In The High Court At Calcutta

Civil Revisional Jurisdiction

Appellate side

Present :

The Hon'ble Justice Harish Tandon.

C.O. No. 34 of 2015

Chittanku Ranjan Das
-vs-
Swati Das & Ors;

Judgment on : 21.01.2015

HARISH TANDON, J.:

" The mortality of justice at the hands of law troubles a judge's conscience and points an angry interrogation at the law reformer" as held in case of **Sushil Kumar Sen –v- State of Bihar** reported in **(1975) 1 SCC 774** is the expression fervently used to interpret the processual law dominating certain systems as to overpower substantive rights and substantive justice. The unscrupulous defendant used to adopt the tools of law to prolong the litigation with an avowed object to delay the disposal of the suits which assumes an importance in bringing the

amendments in the Code of Civil Procedure. Order 8 Rule 1 as it stood prior to the amendments having brought in the year 1999 and 2002 was one of such weapon in the hands of the defendant to postpone the filing of the written statement and the Courts were helping and aiding such recalcitrant defendant in granting the adjournment mechanically as when ask for. The rightful claim was delayed because of the frequent adjournments granted to the defendant for filing the written statement even after service of summons. The Parliament showed their anxiety in delayed disposal of the suits instituted before the Courts and invited the Law Commission to explore the mechanism to secure the speedy and early disposal of the civil suits.

On the recommendation of the Law Commission, Order 8 Rule 1 of the Code was substituted by the new provision which was couched in such manner which does not permit the Court to extend the time beyond 30 days from the date of service of summons on the defendant. Because of the stiff resistance from every corner, the said provision was revisited and came to be substituted by introducing the Code of Civil Procedure (Amendment) Act, 2002, and the provision as it stood now is reproduced below:

> **"R.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."

What can be culled out from the aforesaid provision is narrated in Paragraph 27 of the Supreme Court in case of **Kailash –v- Nanhku & Ors;** reported in **(2005) 4 SCC 480** in these words:

> **"27.** Three things are clear. Firstly, a careful reading of the language in which Order 8 Rule 1 has been drafted, shows that it 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. Secondly, the nature of the provision contained in Order 8 Rule 1 is procedural. It is not a part of the substantive law. Thirdly, the object behind substituting Order 8 Rule 1 in the present shape is to curb the mischief of unscrupulous defendants adopting dilatory tactics, delaying the disposal of cases much to the chagrin of 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. The process of justice may be speeded up and hurried but the fairness which is a basic element of justice cannot be permitted to be buried."

There is another line of thoughts supporting the view that the processual law may contain liberal or stringent provision but the

advancement of justice is the primary object and the rules of procedures are handmaid of justice and the procedural enactment ought not to be construed in a manner which would leave the Court helpless to meet the extraordinary situations in the ends of Justice. As held in **State of Punjab and another –v- Shamlal Murari & another** reported in **(1976) 1 SCC 719** " Processual law is not to be a tyrant but a servant not an obstruction but an aid to justice. Processual prescriptions are the handmaid and not the mistress, a lubricant not a resistant in the administration of justice." Though the language implied in Order 8 Rule 1 of the Code, is in negative form which ordinarily makes the rule mandatory but in **Kailash (supra)**, the three Judges Bench held the said provision to be mandatory as in an exceptional circumstances, the Court's power to enlarge a time beyond the prescribed period cannot be taken away. In 1955, the Supreme Court in case of **Sangram Singh –v- Election Tribunal, Kotah** reported in **AIR 1955 SC 425** laid down the principles for interpreting any provision of the Code of Civil Procedure as;

> "(*i*) 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.

(*ii*) 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.

(*iii*) No forms or procedure should ever be permitted to exclude the presentation of the litigant's defence unless there be an express provision to the contrary."

In case of **Salem Advocate Bar Association –v- Union of India** reported in **(2005) 6 SCC 344**, the Constitution Bench interpreted the word 'shall' appearing in Order 8 Rule 1 of the Code of Civil Procedure to be inconclusive to determine whether a provision is mandatory or directory. It is ultimately held that the said provision is directory in nature and outer limit fixed therein can be extended in an exceptional cases but should not be made in routine manner so as to frustrate and nullify the period fixed therein. The object and reasons behind incorporating the time limit is to advance the cause of justice and not to defeat it. The Constitution Bench also accepted the principles that the processual law are the handmaid of justice and not its mistress while observing " 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. The construction of rule or procedure which promote justice and prevents miscarriage has to be preferred. The rules of procedure are the handmaid of justice and not its mistress. In the present context, the strict interpretation would defeat justice." While upholding the ratio that the provision under Order 8 Rule 1 of the Code is directory in nature and applying the ratio laid down in **Salem Advocate Bar Association, Tamil Nadu (supra)**, another Division Bench of the Supreme Court in case of **Sk. Salim Haji Abdul Khayumsab –v-Kumar** reported in **(2006) 1 SCC 46,** held:

> **"16.** Challenge to the constitutional validity of the Amendment Act and the 1999 Amendment Act was rejected by this Court in *Salem Advocate Bar Association* v. *Union of India*. However, to work out modalities in respect of certain provisions a committee was constituted. After receipt of the committee's report the matter was considered by a three-Judge Bench in *Salem Advocate Bar Assn.* v. *Union of India*. As regards Order 8 Rule 1 the committee's report is as follows:
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> "*15*. 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 8 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.
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> *16*. 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 8 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.

17. In *Raza Buland Sugar Co. Ltd.* v. *Municipal Board, Rampur* 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.

18. In *Sangram Singh* v. *Election Tribunal, Kotah* 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 be used to frustrate it.
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> 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 **Sambhaji & Ors; -v- Gangabai & Ors;** reported in **(2008) 17 SCC 117,** another Division Bench of the Supreme Court had an occasion to decide the similar point as to whether the Courts power to extend the time provided under Order 8 Rule 1 of the Code did exist. While interpreting the said provision, it is held "any interpretation which eludes or frustrates the recipient of justice is not to be followed."

Simultaneously with the substitution of Order 8 Rule 1 of the Code, Order 5 Rule 1 was also substituted. In tune of the said provision, second proviso to Order 5 Rule 1 of the Code postulates that where the defendant fails to file the written statement within 30 days from the date of service of summons, he shall be allowed a further time by the Court for the reasons to be recorded in writing but not less than 90 days from the date of the service of summons. First proviso takes care of the situation where the defendant appeared without service of summons at the presentation of plaint and admit the plaintiff's claim. In such event, there shall not be any service of summons if both the provisions are harmoniously construed. It leads to an inevitable conclusion that service of summons on the defendants is the mandatory requirement of the provisions except where the defendant appeared at the presentation of the plaint and admits the plaintiff's claim. The aforesaid proposition is

fortified by a Division Bench judgment of this Court in case of **Thakurdas Majhi –v- Chand Majhi & another** reported in **AIR 1960 Cal 538** in the following words:

> "7. Under O.V, R. 1, service of summons on the defendant is obligatory in every suit, unless the case comes within the proviso which contemplates the case of a defendant who has entered appearance at the presentation of the plaint and who has admitted the plaintiff's claim. The present case, in our opinion, cannot be brought within the said proviso and, if that be the true position in law, summons of the suit (T.S. 69/1947) had to be served upon all the defendants including the applicant-opposite party who was defendant no. 3 therein. That actually was attempted to be done in this case also, as we find on the record that, after registration of the suit as aforesaid, the plaintiff was directed to put in process fees and copies of the plaint and the court directed service of summons upon the defendants and, it was only after the peon's return had been accepted by the learned Subordinate Judge that there was actually service of summons upon the present contesting opposite party, defendant no.3 that the suit in question proceeded. What we have said above also accords quite fully with the practice in this matter which prevails in the civil courts, and, in our opinion, that practice is salutary and fully in accordance with law and it should not be interfered with."

From the plain reading of the language provided in Order 8 Rule 1 or Order 5 Rule 1 of the Code, the period provided therein would reckon from a date of service of summons but the question still begging an answer when the defendant voluntarily appears in the suit without service of summons and does not admit the plaintiff's claim.

There may be a conceivable situation where the defendant appears after service of notice affected under Order 39 Rule 3 of the Code or appeared upon service of an application in pursuance of the caveat lodged under Section 148A of the Code. In the present case, the petitioner appeared after service of the notice sent to him in compliance of Order 39 Rule 3 of the Code and participated in the injunction proceeding. The provision, if looked into in its contextual sense, the right to file written statement emanates from service of the summons and not otherwise. In strict sense, first proviso to Order 5 Rule 1 of the Code is applicable when the defendant appeared at the presentation of plaint and admits the claim. Section 148A of the Code restricts applicability to an application expected to be made in any suit or proceeding instituted or about to be instituted and confers a right of the person to be served with a copy of the application or the documents which has been or may be filed in support of the application. At the time of hearing the interlocutory application, the Court is not applying its mind on the hearing of the suit. The legislative intend behind incorporating the provisions for service of summons is to afford the defendant an opportunity to contest which is akin to the principle of audi *alteram partem*. Rule 2 of Order 5 which is again substituted by Civil Procedure Code (Amendment) Act, 1999 mandates every summons to be

accompanied by a copy of the plaint. The object is to make the defendant aware, the claims made in the suit on the facts and law and inures the defendant to put his defence both on facts and law. Under Rule 5 of Order 5 of the Code, the Court shall issue the summons either for settlement of issues only or final disposal of the suit. If the aforesaid provisions are construed with the legislative intend, the summons are required to be served to make the defendant aware of the relief claimed against him on the facts incorporated therein and to enable him to put his defence to enable the Court to determine the dispute involved therein. The aforesaid proposition is not free from an exception. There may be a situation where the defendant voluntarily appears and prayed for a time to file written statement. In such case, it may be implied that the defendant has waved the service of summons and the limitation shall start from the date of the appearance. There may be another situation whether the defendant appeared at the interlocutory stage say when a caveat is lodged under Section 148A of the Code but did not seek for a time to file the written statement. In such event, it shall not amount to waiving the service of summons unless the Court records the appearance of the defendant and passed the order. No service of summons should be served and such appearance is treated as an appearance upon service of summons. In such eventuality, it would frustrate the legislative intend, if

the Court has to waive the service return of the summons which shall further the delay in disposal of the suit. The object for timely and speedy disposal of the civil suit is behind the amendments to be brought in 1999 and 2002 in the Code of Civil Procedure. Section 27 of the Code also show a change when certain words were inserted by an Amendment Act, 46 of 1999 which brought effect from 1st July, 2002. The said section requires summons to be issued to the defendant within 30 days from the date of the institution of the suit.

The object for fixing the time limit of 30 days for issuance of the summons on the defendant is elaborately discussed in case of **Salem Advocate Bar Association (supra)** and is held:

> "*7.* It was submitted by Mr Vaidyanathan that the words 'on such day not beyond thirty days from the date of the institution of the suit' seem to indicate that the summons must be served within thirty days of the date of the institution of the suit. In our opinion, the said provisions read as a whole will not be susceptible to that meaning. The words added by amendment, it appears fix outer time-frame, by providing that steps must be taken within thirty days from the date of the institution of the suit, to issue summons. In other words, if the suit is instituted, for example, on 1-1-2002, then the correct addresses of the defendants and the process fee must be filed in the court within thirty days so that summons be issued by the court not beyond thirty days from the date of the institution of the suit. The object is to avoid long delay in issue of summons for want of steps by the plaintiff. It is quite evident that if all that is required to be done by a party, has been performed within the period of thirty days, then no fault can be attributed to

> the party. If for any reason, the court is not in a position or is unable to or does not issue summons within thirty days, there will, in our opinion, be compliance with the provisions of Section 27 once within thirty days of the issue of the summons the party concerned has taken steps to file the process fee along with completing the other formalities which are required to enable the court to issue the summons."

If it is accepted that even after seeking time to file written statement does not render the time to commence under Order 8 Rule 1 of the Code, it would amount to travesty of justice and inevitably results in delay while causing serious prejudice to the interest of the parties and administration of justice. Such interpretation would run contra to legislative intend behind the provision of Order 8 Rule 1 and Order 5 Rule 1, 2 & 5 of the Code of Civil Procedure.

On the touchstone of the aforesaid proposition of law, let me see whether the Trial Court was right in rejecting the application filed by the defendant no.2 to accept the written statement. From the certified copy of the order sheet produced before this Court, the suit was instituted on 18th November, 2013 and an application for injunction was moved on 20.11.2013. The defendant no. 3 was on caveat and appears in the said application. The defendant no.2 who is the petitioner in this revisional

application was not on caveat and a service was directed to be affected upon the other defendants including the petitioner herein under Order 39 Rule 3 (a) & (b) of the Code of Civil Procedure. The petitioner appeared on 19.12.2013 and prayed for a time to file written objection to the injunction application. The next date was fixed on 27th January, 2014 when further time to file written objection but further sought permission to file written objection to the injunction application was sought by the petitioner. Though the injunction application was further fixed on 3rd March, 2014 and 4th April, 2014 but it does not appear that the petitioner have waived the service of summons by conduct or by specific action. It is only on 13th May, 2004, the petitioner not only prayed for extension of time to file written statement. Once the defendant have taken steps to disclose the defence, the time under Order 8 Rule 1 of the Code should begin. It appears that the written statement was filed on 16th July, 2014 within 120 days. The written statement, therefore, does not appear to have been filed beyond the outer limit and once the Court permitted the defendant to file written statement by enlarging the time, it would be a travesty of justice that the written statement filed subsequently shall not be accepted.

This Court, therefore, set aside the order of the Trial Court. The written statement filed by the petitioner shall be taken on record.

The revisional application thus succeeds.

However, there shall be no order as to costs.

Urgent photostat certified copy of this order, if applied for, be given to the parties on priority basis.

(Harish Tandon, J.)