

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/SPECIAL CIVIL APPLICATION NO. 11625 of 2020

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RAJENDRABHAI MAGANBHAI KOLI
Versus
SHANTABEN MAGANBHAI KOLI
=====

Appearance:

MR AV NAIR(5602) for the Petitioner(s) No. 1

Advocate Not Given for the Respondent(s) No. 2,3

NOTICE SERVED(4) for the Respondent(s) No. 1
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CORAM:HONOURABLE DR. JUSTICE ASHOKKUMAR C. JOSHI

Date : 24/01/2022

ORAL ORDER

1. *Rule.*

2. This petition, under Article 227 of the Constitution of India, the petitioner - original defendant No. 2 has prayed for to issue a writ of certiorari or any other writ, order or direction, in the nature of writ of certiorari, by quashing and setting aside the order dated 21.08.2019 passed by the learned Additional Civil Judge, Bodeli in the application Exh. 18 in Regular Civil Suit No. 50 of 2018 and the order dated 13.01.2020 passed by the learned Additional District Judge, Chhotaudepur below Exh. 6 in Misc. Civil Appeal No. 27 of 2019 and further be pleased to permit the filing of the written statement.

3. At the outset, it may be noted that though served and although sufficient opportunity is given to the respondents, they have put in no appearance. Accordingly, the Court had no option

but to proceed with the matter.

4. The learned advocate for the petitioner – original defendant No. 2 submitted that the respondent No. 1 – original plaintiff has filed a suit being Regular Civil Suit No. 50 of 2018 before the concerned Civil Court at Bodeli for declaration and permanent injunction and partition in respect of the suit property being agricultural land bearing survey Nos. 123, 127, 196, 240, 244 and others, situated at Village: Nava Timberva, Taluka: Bodeli, District: Chhotaudepur. In the said suit, the petitioner – defendant No. 2 was duly served with the summons, however, could not file his written statement in time and hence, the learned Civil Court concerned, closed the right of the petitioner to file the written statement. Against which, an application Exh. 18 was preferred by the petitioner, which came to be rejected *vide* order dated 21.08.2019, observing therein that, filing of written statement after a period of 120 days is not permissible. Against the said order, the petitioner preferred Misc. Civil Appeal No. 27 of 2019, which also came to be rejected by the learned Additional District Judge, Chhotaudepur *vide* order dated 13.01.2020 on the ground of maintainability of the said appeal as well as on merits.

4.1 The learned advocate for the petitioner submitted that the learned trial Judge has wrongly applied the decisions of the Apex Court. The learned advocate, relying upon the decision of the Apex Court in ***Salem Advocate Bar Association, Tamil Nadu v. Respondent: Union of India (UOI), MANU/SC/0450/2005***, he submitted that, as directed by the Apex Court, the period of 120 days is directory and not mandatory.

4.2 The learned advocate for the petitioner further submitted

that the trial of the suit is yet to be commenced and the suit is at the stage of deciding the Exh. 5 application only and in the circumstance, allowing to file the written statement *per se* would not affect the right of the plaintiff in any way. The learned advocate for the petitioner, referring to the copies of death certificates produced on record, submitted that out of all the defendants, the defendant Nos. 1 and 3 have expired and their legal heirs are also required to be brought on record of the suit and in the circumstance, rejection of the said application would certainly jeopardize the right of the defendants. Besides, due to prevalent pandemic situation and the restriction therefor also, the petitioner could not pursue the matter.

4.3 The learned advocate for the petitioner, on instructions, submitted that the petitioner - defendant is ready and willing to pay the cost as may be imposed by the Court and accordingly, making such submissions, it is urged that this writ petition may be allowed, setting aside the impugned orders and the petitioner may be permitted to file the written statement in the pending suit.

5. It may be reiterated that though served and although sufficient opportunity is given to the respondents, no one has put in appearance.

6. Regard being had to the submissions advanced and perusing the material placed on record, it appears that against the orders passed by two learned Courts below, rejecting to open the right of the defendant to file the written statement in the pending suit, present writ petition has been filed.

6.1 In this regard, if the relevant provisions as regards the written statement is referred to in the CPC under O. VIII, the relevant of which, reads as under:

“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.

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 written statement on such other day, as may be specified by the Court, for reasons to be recorded in writing and on payment of such costs as the Court deems fit, but which shall not be later than one hundred twenty days from the date of service of summons and on expiry of one hundred twenty days from the date of service of summons, the defendant shall forfeit the right to file the written statement and the Court shall not allow the written statement to be taken on record.”

6.2 Thus, by virtue of the aforesaid provision, the Court may, for the reasons to be recorded in writing, and on payment of such costs as the Court deems fit, allow the defendant to file the written statement on such other day, but which shall not be later than one hundred twenty days from the date of service of summons and on expiry of one hundred twenty days from the date of service of summons, the defendant shall forfeit the right to file the written statement and the Court shall not allow the written statement to be taken on record. The learned advocate for the petitioner has relied upon the decision of the Apex Court in **Salem Advocate Bar Association, Tamil Nadu (supra)** wherein, it has been observed as under:

*“(d) Order VIII, Rule 1--Amendment by Act 46 of 1999 providing that defendant shall within 30 days from date of service of summons on him, present written statement of his defence--Court can extend time for filing written statement upto 90 days--**Whether Court has power or jurisdiction to extend period beyond 90 days?--Held, "yes"--Provision providing for maximum period of 90 days is not mandatory but only directory.***

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

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.

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.

However, 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."

6.3 Thus, the provision providing for maximum period of 90 days is not mandatory but only directory, however, exercise of discretion should not be a routine course and such powers should be exercised sparingly and in appropriate cases.

6.4 Further, as the facts go, the trial in the suit is yet to be commenced and the suit is pending at the stage of deciding application Exh. 5 and accordingly, considering the submissions made by the learned advocate for the petitioner so also considering the extant pandemic situation and the fact that allowing the petitioner to file the written statement may not prejudicially affect to the other side and also with a view to see that the suit in question be decided on merits and in the interest of justice, the petition deserves favourable consideration, however, with exemplary cost.

7. In view of the above, this writ petition is allowed. The order dated dated 21.08.2019 passed by the learned Additional Civil

Judge, Bodeli in the application Exh. 18 in Regular Civil Suit No. 50 of 2018 and the order dated 13.01.2020 passed by the learned Additional District Judge, Chhotaudepur below Exh. 6 in Misc. Civil Appeal No. 27 of 2019 are hereby set aside. The petitioner is permitted to file the written statement, which shall be filed within a period of 15 days and subject to payment of cost of Rs.10,000/- (Rupees Ten Thousand only), which shall be deposited before the trial Court concerned within 10 days and the trial Court concerned shall permit the original plaintiff to withdraw the same, on due verification and following due procedure. Rule is made absolute accordingly.

7.1 It is made clear that this order is passed in the peculiar facts and circumstances of the case and shall not be treated as precedent in any other case.

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[A. C. Joshi, J.]

