

**Satish Chandra Vs. Additional District Judge and ors.**

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**SooperKanoon Citation :** [sooperkanoon.com/754717](http://sooperkanoon.com/754717)

**Court :** Rajasthan

**Decided On :** Mar-27-2006

**Reported in :** RLW2006(2)Raj1513; 2006(3)WLC159

**Judge :** Prem Shanker Asopa, J.

**Acts :** Code of Civil Procedure (CPC) - Sections 151 - Order 8, Rules 1 and 9

**Appeal No. :** S.B. Civil Writ Petition No. 2592 of 2005

**Appellant :** Satish Chandra

**Respondent :** Additional District Judge and ors.

**Advocate for Def. :** Rajesh Moondia, Adv.

**Advocate for Pet/Ap. :** Amit Punia, Adv.

**Disposition :** Writ petition allowed

**Judgement :**

**Prem Shanker Asopa, J.**

1. By the instant writ petition the petitioner has challenged the order dated 14.2.2005 passed by the Additional District & Sessions Judge (Fast Track) No. 1, Baran whereby the application for taking the written statement filed on 28.9.2004 has been rejected on the ground that the provisions of Order-8 Rule-1 of C.P.C.

are mandatory and in the application no reason has been assigned as to why the Court should ask him to file the written statement, whose aim is also to delay the proceedings.

2. Briefly stated the relevant facts of the case are that the plaintiff-respondent No. 2 filed a civil suit for partition of ancestral property described in para No. 1 of the plaint. The Trial Court has fixed the date 22.9.2004 for filing the written statement but on 22.9.2004 it was recorded that the service on the petitioner-defendant No. 1 was effected on 12.3.2004 and the written statement has not been filed. Thus, the same cannot be filed after 90 days. After recording the said part of the order-sheet, Shri Mahesh Prakash Gautam, Advocate filed the 'Vakalatnama' along with the written statement but neither the same was taken on record nor the date fixed for evidence i.e., 6.10.2004 was changed. Subsequently, the counsellor the petitioner-defendant No. 1 filed an application under Order-8 Rule-1 and 9 read with Section 151 CPC for taking the written statement on record,

3. The respondent-plaintiff filed reply to the said application and submitted that the written statement cannot be taken on record after expiry of 90 days and the Court is free to pass the judgment under Order-8 of the CPC. The Trial Court hearing both the parties has held that the provisions of Order-8 Rule-1 of C.P.C. are mandatory and in the application no reason has been assigned as to why the Court should ask him to file the written statement, whose aim is also to delay the proceedings.

4. The submission of the counsel for the petitioner-defendant No. 1 is that the Supreme Court as well as this Court has held that the provisions of Order-8 Rule-1 CPC are directory and further having extended the time beyond 90 days vide orders dated 25.8.2004 and 13.9.2004 to 22.9.2004, it is not open for the Court to say that the written statement has not been filed within the extended period of 90 days, otherwise the petitioner- defendant No. 1 who was relying on the order-sheets dated 25.8.2004 and 13.9.2004, will suffer for not fault on his part. The further submission of the counsel for the petitioner- defendant No. 1 is that on 22.9.2004 after writing the main order-sheet, counsel for the petitioner-defendant No. 1 before the Trial Court has filed written statement along with his

'Vakalatnama' on 22,9.2004 and a note to the aforesaid effect was appended on the order-sheet of 22,9.2004. In such circumstances, his application for taking the written statement on record ought to have been allowed. In support of his submissions, the counsel for the petitioner has relied on the judgments of this Court in Lala Ram and Ors. v. Civil Judge (Sr. Division) Dantaramgarh and Ors. 2004 WLC (Raj.) UC 580 and Rameshwar Lal and Anr. v. Dayanand and 7 Ors. 2005 (3) WLC (Raj.) 237. In the later judgment of this Court, the judgment of the Supreme Court in Kailash v. Nanhku and Ors. reported in : AIR 2005 SC2441 has been followed. There are two other judgments of Hon'ble the Supreme Court on the same issue i.e., Rani Kusum (Smt.) v. Kanchan Devi (Smt.) and Ors. : AIR 2005 SC3304 and Shaikh Salim Haji Abdul Khayumsab v. Kumar and Ors. : AIR 2006 SC396 wherein also Kailash v. Nanhku and Ors. (supra) and Rani Kusum (Smt.) v. Kanchan Devi (Smt.) and Ors. (supra), cases have been followed and it was further held that negative language implying mandatory character is not conclusive of the matter and the maxims actus curiae neminem grauabit and lex non cogit ad impossibilia will also apply.

5. The submission of the counsel for the respondent-plaintiff is that although the provisions of Order-8 Rule 1 CPC are held to be directory but no sufficient reason has been given for filing of the written statement beyond the extended period of 90 days.

6. I have gone through the record of the writ petition and further considered the rival submissions of the parties.

7. The relevant order-sheets dated 25.8.2004, 13.9.2004 and 22.9.2004 are reproduced hereunder for ready reference:

25.8.2004

i=koyh ekuuh; Mh-ts- lkgc ds vkns'k ls eqrfdy gksdj , -Mh-ts- ckjka esa ntZ jftLVjA

odhy oknh mifLFkfrA izfroknh la;k 1 o 3 dSyk'k mifLFkr A izfroknh 2] 4] 5] 6 dks lwpuks gksus ds ckn Hkh mifLFkfr ugha vr% buds fo:) ,d rjQk dk;Zokgh dh tkrh g SA

i=koyh tokc nkok gsrw fnukad 13-9-2004 dks is'k gksA

vij ftyk U;k;k/kh'k] ckjka

13-9-2004

odhy oknh mifLFkrA odhy izfriknh uEcj 1 o 3 ds vf/koDrk mifLFkr A tokc nkok is'k djus dks le; pkgkA i=koyh tokc nkok okLrs fnukad 22-9-2004 dks is'k gksA

vij ftyk ,oa Is'ku U;k;k/kh'k

Qk LV VsV la[;k & 1] ckjkaA

22-9-2004

odhy oknh mifLFkr A odhy izfroknh la[;k1 o 3 ds vf/koDrk miLFkrA izfroknh la[;k 3 us tokc nkok is'k fd;k A tks fjdk MZ ij ugha fy;k tk ldrk gS D;ksafd izfroknh la[;k 3 dks rkfey 15-3-2004 dks 90 fnu Is vf/kd vof/k gks pqdh g SA vr% tokc nkok fjdk MZ ij ugha fy;k tk ldrk g SA izfroknh la[;k 1 dks rkfey 12-3-2004 dks gqbZ] tokc nkok is'k ugha fd;k g SA vr% tokc nkok 90 fnu ckn is'k ugha dj ldrs g SA i=koyh okLrs lk{; oknh gsrw fnukad 6-10-2004 dks is'k gksA

vij ftyk ,oa Is'ku U;k;k/kh'k

Qk LV VsV la[;k & 1] ckjkaA

iqu'p% bruk fy[kus ij Jh egs'k xkSre ,M- us odkyrukek o tokc nkok is'k fd;k g SA 'kk-i=k- g SA i=koyh fu;r fnukad 6-10-2004 dks is'k gksA

vij ftyk ,oa Is'ku U;k;k/kh'k

Qk LV VsV la[;k & 1] ckjkaA

8. A bare perusal of which would reveal that on 25.8.2004 the case was fixed for written statement of the petitioner-defendant No. 1 and the last date for filing the written statement was 22.9.2004 but while drawing the order-sheet dated 22.9.2004, the Court has ignored the order-sheets dated 25.8.2004 and 13.9.2004.

9. The relevant provisions of Order-8 Rule-1 of CPC are as follows:

[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.

10. In *Kailash v. Nanhku and Ors.* (supra), 3 Judges Bench of the Supreme Court while holding that the provisions of Order-8 Rule-1 CPC are directory in character and not mandatory, framed guidelines of exercise of discretion by court in this regard. The relevant guidelines No. (iv) and (v) in para No. 46 of the aforesaid judgment for exercising discretion under Order-8 Rule-1 are as follows:

(iv) The purpose of providing the time schedule for filing the written statement under Order 8 Rule 1 CPC is to expedite and not to scuttle the hearing. The provision spells out a disability on the defendant. It does not impose an embargo on the power of the court to extend the time. 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.

(v) Though Order 8 Rule 1 CPC is a part of procedural law and hence directory, keeping in view the need for expeditious trial of civil causes which persuaded Parliament to enact the provision in its present form, it is held that ordinarily the time schedule contained in the provision is to be followed as a rule and departure therefrom would be by way of exception. 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. Costs may be imposed and affidavit or documents in support of the grounds pleaded by the defendant for extension of time may be demanded, depending on the facts and circumstances of a given case.

11. In the aforesaid judgment, it was held that the extension of time may be allowed by way of an exception for reasons beyond control to be assigned by the defendant and also be placed on record in writing, however, briefly, by the court on its being satisfied. That grave injustice would be occasioned if the time was not extended. Costs may be imposed. The application for extension of time be supported by an affidavit.

12. The said judgment has been followed in Rani Kusum (Smt.) v. Kanchan Devi (Smt.) and Ors. (supra), wherein the Supreme Court has added the word of caution that justice delayed may amount to justice denied, justice hurried may in some cases amount to justice buried. The relevant paragraph Nos. 9 to 15 are as follows:

9. Order 8 Rule 1 after the amendment casts an obligation on the defendant to file the written statement within 30 days from the date of service of summons on him and within the extended time falling within 90 days. 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, the nature of the provision contained in Order 8 Rule 1 is procedural. It is not a part of the substantive law. The substituted Order 8 Rule 1 intends to curb the mischief on unscrupulous defendants adopting dilatory tactics, delaying the disposal of cases causing inconvenience to plaintiff's and petitioners approaching the court for quick relief and also to the serious inconvenience of the court faced with frequent prayers for adjournments. The object is to expedite the hearing and not to scuttle the same. While justice delayed may amount to justice denied, justice hurried may in some cases amount to justice buried.

10. All the rules of procedure are the handmaid of justice. The language employed by the draftsman of procedural law may be liberal or stringent, but the facts 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.

11. The majority of justice at the hands of law troubles a judge's conscience and points an angry interrogation at the law reformer.

12. The processual law so dominates in certain systems as to overpower substantive right and substantial justice. The humanist rule that procedure should be the handmaid, not the mistress, of legal justice compels consideration of vesting a residuary power in the judges to act *ex debito justitiae* where the tragic sequel otherwise would be wholly inequitable. Justice is the goal of jurisprudence, processual, as much as substantive. (See *Sushil Kumar Sen v. State of Bihar* : [1975]3SCR942 ).

13. No person has a vested right in any course of procedure. He has only the right of prosecution or defence in the manner for the time being by or for the court in which the case is pending, and if, by an Act of Parliament the mode of procedure is altered, he has no other right than to proceed according to the altered mode. (See *Blyth v. Blyth* (1966) 1 All ER 524). A procedural law should not ordinarily be construed as mandatory; the procedural law is always subservient to and is in aid to justice. Any interpretation which eludes or frustrates the recipient of justice is not to be followed. (See *Shreenath v. Rajesh* : [1998]2SCR709 .

14. Processual law is not to be a tyrant but a servant not an obstruction but an aid to justice. Procedural prescriptions are the handmaid and not the mistress, a lubricant, not a resistant in the administration of justice.

15. It is also to be noted that though the power of the court under the proviso appended to Rule 1 Order 8 is circumscribed by the words 'shall not be later than

ninety days' but the consequence flowing from non-extension of time are not specifically provided for though they may be read in 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.

13. The said judgments of *Kailash v. Nanhku and Ors.* (supra) and *Rani Kusum (Smt.) v. Kanchan Devi (Smt.) and Ors.* (supra) have been further followed in *Shaikh Salim Haji Abdul Khayumsab v. Kumar and Ors.* (supra) and further another circumstance considered in the same case was that the court has extended the time beyond 90 days for filing the written statement and the date fixed by the court happened to be a holiday, therefore, the written statement was filed on the next day, then the court has considered the aspect of the matter that an act of the Court shall prejudice no man. The relevant para Nos. 18 and 20 are as follows:

18. The matter can be looked at from another angle. Undisputedly the Trial Court had granted time up to 19.2.2004 which undisputedly fell beyond the 90 days' period. Since 19.2.2004 happened to be a holiday, the written statement was filed on the next day. Had the written statement been filed on 19.2.2004, obviously the court could not have refused to accept the written statement as it was within the time granted by it. Merely because of a fortuitous circumstance the written statement came to be filed on the next day i.e., on account of the date fixed being a holiday that cannot make the written statement filed, unacceptable.

20. In the facts and circumstances of the case, the maxim of equity, namely, *actus curiae neminem gravabit*, an act of court shall prejudice no man, shall be applicable. This maxim is founded upon justice and good sense which serves a safe and certain guide for the administration of law. The other maxim is, *lex non cogit ad impossibilia*, the law does not compel a man to do what he cannot possibly perform. The law itself and its administration is understood to disclaim as it does in its general aphorism, all intention of compelling impossibilities, and the

administration of law must adopt that general exception in the consideration of particular cases. The applicability of the aforesaid maxims has been approved by this Court in *Raj Kumar Dey v. Tarapada Dey* : [1988]1SCR118 , *Gursharan Singh v. New Delhi Municipal Committee* : [1996]1SCR1154 and *Mohd. Gazi v. State of M.P.* (2000 4 SCC 342).

14. This Court in *Lala Ram and Ors. v. Civil Judge (Sr. Division) Dantaramgarh and Ors.* (supra) has considered the fact that in case the time is extended by the Court to file written statement, then the same ought to have taken on record, otherwise the same would result in miscarriage of justice.

15. In *Rameshwar Lal and Anr. v. Dayanand and 7 Ors.* (supra), this Court had held that Order 8 Rule 1 CPC does not specify any formal consequences and does not, therefore, take away power of the Court to extend time for filing written statement as matter of exception and for reasons to be assigned.

16. In view of the aforesaid judgments of Hon'ble the Supreme Court as well as of this Court, I am of the view that now there cannot be any dispute with regard to the fact that provisions of Order 8 Rule 1 CPC being procedural in nature are directory and further the Court has to assigned the reasons for its exercising of discretion to extend the time even beyond 90 days and the cogent reasons have to be assigned while rejecting the application for not taking the written statement on record and further even in case the Court has wrongly extended the time, then a litigant cannot be allowed to suffer for the mistake committed on the part of the Court on account of the maxims *actus curiae neminem gravabit*.

17. In the result, the writ petition is allowed. The impugned order dated 14.2.2005 passed by the Additional District & Sessions Judge (Fast Track) No. 1 Baran in Civil Suit No. 17/04 is quashed and the Trial Court is directed to take the written statement on record with no order as to costs.