

(2008) 12 GAU CK 0021

In the Gauhati High Court

Case No : Civil Revision Petition No. 4 of 2008

Thokchom Ongbi Gayabati Devi and Others

APPELLANT

Vs

Konthoujam Bebungou Singh and Another

RESPONDENT

Date of Decision : 19-12-2008

Acts Referred:

Civil Procedure Code Amendment Act, 1999 — Order 8 Rule 10, Order 8 Rule 9
Civil Procedure Code, 1908 (CPC) — Order 6 Rule 15(4), Order 8 Rule 1, 141

Citation : (2009) 2 GLT 801

Hon'ble Judges : T. Nandakumar Singh, J

Bench : Single Bench

Advocate : O. Kiranjit, for the Appellant; Kh. Santa, for the Respondent

Final Decision : Allowed

Judgement

T. Nandakumar Singh, J.—This revision petition is directed against the very cryptic order dated 12.6.2008 passed by the learned Civil Judge (Jr. Divn.), Imphal in Judl. Misc. Case No. 72-A of 2008 (Ref. Original Suit No. 34 of 2007) for allowing the Respondent/Defendant No. 1 Shri Konthoujam Babungou Singh to file the written statement subject to cost of Rs. 300/-. The impugned cryptic order dated 12.6.2008 is quoted hereunder:

THE ORDER PASSED ON 12.6.2008.

Heard both the learned Counsel. Perused the materials on record, also gone through, the provision of Order 8, Rule 1. The reasons given by the Plaintiff/Defendant is satisfactory.

Hence, leave granted to file written statement. However a cost of Rs. 300/- is to be paid.

Sd/- (A. Noutuneshwari Devi) Civil Judge (Junior Division), Imphal

2. Mr. O. Kiranjit, learned Counsel, appears for the Petitioners/Plaintiffs in Original Suit No. 34 of 2007. None appears for the Respondent/Defendant No. 2,

Shri Thokchom Nilachandra Singh without showing any cause inspite proper service of notice of the Revision petition. Mr. Kh. Santa appears for the Respondent/Defendant No. 1, Mr. Konthoujam Babungou Singh.

3. The present Petitioners, as the Plaintiffs, had filed Original Suit No. 34 of 2007 against the Respondent No. 1/Defendant No. 1 Mr. Konthoujam Babungou Singh and Respondent No. 2/Defendant No. 2 Mr. Thokchom Nilachandra Singh, in the Court of Civil Judge (Jr. Divn.) Imphal. The gist, prepared by the Petitioners, of the day to day orders passed by the learned Civil Judge (Jr. Divn.) Imphal in Original Suit No. 34 of 2007 is stated hereunder:

(i) 19.9.2007 Filing of the Suit

(ii) 20.9.2007 Passing of ex-parte interim injunction Order and taking steps by registered post for serving Summons to the Respondents.

(iii) 4.10.2007 Counsel for the Defendant 2 filed Vakalatnama on his behalf and waited for Service reports of summons to Defendant 1.

(iv) 31.10.2007 Re-issue summons upon defendant 1 and steps was taken by the Plaintiffs.

(v) 3.11.2007 Steps was again taken through process server upon Defendant 1.

(vi) 15.11.2007 Plaintiffs were directed to take steps through the local daily newspapers for serving summons to Defendant 1.

(vii) 17.11.2007 Summons issued on 15.11.2007 to the Defendant 1 by publication in the "Naharolgee Thoudang" local Daily newspaper.

(viii) 28.11.2007 Order for ex-parte proceedings against Defendant 1 was passed and the Hon'ble Court further directed Defendant 2 to file his written statement.

(ix) 11.12.2008 Defendant 2 filed his written statement to the main suit (Original Suit No. 34 of 2007) and the same was fixed on 27.12.2007 for issue hearing.

(x) 13.12.2007 The case was not fixed on that day. However, Defendant 1 filed his power of Attorney (Vakalatnama). (xi) 27.12.2007 Suggested Issue submitted by the Plaintiffs was allowed and prepared for ex-parte hearing against Defendant 1 by framing the issue. Later, on that day, Counsel for Defendant 1 present.

(xii) 5.1.2008 Fixed on 22.1.2008 for further proceedings.

(xiii) 22.1.2008 Fixed on 2.2.2008 for further proceedings.

(xiv) 2.2.2008 Fixed on 16.2.2008 for further proceedings.

(xv) 16.2.2008 Fixed on 1.3.2008 for further proceedings.

(xvi) 1.3.2008 The earlier order for exparte proceedings against Defendant 1 dated 28.11.2007 was set aside with costs of Rs. 200/- and the case was fixed on 15.3.2008 for P.W. hearing and further proceedings.

(xvii) 15.3.2008 Case was fixed on 29.3.2008 for P.W. hearing and further proceedings.

(xviii) 29.3.2008 Fixed on 17.4.2008 for P.W. hearing and further proceedings.

(xix) 17.4.2008 Examination-in-Chief of P.W. 1 on affidavit was filed by the Plaintiffs. Meanwhile Defendant 1 also filed Judicial Misc. Case No. 72(A) of 2008. and the Hon'ble Court directed to put up the said Examination-in-Chief of PW 1 on affidavit after disposal of the said Judicial Misc. case.

(xx) 3.5.2008 Fixed on 31.5.2008 for written objection to Judicial Misc. Case No. 72(A) of 2008.

(xxi) 31.5.2008 Written objection was filed by the Plaintiffs and fixed on 7.6.2008 for hearing of the said Misc. Case.

(xxii) 7.6.2008 After hearing, fixed on 12.6.2008 for order.

4. On perusal of the day to day order sheet of the Original Suit No. 34 of 2007, it appears that on 28.11.2007, the learned Civil Judge (Jr. Divn.) Imphal passed the order for proceeding the O.S. No. 34 of 2007 as exparte against the Respondent/Defendant No. 1, Shri Konthoujam Babungou Singh, and also even after effecting proper service of notice/summon to the Respondent/Defendant No. 1, he did not file his written statement in the O.S. No. 34 of 2007 within 30 days from the date of service of summon on him. After 141 days from the date of proceeding the O.S. No. 34 of 2007 as exparte, Respondent/Defendant No. 1 filed an application, which had been registered as Judl. Misc. Case No. 72(A) of 2008, for allowing to file the written statement to the plain in O.S. No. 34 of 2007. A copy of the said application i.e. Judl. Misc. Case No. 72(A) of 2008 filed by the Respondent/Defendant No. 1 is available at Annexure-A/14 to the present Revision petition and the same is quoted hereunder:

In the Court of the Civil Judge Junior Division, Imphal Judl. Misc. Case No. 72(A) of 2008 Ref: Original Suit No. 34 of 2007.

1. Smt. Thokchom Ongbi Gyabati Devi and two Ors. ...Plaintiffs. v. 2. Shri Thokchom Babungou Singh and one Anr. ...Defendants. In the matter of:

An application of the Defendant No. 1 praying for allowing to file the written statement to the plaint of the Plaintiffs.

Most Respectfully Sheweth:

1. That, the present applications is filed by the Defendant No. 1 seeking permission of the Hon'ble Court for filing of his written statement in the above-referred original suit.

2. That, the Defendant No. 1 filed his power of attorney on 13.12.2007 and file his written statement with counter claim on 4.2.2008.

3. That, though bonafide mistake and oversight, the Defendant No. 1 filed his written statement with counter claim and written objection on 4.2.2008 without the knowledge of order dated 28.11.2007 proceeded ex-parte against the Defendant No. 1. The said ex-parte order was set aside on 1.3.2008.

4. That, the Defendant No. 1 submitted that on 13.12.2007 the counsel of the Defendant No. 1 and on the order sheet of the case the date was wrongly written as 28.2.2007 and the counsel of the Defendant No. 1 presumed that the date might be 28.12.2007 and through bonafide mistake of the Court, Court might pass the order of ex-parte as on the earlier dated i.e. 13.12.2007 the power of attorney of the Defendant No. 1 was filed. But after due enquiry the said date of 28.2.2007 was wrong it should be 28.11.2007.

5. That, the Defendant No. 1 and his counsel have no any malafide intention to do those unwanted incidents.

6. That, the Defendant No. 1 desires to file his written statement and written objection along with the additional documents so as to enable him to contest the suit.

7. That, there shall be a great loss and prejudice on the parts of the Defendant No. 1 and the counsel if the prayer of the Defendant No. 1 be not allowed by this Hon"ble Court.

In view of the above facts and circumstances, it is, therefore, prayed that Your Honour be pleased to file the written statement and written objection along with the proposed enclosed additional list of documents, for the ends of justice.

5. The said application i.e. Judl. Misc. Case No. 72(A) of 2008, was not even supported by an affidavit in compliance with order 6, Rule 15(4) read with Section 141 of the CPC 1908.

6. By the CPC amendment Act. i.e. Act. 46 of 1999, which was on the recommendation of Malimath Committee, the Order 8, Rule 1 of the CPC had been amended. The amended Order 8, Rule 1 of CPC is quoted hereunder:

Order 8, Rule 1

1. Written statement- The Defendant shall within thirty days from the date of service of summons on him, present a written statement of his defence.

Provided that where the Defendant fails to file the written statement within the said period of thirty days, he shall be allowed to file the same on such other day, as may be specified by the Court for reasons to be recorded in writing, but which shall not be later than ninety days from the date of service of summons.

7. On plain perusal of the Order 8, Rule 1 of Code of Civil Procedure, it appears that the written statement should be filed by the Defendant within 30 days from

the date of service of summon on him and for the specific reasons are to be recorded by the Court in writing, further time for filing written statement can be granted to the Defendant but not later than 90 days from the date of service of summon. The scopes and objects of amendment of Order 8, Rule 1 of CPC had been discussed by the Apex Court in the following cases:

- (1) Salem Advocate Bar Association, Tamil Nadu Vs. Union of India (UOI),
- (2) Kailash Vs. Nanhku and Others,
- (3) Aditya Hotels (P) Ltd. Vs. Bombay Swadeshi Stores Ltd. and Others,
- (4) Baliram Prasad Gupta Vs. Md. Isa,

8. The Apex Court (3 Judges) had discussed the mandatory and directory nature of the amended Order 8, Rule 1 of CPC in Kailash case (supra) and held that the extension of time sought for by the Defendant for filing written statement should not be allowed normally but only on exceptional circumstances, occasioned by reason beyond the control of the Defendant, the extension of time could be granted by the Trial Court or the Court concerned, that too for the reasons to be recorded in writing. Paras 23, 24, 26, 28, 29, 32 and 42 of SCC in Kailash cases (supra) are quoted hereunder:

23. This leads us to examine the alternative contention of the learned Senior Counsel for the Appellant that, in any event, Order 8, Rule 1 CPC is not mandatory but directory in nature, a submission on which both the learned Counsel for the parties have forcefully argued and the learned amicus curiae has also made detailed submissions.

24. CPC which consolidated and amended the laws relating to the procedure of the Courts of Civil Judicature in the year 1908, has in the recent times undergone several amendments based on the recommendations of the Law Commission displaying the anxiety of Parliament to secure an early and expeditious disposal of civil suits and proceedings but without sacrificing the fairness of trial and the principles of natural justice inbuilt in any sustainable procedure. The Statement of Objects and Reasons for enacting the CPC (Amendment) Act, 1976 (104 of 1976) records the following basic considerations which persuaded Parliament in enacting the amendments:

- 5.(i) that a litigant should get a fair trial in accordance with the accepted principles of natural justice;
- (ii) that every effort should be made to expedite the disposal of civil suits and proceedings, so that justice may not be delayed;
- (iii) that the procedure should not be complicated and should, to the utmost extent possible, ensure fair deal to the poorer sections of the community who do not have the means to engage a pleader to defend their cases.

25. By the CPC (Amendment) Act, 1999 (46 of 1999) the text of Order 8, Rule 1

was sought to be substituted in a manner that the power of Court to extend the time for filing the written statement was so circumscribed as would not permit the time being extended beyond 30 days from the date of service of summons on the Defendant. As is well known there was stiff resistance from the members of the Bar against enforcing such and similar other provisions sought to be introduced by way of amendment and hence the Amendment Act could not be promptly notified for enforcement. The text of the provision in the present form has been introduced by the CPC (Amendment) Act, 2002 (22 of 2002) with effect from 1.7.2002. The purpose of such like amendments stated in the Statement of Objects and Reasons is "to reduce delay in the disposal of civil cases."

26. The text of Order 8, Rule 1, as it stands now, reads as under:

1. Written statement- The Defendant shall, within thirty days from the date of service of summons on him, present a written statement of his defence:

Provided that where the Defendant fails to file the written statement within the said period of thirty days, he shall be allowed to file the same on such other day, as may be specified by the Court, for reasons to be recorded in writing, but which shall not be later than ninety days from the date of service of summons.

28. All the rules of procedure are the handmaid of justice. The language employed by the draftsman of processual law may be liberal or stringent, but the fact remains that the object of prescribing procedure is to advance the cause of justice. In an adversarial system, no party should ordinarily be denied the opportunity of participating in the process of justice dispensation. Unless compelled by express and specific language of statute, the provisions of CPC or any other procedural enactment ought not to be construed in a manner which would leave the Court helpless to meet extraordinary situations in the ends of justice. The observations made by Krishna Iyer, J. in *Sushil Kumar Sen v. State of Bihar* are pertinent: (SCC p. 777, paras 5-6)

The moailty of justice at the hands of law troubles a judge's conscience and points an angry interrogation at the reformer.

The processual law so dominates in certain systems as to overpower substantive rights and substantial justice. The humanist rule that procedure consideration of vesting a residuary power in judges to act *ex debito justitiae* where the tragic sequel otherwise would be wholly inequitable...Justice is the goal of jurisprudence - processual, as much as substantive.

29. In *State of Punjab v. Shamlal Murari* the Court approved in no unmistakable terms the approach of moderating into wholesome directions what is regarded as mandatory on the principle that: (SCC p. 720)

Processual law is not to be a tyrant but a servant, not an obstruction but an aid to justice. Procedural prescriptions are the handmaid and not the mistress, a lubricant, not a resistant in the administration of justice.

In *Ghanashyam Dass v. Dominion of India* the Court reiterated the need for interpreting a part of the adjective law dealing with procedure alone in such a manner as to subserve and advance the cause of justice rather than to defeat it as all the laws of procedure are based on this principle.

32. Our attention has also been invited to a few other provisions such as Rules 9 and 10 of Order 8. In spite of the time - limit appointed by Rule 1 having expired the Court is not powerless to permit a written statement being filed if the Court may require such written statement. Under Rule 10, the Court need not necessarily pronounce judgment against the Defendant who failed to file written statement as required by Rule 1 or Rule 9. The Court may still make such other order in relation to the suit as it thinks fit.

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 spelt out that a departure from the time schedule prescribed by Order 8, 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.

The law laid down by the Apex Court (3 Judges) in *Kailash* case is that the extension of time sought for by the Defendant for filing written statement shall only be granted in exceptional circumstances which are beyond his control by the Trial Court or competent Court by recording reasons for satisfaction for granting extension of time.

9. The Apex Court (3 Judges) also discussed in *Salem Advocate Bar Association's Case* (supra) the amendment of Order 8, Rule 1 of CPC wherein 90 days is the maximum period for extension of time for filing written statement and held that the even though the word "shall" used in Order 8, Rule 1 of Code of Civil Procedure, it could not be conclusive that the provisions contemplated in Order 8, Rule 1 CPC for extension of time for filing written statement to the maximum of 90 days is mandatory. In exceptionally hard cases, time can be granted for the reason recorded in writing. Paragraphs- 21 and 22 of the AIR in *Salem Advocate Bar Association, Tamil Nadu Vs. Union of India (UOI)*, are quoted hereunder:

20. 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 hand-maid 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 8, 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 8, 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 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 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 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 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 8, Rule 1.

10. The ratio laid down in Kailash case (supra) is also followed by the Apex Court in M/s Aditya Hotel (P) Ltd. v. Bombay Swadeshi Stores Ltd. and Ors. (supra) and held that departure from the time schedule prescribed by Order 8, Rule 1 of CPC was being allowed to be made only because of 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. Para 7 of AIR in M/s Aditya Hotel (P) Ltd. v. Bombay Swadeshi Stores Ltd. and Ors. (supra) is quoted hereunder:

7. The parameters for extending the time granted by Order 8, Rule 1 of the Code have been delineated by this Court in several cases. In *Kailash Vs. Nanhku and Others*, it was noted as follows:

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, *moreso*, 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 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.

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.

11. It is clear that the learned Civil Judge (Jr. Divn.), Imphal had allowed the Misc. Application i.e. Judl. Misc. Case No. 17(A) of 2008 filed by the Respondent/Defendant No. 1, which is not even supported by an affidavit, for extension of time for filing his written statement without proper application of mind and also without recording reasons by passing cryptic impugned order dated 12.6.2008 which is in infraction of the ratio laid down by the Apex Court in the cases discussed above.

12. In the above factual background, this Court is compelled to observe that if the learned Trial Court has no knowledge of the law governing the matters relating with the extension of time beyond 90 days mentioned in Order 8, Rule 1 of the CPC for filing written statement, it is very unfortunate. It shall have unhealthy repercussion in the dispensation of justice.

13. For the reasons discussed above, the impugned cryptic order dated 12.6.2008 passed by the learned Civil Judge (Jr. Divn.) Imphal is hereby set aside and Revision petition is allowed. Registry is directed to bring this judgment and order to the notice of the Hon'ble Portfolio Judge, Manipur for consideration at the time of writing her ACR i.e. Smt. A. Noutuneshwari Devi, Civil Judge (Jr.

Divn.) Imphal and shall also furnish a copy of this judgment and order to Smt. A. Nouturteshwari Devi, Civil Judge (Jr. Division), Imphal and all the learned Civil Judges (Jr. Division) under the learned District Judge, Manipur West and learned District Judge, Manipur East.