

2. The argument raised by the Appellants in the present Appeal is that the learned Single Judge has passed the impugned order in exercise of discretionary power contrary to the specific provision of law as no special circumstances had been shown by the Defendant Applicant, who had taken out Notice of Motion No. 1303 of 2008, seeking condonation of delay in filing the Written Statement. We may refer to the facts giving rise to the present Appeal as under.

3. The Appellants in the Appeal filed a Suit for specific performance of an Agreement dated 1st April 1999 in relation to the property consisting of land admeasuring 1672.25 sq. mtrs. situate at 257, S.V. Road, Bandra (West), Mumbai and the construction raised thereupon consisting of basement, ground and five upper floors. In addition to the relief for specific performance, the Appellants also claimed a declaration that termination of the said Agreement by the Respondents in the Appeal was illegal and there was a valid, subsisting and binding Agreement. Obviously the Appellants had stated that they were willing and ready to perform their part of the contract and it was for the fault of the Respondents who were not discharging their responsibilities under the Agreement, his part could not be performed. The Writ of Summons was served on the Defendants in April 2001, who in turn filed Vakalatnama in August 2001. It is noticed in the impugned order that the same was misplaced from the Court record and fresh Vakalatnama was filed. The Written Statement was not filed within time. The Respondents had taken out Chamber Summons Nos. 11 of 2002 for inspection. This inspection related to the documents which had been given by the Plaintiffs in another proceedings between the parties and this Chamber Summons was later on withdrawn on 6th June 2006. Number of cases were pending between the same parties. Thereafter the Appellants filed Notice of Motion No. 1223 of 2007 on 30th March 2007 praying that the Court should pass the judgment for want of Written Statement with costs. This Notice of Motion remained pending and the Respondents Defendants on 3rd April 2008 had taken out Notice of Motion No. 1303 of 2008 praying for condonation of delay caused in filing the Written Statement and for taking the same on record. This application of the Respondents was contested by the Appellants vehemently. In the affidavit in support of the Notice of Motion of the Respondents, it was stated that writ of summons was served upon the Respondents on 20th April 2001 and details of nearly 7 proceedings pending between the parties were given. Chamber Summons was taken out for inspection of the original documents in various proceedings. The Appellants had filed a Suit being Suit No. 219 of 2000 which was also withdrawn. The Appellants had filed various proceedings in different Suits together with the Notices of Motion which later were withdrawn. It was also

stated that due to genuine oversight by the Advocate, the Written Statement was not filed in the present Suit and the Respondents tendered unconditional and irreversible apology for the said oversight and prayed that the delay in filing the Written Statement be condoned and the same be taken on record. According to the Appellants, no reason had been stated which could form a specific or sufficient ground for condoning the delay. Once the Written Statement was not filed within ten weeks, the Appellants were entitled to a decree and the Court could not have extended the time for filing the Written Statement in face of the provisions referred by us at the very outset of the judgment. The Court had not granted any further time by a specific order to file Written Statement and the period contemplated under the Rules had since been expired, the Court was divested of its discretion to condone the delay any further. In fact, Notice of Motion No. 1223 of 2007 filed by the Appellants should have been allowed which, in fact, has not even been considered by the learned Single Judge in the impugned order.

4. As is evident from the order impugned in the present Appeal, the Court has only dealt with and disposed of Notice of Motion No. 1303 of 2008 and Notice of Motion No. 1223 of 2007 is not subject matter dealt with in the order impugned in the present Appeal. Thus, we are really not concerned with Notice of Motion No. 1223 of 2007 which is still pending before the learned Single Judge.

5. In terms of Rule 88 of the Rules, wherever the Written Statement is called for by the writ of summons, the Defendant in an ordinary Suit shall file an appearance in person or a Vakalatnama within twelve weeks from the date of the service of Writ of Summons. Under Rule 89, if the Defendant commits any default in filing his appearance in person or in filing a Vakalatnama and Written Statement as required under Rule 74 of the said Rules, the Judge in Chambers may, when the Suit appears in the Court for directions, direct that the Suit be set down on board for disposal as an undefended Suit on the same day or on such other day as the Court deems fit. It is obligatory on the Plaintiff in the Suit to take out an application for want of Written Statement by way of Notice of Motion praying for judgment. No such Notice of Motion shall be issued before the date of which the writ of summons is returnable and once affidavit of service of Notice of Motion is filed, the Suit shall be set down on daily board for the purpose of such application. Even where a Suit has not been set down as undefended against the Defendant, the Defendant shall not be allowed to appear and defend it at the trial except with the leave of the Court or the Judge in Chambers. Leave could be granted to file Written Statement, application for giving discovery on payment of costs of adjournment as a condition precedent to defend or to such terms as the Court may deem fit and proper. Besides this requirement of Rule 91, Rule 265 vests wide powers in the Court to enlarge the prescribed time. The said Rule reads as under:

265. Power of Court or Judge to enlarge or abridge time. The Court or the Judge in Chambers shall have power to enlarge or abridge the time appointed by these

rules or fixed by any order for doing any act or taking any proceedings, 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." The language of Rule 265 indicates the wide discretion that the framers of the Rule intended to vest in the Court. Wherever the time is prescribed under these Rules or time or date is fixed for doing any act, the Court may enlarge the time upon such terms and as the justice of the case may require even if the application was not filed till the expiration of the specified time.

6. The expression "Justice of the case may require" is equivalent to "in the interest of justice" or "ends of justice". Thus, the paramount consideration under the scheme of the rules is to achieve justice rather than frustrate rights of the parties on technical ground, particularly when the rights of the other party can be protected by such terms as may appear in the opinion of the court to be just and proper. The High Court, Original Side rules, which will prevail and take precedence over the provisions of the Civil Procedure Code, also indicate that the provisions under the Rules are not as stringent as the provisions of the Code in regard to the defaults. The scheme of the High Court, Original Side Rules is that where the written statement is not filed as contemplated under Rule 74, the course is not provided that a decree will follow as a natural consequence or automatically. The court is still to fix the suit as undefended and then pass such orders as it may deem fit and proper in the facts of the case including requiring the plaintiff to prove his claim. This may result in passing of a judgment and a decree but even before that stage, the defendant has been given liberty to take out a notice of motion for permission to file written statement and taking such other pleas in the suit which can be allowed by the court subject to such terms and conditions as may be deemed fit and proper in terms of Rule 91 of the said Rules. Interestingly, the provisions of Rule 265 are in addition to and not in derogation to the relevant provisions contained in Rules 88 to 91. Rule 266, in fact, completely dilutes the impact of specified period provided under other rules where the parties by consent in writing can enlarge the time for amending or filing pleadings or of filing and delivery of documents. This could be done without application to the court or even the Judge in chambers. It is apparent that the period indicated in these rules is directory and not mandatory. It is directory even to the extent of providing different options to the court and the parties can even get liberty to enlarge the time fixed by consent.

7. We have just noticed that the provisions of the abovereferred rules are alike the provisions of Rule 1 and Rule 10 of Order 8 though they are not identical. The language of these provisions has not even been worded as stringently as the provisions of the Code where the written statement is required to be filed under Order 8 within 30 days from the date of service of summons and maximum within 90 days. The provisions do not give any specific power to the court to extend the time beyond 90 days. Despite the use of such language in the provisions of the Code, the judicial discretion of the court to extend time has

been a matter of legal scrutiny for quite some time and now, the law is well settled that in special circumstances, the court can even extend the time beyond the period of 90 days specified under Rule 1 Order 8. It will be useful to refer to the judgment where after discussing with some elaboration the judgments of the Supreme Court and other High Courts in the case of Indian Institute of Public Opinion Pvt. Ltd. v. Gopal Krishnan and Anr. 2006 (126) DLT 655, a Bench of Delhi High Court recorded the following findings:

...In order to make the facts clear, reference to the order of the Registrar dated 25th March, 2004 would be more appropriate, but vide that order the right of the plaintiff had not been closed by the order of the Court. The Joint Registrar did not forfeit the right of the plaintiff to file written statement to the counter claim of the defendant, but only noticed it that no further opportunity can be granted to the plaintiff. The JR just stopped on passing an order to that effect, observing that the decree should be passed in terms of the provisions of Order 8 Rule 10 CPC in favour of the defendant or that the right of the plaintiff is forfeited. In fact the intent of the order was that the case be listed before the Court for appropriate directions. The doubt has been raised as to the competency of the Registry to pass an effective order for noncompliance or otherwise in relation to provisions of Order 8 Rule 10 relating to filing of the written statement. It is not necessary for the Court to go into this question in the present case and that too at this stage of the proceedings.

Suffice it to note that no effective order has been passed pronouncing a judgment against the plaintiff for noncompliance of the Order 8 Rule 10 CPC nor that the right stand forfeited. This order could be passed by the Court in its wisdom. The Court approved the order of the Joint Registrar and permitted the suit as well as the counterclaim to be proceeded further in accordance with law i.e. for admission/denial of documents and framing of issues. The provisions of Order 8 Rule 10 of the CPC are directory being part of the procedural law. They are not mandatory provisions which leaves no element of discretion with the Court in regard to passing an order as the Court may deem proper in the given facts. Reference can be made to the judgment of this Court in the case of Indradhanush TV Pvt. Ltd. v. National Film Development Corporation Ltd. (S. No. 232/2004) decided today itself where the Court after discussing and applying the judgment of the Supreme Court on facts held as under:

Whether the provisions of Order 8 Rules 1 and 10 of the Code are directory/regulatory or are mandatory is not more res integra and has been squarely answered by the Supreme Court in the case of Kailash Vs. Nanhku and Others, where the Supreme Court considered at great length the historical background of introduction of the amended provisions of Order 8 in the Code and their effect. It was held by the Court:

41. Considering the object and purpose 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 through 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 not 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 candidate may succeed in enjoying the substantial part, if not in its entirety, the term for which he was elected even though he may lose 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.

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 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 exercised.

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 founded 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.

Still in a more recent judgment again the Supreme Court in the case of Smt. Rani Kusum Vs. Smt. Kanchan Devi and Others, discussed the principles governing provisions of Order 8 in the above regard with some elaboration and held as under:

Next, there must be ever present to the mind the fact that our laws of procedure are grounded on a principle of natural justice which requires that men should not be condemned unheard, that decision should not be reached behind their backs, that proceedings that affect their lives and property should not continue in their absence and that they should not be precluded from participating in them. Of course, there must be exceptions and where they are clearly defined they must be given effect to. But taken by and large, and subject to that proviso, our laws of procedure should be construed, wherever that is reasonably possible, in the light of that principle.

In Topline Shoes Ltd. Vs. Corporation Bank, , the question for consideration was whether the State Consumer Disputes Redressal Commission could grant time to the respondent to file reply beyond total period of 45 days in view of Section 13(2) of the Consumer Protection Act, 1986. It was held that the intention to provide time frame to file reply is really made to expedite the hearing of such matters and avoid unnecessary adjournments. It was noticed that no penal consequences had been prescribed if the reply is not filed in the prescribed time. The provision was held to be directory. It was observed that the provision is more by way of procedure to achieve the object of speedy disposal of the case.

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 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. 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.

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 the 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.

18. The Bench in para 54 after considering the Committee's report has observed as follows:

Having regard to the constitutional obligation to provide fair, quick and speedy justice, we direct the Central Government to examine the aforesaid suggestions and submit a report on this Court within four months.

19. After elaborating the purpose for introduction of Order VIII Rule 1, this Court in Kailash's case (supra) at paragraph 45 observed that no straightjacket formula can be laid down except that observance of time schedule contemplated by Order VIII Rule 1 shall be the rule and departure therefrom an exception, made for satisfactory reasons only. The conclusions have been summed up in para 46. The relevant portion reads as follows:(

(iv) the purpose of providing the time schedule for filing the written statement under Order VIII 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 Rule 1 Order VIII CPC is couched in negative form, it does not specify any penal consequences flowing from the noncompliance. 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 CPC is not completely taken away.

(v) Though Order VIII Rule 1 CPC is a part of procedural law and hence directory, keeping in view the need for expeditious trial of civil cases which persuaded Parliament to enact the provisions 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 is needed to be given for 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 case.

In view of the above recent judgments of the Supreme Court hardly any controversy need to be entertained in regard to the application of these provisions in law. What is significant is applying these provisions to the facts and circumstances of each case.

Applying to above principles to the facts of the present case and particularly in view of the fact that no application itself was filed by the defendants for passing a decree under Order 8 Rule 10 CPC in relation to the counter claim raised in the written statement for all this period, I am of the considered view that it will be causing grave injustice and hardship to the plaintiff if the written statement which has already been on the record of the file since May, 2004 is not permitted to be taken on record and the delay in filing the written statement from March, 2004 to May, 2004 is not condoned. That result is also directly attributable to the plaintiff but was an error on the part of counsel who made a statement on 4th and 25th March, 2004 that written statement to the counterclaim has already been filed. These are some peculiar circumstances which would tilt the equity more in favour of the applicant rather than the plaintiff who himself was not vigilant of the right of the benefit which would accrue to him under the provision of Order 8 Rule 10 CPC.

In view of my above discussion 1A 6210/2004 is allowed and the delay in filing the written statement is condoned. The written statement to the counter claim of the plaintiff which has already been filed, is ordered to be taken on record. The IA is accordingly disposed of while leaving the parties to bear their own costs. The defendant may file replication to the written statement filed by the plaintiff to the counterclaim of the defendant within four weeks from today with advance copy to the other side.

8. Reference can also be made to the judgment of the Supreme Court in Salem Advocate Bar Association, Tamil Nadu Vs. Union of India (UOI), h emphasis enunciated the law that the word "shall" appearing in proviso to Order VIII Rule 1 on its plain reading may appear to be mandatory but after examining it in its true context and having regard to the intention of the legislature, the same can be construed as directory. Discretion of the Court to extend the time shall not be

used so frequently and routinely as to nullify the period fixed by Order 8 Rule 1, but wherever it is necessary the Court can exercise the power as there is no restriction in Order 8 Rule 10 that after expiry of the 90 days, further time cannot be granted by the Court. The Court has wide powers to make such order in relation to the Suit as it thinks fit. Use of this expression sufficiently indicate that the power of the Court is not restricted by the provisions of the Code. It also deserves to be noticed that the provisions of Order VIII Rule 1 requires the Defendant to file the Written Statement within 30 days and in terms of the proviso not later than 90 days from the date of service of summons. As far as Bombay High Court is concerned, this provision has been amended and in terms of the provisions of law applicable to Bombay High Court, the Defendant may and if so required by the Court shall within such time as may be specified in this behalf and within such extended time as the Court may permit present Written Statement of his defence after serving a copy thereof on the Plaintiff or his Pleader. Ordinarily, such period shall not exceed four weeks which would not be extended except for reasons to be recorded in writing. Thus, even in terms of this provision, the extension of time is a matter in the discretion of the Court and could be granted for justifiable reasons recorded in writing.

9. A similar view was taken by the Supreme Court in a very recent judgment in *Zolba v. Keshao and Ors.* AIR 2008 SCW 2739, where the Supreme Court held as under : "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. 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."

10. In the case of *Iridium India Telecom Ltd. Vs. Motorola Inc.,* , the Supreme Court approved the earlier view taken that the Rules framed by the High Court on its Original Side will prevail over the provisions of CPC in the event of conflict. It was held that Bombay High Court, Original Side, Rules, 1957 having been enacted in furtherance to Section 129 of the 1882 Code having a non obstante clause will prevail over the provisions of the CPC as it is indicative of Parliament's intention to prevent the application of CPC in respect of civil proceedings on the Original Side of the chartered High Courts. Besides this, we also find no conflict in the provisions of Order 8 Rule 1 and the Original Side Rules of this Court. They can undoubtedly be construed harmoniously. They are the provisions which regulate the period for filing of the Written Statement, default thereto, and power of the Court to condone and/or extend the delay. Wide power is vested in the Court to condone the delay under the Rules and

there is no justification for giving such a strict interpretation to these procedural Rules that they would frustrate very object of doing justice. At the cost of repetition, but without hesitation, we can note that the Original Side Rules of this Court do not invite any interpretation which can persuade us to accept the contention on behalf of the Appellants that after the expiry of the period provided, the Court cannot condone the delay and permit the Written Statement to be taken on record.

11. In the present case, the Suit was pending before the Court. Written Statement admittedly was not filed within the period of twelve weeks from the date when Writ of Summons was served upon the Respondents in the Appeal. Notice of Motion was taken out for judgment by the Appellants prior to the filing of the Notice of Motion by the Respondents for condonation of delay in filing the Written Statement. The reasons, as already noticed, were that by a bona fide mistake the Written Statement was not filed within the time prescribed and because of multifarious litigations pending between the parties, this mistake could not be noticed. Furthermore, the Power of Attorney (Vakalatnama) filed on record is alleged to have been misplaced. Prior to this, the Respondents had taken out Chamber Summons for inspection of documents in the year 2002. This application remained pending for a considerable time and was withdrawn in June 2006, where after the Notice of Motion for condonation of delay was filed. Even assuming for the sake of argument that these reasons by themselves may not be sufficient reasons for extending the period or condoning the delay in filing the Written Statement, subsequent events in the Suit would show that no serious prejudice is being caused to the Appellants inasmuch as no orders had been made for a considerable time on the Notice of Motion taken out for judgment by the Appellants. In fact, the Appellants did not even press this application for quite sometime as the Notice of Motion for condonation of delay was taken out nearly a year later to that filed by the Appellants. The application for judgment was to be listed for disposal in accordance with the prescribed procedure of Rules 88 to 91 of the Rules and after hearing the parties, the Court could pass a decree or even pass any other order as it may deem fit and proper in the facts and circumstances of the case. From the record, it appears that somewhere in August 2007, the Defendants had even sent Draft Issues to the Appellants after filing their application for condonation of delay which was replied to vide their letter dated 27th August 2007 stating that the Respondents could not proceed by giving a Draft Issues as Notice of Motion No. 1223 of 2007 was pending.

12. The learned Counsel appearing for the Appellants while relying upon the judgment of this Court in the case of Tardeo Properties Pvt. Ltd. v. Bank of India 2007 (5) Bom. C.R. 557, argued to say that the Court should have pronounced the judgment in default of filing of Written Statement and could not condone the delay. We are unable to deduce any such principle from the aforesaid Division Bench judgment of this Court. On the contrary, the judgment clearly states that the provisions of the Original Side Rules would be applicable and have precedence over the Rules of CPC and the Court held "there is thus no case for

pronouncing a judgment merely because there is failure on the part of the Defendant to file a Written Statement". In other words, only option which would be available to the Court would be to ask the Plaintiff to prove the case before the pronouncement of the judgment.

13. It is also contended on behalf of the Appellants that no regret is shown for such inordinate delay by the Respondents and the reason given for condonation of delay is vague. Firstly, it is not factually correct. In the affidavit filed at page 7 of the paperbook, the Defendants have recorded the inordinate delay and has stated it to be attributable to a bona fide error appearing on the part of the Advocates and for which the learned Single Judge has imposed sufficient costs of Rs. 50,000/as compensatory costs for the unnecessary delay caused by the Respondents. The discretion is vested in the Court to pronounce a judgment after hearing the parties or even at that stage to pass such other orders as the Court may deem fit and proper. With respect, we follow the view taken by the Division Bench of this Court in the case of Tardeo Properties Pvt. Ltd. (supra) to say that it is not an automatic result of default in filing the Written Statement within twelve weeks that necessarily a decree will follow in favour of the Plaintiff (Appellants). The learned Judge has exercised discretion and has weighed the equities between the parties by imposition of heavy costs. This discretion does not call for interference merely on the ground that the Court could have taken a different view than the one expressed by it. The Appellate Court would normally not interfere in exercise of judicial discretion unless it was patently unjust or ex facie perverse. The present case does not fall in any of these categories and the impugned order in any case is not contrary to law.

14. The learned Counsel appearing for the Respondents while relying upon the judgment of the Supreme Court in the case of Shah Babulal Khimji Vs. Jayaben D. Kania and Another, , argues that the present Appeal of the Appellants was not maintainable inasmuch as the Appeal was against an interlocutory procedural order and thus was not a judgment within the meaning of Clause 15 of the Letters Patent. The contention is that by the impugned order only time for filing the Written Statement has been extended and/or condoned that amounts to passing an order which is purely interlocutory and cannot constitute a judgment. Parties can always raise a grievance against the order while preferring an Appeal against the final judgment. Emphasis was placed on paragraph 114 of the judgment.

15. No doubt it is a settled position of law that orders which are merely procedural where there is no determination of rights and obligation of the parties would hardly be prejudicial to the rights of a party in the pending lis and, therefore, would be orders not appealable because they would not be a judgment within the meaning of Clause 15 of the Letters Patent. In the above referred paragraph of the judgment in the case of Shah Babulal Khimji (supra), the Supreme Court itself noticed that an order refusing an adjournment, an order of refusing to summon additional witness, condonation of delay in filing documents

are orders of routine nature and those are procedural interlocutory orders. They are steps to be taken for prosecution of the Suit simplicitor.

16. In the present case, it cannot be said that order passed on a Notice of Motion for condonation of delay in face of Rules 89 to 91 and 265 of the High Court Original Side Rules read with Order 8 Rule 1 of the CPC, would be a mere procedural order or an order merely a step in prosecution of the Suit. The result of this order would have very serious consequences on the right and obligation of the parties. In the event the application for condonation was declined, the Appellants would have been entitled to a judgment as in terms of its Notice of Motion No. 1223 of 2007. The parties were heard, the Court applied its mind and by a detailed order exercised its judicial discretion in extending the time for filing the Written Statement, which, but for the leave of the Court, could not have been filed after the expiry of twelve weeks from the date of Writ of Summons was served upon the Respondents. Thus, it was a determination by the Court on a material aspect of the Suit which, if declined, could even result in final disposal of the Suit. The Suit had already been listed as undefended Suit as per the Original Side Rules and the rights of the parties were affected as a result of passing of the impugned order. It could even be equated to a situation where leave to defend is either granted or refused under the provisions of Order 37 of the CPC which is said to be a judgment within the meaning of Clause 15 of the Letters Patent and which would be appealable. In this regard, reference can be made to a recent Full Bench judgment of this Court in the case of Emkay Exports and Anr. v. Madhusudan Shrikrishna, Appeal No. 370 of 2007 in Summons for Judgment No. 669 of 2003 in Summary Suit No. 2171 of 2004, decided on 26th June 2008, where the Court held as under:

29. Let us examine some of the judgments which would throw some light in relation to the principles involved in the present case. Right from the case in Shah Babulal Khimji Vs. Jayaben D. Kania and Another, , the Court discussed in detail the meaning of the word "judgment" appearing in Clause 15 of the Letters Patent and its scope. The basic test to determine as to whether an order would be a judgment within the meaning of the clause or not, being the order which decide matters of moment or affect vital and valuable right of the parties and which will cause serious injustice to the parties concerned would normally be judgment within the meaning of the charter and thus appealable. The Supreme Court clearly stated that an order refusing leave to defend the Suit under Order 37 would be an order which would be covered under the scope of judgment.

30. Satyadhyam Ghosal and Others Vs. Sm. Deorajin Debi and Another, , was a case where the Court noticed that principle of res judicata is based on the need of giving a finality to a judicial decision and once a res is adjudicated, it shall not be adjudged again. The purpose is to prevent the parties from reagitating issues over and over again. In that case where the landlord had obtained a decree for ejectment against the tenant, an application under Order 9 Rule 13 for setting aside the decree was filed which was dismissed and thereafter an application was

made by the tenant u/s 28 of the Calcutta Thika Tenancy Act who prayed for assignment of the decree. While determining the plea of res judicata, the Court squarely dealt with the question whether the interlocutory orders which were not appealable or where no appeal was preferred could or could not be challenged in the final decree preferred. The Court held as under:

16. It is clear therefore that an interlocutory order which had not been appealed from either because no appeal lay or even though an appeal lay an appeal was not taken could be challenged in an appeal from the final decree or order. A special provision was made as regards orders of remand and that was to the effect that if an appeal lay and still the appeal was not taken the correctness of the order of remand could not later be challenged in an appeal from the final decision. If however an appeal did not lie from the order of remand the correctness thereof could be challenged by an appeal from the final decision as in the cases of other interlocutory orders. The second subsection did not apply to the Privy Council and can have no application to appeals to the Supreme Court, one reason being that no appeal lay to the Privy Council or lies to the Supreme Court against an order of remand.

31. No provision has been brought to our notice which on its plain language or even by necessary implication, would support the view that the orders made during the pendency of the suit, particularly orders under Rule 3 of Order 37 which ultimately may result into passing of the decree, cannot be assailed or challenged in an appeal against the decree. The appellant challenging the final decree can safely argue that the orders passed during the pendency of the suit ought not to have been passed and the judgment could not have been pronounced. However, this is subject to the condition that the orders made during the pendency of the suit were not affirmed by the appellate court or court of higher jurisdiction in an appeal taken out by the aggrieved party against whom finally a decree is made. The doctrine of finality and principles of res judicata, constructive or otherwise, would justify introduction of such an exception. The parties cannot be permitted to agitate and reagitate the same issues which have attained finality at different stages of the suit or even in an appeal. This can be viewed from another angle. During the pendency of the suit different kinds of orders could be passed, the ones which are interlocutory orders of procedural nature hardly have any bearing on the matters in issue or on the rights of the parties, while the others are interlocutory orders which determine the controversy and affect the rights of the parties to the suit. Such orders could prejudice the interest of the party against whom they are passed. The former class of orders which are not appealable under Order 43 would also not be appealable with the aid of Clause 15 of the Letters Patent, while the later class of orders would be appealable under either of the statutory provisions. We have already discussed in some detail the orders which would squarely fall within the ambit of expression "judgment" in Clause 15 of the Letters Patent. Does it mean that the party is bound to appeal every interlocutory order which even may be a step in the procedure that leads to a final decree? This question was answered in

the negative by the Privy Council in *Sheonoth v. Ramnath* (1865) 10 MIA 413 and explained by the Supreme Court in *Achal Misra Vs. Rama Shanker Singh and Others*, . The Supreme Court held as under:

13. This principle is recognised by Section 105(1) of the CPC and reaffirmed by Order 43 Rule 1A of the Code. The two exceptions to this rule are found in Section 97 of the Code of Civil Procedure, 1908, which provides that a preliminary decree passed in a suit could not be challenged in an appeal against the final decree based on that preliminary decree and Section 105(2) of the Code of Civil Procedure, 1908 which precludes a challenge to an order of remand at a subsequent stage while filing an appeal against the decree passed subsequent to the order of remand. All these aspects came to be considered by this Court in *Satyadhyan Ghosal v. Deorajin Debi* wherein, after referring to the decisions of the Privy Council, it was held that an interlocutory order which had not been appealed from either because no appeal lay or even though an appeal lay, an appeal was not taken, can be challenged in an appeal from a final decree or order. It was further held that a special provision was made in Section 105(2) of the CPC as regards orders of remand where the order of remand itself was made appealable. Since Section 105(2) did not apply to the Privy Council and can have no application to appeals to the Supreme Court, the Privy Council and the Supreme Court could examine even the correctness of an original order of remand while considering the correctness of the decree passed subsequent to the order of remand. The same principle was reiterated in *Amar Chand Butail v. Union of India* and in other subsequent decisions.

32. In a more recent judgment in the case of *Employer in Relation to Employer in Relation to Managment of Central Mine Planning and Design Institute Ltd. Vs. Union of India and Another*, , in view of the expression "judgment" occurring in Clause 10 of the Letters Patent of the High Court of Judicature at Patna, the Supreme Court stated that interlocutory order dealing with an application u/s 17B of the Industrial Disputes Act would be a judgment and appeal would lie and the test of Section 2(9) of the CPC would not operate *stricto sensu* in examining the scope of judgment under Clause 10. The court held as under:

...

8. A close reading of the provision, quoted above, shows that it has three limbs : the first limb specifies the type of judgments of one Judge of the High Court which is appealable in that High Court and the categories of judgments/orders which are excluded from its ambit: the second limb provides that notwithstanding anything provided in the first limb, an appeal shall lie to that High Court from judgment of one Judge of the High Court or one Judge of any Division Court, pursuant to Section 108 of the Government of India Act (now Article 225 of the Constitution of India), on or after February 1, 1929, passed in exercise of appellate jurisdiction in respect of a decree or order made in exercise of appellate jurisdiction by a Court subject to the superintendence of the said High Court where the Judge who passed the judgment declares that the case is a

fit one for appeal; and the third limb says that the right of appeal from other judgments of Judges of the said High Court or such Division Court shall be to "us, our heirs or successors in our or their Privy Council, as hereinafter provided.

...

10. The above analysis of Clause 15 of the Letters patent will equally apply to Clause 10 of the Letters Patent of Patna. It follows that an appeal shall lie to larger Bench of the High Court of Judicature at Patna from a judgment of one judge of the said High Court or one judge of any Division Court pursuant to Article 225 of the Constitution of India. The following categories of judgment are excluded from the appealable judgments under the first limb of Clause 10 of the Letters Patent:

(i) a judgment passed in exercise of appellate jurisdiction in respect of a decree or order made in exercise of appellate jurisdiction by a Court subject to superintendence of the said High Court in other words no letters patent appeal lies to the High Court from a judgment of one judge of the High Court passed in second appeal:

(ii) an order made by one judge of the High Court in exercise of revisional jurisdiction; and

(iii) a sentence or order passed or made in exercise of power under the provisions of Section 107 of Government of India Act, 1935 (now Article 227 of the Constitution of India) or in exercise of criminal jurisdiction.

11...

12. The next question which needs to be considered is, what does the expression 'judgment' mean? That expression is not defined in Letters Patent. It is now well settled that definition of 'judgment' in Section 2(9) of Code of Civil Procedure, has no application to Letters Patent. That expression was interpreted by different High Courts of India for purposes of Letters Patent. In *Asrumati Debi Vs. Kumar Rupendra Deb Raikot and Others*, , a four-Judge Bench of this Court considered the pronouncements of the High Court of Calcutta in *Justices of the Peace for Calcutta v. Oriental Gas Co.* (1872) 8 Beng LR 433, the High Court of Ragoon in *Dayabhai v. Murugappa Chettiar* (1935) ILR 13 Ran 457 : AIR 1935 Ran 267, the High Court of Madras in *Tuljaram v. Alagappa* ILR (1912) Mad 1, the High Court at Bombay in *Sonebai v. Ahmedbhai* (1871) 9 Bom HCR 398 , as also the High Court at Nagpur, the High Court at Allahabad and Lahore High Court and observed as follows:

In view of this wide divergence of judicial opinion, it may be necessary for this Court at some time or other to examine carefully the principles upon which the different views mentioned above purport to be based and attempt to determine with as much definiteness as possible the true meaning and scope of the word 'judgment' as it concurs in Clause 15 of the Letters Patent of the Calcutta High Court and in the corresponding clauses of the Letters Patent of the other High

Courts.

13...

14. In the instant case, we are concerned with the last mentioned category. From the above discussion, it follows that to determine the question whether an interlocutory order passed by one judge of a High Court falls within the meaning of 'judgment' for purposes of Letters Patent the test is : whether the order is a final determination affecting vital and valuable rights and obligations of the parties concerned. This has to be ascertained on the facts of each case.

15. Adverting to the facts of this case, Section 17B of the I.D. Act confers valuable rights on the workmen and correspondingly imposes an onerous obligations on the employer. The order in question passed by the learned single Judge determines the entitlement of the workmen to receive benefits and imposes an obligation on the appellant to pay such benefits provided in the said section. That order cannot but be 'judgment' within the meaning of Clause 10 of Letters Patent, Patna. The High Court is obviously in error in holding that the said order is not judgment within the meaning of Clause 10 of the Letters Patent of Patna.

17. In the case of Collector of Bombay v. Issac Penhas AIR 1948 Bom 103, this Court took the view that judgment under Clause 15 means a decision which concludes the merits of the question between the parties by determining some right or liability. The order which would be appealable has to be seen in contradistinction to a mere formal order or an order merely regulating the procedure in the Suit. Once the order affects the rights of the parties in a substantial manner or could result in serious prejudice to the right of a party, in those circumstances, order could be termed as judgment. It will be more so where the order could result into final culmination of the proceedings by passing of a judgment as a result of the default. It could put an end to the Suit or proceedings so far the Court before which the Suit was pending.

18. In our considered opinion, thus the impugned order would be appealable particularly in light of the language and consequences flowing from default as contemplated under Rules 89 to 91 of the High Court, Original Side, Rules and Order 8 Rule 1 of the Civil Procedure Code. We have already discussed the merit and otherwise of the various contentions raised before us by the parties and have answered them in favour of the Respondents and against the Appellants. Resultantly, the objection raised by the Respondents loses its significance and we do not wish to elaborate our discussion any further on this issue.

19. For the reasons aforesated, we do not find any merit in the Appeal. The same is dismissed leaving the parties to bear their own costs.