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Court : Kolkata

Decided On : Apr-11-2012

Judge : Prasenjit Mandal

Appeal No. : C.O. NO. 1039 OF 2008

Appellant : Shyam Sundar Chatterjee and Another

Respondent : Bapi Saha @ Narayan Ch. Saha

Judgement :

Prasenjit Mandal, J.

This application is directed against the order No.15 dated February 25, 2008 passed by the learned Judge, City Civil Court, 10th Bench, Calcutta in Title Suit No.468 of 2006 thereby disposing of an application dated November 2, 2006 filed by the plaintiff.

The plaintiff/petitioner herein instituted a suit for recovery of possession from a trespasser, damages and other reliefs against the defendant/opposite party herein before the City Civil Court, Calcutta. The defendant was served with summons on April 24, 2006 and the next date was fixed on June 22, 2006 for appearance of the defendant. The defendant entered an appearance on June 22, 2006 and thereafter on the prayer of the defendant, the learned Trial Judge fixed the dates on August 5, 2006, September 4, 2006, September 26, 2006 and November 2, 2006 for filing a written statement by the defendant. But he failed or neglected to file a written

statement on November 2, 2006. Then the plaintiff filed an application on November 2, 2006 before the learned Trial Judge to hear out the suit ex parte and to debar the defendant from filing a written statement.

That application was fixed for hearing on December 5, 2006 and then on January 5, 2007 but the defendant did not care to file a written statement again. The said application under Order 8 Rule 10 of the Civil Procedure Code (henceforth shall be called 'CPC') was fixed for hearing on April 30, 2007 when the defendant filed a written statement without accounting for the delay in filing the said written statement. Thus, there was 356 days' delay from the date of receiving the summons.

The learned Trial Judge, by passing the impugned order, disposed of the said application with a note that the suit shall be disposed of expeditiously and the written statement filed by the defendant has been accepted. Being aggrieved, this application has been preferred.

Now, the point for consideration is whether the impugned order should be sustained.

Upon hearing the learned Counsel for the parties and on going through the materials-on-record, I am of the view that the impugned order passed by the learned Trial Judge cannot be supported. In order to elucidate the matter, the provisions of Order 8 Rule 1 and Order 8 Rule 10 of the CPC are to be considered and as such the said two Rules are quoted below:-

Order 8 Rule 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.]

Order 8 Rule 10.-Procedure when party fails to present written statement called for by Court. -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, as the case may be, the Court shall pronounce judgment against him, or make such order in relation to the suit as it thinks fit and on the pronouncement of such judgment a decree shall be drawn up.]

Therefore, the defendant/opposite party herein was required to file a written statement within 30 days from the date of service of summons upon him on April 22, 2006, but, the Court may extend time for the petitioner to file written statement upto 90 days provided reasonable cause has been shown by the defendant. If the defendant fails to file a written statement within 90 days as provided in Order 8 Rule 1 of the CPC, the Court may grant him permission to file a written statement provided satisfactory reasons are explained by the defendant for the delay. But, in the instant case, I find that the defendant has obviously failed to explain the delay of 356 days in filing the written statement. No leave of the Court has been sought for in filing the belated written statement. No reasons have been assigned by him for the delay.

As to cause for the delay, the defendant has simply stated in the objection to the petition under Order 8 Rule 10 of the CPC that a receiver was appointed in respect of the suit property long time back in Suit No.1271 of 1961 before the Hon'ble High Court and his father paid rent to the learned Receiver in respect of the suit property and thereafter, the learned Receiver died and then his father was not in a position to determine as to whom the rent was payable. He was searching for the record and as such an appropriate application for inspection of the said record before the Hon'ble Court was filed but the record could not be traced and as such there was delay. No more particulars have been mentioned including the fact upto what period, his father had paid rent for the premises. As noted earlier, such contention is not for the acceptance of the belated written statement but for the purpose of rejection of the petition under Order 8 Rule 10 of the CPC.

It may be mentioned herein that the defendant was not a party to the said suit over which the Receiver was appointed. He claims himself as a tenant in respect of the suit property. Moreover, the provisions of the Premises Tenancy Act are very much clear as to whom and where the rent is payable, when the landlord or the

person entitled to receive rent refuses to accept the same. The defendant having not resorted to any of the recourses as provided under the Act, the simple contention that he could not get the report of inspection and so, there was delay of 356 days, is not enough to condone the delay for the purpose of accepting the written statement beyond 90 days as provided in Order 8 Rule 1 of the CPC.

Mr. D.S. Mullick, learned Counsel appearing for the opposite party has submitted that according to the decision of Salem Advocate Bar Association, T.N. v. Union of India reported in (2005)6 Supreme Court Cases 344 particularly the Paragraph No.s 20 and 21, the word 'shall' appearing in Order 8 Rule 1 of the CPC, 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. Thus, Mr. Mullick submits that the word 'shall' be construed as directory and not mandatory. But in the instant case as noted above, the defendant having failed to show the justified reasons for the delay, I am of the view that the said decision of Salem Advocate Bar Association will not help the opposite party at all. In view of the word 'shall' to be treated as directory, the defendant was required to explain the delay. In special circumstances, if the Court finds that prayer for filing the written statement should be granted beyond 90 days that could be done. But, in the instant case, no such satisfactory reasons have been forwarded at the time of filing of the written statement by filing an appropriate application. The reasons as stated by the defendant/opposite party herein cannot be treated as satisfactory at all.

It may be pointed that Mr. D.S. Mullick filed the Xerox copies of the decision of (2006) 1 Supreme Court Cases 46. This was not urged at the time of making submission. This decision also lays down that the delay beyond 90 days must be explained by satisfactory reasons only. The defendant/opposite party has adopted dilatory tactics to defeat the prayer of the plaintiff/petitioner herein in the plaint and as such I am of the view that the delay of 356 days cannot be condoned simply because of the fact that the written statement had been filed. The learned Trial Judge has taken a lenient view which is not based on satisfactory reasons and the decisions of the Apex Court

The learned Trial Judge has also relied on a decision of AIR 1986 Rajasthan 72 where there was delay for 2 days only in filing the written statement and that too happened when the last date fixed for filing written statement was declared a Gazetted Holiday and on the next working day the learned Trial Judge rejected the prayer for further time to file a written statement and passed a judgment in favour of the plaintiff. So, the fact of that case is altogether different from the present one. So, the said decision is not applicable in the instant situation.

Since, no special reasons have been assigned by the defendant/opposite party, the impugned order cannot be supported.

It may be mentioned herein that while accepting the belated written statement, even the learned Trial Judge did not assign any reason why he was accepting the belated written statement. Moreover, he has not even awarded any cost against the defendant/opposite party. So, the impugned order is not in conformity with the provisions of Order 8 Rule 1 of the CPC.

The learned Trial Judge has, therefore, failed to take into consideration the amended provisions of Order 8 Rule 1 and Order 8 Rule 10 of the CPC. He has failed to address the issue properly. The result is that he has committed errors of law in arriving at a conclusion.

Accordingly, the impugned order cannot be sustained and the same must be set aside.

The application is, therefore, allowed. The impugned order is hereby set aside.

The application dated November 2, 2006 filed by the plaintiff stands allowed.

The written statement filed by the defendant stands 'not accepted'.

The learned Trial Judge shall proceed with the suit in accordance with law from that stage.

Considering the circumstances, there will be no order as to costs.

Urgent xerox certified copy of this order, if applied for, be supplied to the learned Advocates for the parties on their usual undertaking.

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