

ZOLBA

v.

KESHAO AND ORS.

(Civil Appeal No. 2360 of 2008)

APRIL 1, 2008

(TARUN CHATTERJEE AND HARJIT SINGH BEDI, JJ.)

Code of Civil Procedure, 1908:

Or. 8, r.1 – Filing of written statement after expiry of statutory period – HELD: It would be open to the court to permit defendant to file written statement if exceptional circumstances have been made out – Unless compelled by express and specific language of statute, provisions of Order 8 Rule 1 or any procedural enactment should not be construed in a manner which would leave the court helpless to meet extraordinary situations in the ends of justice – In the instant case, facts stated would constitute sufficient cause for condoning delay in filing written statement and it has to be taken that non-availability of records in the trial court had prevented the defendant from filing written statement within the period of limitation which was an exceptional circumstance – High Court as well as trial court erred in rejecting application for condoning delay in filing written statement – Application is allowed and the written statement accepted – Trial court to proceed with hearing of the suit and dispose of the same expeditiously.

Salem Advocate Bar Association, Tamil Nadu vs. Union of India AIR 2005 SC 3353 – relied on.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2360 of 2008.

From the Judgment and final Order dated 11/10/2006 of the High Court of Judicature at Bombay, Nagpur Bench, Nagpur in W.P. No. 4019/2006

A Shivaji M. Jadhav for the Appellant.

The Order of the Court was delivered by

1. Leave granted.

B 2. In spite of due service, no one has entered appearance on behalf of the respondents. Even at the time of hearing of this appeal, the respondents had failed to appear to contest the appeal.

C 3. This appeal is directed against the judgment and order dated 11th of October, 2006 passed by a learned Judge of the High Court of Judicature at Bombay, Nagpur Bench in Writ Petition No.4019 of 2006 by which the learned Judge had dismissed the writ petition filed by the appellant for condoning the delay of 35 days in filing the written statement in a suit for partition and separate possession of agricultural land filed by D the respondents.

E 4. We have heard the learned counsel appearing for the appellant and also examined the impugned order of the High Court as well as of the trial court and also the application for acceptance of the written statement, which was filed out of time.

F 5. Having heard the learned counsel for the appellant and after considering the materials on record, we are of the view that in the facts and circumstances of the present case, the High Court ought to have condoned the delay in filing the written statement under Order 8 Rule 1 of the Code of Civil Procedure (in short "the CPC"), even if some delay was caused in filing the same. The appellant was the defendant in the suit for partition and separate possession of agricultural land falling under Gat No.243 admeasuring 0.50 H.R. situated at Village Mouza – Kojai and house No.139 situated at Village Gaijapur, Maharashtra G (herein after referred to as the 'suit properties'). The plaintiffs/respondent Nos. 1 to 5 have also sought for a declaration to the effect that a Will dated 6th of June, 2003 executed in favour of the respondent No.6 (petitioner No. 2 in the High Court) was H illegal, null and void and also for permanent injunction restraining

the appellant from making any construction over the open land falling in house No.139. A perusal of the record would show that the respondents in the pending suit moved an application for grant of temporary injunction against the appellant. By an order dated 29th of April, 2005, the Civil Judge, Junior Division, Nagbhid granted temporary injunction in favour of the respondents. Feeling aggrieved, the appellant has preferred a misc. civil appeal before the District Judge, Chandrapur and the same is now pending decision. The appellant under bonafide belief and on instruction of his counsel in the trial court could not file the written statement as he was advised by his counsel that the written statement could be filed after the decision of the appeal pending before the district court. However, when advised by his counsel, the appellant filed an application for accepting the written statement on condonation of delay. The learned Civil Judge, Junior Division, Nagbhid rejected the said application for condoning the delay and refused to permit the appellant to file the written statement in view of the proviso to Order 8 Rule 1 of the CPC. A review petition was filed which was also rejected by an one line order. It is against this order a writ petition was moved before the High Court, which was also dismissed. Before we look into the provisions under Order 8 Rule 1 of the CPC, we need to record that the learned counsel appearing for the appellant contended before us that the provisions for filing the written statement under Order 8 Rule 1 of the CPC are directory in nature and therefore, it was open to the court to condone the delay in filing the written statement and such written statement filed by the appellant could be accepted. Before we consider whether the provisions under Order 8 Rule 1 of the CPC are mandatory or directory in nature, we need to consider the provisions under Order 8 Rule 1 of the CPC which run as under: -

"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

A *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."*

B 6. As noted herein earlier, the trial court as well as the High Court, relying on the proviso to Order 8 Rule 1 of the CPC, refused to permit the appellant to file the written statement on the ground that such written statement was filed after 90 days from the date of service of summons.

C 7. Considering the facts and circumstances of the present case and the statements made in the application for condoning the delay in filing the written statement, we are not in a position to hold that the appellant was not entitled to file the written statement even after the expiry of the period mentioned in the proviso to Order 8 Rule 1 of the CPC. After reading the provisions, in particular the proviso to Order 8 Rule 1 of the CPC, we are unable to hold that the provisions under Order 8 Rule 1 are mandatory in nature. In ***Salem Advocate Bar Association, Tamil Nadu vs. Union of India*** [AIR 2005 SC 3353], it has been clearly held that the provisions including the proviso to Order 8 Rule 1 of the CPC are not mandatory but directory. It has been held in that decision that the delay can be condoned and the written statement can be accepted even after the expiry of 90 days from the date of service of summons in exceptionally hard cases. It has also been held in that decision that the use of the word "shall" in Order 8 Rule 1 of the CPC by itself is not conclusive to determine whether the provision is mandatory or directory. The use of the word "shall" is ordinarily indicative of mandatory nature of the provision but having regard to the decision in that case, the same can be construed as directory. In paragraph 21 of the said decision, this court observed as follows: -

H *"The use of the word 'shall' in order 8 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."

8. Therefore, following the principles laid down in the decision, as noted hereinabove, it would be open to the court to permit the appellant to file his written statement if exceptional circumstances have been made out. It cannot also be forgotten that in an adversarial system, no party should ordinarily be denied the opportunity of participating in the process of justice dispensation. Therefore, unless compelled by express and specific language of the statute, the provisions of Order 8 Rule 1 of CPC or any procedural enactment should not be construed in a manner, which would leave the court helpless to meet extraordinary situations in the ends of justice. Keeping this principle as laid down by this court in the case of **Salem Advocate Bar Association** (supra) in mind and in view of our observations made herein above, we now look into the averments made in the application for condoning the delay in filing the written statement. In the application, it has been stated that on instruction of his counsel in the trial court, the written statement was not filed within the period of limitation as the appellant was under bonafide belief that the written statement shall be filed after the decision of the appeal by the District Court. The written statement was, however, filed and the records of

A the case were called from his lawyer who has been conducting his case in the appeal pending before the District Court. The facts disclose that the misc. appeal has been filed against an order of injunction before the District Court – Chandrapur whereas the suit is pending before the Civil Judge, Junior Division, Nagbhid. Since the appeal was pending, the records of the appellant were then lying with the lawyer at Chandrapur. Therefore, the file was not available with the lawyer of the appellant at Nagbhid and therefore, the written statement could not be filed within the period of limitation. Such being the position, in our view, the facts stated would constitute sufficient cause for condoning the delay in filing the written statement and it has to be taken that the non-availability of records at Nagbhid had prevented the appellant from filing the written statement within the period of limitation which in our view was an exceptional case constituting sufficient cause for condoning the delay in filing the written statement. In this view of the matter, in the facts and circumstances of the case and in view of the reasoning given above, we hold that the High Court as well as the trial court had erred in rejecting the application for condoning the delay in filing the written statement. Accordingly, the application for condoning the delay is allowed and the written statement filed by the appellant is accepted and consequent thereupon, the impugned order which affirmed the order of the trial court rejecting the application for condoning the delay in filing the written statement is set aside. The trial court shall now proceed with the hearing of the suit and dispose of the same positively within one year from the date of supply of a copy of this order to it.

9. For the reasons aforesaid, this appeal is allowed to the extent indicated above. There will be no order as to costs.

G R.P.

Appeal allowed.