

**No. 10- COURT'S ORDER WHETHER THE CASE IS OR IS
NOT APPROVED FOR REPORTING**

[Chapter VIII, Rule 32 (2) (b)]

Description of Case

Civil Writ Petition No. 954 (M/S) of 2005

Teerath Singh

Versus

Yogendra Singh

With

Civil Writ Petition No. 955 (M/S) of 2005

With

Civil Writ Petition No. 956 (M/S) of 2005

A.F.R. (Approved for Reporting)

Not Approved for Reporting

(B.S. Verma, J.)

Initials of Judge

Date: 28-04-2006

Reserved Judgment

THE HIGH COURT OF UTTARANCHAL AT NAINITAL.

Civil Writ Petition (M/S) No. 954 of 2005

Teerath Singh S/O Shri Mulki Singh,
R/O village Tikolakalan, Pargana Manglore,
Tehsil Roorkee, District Haridwar.

.....

Petitioner.

Versus

Yogendra Singh S/O Shri Pawan Singh,
R/O village Tikolakalan, Pargana Manglore,
Tehsil Roorkee, District Haridwar.

... **Respondent.**

Sri Lokpal Singh, learned counsel for the Petitioner.
Sri M.S. Tyagi & Sri Arvind Vashist, learned counsel for the respondent.

With

(1)Civil Writ Petition (M/S) No. 955 of 2005

Teerath Singh S/O Shri Mulki Singh,
R/O village Tikolakalan, Pargana Manglore,
Tehsil Roorkee, District Haridwar.

.....

Petitioner.

Versus

Yogendra Singh S/O Shri Pawan Singh,
R/O village Tikolakalan, Pargana Manglore,
Tehsil Roorkee, District Haridwar.

..... **Respondent.**

Sri Lokpal Singh, learned counsel for the Petitioner.
Sri M.S. Tyagi & Sri Arvind Vashist, learned counsel for the respondent.

(1)Civil Writ Petition (M/S) No. 956 of 2005

Teerath Singh S/O Shri Mulki Singh,
R/O village Tikolakalan, Pargana Manglore,
Tehsil Roorkee, District Haridwar.

.....

Petitioner.

Versus

Yogendra Singh S/O Shri Pawan Singh,
R/O village Tikolakalan, Pargana Manglore,
Tehsil Roorkee, District Haridwar.

..... **Respondent.**

Sri Lokpal Singh, learned counsel for the Petitioner.

Sri M.S. Tyagi & Sri Arvind Vashist, learned counsel for the respondent.

Date: April 28, 2006.

(Hon'ble B.S. Verma, J.)

All these three writ petitions are in between the same parties the subject matter of the suit being similar and controversy involved in all the writ petitions is same, therefore, for the sake of convenience, they are being decided by this common judgment.

All these writ petitions have been filed for quashing the impugned orders dated 01.02.2005 and 8-8-2005 passed by the trial court. By the order dated 1.2.2005, the learned Civil Judge (Sr. Div.) Roorkee rejected the application for grant of further time to file the written statement and ordered the case to proceed ex-parte on the ground that the defendant failed to file his written statement even after expiry of the period of 90 days after the service of summons on him on 11.8.2004. By the order dated 8-8-2005, the application of the defendant-petitioner for setting aside the order dated 1.2.2005 was rejected by the Additional District Judge, I.F.T.C. Roorkee at Roshanabad.

Relevant facts giving rise to these writ petitions are that the respondent has filed three suits before the Civil Judge (Senior Division) Roorkee against the petitioner on 28-7-2004 being Original Suit No. 40 of 2004, O.S. No. 41 of 2004 and O.S. No. 39 of 2004 Yogendra Singh Vs. Teerath Singh. These suits are pending for disposal before the Additional District Judge, I.F.T.C. Roorkee. It comes out from the perusal of the record that after filing of the suit, summons were issued to the defendant-petitioner for the date fixed. The summons were served on 11-8-2004. It reveals that no written statement was filed by the defendant in the suits till 1-2-2005. Both the parties were present on that date before the trial court. Application for adjournment was moved on the personal ground of illness of the counsel mentioning that the

written statement was not ready. The plaintiff-respondent opposed the application on the ground that the 90 days period of service of summons on the defendant has already elapsed but no written statement was filed by the defendant. The Trial court observed that the defendant failed to file written statement within the stipulated period of 90 days, though he was served on 11.8.2004, hence the trial court passed the order to proceed ex-parte against the defendant and accordingly rejected the application. It appears that subsequently the case was transferred to the Court of Additional District Judge, I F.T.C. Roorkee. In that court on 28-2-2005, the defendant moved an application alleging therein that the defendant is an illiterate person and not acquainted with the legal knowledge. After receipt of notice, the defendant contacted the lawyer Sri Manmohan and engaged him as his counsel. The defendant was not aware that the said counsel practices on criminal side and not on civil side. It was due to the mistake of the lawyer that no written statement was filed and adjournments were sought. It is alleged that it was only on 1.2.2005, that the defendant came to know that the court had rejected his application. It was prayed that in case the order dated 1.2.2005 is not recalled, the rights of the defendants will be adversely affected. On this application, the plaintiff filed his objection supported by affidavit stating therein that under the provisions of Order 8, Rule 1 C.P.C., no relaxation can be granted and the ignorance of law is not excusable. The learned trial court after hearing the arguments of the parties' counsel has observed that the defendant took time on 13.9.2004 on the ground that Sri Man Mohan Advocate could not inspect the file. On 6-10-2004 again the counsel took adjournment on personal ground. On 9-11-2004, adjournment was sought as he was busy in other cases. On 10-12-2004, time was sought on account of personal ground. It was found that on 1.2.2005, the application was moved on behalf of the defendant by another advocate, therefore, it was not acceptable that Sri Manmohan used to take time in the case throughout. The court further observed that Sri B.M.Sharma, Advocate, also filed his Vakalatnama in the case on 25.2.2005 and even after notice of the

fact that suit was ordered to proceed ex parte, no action was taken promptly. Ultimately, by the impugned order dated 8-8-2005, the trial court did not find favour with the contention of the defendant and relying upon the Apex Court Judgment in the case of Kailash Vs. Nanhku [2005) 4, Supreme Court cases, 272] observed that in the instant case, the circumstances were not exceptional and they cannot be said to be beyond the control of the defendant and accordingly rejected the application of the defendant by a detailed order.

On behalf of the plaintiff-respondent, counter-affidavit has been filed. Therein it was stated by the plaintiff-respondent that the stand taken by the defendant-petitioner that the correct copy of the plaint was not annexed with the summons is totally a false and concocted story, while he appeared on several dates in the proceedings of the suit. Not only this, the petitioner-defendant sought adjournments on different grounds but never applied to the court for copy of the plaint. It was contended in para no. 8 of the Counter Affidavit that the Hon'ble Apex Court has held in the case of "Kailash Vs. Nanhku" [2005) 4, Supreme Court cases, 272] that only in exceptional circumstances the Court may grant time to file written statement beyond the statutory period of 90 days as provided under Order 8, Rule 1 C.P.C. and the petitioner-defendant entirely failed to establish before the lower court that he had been precluded from filing the written statement within the stipulated period of 90 days due to exceptional circumstances.

I have heard Sri Lok Pal Singh, learned counsel for the petitioner-defendant and Sri M.S. Tyagi, learned counsel for the respondent and perused the entire material on record.

The main ground of challenge raised by the learned counsel for the petitioner is that the provisions of Order 8, Rule 1 C.P.C. are directory in nature and not mandatory and the trial court by misinterpreting the provision of law has committed illegality in rejecting the application. Learned counsel for the petitioner submitted that all the rules and procedure are the handmaid of justice and no party should be denied the opportunity of participating in process of justice dispensation. Learned counsel for the petitioner has relied upon the Apex Court judgments in the following cases:-

1. *Sardar Amarjit Singh Kalra (Dead) by L.R.S. Vs. Pramod Gupta (Smt)(Dead) by LR. and others [(2003) 3 Supreme Court Cases, 272].*

2. *Kailash Vs. Nanhku and Others [2005) 4, Supreme Court Cases, 480.]*

3. *Salem Advocate Bar Association, T.N. Vs. Union of India [(2005) 6 Supreme Court Cases, 344].*

On the other hand, the learned counsel for the plaintiff-respondent submitted that the ratio of the Apex Court judgment on the point is that the procedure with regard to the period of time for filing the written statement is directory in nature and only in exceptional circumstances time may be extended beyond the period of 90 days. It has been vehemently submitted that the learned Trial Court after considering each and every event and conduct of the defendant-petitioner has rightly declined the prayer of the defendant thereby rejecting the application and no infirmity or illegality was committed by the trial court in passing the impugned order.

At the outset, it may be noted that it is settled law that the provisions of Order 8, Rule 1 C.P.C. are not mandatory but

they are directory. First I take up the law laid down by the Apex Court in the case of ***Kailash Vs. Nanhku and others (supra)***. In that case in para no. 46, the Apex Court has summed up its conclusion. It has been observed in sub-para (iv) of paragraph 46 that “though the language of the proviso to Rule 1 Order 8 CPC is couched in negative form, it does not specify any penal consequences flowing from the non-compliance. The provision being in the domain of the procedural law, it has to be held directory and not mandatory. The power of the court to extend time for filing the written statement beyond the time schedule provided by Order 8, Rule 1 CPC is not completely taken away.” In sub-para (v) it has been observed that ***“a prayer for extension of time made by the defendant shall not be granted just as a matter of routine and merely for the asking, more so when the period of 90 days has expired . Extension of time may be allowed by way of an exception, for reasons to be assigned by the defendant and also be placed on record in writing, howsoever briefly, by the court on its being satisfied. Extension of time may be allowed if it is needed to be given for circumstances which are exceptional, occasioned by reasons beyond the control of the defendant and grave injustice would be occasioned if the time was not extended.”*** In that case, the Apex Court found that the written statement was already filed in the High Court but the prayer was denied because the High Court felt it had no power to do so.

In the case of ***“Sardar Amarjit Singh Kalra (supra)***, the case before the Apex Court related to Land Acquisition Act 1894 and the provisions of Order 22, Rules 2 and 3 of the C.P.C. were considered by the Apex Court and it was observed in paragraph no. 26 that ***“Laws of procedure are meant to regulate effectively, assist and aid the object of doing substantial and real justice and not to foreclose even an adjudication on merits of substantial rights of citizen under personal, property and other laws. Procedure has always been viewed as the handmaid of justice and not meant to hamper the cause of justice or sanctify miscarriage of justice.”*** The ratio of

the Apex Court verdict in this case cannot be disputed, but the facts of the case before the Apex Court and of the instant case at hand are entirely different. This ruling is not applicable to the present writ petitions, wherein the provisions of Order 8, Rule 1 C.P.C. are only applicable.

Now coming to the case of ***Salem Advocate Bar Association (supra)***, wherein the provisions of Order 8, Rule 1 CPC were dealt with by the Apex Court, it has been observed in paragraph 14 of the judgment that ***“Order 8 Rule 1, as amended by Act 46 of 1999 provides that the defendant shall within 30 days from the date of service of summons on him, present a written statement of his defence. The rigour of this provision was reduced by Amendment Act 22 of 2002 which enables the court to extend the time for filing written statement, on recording sufficient reasons therefore, but the extension can be maximum for 90 days.”*** In paragraph no. 15 the Apex Court, it was observed that 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 and in paragraph no. 16, the Apex Court observed that ***“ 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.”*** In concluding lines of paragraph no. 21, the Apex Court has observed that ***“we wish to make it clear that 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 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 8 Rule 1.”***

The cumulative outcome of the Apex Court judgments in the case of ***Kailash Vs. Nanhku (supra) and Salem Advocate Bar Association (supra)*** is that the discretion of court regarding extension of time to file the written statement should not be availed in a routine manner and the time can be extended only in exceptionally hard cases. Moreover, this discretion should not be frequently and routinely exercised so as to nullify the period fixed by Order 8, Rule 1 C.P.C.

In the light of the Apex Court verdict on the point it has to be seen whether the defendant-petitioner has made out a case of exceptionally hard circumstances beyond his control in his favour for having been prevented to file the written statement within the time schedule as provided under Order 8, Rule 1 CPC in the course of proceedings before the trial court.

For just decision of the writ petitions, the text of Order 8 Rule 1, as it stands now, is reproduced as under:-

“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.”

Thus, from the provision of Order 8, Rule 1 CPC, it is clear that 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. It can be seen that the substituted Order 8 Rule 1 intends to curb the mischief of unscrupulous defendants adopting dilatory tactics, delaying the disposal of cases, causing inconvenience to the plaintiffs and the petitioners approaching the court for quick relief and also the serious inconvenience of the

court faced with frequent prayers for adjournments. Naturally the object is to expedite the hearing and not to scuttle the same.

In the case at hand, the record clearly reveals that initially the three suits of the plaintiff-respondent were filed before the Court of Civil Judge (Senior Division) Roorkee. When the case was taken up on 1-2-2005, both the parties were present before the trial court. Application 34-D was moved by the defendant on the ground of illness of his lawyer alleging that the written statement could not be prepared. The plaintiff objected to it on the ground that the service of summons on the defendant was effective much earlier and the period of 90 days has already elapsed. The trial court has clearly observed that the defendant was served with summons on 11-8-2004 and no written statement was filed by him and continuous adjournments were taken by the defendant. Accordingly, the application was rejected fixing the case for ex-parte evidence on 23-2-2005. Not only this, when the case was subsequently transferred to the Court of Additional District Judge Roorkee, the defendant filed application 38-C praying for setting aside the order to proceed ex-parte dated 1-2-2005. The learned trial court after perusing the record found that the defendant sought time on 13-9-2004 on the ground that Sri Manmohan Advocate could not inspect the file. Again on 6-10-2004, adjournment was sought by the counsel on his personal ground of urgent work. Thereafter again on 9-11-2004, adjournment was sought on the ground that the counsel was busy in other cases. On 10-12-2004, adjournment by the defendant was sought because the counsel had gone to attend a family marriage function. The trial court further found that on 1-2-2005, the application was moved for adjournment by another counsel Manoj Kumar, which was not signed by Sri manmohan. The stand taken for setting aside the impugned order dated 1-2-2005 was that the counsel for the defendant Sri Manmohan engaged by him was a criminal lawyer and he was not used to do civil work and this fact came to his knowledge on 1-2-2005. According to the defendant, he engaged Sri B.M.Sharma, advocate of civil side, on 23-2-2005,

who inspected the file on 25.2.2005 and also filed his Vakalatnama, but even thereafter till 28-2-2005 no written statement was filed in the suit. Moreover, for the first time in the suit before the trial court, the defendant-petitioner raised the plea that the plaintiff had not annexed correct copy of the plaint in O.S. No. 40 of 2004. This submission of the petitioner is without legs. On a number of dates, the defendant was represented through counsel before the trial court, but no such plea was ever taken till the order to proceed ex-parte was passed on 1-2-2005. This stand appears to have been taken with ulterior motive and an application accompanied with written statement was filed for permission to take the written statement on record before the trial court only on 20-4-2005. The contention of the defendant that the advocate Sri Manmohan was not a civil lawyer has also not been substantiated by any document. There is no affidavit of the counsel concerned to that effect. The learned trial court has rightly observed that the ignorance of law is no excuse.

The above narration of the entire aspect of the case, only goes to show that in the course of proceedings before the trial court the defendant-petitioner had availed the adjournment for extension of time to file the written statement in a routine manner on a number of dates as detailed above. The defendant, having been served with the summons as back as on 11-8-2004 and having not filed the written statement in the suits till 1-2-2005 without assigning exceptionally hard circumstances beyond his control and the fact that the defendant for the first time filed the application that he may be permitted to file written statement before the trial court only on 28-4-2005 having put in appearance before the trial court and participated in the proceedings on a number of dates, himself was responsible for his conduct. It may be reiterated that more than sufficient opportunity had been availed by the defendant for extension of time to file written statement till the date of impugned order dated 1-2-2005. It has not been denied that the defendant was served with summons on 11-8-2004.

Having gone through the entire events of the proceedings before the court below and the conduct of the defendant for seeking frequent adjournments in routine manner for time to file written statement, as observed by the trial court in its order dated 8-8-2005, I am fully convinced that the petitioner has utterly failed to show any evidence that he was prevented by any exceptionally hard circumstances and that too beyond his control in filing written statement not only within a period of ninety days from the date of service upon him but for a long time thereafter. I see no reason to interfere with the finding of the trial court and in view of the Apex Court verdict in the cases referred to above, the prayer of the defendant was rightly rejected by the trial court as the discretion of the court to extend the time should not be so frequently and routinely exercised so as to nullify the period fixed by Order 8, Rule 1 C.P.C.

For the reasons and discussion aforesaid, I do not find any manifest error or jurisdictional error or any perversity in the impugned orders dated 1-2-2005 and 8-8-2005. The writ petitions are devoid of merit and are liable to be dismissed.

All the three writ petitions are hereby dismissed. Interim order passed by this Court on 1.9.2005 is vacated. No order as to costs.

(B.S. Verma,J.)

RCP