



IN THE HIGH COURT OF JUDICATURE AT BOMBAY,

NAGPUR BENCH, NAGPUR

WRIT PETITION NO.1479 OF 2014

Sanjay Madanchand Kashyap,
Aged 50 years, Occ. Service,
r/o. "Swadesh Ashram",
Gandhibag, Nagpur.

..... PETITIONER

// **VERSUS** //

Moolchand Saheblal Kashyap,
Aged 78 years, Occ. Business,
r/o. Mehandibagh Road,
Lalganj, Nagpur.

..... RESPONDENT

Mr.P.A.Markandeywar, Adv. for the Petitioner.
Mr.A.M.Ghare, Adv. for the Respondent.

CORAM : A.P.BHANGALE, J.

DATE : 8.7.2014.

ORAL JUDGMENT :

1. Rule returnable forthwith. Heard by the consent of learned Counsel for the respective parties.

2. The petitioner has questioned legality and validity of order dt. 4.1.2014 passed by the Civil Judge (Sr.Dn.), Nagpur in Special Civil Suit No.769 of 2012 by which application Exh.19 for dismissal of the suit was rejected and application Exh. Nos. 20 and 21 are allowed and summons was directed to be issued against defendant nos. 5 to 9, 11 and 14 on payment of process fees.

3. The facts, briefly stated, are as under :

Special Civil Suit No.769 of 2012 for partition, separate possession and damages was filed. The plaintiff had claimed 1/7th share in the suit property with a prayer

for preliminary decree, inquiry into mesne profit, cost of the suit etc. The said suit was instituted by Moolchand Saheblal Kashyap against fifteen persons given family history and relationship between the parties alleging that Saheblal (father of the plaintiff) was karta of the joint hindu family. After his demise, Moolchand Kashyap became karta of the family. Saheblal had acquired property in his name as well as jointly along with his sons. Thus, the plaintiff had claimed 1/7th undivided share in the joint family property and the suit was instituted for partition and separate possession of the said share. It appears that defendant nos. 1 to 4, 10 and 15 were served with suit summons in the month of December, 2012. Defendant nos. 12 and 13 were served subsequently on 6.2.2013. On 29.6.2013, an application (Exh.19) was moved by defendant no.1 in the suit for dismissal of the suit against defendant nos. 2 to 9, 11 and 14, while application Exh. Nos. 20 and 21 were made for grant of permission to serve the defendants. The first defendant in the suit alleged that the plaintiff had not taken steps to serve the defendants and

under Order IX, Rule 5 of the Code of Civil Procedure since the plaintiff did not apply within two months of return of summons, the Court is under obligation to dismiss the suit.

4. Reliance is placed upon the ruling in the case of **Devidas Ganpatrao Kulkarni .vs. Upendrarao Madhavrao Dhopeswarkar and another** reported in 2001 (Supp.2) Bom.C.R. 412. The Single Judge of this Court held in para 16 of the Judgment with reference to Order IX, Rule 5 of the Code of Civil Procedure that, from the wording of the said provisions, it is contemplated that it is duty of the Court to pass an order as per Order IX, Rule 5 of the Code of Civil Procedure. It is, thus, contended that the Court has to see whether provision of Order IX, Rule 5 of the Code of Civil Procedure are complied with or not and the Court on its own has to pass necessary order. It appears that there was Civil Revision Application no.1101 of 1992 before the learned Single Judge of this Court which was allowed making it clear that the suit will stand dismissed only as against defendant no.1 in that case and not as against

defendant no.2 and the suit may proceed as against defendant no.2 as per law.

5. Reference is also made to the ruling in the case of **Shaw and Co. vs. B. Shamaldas and Co.** reported in AIR 1954 Calcutta 369 to argue that when procedural provision provides rule of limitation, the Court is left with no discretion but to make an order that the suit shall be dismissed as against the unserved defendant.

6. Learned Counsel for the petitioner submitted with reference to Order IX, Rule 5 of the Code of Civil Procedure that if the plaintiff is negligent and fails to move the Court according to law within time and also fails to serve the unserved defendants, the Court shall make an order that the suit be dismissed as against such defendants who were unserved. It is contended that the provision is mandatory and leaves no discretion with the Court and the Court ought to have dismissed the suit filed by the plaintiff as against the unserved defendants.

7. As against these contentions, the learned Counsel for the respondent submitted that the impugned order was passed subject to payment of cost to defendant no.1 while application Exh.19 made by the defendant was rejected and the applications made by the plaintiff at Exh. Nos.20 and 21 were allowed by a common order and summons were directed to be issued against the unserved defendants namely defendant nos. 5 to 9 and 11 and 14 on demand of process fee. It is submitted that, considering the fact that the said suit was a suit for partition and separate possession, the impugned order is sustainable on the ground that the procedure is handmaid of justice and is not mandatory but directory.

8. To support the submission that procedural roles are directory in nature and they must serve as handmaids of justice, reference is made to the ruling in the case of **Sambhaji and Others .vs. Gangabai and Others** reported in 2009 (1) ALL MR 921 wherein the Supreme Court with reference to Order VIII, Rule 1 of the Code of Civil

Procedure dealt with the procedural limit of ninety days regarding filing of written statement and although the word 'shall' has been used in mandatory term to file the Written Statement within thirty days from the date of service of summons upon the defendant and considering the outer limit of 90 days from the date of service of summons during which Written Statement is required to be filed mandatorily under the provisions, the Hon'ble Supreme Court interpreted the provision and observed that the object of the provision is to expedite hearing and not to scuttle the same. It is also observed that justice delayed may amount to justice denied, but justice hurried may in some cases amount to justice buried. Thus, all the rules of procedures were held by the Apex Court as handmaids of justice. The observations made in para nos. 9 to 13 of the Judgment are as under :

“9. All the rules of procedure are the handmaids 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 or the statute, the provisions of 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.

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

*11. 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. 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. 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.

12. Processual law is not to be a tyrant but servant, not an obstruction but an aid to justice. A Procedural prescription is the handmaid and not the mistress, a lubricant, not a resistant in the administration of justice.

13. It is also to be noted that though the power of the court under the proviso appended to Rule 1 of Order 8 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 for 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. “

9. The Apex Court has further observed thus :

“ In Sangram Singh vs. Election Tribunal, Kotah (AIR 1955 SC 425) considering the provisions of the Code dealing with the trial of 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 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 to be used to frustrate it. “

10. Thus, it has to be borne in mind that 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 and 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 it reasonably possible, in the light of that principle. The Supreme Court specifically observed in para 15 of the ruling that in cases where close relatives are litigants, liberal approach is called for.

11. Procedural fairness also require that fair opportunity must be given to answer the case and to raise an objection about procedural provision and also to give notice to the opposite party to avail of opportunity of being heard. Therefore, considering the principles of natural justice that nobody shall be condemned unheard, legitimate expectation of a litigant that suit would be decided after hearing the parties in accordance with law must be respected while passing the orders. That being so, the observations made in respect of mandatorily worded provision of Order VIII, Rule

1 of the Code of Civil Procedure are attracted in cases of identical mandatorily worded procedural provision of Code of Civil Procedure. In view of the observations made by Hon'ble Supreme Court as above, the law laid down in the case of Sangram Singh would no longer be a good law, particularly, when litigation is between close relatives seeking partition and separate possession of the joint family or ancestral property. Larger interest of justice would be served if such litigation is taken to its logical end and decided on all fronts. That being so, the impugned orders in respect of application made for permission to serve the unserved defendants made on behalf of the plaintiff and an application made by defendant no.1 to have the suit dismissed on the ground that some of the defendants were unserved and should be dismissed against them were passed in conformity with the law as laid down by the Apex Court in the case of Sambhaji and Ors. The instant case needs no interference in exercise of extraordinary writ jurisdiction. Hence, the Writ Petition must be dismissed. It is accordingly dismissed.



13

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No order as to costs.

JUDGE

jaiswal