(2004) 02 BOM CK 0108

Bombay High Court (Aurangabad Bench)

Case No: Writ Petition No"s. 4688 and 4700 of 2003

Prabhakar Madhavrao Mule		APPELLANT
	Vs	
Bhagwan Mitharam Choudhari		RESPONDENT

Date of Decision: Feb. 24, 2004

Acts Referred:

- Civil Procedure Code Amendment Act, 2002 - Order 8 Rule 1, Order 8 Rule 9

Citation: (2004) 5 BomCR 568 : (2004) 2 MhLj 1058

Hon'ble Judges: B.B. Vagyani, J

Bench: Single Bench

Advocate: D.P. Palodkar, for the Appellant; V.P. Latange, for the Respondent

Final Decision: Dismissed

Judgement

B.B. Vagyani, J.
Heard.

2. Rule. Rule made returnable forthwith. With consent of the parties, taken up for final hearing.

3. The point involved in both the writ petitions is similar in nature and, therefore, both the writ petitions are disposed of by common judgment.

4. The respondent Sahebrao Dagaduba Khandwe, r/o Shindephal, Tq. Sillod, District Aurangabad (respondent in Writ Petition No. 4700 of 2003) has filed Regular Civil Suit No. 77 of 2003 against the petitioner claiming specific performance of agreement and actual possession of the suit property. Bhagwan Mitharam Chaudhari, r/o Bahadurpura, Tq. Parola, District Jalgaon (respondent in writ petition No. 4688 of 2003) has filed Regular Civil Suit No. 76 of 2003 against the very petitioner claiming specific performance

of contract and possession of the suit property. The suit summons in Regular Civil Suit Nos. 77 of 2003 and 76 of 2003 were duly served on the original defendant Prabhakar Mule (petitioner in both the writ petitions). The original defendant was supposed to appear before the Court on 30-4-2003.

5. In response to the suit summons, the defendant appeared in the suit. However, he did not file written statement within a period of 30 days, as per Order 8, Rule 1 of Civil Procedure Code. The defendant even thereafter failed to file written statement of his defence within a period of 60 days. In short, the defendant tailed to file written statement of his defence within 90 days from the date of service of suit summons. After expiry of 90 days, the defendant moved the learned Civil Judge for grant of further extension to file written statement. The learned Civil Judge, by order dated 1-10-2003, rejected the prayer of the defendant on the ground that after expiry of period of 90 days from the date of service of suit summons, the Court has no authority to accept the written statement. The correctness of this order is challenged by the original defendant.

6. The learned counsel Shri Palodkar for the petitioner argued that whole approach of the learned Civil Judge is wrong. According to him, the Civil Judge should have taken recourse to the provisions of Section 148 of the CPC and should have extended the time to file written statement.

7. Section 148 of the CPC can be pressed into service in case any period is fixed or granted by the Court for doing of any act and not otherwise. In the instant case, by virtue of Order 8, Rule 1 of the Code of Civil Procedure, the defendant has to file written statement of his defence within a period of 30 days from the date of service of suit summons. After lapse of 30 days, the defendant can be permitted to file written statement of his defence on such other date as may be specified by the Court for the reasons to be recorded in writing but which shall not be latter than 90 days from the date of service of summons. Therefore, in any case, the defendant is required to file written statement of his defence within 90 days from the date of service of summons. This period is not fixed or granted by the Court. By mandate of statute, the period to file written statement is prescribed. Therefore, the provisions of Section 148 of the CPC cannot be invoked for enlargement of time to file written statement beyond 90 days.

8. In case of Iridium India Telecom Ltd., Bombay v. Motorola Inc. and Anr., 2004 (1) M.L.J. 532, Division Bench of this Court has taken a view that the outer limit of 90 days prescribed by Proviso to Rule 1, Order 8 of the CPC for filing written statement, cannot be extended further with the aid of Section 148 of Code of Civil Procedure. The provisions of Order 8, Rule 1 of CPC are in the nature of self-contained Code as regards filing of written statement. It prescribes the outer limit for filing written statement. Therefore, Division Bench of this Court held that reliance upon general powers u/s 148 of the CPC is not permissible. This Court clarified that Section 148 of the CPC empowers the Court to enlarge time where any period is fixed or granted by the Court. The time for filing written statement is not granted or fixed by the Court and consequently, Section 148 of the CPC

would have no application.

9. Para No. 5 of the judgment in the case of Indium India (cited supra) is relevant for our purpose. It is said that Section 148 of the Code, which is repository of the general power to extend time cannot override the express limitation of Order 8, Rule 1 which has been amended by the Amending Act and which has prescribed outer limit of 90 days beyond which written statement could not be entertained.

10. A reference with profit can also be made to the case of Dr. J.J. Merchant and Others Vs. Shrinath Chaturvedi, . Section 13 of the Consumer Protection Act, 1986 speaks about procedure on receipt of complaint. On receipt of the complaint, the opposite party is required to be given notice directing him to give his version of the case, within a period of 30 days or such extended period not exceeding 15 days, as may be granted by the District Forum or Commission. For having speedy trial, the Legislative mandate is to the effect not to give more than 45 days for submitting the written statement. In para No. 13 of the judgment, Supreme Court has observed that if the time limit is not adhered to, the legislative mandate of disposing of the cases within three or five months would be defeated. Para Nos. 14 and 15 of the judgment are relevant for our purpose. There is reference of Order 8, Rule 1 of Code of Civil Procedure. In para No. 15, the Supreme Court has observed that there is a legislative mandate that written statement of defence is to be filed within 30 days. However, if there is failure to file such written statement within the stipulated time, the Court can, at the most, extend further period of 60 days and not more. Under the Act, the legislative intent is not to give 90 days of time but only maximum 45 days for filing the version by the opposite party. The Supreme Court has in unequivocal terms said that the aforesaid mandate is required to be strictly adhered to.

11. The learned counsel Shri Palodkar then submits that the trial Court has ample power to require written statement or additional written statement from any of the parties, even after lapse of 90 days from the date of service of suit summons, by virtue of latter part of Rule 9, Order 8 of Code of Civil Procedure, Rule 9 of Order 8 of the Code is in respect of subsequent pleadings. It begins with:

"No pleadings subsequent to the written statement of a defendant other than by way of defence to set-off or counter-claim shall be presented except by the leave of the Court and upon such terms as the Court thinks fit."

It means, no subsequent pleadings after filing of the written statement of the defendant, shall be presented except by way of defence to set-off or counterclaim. A defendant in a suit, in addition to his right of pleading set off under Rule 6, set up by way of counter-claim against the claim of the plaintiff and such counter-claim shall be treated as a cross suit. In such eventuality, the plaintiff is required to file written statement in answer to the counter-claim of the defendant, within such period as may be fixed by the Court. The counter-claim by virtue of Sub-rule (4) of Rule 6-A of Order 8 of CPC is required to be treated as a plaint. Order 8, Rule 6-G of the Code would make the position clear that

the rules relating to written statement by a defendant shall apply to a written statement filed by the plaintiff in answer to a counter-claim. This means, the written statement in any case is required to be filed within a period of 30 days from the date of service of suit summons.

12. No doubt, provision with regard to asking written statement or additional written statement from any of the parties at any time is distinct than the provisions contained in Order 8, Rule 1 of Code of Civil Procedure. Even otherwise, the Court is not permitted to fix a time not more than 30 days for presenting the written statement or additional written statement by any of the parties, by virtue of latter part of Rule 9, Order 8 of the Code of Civil Procedure. The discretion is given to the Court for calling the written statement or additional written statement from any of the parties. This rule has nothing to do with the time limit fixed to file written statement as contained in Order 8, Rule 1 of Code of Civil Procedure. The latter part of Rule 9 of Order 8 of CPC does not absolve the defendant from filing written statement, within a period of 30 days, as prescribed by Rule 1 of Order 8 of Code of Civil Procedure. The defendant cannot bank upon latter part of Rule 9 of Order 8 of the CPC to wipe out his default. Failure to file written statement within the prescribed period is not inconsequential.

13. The learned counsel Shri Palodkar submitted next that in the absence of penal consequences for not filing written statement, the time limit prescribed for filing written statement is directory in nature. In support of his submissions, he relied upon the case of A.V. Purushotam Vs. N.K. Nagaraj, . Single Judge of Karnataka High Court has held that in the absence of expressly stating what the penal consequences would be when written statement is not filed within stipulated period, notwithstanding the use of the word "shall" in Order 5, Rule 1, Order 8, Rule 1, Order 8, Rule 9 and Order 8, Rule 10, it cannot be said that the said provisions are mandatory. The Court has observed that the Court is not rendered helpless and the Court can press into service provisions of Section 148 of the CPC or latter part of Order 8, Rule 9 of the CPC as a source of power to receive such written statement.

14. Our High Court in the case of Iridium Indian Telecom Ltd. (cited supra) has ruled out that enlargement of time cannot be permitted by taking aid of Section 148 of the Code of Civil Procedure. It is wrong to hold that no penal consequences are provided for not filing written statement within the prescribed time. It is lawful for the Court to pronounce judgment against the defendant. Order 8, Rule 10 of the CPC speaks about penal consequences. When any party from whom written statement is required under Rule 1 or Rule 9 of Order 8 of CPC fails to present the same within the time permitted or fixed by the Court, as the case may be, it is lawful for the Court to pronounce the judgment against the defendant. However, discretion is given to the Court as to whether straight way to pronounce the judgment against the defendant or to make such order in relation to the suit, as it thinks fit.

15. In the case of Balraj Taneja and Another Vs. Sunil Madan and Another, , the Supreme Court made it clear that in case of failure to file written statement within the prescribed time limit, the discretion is given to the Court under Order 8, Rule 9 of Code of Civil Procedure. If the matter is complicated or the plaint itself indicates existence of disputed questions of fact or two different versions are set out in the plaint itself, it is not safe on the part of the Court to pass a judgment without requiring the plaintiff to prove the fact so as to settle the factual controversy and in such eventuality, instead of pronouncing the judgment, the Court is required to pass, suitable orders in relation to the suit, as it thinks fit. The Supreme Court interpreted the word "judgment" and observed that where case is contested or decided ex-parte or is a case where written statement is not filed and not decided under Order 8, Rule 10 of the Code of Civil Procedure, the Court has to write judgment in conformity with the provisions of the CPC or at least must set out the reasoning on which the controversy is resolved. It is observed that a judgment which does not indicate reasoning, suffers from infirmity.

16. There is no manner of doubt that the Court can pronounce judgment if written statement is not filed by the defendant within the prescribed time limit or make such order in relation to the suit as it thinks fit. In case of complicated nature of the suit or plaint itself exhibits contradictory facts and the dispute cannot be resolved, the Court shall not pass judgment without requiring the plaintiff to prove the fact so as to settle the factual controversy. If the Court decides to proceed to hear the suit without written statement, that would not debar the defendant from taking part in further proceeding. His participation would, however, be hedged in by several limitations. He will not be able to produce his own evidence with regard to any question of fact which he could have pleaded in the written statement. He will, however, be competent to cross examine the plaintiff"s witnesses in order to demolish their version of the plaintiff s case.

17. It is interesting to note that in the case of Smt. Savitha Gupta Vs. Smt. Nagarathna and Others, , a contrary view is taken as that of A.V. Purushotam (cited supra). A Single Judge of the Karnataka High Court has taken a contrary view and held that the time cannot be extended under Order 8, Rule 9 of CPC as filing of written statement is governed exclusively by Order 8, Rule 1 and on failure to file written statement within 30 days under amended Rule 1, Order 8 Code of Civil Procedure, the right to file written statement is lost and time barred written statement cannot be accepted by the Court even by purported exercise of inherent powers u/s 151 of the Code of Civil Procedure. In my view, this is the correct proposition of law.

18. The learned counsel Shri Palodkar, relying on the decision in the case of Jerry Alex Braganaza alias Jeronimo Oriculo Alex Braganaza v. Rajeshree alias Rayeshri Ramdas Borkar alias Shobhavati Ramdas Borkar, 2003 (4) M.L.J. 1034, argued that the Court has discretion for permitting the defendant to file written statement even beyond the period of 90 days. The issue involved in the said case is quite different. In that case, the suit was instituted before commencement of Amending Act 2002 and, therefore, the Court held that the provisions of Order 5, Rule 1 and Order 8, Rule 1 of CPC are not applicable to

the said suit and, therefore, the Court, in its discretion, may permit filing of written statement even beyond the period of 90 days. In the case in hand, the suit is filed after commencement of Amending Act 2002. Therefore, the decision in this case has no bearing on the issue involved in present writ petitions.

19. Before introduction of drastic amendments, no time limit was prescribed for filing written statement. By virtue of recent amendment, time limit is prescribed to file written statement. With the object of cutting short the delay at various levels, drastic amendments are brought into effect by introducing time limit for filing written statement. By virtue of recent amendment, there is no alternative for the defendant to file written statement within 30 days from the date of service of suit summons and by virtue of Proviso to Rule 1, Order 8 of Code of Civil Procedure, the written statement can be allowed to be filed on such other day for reasons to be recorded in writing, but in no case not latter than 90 days from the date of service of suit summons. Rule 1, Order 8 of CPC Code is mandatory in nature and it requires strict compliance. It is true that use of the word "shall" is itself not conclusive of the question whether the provision is mandatory or directory. In order to find out the real and true character of legislation, the Court is required to find out the object of amendment and the context in which the amendments are brought. If the object of law is to be defeated by non-compliance, it has to be regarded as mandatory. Where a Statute proscribes time limit to do a certain act, such an act is required to be done in a specified manner and within specified time limit. Therefore, the requirement of filing written statement within 30 days is certainly mandatory.

20. The impugned rejection order, therefore, does not suffer from any illegality. Both the writ petitions stand dismissed. Rule discharged. No order as to costs.