
(2010) 12 BOM CK 0062

In the Bombay High Court

Case No : Writ Petition No. 6130 of 2010

Umesh Shantaram Khedekar

APPELLANT

Vs

Peshotan Wadia and Others

RESPONDENT

Date of Decision : 02-12-2010

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 8 Rule 1, 148

Citation : (2010) 12 BOM CK 0062

Hon'ble Judges : D.G. Karnik, J

Bench : Single Bench

Advocate : C.G. Gavnekar, for the Appellant; G.S. Godbole, instructed by Y.S. Hadade, for the Respondent

Final Decision : Dismissed

Judgement

D.G. Karnik, J.—By this petition the petitioner (original defendant no.3) challenges the order dated 2nd of July, 2010 passed by the learned Civil Judge, Senior Division, Alibag, rejecting his application for setting aside "No W.S." order with a prayer to permit him to file the written statement.

2. Summons of Special Civil Suit No. 77/2008 was issued to the petitioner on 17th April, 2008, directing him to appear in the court on 24th April, 2008. In spite of service of summons the petitioner did not appear in the court on 24th April, 2008 and therefore, the court passed an order directing the suit to proceed ex parte against him. Thereafter, the petitioner appeared before the court through his Advocate on 2nd May, 2008 and made an application for time to file written statement. By an order passed on the same day, the application was rejected observing that the court had already passed an ex parte order against him and hence, the application could not be granted. The petitioner did not challenge the order and remained quite till 1st of October, 2009. In the meanwhile, the hearing of the suit proceeded ex parte against the petitioner. After recording the evidence of the respondent no.1 (original plaintiff) the matter was posted for arguments on 28th August, 2009. It appears that the arguments could not be heard on that

day as the court was busy in other matters and the matter was adjourned to 1st September, 2009 and then to 1st October, 2009. On 1st October, 2009, the petitioner appeared along with another application for permission to file written statement. By an order dated 2nd July, 2010 the application was rejected. That order is impugned in this petition.

3. Mr. Gavnekar, learned counsel for the petitioner submits that the suit is for specific performance and if the defendant is not allowed to file written statement, a grave injustice would be caused to him. The rules and procedure are handmaid of justice and therefore, the court should have allowed the application by allowing the petitioner to file his written statement. The submission has no merit. By an order dated 24th April, 2008, the court had directed that the suit would proceed *ex parte* against the petitioner. The first application made by the petitioner on 2nd May, 2008 for permission to file written statement was rejected on the ground that it was not maintainable as the suit was already directed to be proceeded *ex parte*. Thus order has become final as the petitioner did not challenged it. Consequently, second application for the very same relief on the same facts was not maintainable. Even otherwise in my view, in the light of the decision of the Supreme Court in the case of Kailash Vs. Nanhku and Others, , the application could not have been granted. While holding that the provisions of Order 8 Rule 1 of the CPC are directory; the Supreme Court has cautioned it did not mean that the time to file written statement should be extended indiscriminately so as to nullify the effect of the amendment which requires a written statement to be filed within the period of 30 days and in any event within a period of 90 days. In paragraphs 41 and 42, the Supreme Court has observed :

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 though 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 vigor - of the provision. the delaying tactics adopted by the defendants in law courts are now 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 not 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 honored. The defendant should be vigilant. No sooner the writ of summons is served on him he should take steps for drafting his defense 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 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..

4. The decision in Kailash vs. Nanhku's case was applied and followed in the case of R.N. Jadi and Brothers and Others Vs. Subhashchandra, . In paragraphs 14 and 15 of the said decision, the Supreme Court has observed :

14. It is true that procedure is the handmaid of justice. The court must always be anxious to do justice and to prevent victories by way of technical knockouts. But how far that concept can be stretched in the context of the amendments brought to the Code and in the light of the mischief that was sought to be averted is a question that has to be seriously considered. I am conscious that I was a party to the decision in Kailash vs. Nanhku which held that the provision was directory and not mandatory. But there could be situations where even a procedural provision could be construed as mandatory, no doubt retraining a power in the court, in an appropriate case, to exercise a jurisdiction to take out the rigor of that provision or to mitigate genuine hardship. It was in that context that in Kailash v. Nanhku it was stated that the extension of time beyond 90 days was not automatic and that the court, for reasons to be recorded, had to be satisfied that there was sufficient justification for departing from the time limit fixed by the code and the power inhering in the court in terms of Section 148 of the Code. Kailash is no authority for receiving written statements, after the expiry of the period permitted by law, in a routine manner.

15. A dispensation that makes Order 8 Rule 1 directory, leaving it to the courts to extend the time indiscriminately would tend to defeat the object sought to be achieved by the amendments to the Code. It is, therefore, necessary to emphasize 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 in *Allen v. Sir Alfred McAlpine & Sons* that 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?

From these decisions it is very clear that though provisions of Order 8 Rule 1 are directory and the court for sufficient reasons is entitled to condone the delay in filing of a written statement even beyond period of 90 days, such condonation is an exception and not matter of course. There must be good and sufficient reasons for extending period beyond the statutory period of 90 days. In the present case there is no reason, much less sufficient reason, for not filing the written statement in time. The petitioner, it appears that, had appeared in May, 2008. His application to file written statement was rejected on 2nd May, 2008. He, thereafter, kept quiet and allowed the suit to proceed *ex parte* and allowed the evidence of the plaintiffs to be recorded. It is only when the suit was posted for arguments that the petitioner woke up and made an application for permission to file written statement. That application was made after 19 months of his appearance. The reasons for this delay are not satisfactorily explained in the application.

5. In the circumstances, there is no merit in the petition which is rejected summarily.

6. After this order was pronounced in the open court, Mr. Gavnekar, learned counsel for the petitioner submits that the interim order which was in force during pendency of the writ petition may be extended for some time so as to enable the petitioner to take appropriate action. Interim order previously granted is extended for a period of two weeks from today.