

(2006) 10 DEL CK 0222

In the Delhi High Court

Case No : I.A. No. 10429/05 and I.A. No. _____ of 2005 in CS (OS) No. 853 of 2005

Vinay Bhushan Chandhok

APPELLANT

Vs

Vivek Bhushan Chandhok and Another

RESPONDENT

Date of Decision : 17-10-2006

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 39 Rule 2, Order 8 Rule 1, Order 8 Rule 10, 129
Delhi High Court (Original Side) Rules, 1967 — Rule 3

Citation : (2006) 133 DLT 510 : (2007) 1 RCR(Civil) 224 : (2007) 1 RCR(Rent) 103

Hon'ble Judges : Reva Khetrapal, J

Bench : Single Bench

Advocate : Keshav Dayal and K. Beriwal, for the Appellant; V.K. Gulati, for the Respondent

Final Decision : Disposed Off

Judgement

Reva Khetrapal, J.—By this order I propose to dispose of two applications, one under Order VIII Rule 10 of the CPC for striking of the defense of the defendants and for grant of a decree against the defendants on account of their failure to file written statement within the time prescribed under Order VIII Rule 1 of the CPC and the other u/s 151 of the CPC for condensation of delay in filing the written statement beyond the statutory period.

2. The facts leading to the filing of aforesaid applications are as under:

(i) plaintiff in his application has averred that he had filed a suit against the defendants praying for the following reliefs:

A. Grant a Decree of Possession in favor of plaintiff and against the defendants in respect of the "suit premises" i.e. A-141, New Friends Colony, New Delhi-110 065 as per the site plan and issue an appropriate direction against the defendants to deliver peaceful and vacant possession of the "suit premises" to

the plaintiff;

B. Grant a Decree of injunction in favor of the plaintiff thereby permanently restraining the defendants No. 1 & 2, their agents, employees, servants etc. or anyone claiming through them from selling, disposing, alienating, encumbering, transferring or creating any third party interest in the "suit-premises" i.e. A-141, New Friends Colony, New Delhi-110 065 and;

C. Grant a decree for Damages in favor of plaintiff and against the defendants to the tune of Rs. 6,50,000/- for occupation and possession of Ground Floor, along with one garage and two servant quarters in the premises No. A-141, New Friends Colony, New Delhi;

D) Grant interest @ 18% per annum on the amount of damages from the date of filing of the Suit till realization in favor of the plaintiff and against the defendants;

E) Any other order, this Hon"ble Court may deem fit and proper may also be passed in favor of the plaintiff and against the defendant.

(ii) The above suit was listed for hearing before this Court on 08.06.2005, when this Court was pleased to grant ex-parte injunction order against the defendants under Order XXXIX Rules 1 & 2 of the Code of Civil Procedure, 1908. On the same day, summons for settlement of issues were issued by the Court to the defendants for 01.08.2005. The defendants were served dusty on 11.06.2005, and an affidavit of service on the defendants was filed by the plaintiff in this regard.

(iii) Pursuant to their service, the defendants appeared in the Court through their counsel on 01.08.2005 and sought time for filing written statement. The Court granted four weeks time to the defendants to file their written statement. Documents were directed to be filed by both the parties within four weeks and the matter was directed to be listed before the Joint Registrar for admission/denial of documents on 27.9.2005 and for framing of issues before the Court on 7.12.2005. It was made clear by the said order that in the event of parties failing to complete the admission/denial of documents on the date fixed before the Joint Registrar, the Court shall draw an adverse inference against the defaulting party. On 27.09.2005, however, no one appeared for the defendants before the Joint Registrar and, Therefore, the matter was put up before the Court on 7.12.2005, for further proceedings, as per order dated 01.08.2005. On 07.12.2005 also, the written statement of the defendants was not on record and the case was adjourned to 14.12.2005 at the request of counsel for the defendants. On the said date, that is, on 14.12.2005, proxy counsel appeared for counsel for defendants and the case was adjourned to 21.3.2006.

(iv) On 14.12.2005, however, the present application being I.A. No. 10429/2005 was filed by counsel for plaintiff under Order VIII Rule 10 of CPC for grant of a decree as prayed for in favor of the plaintiff. Notice of the application was issued to the non-applicants/defendants on 19.12.2005, returnable for 22.2.2006.

(v) On 22.2.2006, counsel for parties were directed to complete their pleadings in I.A. No. 4736/05 (under Order XXXIX Rules 1 and 2 CPC) as well as I.A. No. 10429/2005 (under Order VIII Rule 10 CPC) and the case was directed to be listed on 21.3.2006. On 21.3.2006, the case was adjourned to 27.3.2006. On the said date, i.e., 27.3.2006, none was present on behalf of the defendants nor any reply was filed by the defendants as ordered on 22.2.2006. In the interest of justice, however, order was deferred and the matter was directed to be listed on 18.5.2006 and thereafter adjourned from time to time for arguments on the aforementioned application. Till date no reply has been filed by the defendants to the plaintiff's application under Order VIII Rule 10 or even to the injunction application.

(vi) It emerges from the record that written statement was filed by the defendants on 06.12.2005 along with application for condensation of delay, but the same was returned under office objection, the objection being that copy of written statement had not been furnished to the opposite party. Thereafter, written statement was not re-filed, though, as stated hereinabove, the case was listed before the court on 7.12.2005, 14.12.2005, 19.12.2005, 22.2.2006 and 21.3.2006. Significantly also, on none of these dates, the defendants asked for enlargement of time for filing written statement. On 20.03.2006, vide diary No. 8021, the defendants chose to re-file their written statement along with the application for condensation of delay. The defendants not having sought issuance of notice on the said application at any point of time and the application having come to light in the course of arguments on the application under Order VIII Rule 10 of Civil Procedure Code, learned Counsel for plaintiff submitted that with a view to avoid any further delay, the application of the plaintiff under Order VIII Rule 10 being I.A. No. 10429/2005 be read as answer to the application for condensation of delay filed by the defendants. Hence I proceed to dispose of both the applications simultaneously. Registry is, however, directed to number the said application.

3. The text of Order VIII Rule 1 in its present form as it stands after the introduction of the CPC (Amendment) Act, 2002 with effect from 1.7.2002, reads as under:

Order VIII(1): Written Statement- The defendant shall, within thirty days from the date of service of summons on him, present a written statement of his defense:

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.

4. It is not in dispute that in view of the amended provisions of Order VIII Rule 1 of the Code of Civil Procedure, the written statement was required to be filed by the defendants within thirty days from the date of service of summons and, in

any case, not later than 90 days from the date of such service. It is also not in dispute that the said statutory period of 90 days for filing the written statement ended on 11.09.2005, the defendants having been served on 11.6.2005. Defendants have also not disputed the fact that after 01.8.2005 when four weeks time was granted to them by the Court on the prayer made by their counsel, the defendants at no point of time sought enlargement of time for filing written statement. As per the defendants own saying also, written statement along with an application for condensation of delay was filed by them on 6.12.2005, but the same was returned under office objection and was thereafter re-filed on 20.3.2006.

5. The short question which arises for consideration in both these applications, Therefore, is whether this Court is empowered to extend time for filing written statement beyond the period of 90 days, and if so, whether the defendants, on the grounds set out in their application for condensation of delay, are entitled to extension of time as prayed for by them.

6. A Division Bench of this Court in D.D.A. and Another Vs. K.R. Builders P. Ltd., was faced with a somewhat similar though not identical question:

Whether Rule 3 Chapter VI of Delhi High Court (Original Side) Rules, 1967 empowered the court to extend time for filing the written statement beyond the upper limit of 90 days prescribed under Order VIII Rule 1 CPC or whether the two provisions could be harmoniously interpreted to hold that even Rule 3 did not permit any extension beyond these 90 days?

7. Before advertng to the answer given by the Division Bench to the aforementioned question, I pause here to notice the provisions of Rule 3 of Chapter VI of the Delhi High Court (Original Side) Rules, 1967 which read as under:

Rule 3: Extension of time for filing written statement:

Ordinarily not more than one extension of time shall be granted to the defendant for filing a written statement provided that second or any further extension may be granted only on an application made in writing setting forth sufficient grounds for such extension and supported, if so, required by an affidavit.

8. The Division Bench in K.R. Builders (supra), after noticing the provisions of Rule 3, placed reliance upon the decision of the Supreme Court in Iridium India Telecom Ltd. Vs. Motorola Inc., , holding therein that the historical development of the law suggests that, the non-obstante clause in Section 129 is intended to by-pass the entire body of the Code insofar as rules made by the Chartered High Courts for recalling the procedure on its original side are concerned. The Division Bench on the strength of the aforesaid Supreme Court judgment held that suits filed on the Original Side of this Court would also be governed by the Rules framed u/s 129 to the exclusion of the provisions of CPC, wherever the field is occupied by these Rules, though this Court is not the creation of a Letters Patent

but a statute enacted by the Parliament. The Division Bench further held that Rule 3 of the Original Side Rules acquires a higher pedestal and the question of a grant of extension in time by the Court for filing the written statement would have to be done under this Rule only. The Division Bench in K.R. Builders (supra) thereby adopted the view taken by the Bombay High Court and affirmed by the Supreme Court in Iridium India Telecom (supra), laying down that the amended provisions of Order VIII Rule 1 had no application to the suit governed by the Original Side Rules.

9. Since the decision of the Division Bench in K.R. Builders (supra), however, the Delhi High Court (Original Side) Rules, 1967 have been amended. Vide notification No. 6/Rules/DHC dated 9.1.2006 the following have been substituted for the existing Rule 2 (ii) and 3 of Chapter VI of the Delhi High Court (Original Side) Rules, 1967:

The following shall be substituted for the existing Rule 2 (ii) & 3 of Chapter VI of Delhi High Court (Original Side) Rules, 1967:

2(ii) Where the summons is for appearance and for filing written statement, the defendant shall file the written statement within 30 days from the date of service of summons. A copy of the written statement shall not be accepted unless it contains an endorsement of service signed by such party or his advocate.

Rule 3: Extension of time for filing written statement:

Where the defendant fails to file written statement within the period of 30 days as stated in rule 2 (ii) he shall be allowed to file the same on such other day as may be specified by the court on an application made in writing setting forth sufficient ground for such extension and supported, if so required, by an affidavit but such day shall not be later than 90 days from the service of summons.

10. Needless to state that with the above amendment, the Delhi High Court Rules pertaining to prescription and extension of time for filing written statement have been brought in para materia with the provisions of Order VIII Rule 1 CPC. Accordingly, the judgment of the Division Bench in K.R. Builders (supra) to this extent has been rendered otiose by the amendment of the Rules themselves, the Rules having been brought in line with the provisions of the Code.

11. A three-Judge Bench of the Hon'ble Supreme Court in Kailash Vs. Nanhku and Others, considered the nature and effect of Order VIII Rule 1 and the proviso thereto in the context of whether the provisions of Order VIII Rule 1 are directory in character or mandatory. Chief Justice R.C.Lahoti, as His Lordship then was, in paragraphs 42 to 45 of the Report at page 499 held 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 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.

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 there from 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.

12. Another three-Judge Bench in the case of Salem Advocate Bar Association, Tamil Nadu Vs. Union of India (UOI), , examined the question as to whether the Court has any power or jurisdiction to extend the period of 90 days in the light of the fact that the maximum period of 90 days to file written statement has been provided , but the consequences on failure to file written statement by the defendant within the said period have not been provided for in Order VIII Rule 1 of the Code of Civil Procedure. In paragraphs 21 & 22 of its decision, the Apex Court opined as follows:

21. The use of the word "shall" in Order VII 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 of 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 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 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 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.

13. In Smt. Rani Kusum Vs. Smt. Kanchan Devi and Others, , the factual position was as follows. The respondent was served with summons issued by the trial court on 10-11-2003 and the written statement was filed on 10-7-2004. According to the learned Counsel for the appellant, the written statement should not have been entertained as it was filed beyond 30 days (which is the normal period) and even beyond 90 days (which is the maximum period). According to the appellant also, after amendment of CPC, the court has no discretion to extend the period for filing the written statement beyond 90 days from the date of service of summons even where the court extends the time beyond 30 days. After noticing the anxiety of Parliament to ensure expeditious disposal of civil suits and proceedings so that justice may not be delayed, the Apex Court in Rani

Kusum's case (supra) endorsed the view taken by it in Nanhku's case (supra) and Salem Advocate Bar Association (II)'s case (supra).

14. Significantly in all the three aforesaid decisions rendered by the Hon'ble Supreme Court, the Court reiterated that a procedural law should not ordinarily be construed as mandatory, procedural law is always subservient and in aid of justice. Any interpretation which eludes or frustrates the recipient of justice is not to be followed. In all its aforesaid decisions also the Apex Court came to the conclusion that the provision of Order VIII Rule 1, though couched in a negative language implying mandatory character, must be held to be directory in nature in view of the fact that Order VIII Rule 1 was part of the vast body of procedural law, the ultimate aim of which is to ensure that no injustice is caused to either party. In this context, the Apex Court observed that: "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."

15. In all the aforesaid decisions of the Apex Court, the following observations in Sangram Singh Vs. Election Tribunal, Kotah, Bhurey Lal Baya, were quoted with approval:

Now a code of procedure must be regarded as such. It is procedure, something designed to facilitate justice and further its ends: not a penal enactment for punishment and penalties; not a thing designed to trip people up. Too technical a construction of sections that leaves no room for reasonable elasticity of interpretation should therefore be guarded against (provided always that justice is done to both sides) lest the very means designed for the furtherance of justice be used to frustrate it.

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 decisions 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.

16. In a recent judgment in Mr. Shaikh Salim Haji Abdul Khayumsab Vs. Mr. Kumar and Others, following Kailash v. Nanhku and Rani Kusum v. Kanchan Devi (supra), the Apex Court categorically held that the plea of counsel for the respondent that the court could not have granted time beyond 90 days was untenable in view of the law laid down by it in the aforesaid cases.

17. The law laid down by the Apex Court is thus crystal clear. There is no room for doubt that this Court is empowered to enlarge the time for filing written statement beyond the period of 90 days fixed by the statute and the Rules so

long as the defendant is able to satisfy the conscience of the Court that the delay was on account of sufficient cause and not with a view to delay the proceedings. The only question which remains to be considered, Therefore, is whether the defendants in the present case have made out sufficient grounds for condensation of delay in filing their written statement. In this context, the intention of the legislature in amending the provisions of Order VIII Rule 1 and of the Delhi High Court in amending Rule 3 of the Original Side Rules has to be viewed in juxtaposition with the substantive right of the petitioner to contest the petition. I pause here to notice the observations of Justice Krishna Iyer in *Sushil Kumar Sen Vs. State of Bihar*, which were quoted with approval in *Kailash v. Nanhku* (supra):

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

The processual law so dominates in certain systems as to overpower substantive rights and substantial justice. The humanist rule that procedure should be the handmaid, not the mistress, of legal justice compels 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.

18. Keeping in view the above observations of the Apex Court that it would be wholly unequitable to deny to the defendant the right to present his defense for processual reasons, I proceed to examine the reasons stated by the defendants in support of their application for condensation of delay in filing the written statement, which in the application dated 06.12.2005 are set out as follows.

19. No notice was served personally upon either defendant No. 1 or defendant No. 2. Defendant No. 1 is a patient of diabetes and a couple of other ailments and for treatment he, almost every year, during mid of June to mid of July, visits Ashram of Asaram Bapu at Surat (Gujarat) and stays there for a month, for natural treatment. In the year 2005 on 14th June, 2005 he went to Surat (Gujarat) for treatment and stayed there for one month, coming back on 16th July, 2005. He came back on call from family that his younger daughter was not keeping good health. After his coming back, day and night he ran for diagnosis of his younger daughter. On 26th July, 2005, Ms. Shakshi his 15 year daughter gave him papers received from this Court with the direction to appear on 1st August, 2005, stating that she had received notice on behalf of her grand-mother also, namely, the defendant No. 2, who is 74 years old, and had been waiting for defendant No. 1 to come back and suddenly due to medical problem of her younger sister forgot about the same. The plaintiff thereupon passed on the papers to his Advocate for filing of written statement. During this time, his younger daughter Samiksha was seriously ill with hepatitis A, severe jaundice as well as stone in her gallbladder. Being the only male member in the family, he was unable to pursue his case as she was off and on admitted in the hospital. On the first sigh of relief, he tried to contact his Advocate, Mr. V.K. Gulati, but he

came to know that he was not in India and had gone to U.K. From 4th September, 2005 upto the end of October, 2005 Mr. Gulati was in U.K. and defendant No. 1 kept on waiting as all the original documents and records were in the possession of Mr. V.K. Gulati. In the month of November also, he could not file the written statement as Mr. V.K. Gulati, his Advocate too suffered from heart ailment and loss of pulse, and Therefore, could not attend to his professional duties. Thus, all through he was undergoing mental tension, on the one hand running around to save the life of his daughter which was at stake and, on the other hand, unable to prosecute the case on account of non-availability of his Advocate coupled with financial difficulties. The instant suit was another unfortunate aspect of his life and that of his mother as the plaintiff is the elder brother of defendant No. 1 and the son of defendant No. 2.

20. The aforesaid reasons then are the reasons set out by the defendant in his application for condensation of delay, filed on 6th December, 2005 along with his written statement, both of which remained under office objection till re-filed on 20th March, 2006. No Explanation whatsoever has been given by the defendant for the delay in re-filing the written statement either by way of an application or in the course of hearing. However, keeping in view the fact that the plaintiff has inter alia prayed for a decree of possession in respect of the suit premises where the defendants have been living for the last fifteen years when the plaintiff was residing out of India, in my view, the defendants cannot be dispossessed of their home and hearth without affording them a right to enter their defense. A second consideration which weighs with me is that the defendant No. 2 is a 74 year old. She is the mother of the plaintiff and of the defendant No. 1, and is living in the suit premises. She must have relied upon defendant No. 1 (who is residing with her) to enter her defense, and to punish her for no fault of hers would, in my view, be wholly unequitable, more so, as the delay caused in re-filing of the written statement from 6th December, 2005 to 20th March, 2006 cannot be attributed to her, and possibly not even to the defendant No. 1. The written statement had been returned by the Registry of the Court after it had been filed on 6th December, 2005 under an office objection that the other side had not been served. It was for the counsel to ensure that the same was re-filed after removing the said office objection. The defendants cannot be blamed for the same. Possibly for the reason that counsel of the defendants was himself suffering from a heart ailment, the matter was not attended to.

21. Thus, in my view, good grounds justifying the delay in filing the written statement must be said to have been made out by the defendants. Accordingly, in view of the law laid down by the Apex Court in the case of *Kailash v. Nanhku* (supra) and reiterated in the cases of *Rani Kusum* (supra), *Salem Advocate Bar Association II* (supra) and *Sangram Singh's* (supra), the defendants are held entitled to condensation of delay subject, however, to the payment of compensatory costs to the plaintiff in the sum of Rs. 30,000/-.

22. Both applications stand disposed of in the above terms.

23. List the case for further proceedings before the Joint Registrar on 19th October, 2006.