

# RAJASTHAN HIGH COURT

NemichandBurad

Vs.

Jorawarmal

Civil Writ Petition No. 5946 of 2004

(K.S. Rathore, J.)

23.11.2004

## ORDER

**K. S. Rathore, J.**

1. This writ petition is filed before the principal seat of High Court at Jodhpur. The learned single Judge vide order dated 27-11-2003 after hearing the learned counsel for the petitioner and considering this fact that the petitioners are not given reasonable opportunity to file the written statement as well as in the interest of justice has given one opportunity to take written statement on record on the cost of Rs. 3000/-. The petition was disposed of at admission stage.

2. Against the order dated 27-11-2003 respondent Nos. 1 and 2 preferred an appeal before the Division Bench and the same was registered as D.B. Civil Special Appeal (W) No. 54/2004. The Division Bench of this Court has set aside the order passed by the learned single Judge dated 27-11-2003 and the writ petition was returned with the direction to the registry to transfer the writ petition to *Jaipur* Bench. The Division Bench has considered the submissions made on behalf of the respondent Nos. 1 and 2 that the learned single Judge while disposing of the writ petition has not looked into the provisions of Order 8, Rule 1 Civil Procedure Code. Since in the writ petition the petitioners have challenged the order passed by the Additional District Judge (Fast Track), Beawer, as such only *Jaipur* Bench has jurisdiction. Therefore, the matter is transferred from Jodhpur to *Jaipur* Bench.

3. The brief facts of the case are that the respondent Nos. 1 and 2 filed a civil suit against the petitioners for which notices were issued and the petitioner put up his appearance through the Advocate on 2-4-2003 and filed an application under Order 7, Rule 11 for the maintainability of the suit. The matter was listed by the trial Court on

the application under Order 7, Rule 11 filed by the petitioner. On several dates the time was sought for filing reply and ultimately the reply to the application was filed on 31-7-2003. After filing the reply by the respondent Nos. 1 and 2 the petitioner filed an application under Order 8 Rule 1 stating therein that after notices were served on him he had gone to Bombay and had fallen sick as he was suffering from High Blood Pressure and since he was a heart patient the doctors advised him total bed rest.

4. The application so filed by the petitioner has been rejected by the trial Court vide order dated 10-11-2003.

5. Learned counsel for the petitioner has challenged this impugned order passed by the Addl. District Judge No. 2 (Fast Track), Ajmer on several counts. Mr. Maloo submits that until unless the trial Court decide the application moved on behalf of the petitioner under Order 7 Rule 11, the trial Court seriously erred rejecting the application filed by the petitioner under Order 8, Rule 1. The learned trial Court has also not properly considered the facts and the grounds mentioned in the application, the petitioner is able to show the sufficient reason to cause in filing the written statement beyond the prescribed limit and the trial Court ought to have been condone the delay in filing the written statement.

6. He has drawn my attention towards the order sheets drawn by the trial Court and by referring the order sheets of the trial Court demonstrated before this Court that the trial Court has never fixed the case for filing written statement and the case was listed for reply on the application filed by the petitioner under Order 7, Rule 11. Thus in the interest of justice it is just and proper for the trial Court to condone the delay and take the written statement on record.

7. In support of his submissions he placed reliance on the judgment rendered by the Hon'ble Supreme Court in the case of *Topline Shoes Ltd. v. Corporation Bank reported in, <sup>1</sup>* wherein the Hon'ble Supreme Court has held that the provision as contained under clause (a) of sub-section (2) of Section 13 is procedural in nature. It is also clear that with a view to achieve the object of the enactment, that there may be speedy disposal of such cases, that it has been provided that reply is to be filed within 30 days and the extension of time may not exceed 15 days. This provision envisages that proceedings may not be prolonged for a very long time without the opposite party having filed his reply. No penal consequences have however been provided in case extension of time exceeds 15 days. Therefore, it could not be said that any substantive right accrued in favour of the appellant or there was any kind of bar of limitation in

filing of the reply within extended time though beyond 45 days in all. The reply is not necessarily to be rejected. All facts and circumstances of the cases must be taken into account. The statement of objects and reasons of the Act also provides that principles of natural justice have also to be kept in mind.

8. After referring the aforesaid judgment Mr. Maloo referred Order 8, Rule 1 and Rule 9. In Order 8, Rule 1 the written statement can be filed within 30 days from the date of service of summons on him, present a written statement of his defense. In case the defendant fails to file the written statement within 30 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.

9. Mr. Maloo submits that he has shown the sufficient cause of delay and immediately after expiry of 90 days and immediately after opening of the Court after December vacations he filed the written statement. The Court while exercising power under Order 8, Rule 1 can condone the delay in filing of the written statement.

10. He further referred the case reported in (*Manik Singh v. Kumawat Panchayat*)<sup>2</sup> wherein this Court has held that written statement filed as many as after 33 opportunities trial court refusing to take same on record no prejudice to plaintiff if written statement be taken on record written statement allowed to be taken on record on payment of costs of Rs. 2000/-.

11. By referring this judgment Mr. Maloo submits that in the instant case also the learned single Judge at Jodhpur High Court has allowed the written statement to be taken on record on payment of cost of Rs. 3000/-. The cost has been paid and the same has been received by the plaintiff and in such eventuality at this stage after accepting the cost, cannot raise the objections with regard to the taking written statement on record.

12. For this purpose he referred the judgments reported in (*Metal Press Works Ltd. Calcutta v. Guntur Merchants Cotton Press Co. Ltd.*)<sup>3</sup> more particularly referred Head Note B and AIR 1989 Punjab and Haryana 229. In the case of Amar Singh the Division Bench of the Punjab and Haryana High Court has held that the cost, which has been accepted under protest even then the defendant respondent has no right to challenge the same. In the instant case also they accepted the cost.

13. Mr. Maloo also placed reliance on the judgment of *Lala Ram v. Civil Judge (Sr.*

*Division) Dantaramgarh reported in* <sup>4</sup>wherein this court has held that as per the provisions of Civil Procedure Code the written statement ought to have been filed within the period of 30 days from the date of service of notice and after then the Court, can extend the time.

14. Mr. Maloo submits that the preliminary objections, which has been raised by the respondents that the document, which has been filed here should not be looked into is baseless and frivolous. The respondents in its reply has placed several documents, therefore in rejoinder the petitioner also has submitted several documents, which are necessary for adjudicating the matter.

15. He also referred contents of the application moved on behalf of the petitioner under Order 8, Rule 1 read with Section 148 and 151 wherein para No. 5 categorically stated that the petitioner No. 1 fell ill and advised bed rest, therefore, it was requested that in exercise of power the Court may condone the delay and can accept the written statement but the Court has not given any reason as to why the application under Order 8, Rule 1, Civil Procedure Code has been refused.

16. In support of his submissions he further placed reliance on the cases of *Sri PrasannaParvathamba v. M. S. Radhakrishna Dixit reported in*<sup>5</sup> and *NachipeddiRamaswamy v. P. Buchi Reddy reported in* <sup>6</sup> wherein the Andhra Pradesh High Court has held that non filing of written statement within 90 days the Court has power to condone delay and extend period beyond 90 days. He further submits that the provisions of Order 8, Rule 1, Civil Procedure Code is not mandatory but directory.

17. Per contra learned counsel for the respondents plaintiff Mr. Surana raised the preliminary objections that as per the provisions of Order 8, Rule 1, Rule 6 and Rule 9 the rejoinder, which has been filed by the petitioners cannot be taken on the record. He gave much strength on Order 8, Rule 9, which deals with the subsequent pleadings. No pleading subsequent to the written statement of a defendant other than by way of defense to set-off or counter-claim shall be presented except by the leave of the Court. He further submits that the petitioner has not sought any leave from the Court, therefore, the rejoinder filed by the petitioner cannot be taken on record and should not be looked into.

18. Mr. Surana further raised the objection that as in the plaint the petitioner Nos. 1 and 2 are the defendants and on account of ailment if petitioner No. 1 NemichandBurad was not able to file the written statement, the petitioner No. 2 Sri Sanjay Burad could have filed the written statement well within the time or could have

filed application for condonation of delay.

19. Mr. Surana also referred the application, which has been filed by the petitioner defendant before the trial Court and by reading the contents of the application he submits that admittedly the written statement, which has been filed is beyond the limit i.e. 90 days and without seeking condonation from the Court the application under Order 8, Rule 1 is filed after expiry of the time and they have not specifically mentioned any reason except that the petitioner being heart patient is advised bed rest.

20. He further submits that at the time of filing of the application the petitioner is not able to place any medical certification in support of his submissions made in the application and only submitted that he is heart patient, which has been properly considered by the trial Court and as the petitioner is unable to prove and show his cause of delay, therefore, the application under Order 8, Rule 1 read with Order 8, Rule 9 Sections 148 and 151 Civil Procedure Code has been rejected.

21. In support of his submissions Mr. Surana placed reliance on the judgment reported in (*Essen Deinki v. Rajiv Kumar*)<sup>7</sup> wherein the Hon'ble Supreme Court has held that exercise of jurisdiction under Article 227 of the Constitution is limited and restrictive in nature. It is so exercised in normal circumstances for want of jurisdiction, errors of law, perverse findings and gross violation of natural justice, to name a few. It is merely a revisional jurisdiction and does not confer an unlimited authority or prerogative to correct all orders or even wrong decisions made within the limits of the jurisdiction of the Courts below. The finding of fact being within the domain of the inferior tribunal, except where it is a perverse recording thereof or not based on any material whatsoever resulting in manifest injustice, interference under the article is not called for.

22. It is clear that error must be that of law and patently on record committed by the inferior tribunal so as to warrant intervention it ought not to act as a Court of appeal.

23. He also referred the case reported in (*Remesh Chand Ardawatiya v. Anil Panjwani*)<sup>8</sup> wherein the Hon'ble Supreme Court has observed that Counter-claim-Modes of filing - Maintainability of - Three modes of filing counter-claim, restated Counter-claim filed by a defendant who had not filed a written statement and had also lost the right to file the same and not maintainable. However, such a defendant is at liberty to file his own suit based on the cause of action for the counter-claim.

24. Mr. Surana in support of his submissions that delay in filing of the written

statement after expiry of 90 days without seeking permission of this Court, such written statement cannot be taken on record, has placed reliance on the judgment of *Shiv Ram Singh v. MahendraRanjeet Mal Chordia reported in*<sup>9</sup> wherein this Court considering the case of Hon'ble Supreme Court and various High Courts has held that - Written statement - Delay in filing of - Effect Written statement filed after 154 days without any compelling or *bona fide* explanation when already second opportunity was given for same on costs - Order refusing to take written statement not interfered with.

25. Here in the instant case the written statement has been admittedly filed after 120 days without any *bona fide* explanation, therefore, the order impugned passed by the trial Court is strictly in accordance with the provisions of law and no interference while exercising power under Article 227 is required.

26. Heard rival submissions of the respective parties and carefully perused the material available on record as well as the judgments referred by the respective parties and relevant provisions of Civil Procedure Code.

27. This case has peculiar facts and the circumstances as the petitioner has filed this present petition before the principal seat of High Court as Jodhpur and the learned single Judge at Jodhpur High Court after hearing the arguments of learned counsel for the petitioner, at admission stage, disposed of the writ petition with the direction that in case the petitioner deposits the cost of Rs. 3000/- the written statement be taken on record. It appears that pursuant to the order dated 27-11-2003 the petitioner has paid the cost of Rs. 3000/-. Thereafter, the respondent plaintiff preferred appeal before the Division Bench of Jodhpur High Court.

28. It appears that respondent plaintiff has offered back the cost of Rs. 3000/- but the same was refused by the petitioner defendant and then was deposited in the Court. Now applying on the ratio decided by the Andhra Pradesh as well as Punjab and Haryana High Court in the case of Amar Singh, which has been referred by learned counsel for the petitioner, an application for amendment of plaint was moved by the plaintiff and the Court allowed the same subject to payment of the cost and the defendant accepted the cost. After acceptance of the cost he cannot challenge the order notwithstanding that the cost was accepted under protest. By acceptance of the cost he accepted the order as correct.

29. Herein the instant case also in view of the observation made by this Court vide order dated 27-11-2003 the petitioner offered and the same has been accepted by the respondents. But as per the ratio decided on acceptance of the cost termed as the

respondent plaintiff has accepted the order dated 27-11- 2003.

30. Now the facts of the present case are slightly different than the facts before the Punjab and Haryana High Court. The cost has been offered back and on refusal deposited in the Court and the plaintiff has challenged the order dated 27-11-2003. The Division Bench of this Court while setting aside the order dated 27-11-2003 remitted the matter back to this Court as the cause of action arises at Beawer and jurisdiction lies with *Jaipur* Bench. It is also observed that while passing the order dated 27-11-2003 the opportunity of being heard to the respondent plaintiff has not been given and the single Judge has not looked into the provisions of Order 8, Rule 1, Civil Procedure Code.

31. I have examined the relevant provisions of Civil Procedure Code, more particularly Order 8, Rule 1. The Order 8, Rule 1 is reproduced hereunder:

"Written statement .- The defendant shall, within thirty days from the date of service of summons on him, present a written statement of his defense : 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."

32. Upon bare perusal of the Order 8, Rule 1 the defendant can submit his statement of defense within 30 days from the date of service of summons and beyond the expiry of 30 days the petitioner can be allowed to submit the written statement within the period of 90 days with the permission of the Court.

33. For the enlargement of the period there is provision in Civil Procedure Code under Section 148. As per the provisions of Section 148 any period is fixed or granted by the Court for the doing of any act prescribed or allowed by this Code, the Court may, in its discretion, from time to time, enlarge such period (not exceeding thirty days in total), even though the period originally fixed or granted may have expired.

34. Admittedly in the instant case the written statement is filed after expiry of the period and for the enlargement of time the application under Order 8, Rule 1 read with Section 148 and 151 has been filed by the petitioner. The application so filed by the petitioner is also annexed herewith the writ petition as Annex. 4. The reasons, which are stated in the application are given in para 5. Para 5 of the application is reproduced hereunder:

(Vernacular matter omitted.....Ed.)

35. This application has been considered by the trial Court and while considering this application the trial Court also considered the judgment referred in para 5 reported in AIR 2003 Karnataka 345 and after considering this judgment the trial Court has observed as under :

(Vernacular matter omitted.....Ed.)

36. The Court has observed that the petitioner has failed to submit the cogent reason with the support of the document and it is also not believable that at the time of filing of the application the petitioner has not been able to produce the medical certificate to prove that the petitioner was suffering from heart ailment and was advised complete bed rest.

37. Now in the writ petition the petitioner has placed the medical certificate along with the rejoinder to the reply. The consistent view has been taken by the Hon'ble Supreme Court and this High Court while exercising power under Article 227 that the documents, which are placed in the writ petition cannot be examined as the petitioner has failed to produce the same before the trial Court. This Court cannot sit as an appellate Court.

38. As per Order 8, Rule 9 no pleading subsequent to the written statement of a defendant other than by way of defense 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; but the Court may at any time require a written statement or additional written statement from any of the parties and fix a time of not more than thirty days for presenting the same.

39. The petitioner had the opportunity to move before the trial by set-off counter-claim and move to seek leave from the trial Court to place the document on record. By bare perusal of Rule 9 reveals that no written statement or counter-claim can be accepted without seeking prior leave from the Court.

40. Similarly as the petitioner has not submitted particulars and documents along with the application and only filed an affidavit of his daughter, which is not found sufficient to show the reason, which prevents the petitioner not to file the written statement well within time. As per Rule 6 of Order 8 the particulars of set-off to be given in written statement.

41. There are two defendants/petitioners. If petitioner No. 1 was fell ill and was

advised rest then petitioner No. 2 could have filed his written statement. As informed by learned counsel for the respondents plaintiff that petitioner No. 2 has also not filed any written statement. It is also observed that there is no reason why the writ petitioner-defendant No. 2 has not filed the written statement.

42. I do not want to express my opinion with regard to petitioner No. 2 since petitioner No. 1 only moved application under Order 8, Rule 1 read with Section 148. It is the choice of the petitioner No. 2 to move proper application for seeking leave from the trial Court. But in any case I am not convinced with the submissions made on behalf of the petitioner that petitioner on account of ailment was not able to file written statement.

43. I find no illegality in the observations made by the trial Court while rejecting the application filed by the petitioner No. 1 under Order 8, Rule 1 and Order 8, Rule 9 read with Sections 148 and 151, Civil Procedure Code. The judgments, which are referred by the petitioner are not applicable to the facts and the circumstances of the present case. In view of the settled proposition of the Supreme Court and in view of the provisions of Order 8, Rule 1 and Order 8, Rule 9 and Sections 148 and 151, I find no illegality in the order dated 10-11-2003 passed by the trial Court and no interference whatsoever is required by this Court.

44. Consequently, the writ petition fails and is herewith dismissed with no order as to costs.

Petition dismissed.

Cases Referred.

1. 2002 WLC (SC) Civil 653: (AIR 2002 SC 2487)
2. 2004 WLC (UC) Raj 576: (AIR 2005 Raj 140)
3. AIR 1976 AP 205
4. 2004 WLC (Raj) UC 580
5. AIR 2003 Karn 345
6. AIR 2003 AP 409
7. (2002) 8 SCC 400: (AIR 2003 SC 38)
8. (2003) 7 SCC 350: (AIR 2003 SC 2508)
9. 2004 (3) WLC (Raj) 308: (AIR 2004 NOC 422)