

CASE NO.:
Appeal (civil) 5066 of 2005

PETITIONER:
Smt. Rani Kusum

RESPONDENT:
Smt. Kanchan Devi and Ors.

DATE OF JUDGMENT: 16/08/2005

BENCH:
ARIJIT PASAYAT & H.K. SEMA

JUDGMENT:
J U D G M E N T
(Arising out of SLP (C) No. 377 OF 2005)

ARIJIT PASAYAT, J.

Leave granted.

Order passed by a learned Single Judge of the Patna High Court is the subject-matter of challenge in this appeal. By the impugned order the learned Single Judge found no substance in the plea of the appellant that there was non-compliance with the requirements of Order VIII Rule 1 of the Code of Civil Procedure, 1908 (in short 'CPC') as amended by the Code of Civil Procedure (Amendment) Act, 2002 (in short the 'Amendment Act').

Factual position is almost undisputed and, therefore, need not be elaborated.

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. By order dated 12.8.2004 learned Subordinate Judge accepted the written statement which had been filed and rejected the prayer of the appellant to reject the written statement filed. According to the appellant 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.

Learned counsel for the appellant submitted that the amendment requiring filing of the written statement within the stipulated time is intended to avoid delay in disposal of suits and to avoid unnecessary harassment to the litigants. Learned counsel for the respondents on the other hand submitted that the provisions of Order VIII Rule 1 of CPC are directory and when written statement has already been filed and accepted by the trial Court, the High Court has rightly rejected appellant's plea.

The scope and ambit of Order VIII Rule 1 of CPC has been examined in detail by this Court in Kailash v. Nanhku and Ors. (2005 (4) SCC 480).

The CPC enacted in 1908 consolidated and amended the laws relating to the procedure of the Courts of Civil Judicature. It has undergone several amendments by several Acts of Central and State Legislatures. Under Section 122 CPC the High Courts have power to amend by rules, the procedure laid down in the Orders. In exercise of these powers various amendments have been made in the Orders by various High Courts. Amendments have also been made keeping in view recommendations of Law Commission. Anxiety of Parliament as evident from the amendments is to secure an early and expeditious disposal of civil suits and proceedings without sacrificing the fairness of trial and the principles of natural justice in-built in any sustainable procedure. The Statement of Objects and Reasons for enacting Code of Civil Procedure (Amendment) Act, 1976 (104 of 1976) (in short '1976 Amendment Act') highlight following basic considerations in enacting the amendments:-

- (i) with the accepted principles of natural justice that a litigant should get a fair trial in accordance;
- (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."

By Code of Civil Procedure (Amendment) Act, 1999 (46 of 1999) (in short the 'the 1999 Amendment Act') the text of Order VIII, 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. Due to resistance from the members of the Bar against enforcing such and similar other provisions sought to be introduced by way of amendment, the Amendment Act could not be promptly notified for enforcement. The text of the provision in the present form has been introduced by the Amendment Act with effect from 1.7.2002. The purpose of such like amendments is stated in the Statement of Objects and Reasons as "to reduce delay in the disposal of civil cases".

The text of Order VIII, 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."

Order VIII, Rule 1 after the amendment casts an obligation on the defendant to file the written statement within 30 days from the date of service of summons on him and within the extended time falling within 90 days. The provision does not deal with the power of the court and also does not specifically take away the power of the court to take the written statement on record though filed beyond the time as provided for. Further, the nature of the provision contained in Order VIII, Rule 1 is procedural. It is not a part of the substantive law. Substituted Order VIII, Rule 1 intends to curb the mischief of unscrupulous defendants adopting dilatory tactics, delaying the disposal of cases causing inconvenience to the plaintiffs and petitioners approaching the court for quick relief and also to the serious inconvenience of the court faced with frequent prayers for adjournments. The object is to expedite the hearing and not to scuttle the same. While justice delayed may amount to justice denied, justice hurried may in some cases amount to justice buried.

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 the Statute, the provisions of the 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 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. (See *Sushil Kumar Sen v. State of Bihar* (1975 (1) SCC 774).

No person has a vested right in any course of procedure. He has only the right of prosecution or defence in the manner for the time being by or for the Court in which the case is pending, and if, by an Act of Parliament the mode of procedure is altered, he has no other right than to proceed according to the altered mode. (See *Blyth v. Blyth* (1966 (1) All E.R. 524 (HL)). A procedural law should not ordinarily be construed as mandatory, the procedural law is always subservient to and is in aid to justice. Any interpretation which eludes or frustrates the recipient of justice is not to be followed. (See *Shreenath and Anr. v.*

Rajesh and Ors. (AIR 1998 SC 1827)

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.

It is also to be noted that though the power of the Court under the proviso appended to Rule 1 of Order VIII is circumscribed by the words - "shall not be later than ninety days" but the consequences flowing from non-extension of time are not specifically provided though they may be read by necessary implication. Merely, because a provision of law is couched in a negative language implying mandatory character, the same is not without exceptions. The courts, when called upon to interpret the nature of the provision, may, keeping in view the entire context in which the provision came to be enacted, hold the same to be directory though worded in the negative form.

Challenge to the Constitutional validity of the Amendment Act and 1999 Amendment Act was rejected by this Court in Salem Advocate Bar Association, Tamil Nadu v. Union of India (JT 2002 (9) SC 175). However to work out modalities in respect of certain provisions a Committee was constituted. After receipt of Committee's report the matter was considered by a three-Judge Bench in Salem Advocate Bar Association, Tamil Nadu v. Union of India (JT 2005 (6) SC 486). As regards Order VIII Rule 1 Committee's report is as follows:

"The question is whether the Court has any power or jurisdiction to extend the period beyond 90 days. The maximum period of 90 days to file written statement has been provided but the consequences on failure to file written statement within the said period have not been provided for in Order VIII Rule 1. The point for consideration is whether the provision providing for maximum period of ninety days is mandatory and, therefore, the Court is altogether powerless to extend the time even in an exceptionally hard case.

It has been common practice for the parties to take long adjournments for filing written statements. The legislature with a view to curb this practice and to avoid unnecessary delay and adjournments, has provided for the maximum period within which the written statement is required to be filed. The mandatory or directory nature of Order VIII Rule 1 shall have to be determined by having regard to the object sought to be achieved by the amendment. It is, thus, necessary to find out the intention of the legislature. The consequences which may follow and whether the same were intended by the legislature have also to be kept in view.

In Raza Buland Sugar Co. Ltd., Rampur v. The Municipal Board, Rampur [AIR 1965 SC 895], a Constitution Bench of this Court held that the question whether a particular provision is

mandatory or directory cannot be resolved by laying down any general rule and it would depend upon the facts of each case and for that purpose the object of the statute in making out the provision is the determining factor. The purpose for which the provision has been made and its nature, the intention of the legislature in making the provision, the serious general inconvenience or injustice to persons resulting from whether the provision is read one way or the other, the relation of the particular provision to other provisions dealing with the same subject and other considerations which may arise on the facts of a particular case including the language of the provision, have all to be taken into account in arriving at the conclusion whether a particular provision is mandatory or directory.

In Sangram Singh v. Election Tribunal Kotah & Anr. [AIR 1955 SC 425], considering the provisions of the Code dealing with the trial of the suits, it was opined that:

"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 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. "

In Topline Shoes Ltd. v. Corporation Bank [(2002) 6 SCC 33], the question for consideration was whether the State Consumer Disputes Redressal Commission could grant time to the respondent to file reply beyond total period of 45 days in view of Section 13(2) of

the Consumer Protection Act, 1986. It was held that the intention to provide time frame to file reply is really made to expedite the hearing of such matters and avoid unnecessary adjournments. It was noticed that no penal consequences had been prescribed if the reply is not filed in the prescribed time. The provision was held to be directory. It was observed that the provision is more by way of procedure to achieve the object of speedy disposal of the case.

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 handmaid of justice and not its mistress. In the present context, the strict interpretation would defeat justice.

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."

The Bench in para 54 after considering the Committee's report has observed as follows:

"Having regard to the constitutional obligation to provide fair, quick and speedy justice, we direct the Central Government to examine the aforesaid suggestions and submit a report on this Court within four months."

After elaborating the purpose for introduction of Order VIII Rule 1, this Court in Kailash's Case (supra) at paragraph 45 observed that no straightjacket formula can be laid down except that observance of time schedule contemplated by Order VIII Rule 1 shall be the rule and departure therefrom an exception, made for satisfactory reasons only. The conclusions have been summed up in Para 46. The relevant portion reads as follows:

"(iv) the purpose of providing the time schedule for filing the written statement under Order VIII Rule 1 CPC is to expedite and not to scuttle the hearing. The provision spells out a disability on the defendant. It does not impose an embargo on the power of the Court to extend the time. Though the language of the proviso to Rule 1 Order VIII CPC is couched in negative form, it does not specify any penal consequences flowing from the non-compliance. The provision being in the domain of the procedural law, it has to be held directory and not mandatory. The power of the Court to extend time for filing the written statement beyond the time schedule provided by Order VIII Rule 1 CPC is not completely taken away.

(v) Though Order VIII Rule 1 CPC is a part of procedural law and hence directory, keeping in view the need for expeditious trial of civil cases which persuaded Parliament to enact the provision in its present form, it is held that ordinarily the time schedule contained in the provision is to be followed as a rule and departure therefrom would be by way of exception. A prayer for extension of time made by the defendant shall not be granted just as a matter of routine and

merely for the asking, more so when the period of 90 days has expired. Extension of time may be allowed by way of an exception, for reasons to be assigned by the defendant and also be placed on record in writing, howsoever briefly, by the court on its being satisfied. Extension of time may be allowed if it is needed to be given for circumstances which are exceptional, occasioned by reasons beyond the control of the defendant and grave injustice would be occasioned if the time was not extended. Costs may be imposed and affidavit or documents in support of the grounds pleaded by the defendant for extension of time may be demanded, depending on the facts and circumstances of a given case."

In view of the above, the appeal is without merit and is dismissed but without any order as to costs.