

**(2010) 07 BOM CK 0048**  
**In the Bombay High Court**  
**Case No : Writ Petition No. 691 of 2009**

Shri Dattaram Krishnanath Pednekar, Smt. Manoramabai  
Dattaram Pednekar and represented by their duly constituted  
Attorney Shri Premanand Dattaram Pednekar and Smt.  
Savitri Gopal Pednekar represented by her duly constituted  
Attorney Shri Vallabh Gopal Pednekar

APPELLANT

Vs

Shri Pandurang K. Pednekar and Others

RESPONDENT

**Date of Decision : 02-07-2010**

**Acts Referred:**

Civil Procedure Code Amendment Act, 1976 — Order 8 Rule 1, Order 8 Rule 6A, Order 8 Rule 6A(3), Order 8 Rule 6A(4), Order 8 Rule 6G

**Citation : (2010) 4 ALLMR 525 : (2010) 4 BomCR 481**

**Hon'ble Judges : N.A. Britto, J**

**Bench : Single Bench**

**Advocate : S.R. Rivonkar, for the Appellant; F. Mesquita, for the Respondent**

## Judgement

N.A. Britto, J.—Rule. By consent, heard forthwith.

2. The Petitioners herein are the plaintiffs in Regular Civil Suit No. 177/2007/A and shall, hereinafter, be referred to as such.

3. In this Writ Petition, they have challenged the Order dated 20-8-2009 of the learned Civil Judge, Senior Division, Mapusa by which they have been disallowed to file written statement to the counterclaim.

4. Heard Shri S.R. Rivonkar, the learned Counsel on behalf of the plaintiffs and Ms. F. Mesquita, the learned Counsel on behalf of the Respondent Nos. 2 to 7 i.e. the Defendants in the said Civil Suit.

5. There is no dispute that the Defendants filed written statement with counterclaim on 8-2-2008.

6. On 14-3-2008, the case was simply adjourned and was fixed for arguments on application for temporary injunction on 17-4-2008. On this day, an application

was filed by the plaintiffs seeking time to file written statement to the counterclaim and the same was granted by the Court as it was not objected to on behalf of the Defendants. The case was again taken up on 30-4-2008 and as the plaintiffs were absent it was fixed for arguments on application for temporary injunction on 2-7-2008.

7. There were no sittings of the Court on 2-7-2008, 7-8-2008, 3-10-2008, 4-11-2008 and 6-12-2008. On 30-1-2009, the plaintiffs filed an application seeking time to file written statement in answer to the counterclaim. In this application, it was, inter alia, stated that on going through the file it was found that no reply i.e. W.S. was filed by the plaintiffs to the counterclaim. The same came to be rejected on the ground that there was no explanation for filing the W.S. beyond 90 days. On the same day, the plaintiffs filed a comprehensive application, styling the same as an application for condonation of delay in filing the written statement to the counterclaim. In the said application, it was set out by the plaintiffs in detail, that some of the documents relied upon by the defendants in the counterclaim were not furnished to the Plaintiffs, and, therefore they had filed an application directing the Defendants to furnish the said documents; thereafter there was no Presiding Officer and the dates were being given by the Bench Clerk; that subsequently, the documents were submitted by the Defendants to the plaintiffs on 16-4-2008, and accordingly the written statement was prepared and handed over to the plaintiffs for verification; in the meantime, there were talks for settlement between the plaintiffs and the Defendants, as the plaintiffs and Defendants were the co-owners of the suit property; that there was another suit bearing R.C.S. No. 520 of 2000 which was pending before the Civil Judge, Junior Division at Mapusa wherein it was recorded that the parties were negotiating settlement and talks for settlement were going on; that the written statement to the counterclaim although was prepared and was ready to be filed remained without being verified and remained with the plaintiffs; that in the meantime, the plaintiffs' grand-daughter expired in an accident, and, therefore the plaintiffs were in grief and were depressed; that the plaintiffs were in bona fide impression that since the Presiding Judge was not sitting and the dates were being given by the Bench Clerk, the plaintiffs would have filed the written statement when the Presiding Judge presided and sat in the Court; that an application for adjournment was filed and the same was rejected.

8. The plaintiffs, therefore, got verified the written statement and presented it to the Court and since the written statement was filed after the expiry of 90 days, the Court refused to take the same on record;

9. Therefore, the said application was filed to seek condonation of delay in filing the written statement to the counterclaim. The learned trial Court by the impugned Order came to the conclusion that since the statute prescribed certain period, the said period could not be enlarged further by the Court. Although, some decisions were cited before the learned trial Court the same were simply

brushed aside observing that the ratio mentioned therein was not applicable to the facts and circumstances of the case, and, therefore the learned trial Court refused to condone the delay and dismissed the application.

10. Shri S.R. Rivonkar, the learned Counsel appearing on behalf of the plaintiffs submits that the learned trial Court did not at all consider the reasons set out by the plaintiffs in their application dated 30-1-2009. Learned Counsel further submits that explanation was given by the plaintiffs showing cause as to why they could not file the W.S. to the counterclaim within 90 days.

11. On the other hand, Ms. F. Mesquita, the learned Counsel appearing on behalf of the Defendants submits that in the first application filed by the plaintiffs on 30-1-2009 the plaintiffs had made false statements. Learned Counsel further submits that the approach of the plaintiffs in filing the first application was very casual.

12. Shri Rivonkar, the learned Counsel has placed reliance on a decision of this Court in the case of Mrs. Shalini Nunes Mascarenhas and Ors. v. Mr. Trevor Nunes and Anr. 2009 (2) Goa L.R. 222 to contend that the time limit to file a W.S. to the counterclaim was governed by Order 8, Rule 6A(3) which provides that the plaintiffs shall be at liberty to file written statement in answer to the counterclaim of the Defendants within such period as may be fixed by the Court. Ms. Mesquita, the learned Counsel appearing on behalf of the Defendant Nos. 2 to 7 has then submitted that the decision in the case of Mrs. Shalini Nunes Mascarenhas and Ors. v. Mr. Trevor Nunes and Anr. (supra) is per incuriam in that it did not take into consideration the provision of Rule 6G of Order 8, C.P.C. which provides that the Rules relating to a written statement by a defendant shall apply to a written statement filed in answer to a counterclaim.

13. Be that as it may, there can be no dispute that the provisions of Rule 6A onwards of Order 8, C.P.C. were inserted by the CPC (Amendment) Act, 1976 w.e.f. 1-2-1977 while the provisions of Rule 1 of Order 8 were substituted by the Code of Civil Procedure(Amendment) Act, 2002 w.e.f. 1-7-2002. It is well settled by now that the provision of Rule 1, Order 8, is directory and not mandatory and it can be stretched in rare and exceptional cases. Rule 1, Order 8 was intended to cut down laws of delays, intentionally created or otherwise. In this context, it would be apt to refer to the case of Smt. Rani Kusum Vs. Smt. Kanchan Devi and Others, wherein the Apex Court has stated that Order 8, Rule 1, after the amendment casts an obligation on the defendant to file the written statement within 30 days from the date of service of summons on him and within the extended time falling within 90 days. The provision does not deal with the power of the Court and also does not specifically take away the power of the Court to take the written statement on record though filed beyond the time as provided for. The substituted Order 8, Rule 1 intends to curb the mischief of unscrupulous defendants adopting dilatory tactics, delaying the disposal of cases causing inconvenience to plaintiffs and petitioners approaching the Court for quick relief and also to the serious inconvenience of the Court faced with frequent prayers

for adjournments. The object is to expedite the hearing and not to scuttle the same.

14. The Apex Court in *R.N. Jadi and Brothers and Others Vs. Subhashchandra*, has held that the provisions of Order 8, Rule 1 are directory but that the grant of extension of time beyond 30 days is not automatic, that it should be exercised with caution and for adequate reasons and that an extension of time beyond 90 days of the service of summons must be granted only based on a clear satisfaction of the justification for granting such extension, the Court being conscious of the fact that even the power of the Court for extension inhering in Section 148 of the Code, has also been restricted by the legislature. It would be proper to encourage the belief in litigants that the imperative of Order 8, Rule 1 must be adhered to and that only in rare and exceptional cases, will the breach thereof will be condoned. Such an approach by Courts alone can carry forward the legislative intent of avoiding delays or at least in curtailing the delays in the disposal of suits filed in Courts. The lament of Lord Denning was also quoted that "the law's delays have been intolerable and last so long as to turn justice sour, is true of our legal system as well. Should that state of affairs continue for all times?"

15. Reverting to the controversy, that the provisions of Order 8, Rule 1, do not apply to a written statement in answer to the counterclaim is a question which is no longer *res integra*, with the decision of this Court in the case of *Mrs. Shalini Nunes Mascarenhas and Ors. v. Mr. Trevor Nunes and Anr.* (supra) wherein this Court has held that the filing of the written statement to the counterclaim, is not governed by Order 8, Rule 1, C.P.C. but it is governed by Order 8, Rule 6A(3), C.P.C. In terms of the said sub-rule, the trial Court is expected to fix time for filing the written statement to the counterclaim. The necessary conclusion, therefore, is that Order 8, Rule 1, C.P.C. is not applicable to the written statement filed by the plaintiffs to the counterclaim filed by the Defendants. In my view, the provisions of Rule 6G of Order 8 have nothing to do with the provisions of Sub-rule (3) of Rule 6A, Order 8. When Rule 6G, Order 8 states that the Rules relating to a written statement by Defendant shall apply to a written statement filed in answer to a counterclaim, it only refers to the contents of the W.S. and has nothing to do with the time limit set out for filing of the written statement in answer to counterclaim, in Sub-rule (3) of Rule 6A, Order 8. Likewise, when Sub-rule (4) of Rule 6A of Order 8 provides that the counterclaim shall be treated as a plaint and governed by the Rules applicable to plaints, it has nothing to do with Order 8 but will have everything to do with Order 7, which deals with contents of a plaint.

16. Therefore, the conclusion is inescapable that the time limit of filing a W.S. in answer to a counterclaim is governed by Sub-rule (3), Rule 6A, Order 8, C.P.C. i.e. within such time as may be fixed by the Court.

17. Does that mean, a plaintiff can get time, time and again, to file a W.S. to the counterclaim and delay the trial of the suit? It is not that it is always the

defendant/s who are interested in delaying a suit. At times, the plaintiff/s are also interested for delaying the trial of the suits. At times the Courts as well as the parties remain focused on applications for temporary injunctions, forgetting the need to file W.S. either to the claim or counterclaim.

18. The Courts therefore will do well, to keep in mind the mandate of Rule 1, Order 8, C.P.C, while fixing or extending the time to file W.S. in answer to the counterclaim under Sub-rule (3) of Rule 6A and follow the said provision to the extent it is applicable. In other words, the provision of Order 8, Rule 1, could be read into the provision of Sub-rule (3), Rule 6A, Order 8, C.P.C., whilst considering fixing or extending the time for filing the W.S. to the counterclaim. As is often said "what is sauce for the goose should also be sauce for the gander".

19. Reverting to the facts of the case, Shri Rivonkar is right that the learned trial Court has not at all considered the reasons assigned by the plaintiffs to extend the time. On 14-3-2008, the Court remained busy, and the suit was just adjourned for arguments on interim application. On 17-4-2008, the plaintiffs did seek time. From 2-7-2008 to 6-12-2008 there was no Presiding Officer and on 30-1-2009 the applications for extension/condonation were filed. The reasons assigned by the plaintiffs cumulatively considered were sufficient to extend the time for filing the W.S. in answer to the counterclaim which have not at all been considered by the learned Civil Judge, Senior Division.

20. Considering the facts of the case, in my view, this Writ Petition deserves to succeed. Both the Orders dated 30-1-2009 and 20-8-2009 of the learned Civil Judge, Senior Division are hereby set aside. The W.S. filed by the plaintiffs, if not on record, shall be taken on record on 12-7-2010. Both the parties are hereby directed to appear before the learned Civil Judge, Senior Division on 12-7-20 10 at 10.00 a.m. for further proceedings. Rule made absolute on the above terms with no order as to costs.