

(2008) 04 MAD CK 0133

In the Madras High Court

Case No : C.R.P. (PD) No. 1287 of 2008 and M.P. No. 1 of 2008

Zahidunnisa

APPELLANT

Vs

C.A. Sattar, Sar-an Bi alias Saru and Imtiaz

RESPONDENT

Date of Decision : 10-04-2008

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 8 Rule 1, Order 8 Rule 10, Order 8 Rule 9, 113

Citation : (2008) 04 MAD CK 0133

Hon'ble Judges : S. Rajeswaran, J

Bench : Single Bench

Advocate : C.A. Khabeer, for the Appellant; D. Dharamchand Jain, for the Respondent

Final Decision : Dismissed

Judgement

S. Rajeswaran, J.—The plaintiff in O.S.No.678 of 2004 is the revision petitioner before this Court. The suit in O.S.No.678 of 2004 has been filed by the petitioner/plaintiff for partition. The defendants have filed a written statement. Pending suit, the petitioner/plaintiff filed an application in I.A.No.1258 of 2004 to pronounce judgment in the suit as the defendants failed to present the written statement within the period prescribed under Order 8 Rule 9 CPC. The same was resisted by the respondents/defendants. The Trial Court by an order dated 27.11.2007 dismissed that application. Aggrieved by the same, the above civil revision petition has been filed. I have heard the learned counsel appearing for the petitioner and I have also gone through the documents filed in support of this submission.

2. The learned counsel for the petitioner submit that the trial Court committed an error in accepting the written statement after expiry of the time limit prescribed under Order 8, Rule 9 CPC as amended by the Act, 2002. According to him, the trial Court did not consider the case put forth by the petitioner that under Order 8 Rule 9 CPC, the Court has been given discretionary power to require a written

statement from any of the parties and fixing a time of not more than 30 days for presenting the same. But the discretion power to grant time for filing written statement has been restricted in Order VIII Rule 1 CPC, according to which the time given shall not be later than 90 days from the date of service of summons. The time was granted by the trial Court up to 05.06.2003, for filing written statement, by the order dated 25.03.2003, though that fell beyond the 30 days period restricted under Order VIII Rule 1 CPC. The acceptance of the written statement after the expiry of the limitation period prescribed by the law is illegal. On the expiry of the time prescribed by law, the petitioner acquires the right under Order VIII Rule 10 CPC to obtain judgment against the defendants who failed to file written statement within time. Hence according to the learned counsel for the petitioner the rejection of I.A.No.1258 of 2004 is illegal and the same is to be allowed.

3 . In support of his submission, the learned counsel for the petitioner relied on a decision reported in Ponnammal Vs. Subburaman and Another, and another decision reported in Aditya Hotels (P) Ltd. Vs. Bombay Swadeshi Stores Ltd. and Others, The learned counsel for the petitioner has also further relied on a decision reported in AIR 2007 SC 1077 (Hasham Abbas Sayyad Vs. Usman Abbas Sayyad and others).

4. I have considered the submissions of the learned counsel for the petitioner with regard to facts and citations.

5. The revision petitioner as plaintiff filed I.A.No.1258 of 2004 under Order VIII Rule 10 CPC and the prayer in the petitioner reads as under:-

For the reasons stated in the accompanying original and the additional affidavit, it is prayed that the Hon"ble Court may be pleased to pronounce judgment against the defendants and in favour of the plaintiff as the written statement filed on 23.07.2003 in the suit making counter claim as to the title of the suit properties has not been presented within the time of the ninety days from 01.07.2002 as permitted under the Rule 1 of Order VIII CPC 2002, or has not been presented within the time of thirty days as fixed under the Rule 9 of Order VIII, CPC from the order dated 25.03.2003 made by this Hon"ble Court in the suit, and render justice expeditiously, or, in alternative refer to the Hon"ble High Court u/s 113 CPC for decision of the substantial question of law stated in the para 2 of the additional affidavit, and render justice.

6. In respect of the above submissions, it is stated by the petitioner in her affidavit, that the suit has been filed for partition and separate possession among the family members. It is her case that the defendants failed to file the written statement within the time stipulated under Order VIII Rule 1 of CPC as amended by Act 1999 and 2002. It is her further case that the defendants have also failed to file the written statement as required by the trial Court by its order dated 25.03.2003 exercising its power under Order 8 Rule 9. Therefore, written statement filed subsequently by the defendants after the prescribed period is

liable to be dismissed and judgment is to be pronounced in favour of the plaintiff under Order VIII Rule 10 of CPC

7. This was resisted by the defendants by filing a counter, wherein it is stated that an ex parte order passed by the trial Court was set aside on 25.03.2003 in I.A.No.158 of 2002. Thereafter the suit was posted for final hearing on 05.06.2003 and again 02.07.2003 the written statement was filed on 02.07.2003 and thereafter the suit is to be decreed on merits. It is contended that the provisions of the amended CPC are only discretionary in so far as the period of time prescribed for filing the written statement concerned. The trial Court after observing that originally the suit was filed before the Additional Sub Judge and thereafter written statement filed after the ex parte order was set aside and the same was also accepted. The suit was posted for issues. The trial Court after referring the Hon"ble Supreme Court Judgment reported in R.N. Jadi and Brothers and Others Vs. Subhashchandra, held that if the written statement is received after the time prescribed, the same is not an illegality. Hence, the trial Court dismissed I.A.No.1258 of 2004.

8. After going through the order of the trial Court, I am of the considered view that the same has been correctly passed and the same need not be interfered with.

9. Order VIII rule 1 CPC reads as under:-

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.

10. From the above it is clear that the defendant in a suit has to file written statement of his defence within 30 days from the date of service of summons to him. If he fails to file the written statement within 30 days, time may be extended by the trial Court, but the same shall not be later than 90 days from the date of service of summons. It is implied that the trial Court has got the power to condone only 60 days under Order VIII Rule 1 CPC.

11. The question then arises as to the mandatory nature of Order VIII Rule 1 CPC. Now the same has been settled by the Hon"ble Supreme Court by holding that the period mentioned under Order VIII Rule 1 CPC is not mandatory and in appropriate cases, the Court can permit the defendant to file the written statement even after the 90 days period mentioned under Order VIII Rule 1 of CPC.

12. Now let me consider the decisions relied on by the learned counsel for the petitioner in 2003-3-L.W. 564 (cited supra) this Court held that Court can receive the written statement filed after the stipulated time if it is found that such a

defence has to be received to render justice, but receiving such written statement is only an exception and the court should be very careful in exercising judicial discretion.

13. In the above case, the plaintiff filed a suit in O.S.No.196 of 2002 for declaration that they are the absolute owners of the suit property and for permanent injunction. The suit was filed on 09.12.2004 for filing the written statement. As the written statement filed on 09.12.2002, the suit was decreed *exparte*. To set aside the *exparte* order an application was filed along with a written statement and other documents. The trial Court refused to set aside the *exparte* decree and it is also held that the defendant should not be allowed to file the written statement beyond 90 days from the date of service of summons. This order was challenged in the above decision and this Court refused to interfere with the order of the trial Court on the ground that the reasons given by the defendants in that suit for not filing the written statement earlier were nothing but false.

14. As rightly observed by the trial Court the facts of the above case are totally different from the present case. In the present case the *exparte* order was set aside on 25.03.2003 and the same was not challenged. Further the trial Court granted time to file the written statement on 05.06.2003 and again on 02.07.2003. This was also not challenged by the plaintiff. It is an admitted fact that indeed written statement is filed on 02.07.2003 and was accepted by the trial Court. In such circumstance, I am of the view that the above judgment of this court is not helpful to the petitioner.

15. In AIR 2007 SC 1077 (cited *supra*) the Hon"ble Supreme Court held that any order passed by the Court without the subject jurisdiction would be *Coram "non iudice* being a nullity and the same ordinarily should not be given effect to". The above judgment is not at all helpful to the petitioner as it cannot be said that the trial Court is lacking in jurisdiction over the subject matter of the suit.

16. In *Aditya Hotels (P) Ltd. Vs. Bombay Swadeshi Stores Ltd. and Others*, the Hon"ble Supreme Court held that the extension of time sought for by the defendant should not be granted just as a matter of routine and merely for the asking more time when the period of 90 days is expired. The defendant should establish that he was not able to file the written statement within the time due to circumstances which are exceptional and beyond his control. In the above decision, the suit was filed in O.S.No.59 of 2005 seeking vacant and peaceful possession of the suit premises. The summons were served on 22.03.2005 and the suit was posted for filing written statement on 20.06.2005. Time was extended to 14.07.2005. On that day also, the written statement was not filed and it was filed only on 12.08.2005. This was challenged by the plaintiff, but the same was rejected. The matter was taken to the High Court and the High Court dismissed the petition. When the matter went to Hon"ble Supreme Court, the Hon"ble Supreme Court after finding that neither the trial Court nor the High Court indicated any reason to justify the acceptance of the written statement

after the expiry of the time fixed, set aside the orders and remitted the matter to trial Court for fresh disposal in the light of what has been stated in Kailsah's case reported in Kailash Vs. Nanhku and Others, . This decision is also not helpful to the petitioner as he has not challenged the time granted by the trial Court to file the written statement. Only if that was challenged, the Court would have been in a position to find out the reason for the delay in filing the written statement. Further, in the above judgment of the Hon''ble Supreme Court, the suit was filed on 24.12.2004, that is, much after the amendments came in to effect, whereas in the present CRP, the suit was filed in the year 1997 itself.

17. Therefore, I am unable to accept the contention of the revision petitioner that she is entitled to a judgment under Order VIII Rule 1 of CPC as contended by her in I.A.No.1258 of 2004.

18. The reliance placed on by the learned counsel for the petitioner under Order 8 Rule 9 CPC is not relevant as what is contemplated under Order VIII Rule 9 CPC is subsequent pleadings, i.e., subsequent to the written statement filed by a defendant. In the result, the civil revision petition is devoid of merits and the same is dismissed. No costs. Consequently, connected M.P. is also dismissed.