

THE HIGH COURT OF SIKKIM: GANGTOK

(Civil Writ Jurisdiction)

## WP(C) No.17 of 2008

- Mr. Dharma Shamsher Basnet, S/o Late P. B. Basnet, R/o 5<sup>th</sup> Mile, Tadong, P.O. Samdur, P.S. Ranipool, East Sikkim.
- 2. Mrs. Milan Basnet,
  W/o Mr. Dharma Shamsher Basnet,
  R/o 5<sup>th</sup> Mile, Tadong,
  P.O. Samdur,
  P.S. Ranipool,
  East Sikkim. Petitioners

## versus

- Mr. T. S. Chettri,
   S/o Late Dal Bahadur Chettri,
   R/o 5<sup>th</sup> Mile, Tadong,
   P.O. Samdur,
   P.S. Ranipool,
   East Sikkim.
- Mrs. Pampha Tiwari,
   W/o Late H. P. Sharma,
   R/o 5<sup>th</sup> Mile, Tadong,
   P.O. Samdur,
   P.S. Ranipool,
   East Sikkim.
- Mrs. Bina Chettri,
   W/o Mr. B. L. Dhal,
   R/o 5<sup>th</sup> Mile, Tadong,
   P.O. Samdur,
   P.S. Ranipool,
   East Sikkim.
- Mrs. Hemlata Chettri, W/o Mr. N. B. Khatiwada, R/o 5<sup>th</sup> Mile, Tadong, P.O. Samdur, P.S. Ranipool, East Sikkim.

..... Respondents

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Mr. T. B. Thapa, Mr. B. R. Pradhan and For Petitioners :

> Mr. Anmole Prasad, learned senior counsel assisted by Ms. Yangchen D. Gyatso, Ms. Pema Yeshey Bhutia and Ms.

Pem Choki Sherpa, learned counsel.

Mr. B. Sharma, learned senior counsel For Respondents:

assisted by Mr. J. K. Kharka and Mr.

Bijay Rai, learned counsel.

PRESENT: HON'BLE MR. JUSTICE A. H. SAIKIA, CHIEF JUSTICE. HON'BLE MR. JUSTICE A. P. SUBBA, JUDGE.

Last date of hearing: 02-11-2009

DATE OF JUDGMENT: 07-12-2009

## JUDGMENT

## Subba, J.

This writ petition filed by the two defendants in Title Suit No.2 of 2006 pending in the Court of learned Civil Judge, East & North Sikkim at Gangtok is directed against the interlocutory order dated 01-05-2008 passed by the learned Court of the Civil Judge, East & North Sikkim at Gangtok rejecting the application filed by the petitioners for extension of time to file written statement in the suit.

The facts of the case relevant for the present 2. purpose are that the plaintiffs who are respondents herein filed a Civil Suit on 10-07-2006 against the present petitioners seeking a decree for declaration, mandatory injunction and other reliefs. Along with the plaint, the plaintiffs also filed an injunction application under Order XXXIX Rules 1 and 2 read with Section



151 of the Code of Civil Procedure, 1908 (In short "CPC"). Since this application was followed by many miscellaneous applications including miscellaneous appeals to the lower appellate Court the defendants, i.e., the petitioners herein were so hard pressed that they could not file the written statement in the main suit in time. It was only on 01-08-2007 that the petitioners were able to file the written statement along with an application for extension of time for filing written statement. The learned trial Court after hearing the parties and on an interpretation of Order VIII Rule 1 CPC came to the conclusion that the petitioners had not been able to show any cogent reason to justify extension of time and accordingly, rejected the petition. It is against this order that the petitioners have come up before this Court in the present petition.

Since neither an appeal nor a revision under Section 115
CPC lies against an order passed under Order VIII Rule 1 CPC
the petitioners have resorted to constitutional provisions and
have filed the present petition under Articles 226 and 227 of the
Constitution of India.

3. The main ground taken in the present petition when it was initially filed is that miscellaneous matters which came up between the parties after the main suit was filed came in the way of filing of the written statement by the defendants within time. The additional grounds that has been taken by the petitioners is that because of the confusion created by the miscellaneous proceedings some of which culminated in





miscellaneous appeals in the lower appellate court many documents got misplaced. The misplaced documents and other documents which were not in their possession were traced out only few days before the application was moved. The further ground taken is that the learned counsel for the petitioners had to leave the station on account of the ailment of his wife.

The application was opposed by the plaintiffs-respondents herein mainly on the ground that there being no provision in CPC to file such an application the application filed by the petitioners for extension of time was contrary to mandatory provisions of law and as such, not maintainable.

At this stage, it may be relevant to mention that the 4. grounds as narrated above were the only grounds taken in the present petition when it was initially filed. However, in course of the proceedings before this court, the learned counsel for the petitioners moved an application for amendment mentioning that while preparing for motion for admission of the writ petition and also on examination of the relevant documents certain facts which were germane to the issue but had been inadvertently left out at the time of preparing the writ petition came to the notice of the petitioners. The facts so stated to have been left out are that the learned trial Court had never passed any order directing the issuance of summons upon the petitioners as required under the provisions of Orders V and VIII of CPC so that the limitation period of 90 days could be said to have commenced. As a consequence, the petitioners were labouring under the mistaken





apprehension that the last date of filing the written statement was 13-10-2006, that is to say 90 days from date of service of notice to show cause to the defendants in the miscellaneous matter. Such mis-apprehension led them to believe that they were not able to prepare and file the written statement within the time prescribed by Order VIII Rule 1 CPC and there has been a delay of 291 days in filing the written statement. It was thus contended that since the learned trial Court had not yet passed any order directing issue of summons calling upon the defendants to file written statement of their defence no date has been set on and from which 90 days period could have been computed and as such, the written statement already filed by the petitioners could not have been treated as time barred.

The amendment as sought for having been allowed after hearing the parties, the above grounds were also incorporated in the main petition and accordingly, recast writ petition was filed. The respondents chose not to file any counter-affidavit.

- We have heard the learned counsel for both parties at length.
- 6. The short point that falls for consideration is whether time to file a written statement could be extended beyond 90 days in view of the Order VIII Rule 1 CPC as it stands after the latest amendment of 2002.
- 7. While it was the submission of the Mr. T. B. Thapa, learned senior counsel for the petitioners that the petitioners had





made out a strong case for extension of time, Mr. B. Sharma, learned senior counsel appearing for the respondents submitted that the longest time that can be allowed in terms of Order VIII Rule 1 CPC was 90 days and as the period of 90 days had already elapsed by the time the present petition for extension of time to file written statement was filed the same could not have been allowed.

As can be noticed from the foregoing narration, the 8. additional ground taken by the petitioners on the amendment being allowed is that since no summons calling upon the petitioners to file written statement has been issued there has been no delay in filing the written statement. In other words, the written statement already filed is within time. Since we find it convenient to take up this issue first we propose to refer to the submission made by Shri B. Sharma, learned senior counsel appearing for the respondents in this regard at the first instance. The submission made by the learned senior counsel is to the effect that where the defendants had already entered appearance in the proceedings issuance of a separate summons calling upon the defendants to file written statement by particular date was not a requirement of law and as such, there was no irregularity The learned counsel in support of his on that account. submission relied on the decision of the Apex Court in Sri Nath Agarwal vs. Santosh Kumar reported in AIR 1981 All. 400 wherein it has been held as follows:-



"If the defendant party appears before the court after the registration of the suit, and he is informed about the nature of the claim and the date fixed for reply thereto it must be deemed that the defendant has waived the right to have a summons served on him.

In such a case if some date is fixed for filing the written statement and for hearing of the suit it would rather be too technical a view to take that service of summons in the ordinary course were still to be insisted upon and to hold that further proceedings in the suit would take place only thereafter. This is neither the purpose nor the way to look at various provisions of the CPC."

9. The law as laid down by the above decision having not been seriously disputed by the learned counsel for the petitioners, we have no hesitation to hold that since the petitioners had already entered appearance in the present case and were aware of the day to day proceedings a separate order directing issue of summons upon the petitioners, i.e., the defendants for filing of written statement was not called for. Accordingly, it must be observed on the basis of the decision cited above that the order dated 08-09-2006 which was passed in presence of both parties fixing a next date for filing of the written statement by the defendants to file written statement was sufficient compliance of the requirement of law. Thus, even though the petitioners had seriously pressed this issue, it is of little avail. However, it may be observed that the learned counsel for the petitioners stand on a firmer ground in respect of the other plea that the Court has discretion to allow filing of written statement after 90 days even under the amended provision of Order VIII Rule 1 CPC if sufficient cause is shown.



That it is so would be clear from our discussion that follows hereinafter.

Mr. B. Sharma, learned senior counsel for the respondents relied on the following two decisions on the point:

- Sukhdeo Rai vs. Ashok Kumar Rai and Ors. reported in AIR 2005 Gau. 37; and
- A. M. Khaithan vs. M. Sheshappa and Ors. reported in AIR 2005 Kant. 23.

In Sukhdeo Rai's case where written statement was eventually filed after expiry of the period of 90 days a learned Single Bench of the Gauhati High Court held that there was no power or discretion left in the Court to condone the delay and take the written statement on record. It was observed that the provisions of Order VIII as amended by the Amendment Act 2002 is particularly stringent and no discretion has been left to the Court to extend the time for filing the written statement beyond 90 days and that even extension of time beyond the initial 30 days, if granted, is required to be supported by reasons to be recorded in writing. Similarly, in A. M. Khaithan's case where the learned trial Court had rejected the petitioner's application for leave to file written statement a Single Bench of the Karnataka High Court relying on a Division Bench decision of the same Court in A. Sathyapal vs. Smt. Yasmin Banu Ansari reported in 2004 AIR - Kant HCR 1108 held that the order rejecting leave to file written statement was in conformity with the law. In other words, the decision lays down that the time to file written statement cannot be extended beyond 90 days.





- 10. There is no doubt that the above decisions lay down that no time can be extended beyond 90 days for filing written statement after 2002 amendment of CPC. However, in order to ascertain and arrive at the correct position of law in this regard, we find it necessary to refer to the following decisions out of the number of decisions relied on by the learned counsel for the respondents.
- 11. At the outset, we wish to make it clear that it does not appear to us to be the law that in no circumstances can a Court extend such time beyond 90 days even after the latest amendment of CPC in the year 2002. Indeed, one of us (Saikia, C.J. the then Judge of Gauhati High Court) had in Subir Kumar Dey vs. Joya Dey @ Joya Mahajan reported in 2006 (2) Gauhati Law Times 298 had already expressed the view and held relying on Kailash vs. Nanhku and Ors. reported in (2005) 4 SCC 480 that the provisions of Order VIII Rule 1 C.P.C. were directory in character and not mandatory and that though an obligation was cast on the defendant/opposite party to file a written statement within the time prescribed the provisions did not deal with nor specifically took away the power of the Court to accept a written statement on record though filed beyond the time as provided under Order VIII, Rule 1 C.P.C.
- 12. Order VIII Rule 1 CPC as it stands now reads 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."

13. The scope and ambit of the above provision of law has been examined by the Apex Court in the above Kailash's case (supra) and in Salem Advocate Bar Association, T.N. vs. Union of India reported in (2005) 6 SCC 344 and other more recent decisions.

In the above, **Kailash**'s case (supra), the three Judge Bench of the Apex Court while interpreting the provisions of Order VIII Rule 1 CPC held as follows:-

> "The extension of time sought for by defendant from court, whether 30 or 90 days, should not be granted as a matter of routine and merely for the asking, and especially when period of 90 days has expired. Extension of time beyond the limits laid down in Or. 8 Rule 1 and proviso thereto, as amended, could only be by way of exception and for reasons assigned by defendant and also recorded in writing by court to its satisfaction, howsoever brief they might be. Court concerned had to spell out that departure from time schedule prescribed in Or. 8 Rule 1 and proviso thereto, as amended, was being allowed because circumstances were exceptional, occasioned by reasons beyond control of defendant and such exception was required in the interest of justice, and grave injustice would be occasioned if time were not extended."

[emphasis supplied]

In Salem Advocate Bar Association, it has been clearly held that the Order VIII Rule 1 CPC including the proviso are not



mandatory but directory. Accordingly, it has been held that the delay can be condoned and a written statement can be accepted even after the expiry of 90 days from the date of service of summons in exceptional hard cases.

Division Bench of the Apex Court in Rani Kusum (Smt) vs.

Kanchan Devi (Smt) and Ors. reported in (2005) 6 SCC 705

observed 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. Further, it was observed that the nature of the provision contained in Order 8 Rule 1 is procedural. It is not a part of the substantive law. Clarifying the legal position further the Apex Court in paragraph 10 of the judgment also observed as follows:-

"10. All the rules of procedure are the handmaid of justice. The language employed by the draftsman of processual law may be liberal or stringent, but the fact remains that the object of prescribing procedure is to advance the cause of justice. In an adversarial system, no party should ordinarily be denied the opportunity of participating in the process of justice dispensation. Unless compelled by express and specific language of the statute, the provisions of CPC or any other procedural enactment ought not to be construed in a manner which would leave the court helpless to meet extraordinary situations in the ends of justice."

In Shaikh Salim Haji Abdul khayumsab vs. Kumar and Ors. reported in (2006) 1 SCC 46 also the Apex Court held that Order VIII Rule 1 CPC and the proviso thereto as amended by



2002 Amendment do not take away the power of the Court to take written statement on record though filed beyond 90 days. The Court, however, observed that any departure from the provisions contained in Order VIII Rule 1 has to be for satisfactory reason only. The Court in paragraph 15 of the judgment observed as follows:-

"15. It is also to be noted that though the power of the court under the proviso appended to Rule 1 of Order 8 is circumscribed by the words "shall not be later than ninety days" but the consequences flowing from nonextension of time are not specifically provided for though they may be read by necessary implication. Merely, because a provision of law is couched in a negative language implying mandatory character, the same is not without exceptions. The courts, when called upon to interpret the nature of the provision, may, keeping in view the entire context in which the provision came to be enacted, hold the same to be directory though worded in the negative form." [emphasis supplied]

The following observation made by Hon'ble Shri Justice P.

K. Balasubramanyan (as his Lordship then was) in his Lordship's concurring judgment rendered in R. N. Jadi & Brothers and Ors. vs. Subhashchandra reported in (2007) 6 SCC 420 emphasises the same position of law:-

"15. It is, therefore, necessary to emphasise that the grant of extension of time beyond 30 days is not automatic, that it should be exercised with caution and for adequate reasons and that an extension of time beyond 90 days of the service summons must be granted only based on a clear satisfaction of the justification for granting such extension, the court being conscious of the fact that even the power of the court for extension inhering in Section 148



of the Code, has also been restricted by legislature." [emphasis supplied]

The above decisions make it clear beyond any doubt that extension of time to file written statement beyond 90 days can be granted the only condition being that it should be for satisfactory and justifiable reasons. In view of this, we have no hesitation to hold that time to file written statement can be extended beyond 90 days for satisfactory and justifiable reasons.

The next question that needs to be answered is whether the cause shown by the petitioners in support of the application for condonation of delay is satisfactory and justifiable.

As already narrated above, the filing of the suit in question was followed by miscellaneous applications and the petitioners after entering appearance were fully engaged in contesting the miscellaneous proceedings including the appeal arising out of it. Thus, there were not only miscellaneous proceedings but there were also miscellaneous appeals arising out of the miscellaneous matters which the defendants were required to contest in the lower appellate court. To add to it, it is also noticed that in the appeal that was filed before the lower appellate court against the injunction order, the records of the court were called for by the appellate court and remained with the appellate court until the matter was finally disposed of.

15. In a similar case in which the defendants were prevented from filing a written statement in time on account of intervening miscellaneous applications and the appeals that



arose out of the miscellaneous matters, the Apex Court has held that the case was an exceptional one which constituted sufficient cause for condoning the delay in filing the written statement [see Zolba vs. Keshao & Ors. reported in AIR 2008 SC 2099]. In the facts and circumstances of the case the Apex Court held that the High Court as well as the trial Court had erred in rejecting the application for condoning the delay in filing the written statement.

Keeping in view the above guidelines as well as the principle that no party should ordinarily be denied the opportunity to participate in the process of justice dispensation in an adversarial system which we follow in our country as enunciated by the Apex Court in *Rani Kusum*'s case referred to above, we see no reason as to why the reasons given by the petitioners in the present case should not be taken as satisfactory and sufficient for the purpose of condonation of the delay in filling the written statement. In the facts and circumstances of the case, the learned trial Court ought to have condoned the delay under such condition as may be permissible under the law. In our considered view such an approach would certainly have served the ends of justice well.

Accordingly, in the facts and circumstances of the case and in view of the reasoning and observations made above, we have no hesitation to hold that the learned trial court had erred in rejecting the application for condonation of delay in





filing the written statement and as such, interference of this Court is called for.

- 17. Accordingly, the impugned order dated 01-05-2008 is hereby quashed and set aside. The learned trial court is directed to take the written statement already filed by the petitioners on record. Thereafter, the learned trial Court shall proceed to hear the matter according to law and shall make all efforts to dispose of the matter as early as possible.
- 18. In the result, the writ petition stands allowed.
- 19. However, keeping in view the peculiar facts and circumstances of the case, we direct the petitioners to pay a cost of Rs.5,000/- (Rupees five thousand) to the respondents.
- 20. A copy of the judgment be sent to the court below for information and compliance.
- 21. The lower court records may be returned forthwith.

( Justice A. H. Saikia ) Chief Justice

07-12-2009

( Justice A. P. Subba )

Judge

ds/