

Order below Ex.25.**(Passed on 20.06.2018)**

The present application is filed by the defendant for seeking permission to file written statement on record and setting aside no written statement order.

2. The defendant submitted that the present suit is filed for eviction and possession in respect of the suit property by describing the defendant as a licensee. The plaintiffs have also mentioned the defendant as a licensee and tress passer in the present suit. The suit is valued as per the provision of section 6 (4) (xii) of Maharashtra Court Fees Act in which it is provided relating to the suit between landlord and tenant. But in fact this provision is applicable in case of licensee or tress passer. Further, the various technical objections have raised by the defendant. The defendant has filed an application under Order 7 Rule 11 of the Code of Civil Procedure (hereinafter the C.P.C.). The said application was dismissed on 24.11.2017. But during the process of filing of the application to its final order, the matter was kept pending for various dates for one reason or other. Lastly, the said application was dismissed by this court on 24.11.2017.

3. Further, the defendant submitted that during the said period due to the expiry of 90 days the no written statement order was passed. The defendant could not get the certified copies of the order. The defendant get the certified copy on 07.12.2017. The defendant was intending to file petition to Hon'ble High Court. But due to the

vacation the said petition could not be filed. Now the present case is posted for hearing on application under section 10 of the Code of Civil Procedure. In such circumstances, there is no intentional default on the part of the defendant in filing of the written statement. During the proceeding of the present suit several subsequent events have happened. The plaintiffs have created obstruction to close main gate and the install barricades. Therefore, the application for temporary injunction was required to be filed in the case in Special Suit No. 29/12 which is pending in the Hon'ble Civil Judge (Sr. Dn.) Khamgaon. As such the said matter went to the appeal before District Court and now it is pending in the Hon'ble High Court.

4. The defendant submitted that the provision of Order 8 Rule 1 of the Code of Civil Procedure are directory in nature. If the defendant is allowed to file the written statement, ultimately no serious prejudice will cause to plaintiffs. Therefore, the defendant prayed to set aside no written statement order and to file the written statement on record.

5. The plaintiffs have strongly resisted the application by filing the say at Ex. 34. They have denied all contentions of the defendant in *toto*. They contended that the present suit is filed for the relief of eviction and possession from the defendant -licensee with bonafide administrative purpose to provide more facility and safety to the devotees visiting the Samadhi of Gajanan Maharaj. The plaintiffs have denied that the provision of Section 6 (4) of Maharashtra Court Fees Act is not applicable to the present suit. Further, the baseless

objections raised by the defendant by view of the application filed under Order 7 Rule 11 of the C.P.C which was rejected by the court on merits by passing the order dated 24.11.2017.

6. The summons of the suit was duly served to the defendant. The defendant has utterly failed to comply with the provisions of Order 8 Rule 1 of the CPC to file the written statement within the period of 90 days. The defendant has prolonged the hearing of the present suit by filing several vexatious applications. The defendant was deliberately prolonging the trial. Meanwhile, during the pendency of the present suit, the no written statement order was passed by the court on 3.12.2016. In fact the application under Order 7 Rule 11 of CPC was filed on 15.6.2016. The defendant has deliberately avoided filing of the written statement from the date 3.12.2016 to till today in order to give only harassment to the plaintiffs. The plaintiffs have not disputed the fact that after rejection of the application filed under Order 7 Rule 11 of CPC the defendant has filed application for seeking time to file written statement. The application below Ex. 31 was rejected by the court.

7. The defendant has sought many adjournments in the present suit and it is evident from the document below Ex. 14, 15, 18, 20, 23, 26 and 27 filed in the present suit. All these applications have been filed by the defendant just to prolong the matter when the defendant was very aware about the contentions raised by the plaintiffs in reply filed to the application for stay of suit. The defendant cannot plead ignorance about the contentions raised by the plaintiff which are the part of the record. The application has no

merits.

8. The defendant ought to have filed the present application to quash and set aside the order within a period of 30 days from passing of the said order. The defendant is admittedly filing this application after lapse of 20 months from passing order. This fact itself shows that the defendant was not diligent in order to proceed with the present suit. Further, the plaintiff submitted that the legislature has created a valuable legal vested right in their favour by amending the provisions of Order 8 Rule 1 of the CPC to proceed with the suit expeditiously. The defendant is trying to prolong and delay the proceeding deliberately.

9. Hon'ble Apex Court though held that the provision of Order 8 Rule 1 of CPC is directory and not mandatory. However, it is specifically provided that extension of time may be allowed by way of exception. Hon'ble Apex Court has observed that the reasons for such extension of time should be beyond control of the defendant. The plaintiff submitted that the defendant has filed the present application in order to take benefit of the decisions of Hon'ble Apex Court as to the directory nature of the provision. But the defendant is not entitled to take benefit of the decisions of Hon'ble Apex Court because the defendant is not a diligent person. The record shows that the defendant has intentionally avoided filing of the written statement on record. Thus, the plaintiffs have prayed to reject the application.

10. Heard advocate Shri. Sarada for the plaintiffs and advocate Shri. B. K. Gandhi for the defendant at length.

11. In support of argument, advocate for defendant relied on,
- a) **Pramod s/o Baliram Wavge v/s Sahadev s/o. Kisan Khadke, 2007(3) Mh. L. J.;**
 - b) **R. K. Roja v/s U. S. Rayudu and another, AIR 2016 Supreme Court 3282;**
 - c) **Ajay Gupta v/s Raju alis Rajendra Singh Yadav, AIR 2016 Supreme Court 3284;**
 - d) **Methodist Episcopal Church, Nagpur & Ors v/s Methodist Church in India, Mumbai & Ors, Mh. L. J. 589;**
 - e) **Sambhaji & Ors v/s Ga ngabai & Ors, 2008 DGLS(SC) 1535 S.C.**

12. Per contra advocate for the plaintiffs relied on,
- a) **Atcom Technologies Limited v/s Y. A. Chunawala & Co. & Ors, 2018(7) Scale;**
 - b) **Kailash v/s Nanhku, 2005 CJ (SC) 655 Supreme Court Decided on 6th April, 2005;**
 - c) **Mohammed Yusuf v/s Fajj Mohammad, 2008CJ (SC) 1001;**
 - d) **R. N. Jadi & Brothers v/s Subhashchandra 2007CJ (SC) 914.**

13. Before jumping towards the merits of the application firstly, I wish to consider the provision of Order 8 Rule 1 of the CPC which reads as under :

“ 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”.

14. After the Amendment to Order 8 Rule 1 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. Advocate for the defendant argued that the provision 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. And the nature of the provision contained is procedural. Per contra, advocate for defendant argued that though the nature of provision of Order 8 Rule 11 of CPC is procedural one. But the extension of time beyond 90 days is not an automatic. It should be in exceptional circumstances.

15. I consider submissions of both advocates. I consider the citations filed by both parties. The submission of advocate for the plaintiffs is based on the ratio laid down in case of *Kailash* cited supra. Wherein Hon'ble Apex Court held that *the provision of Order 8 Rule 1 of the CPC is directory and not mandatory*. The power of the court to extend time for filing the written statement beyond the time schedule provided under Order 8 Rule 1 of the CPC is not completely taken away. The Hon'ble Apex Court also held that *such 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. Further, such extension of time may be allowed if it was needed to be given for the circumstances which are exceptional, occasion by reasons beyond the control of the defendant. And in such cases the heavy costs needs to be imposed upon the defendant in order to compensate the plaintiff for the delay and inconvenience caused to him.

16. The reference of *Kailash* case was further reflected in the judgment of Hon'ble Apex Court in case of *Mohammad Yusuf and R. N. Jadi and brothers* cases cited supra. Wherein again Hon'ble Apex Court has consider the decision of *Kailash* case. The Hon'ble Apex Court observed in para no. 14 of *Mohammad Yusuf case* wherein the reference of *Kailash* case and *R. N Jadi brothers* case has taken. The matter was yet again considered by a three-judge Bench of this Court in *R. N. Jadi & Brothers and Ors v/s Subhashchandra, P. K. Balasubramanyan J*, who was also a member in *Kailash* (supra) in his concurring judgment stated the law thus :

*“ It is true that procedure is the handmaid of justice. The court must always be anxious to do justice and to prevent victories by way of technical knockouts. But how far that concept can be stretched in the context of the amendments brought to the Code and in the light of the mischief that was sought to be averted is a question that has to be seriously considered. I am conscious that I was a party to the decision in *Kailash v/s Nanhku* which held that the provision was directory and not mandatory. But there could be situations where even a procedural provisional could*

be construed as mandatory, no doubt retaining a power in the Court, in an appropriate case, to exercise a jurisdiction to take out the rigour of that provision or to mitigate genuine hardship. It was in that contest that in Kailash v/s Nanhku it was stated that the extension of time beyond 90 days was not automatic and that the court, for reasons to be recorded, had to be satisfied that there was sufficient justification for departing from the time-limit fixed by the Code and the power inhering in the court in terms of Section 148 of the Code. Kailash is no authority for receiving written statement, after the expiry of the period permitted by law, in a routine manner.

17. Thus, as per the view taken by the Apex Court in case of *Mohammad Yusuf* that *Kailash* case is no authority for receiving the written statement after the expiry of the period permitted by law in routine manner. In this regard advocate for defendant argued that the defendant was diligently engaged in the present proceeding. The application filed under Order 7 Rule 11 of the CPC was pending. The defendant was hope that the said application will be allowed and the plaint of the plaintiff will be rejected. But unfortunately, the said application was rejected on merits. He argued that the defendant was and is diligent in the present proceeding. The defendant has never intended to prolong the matter. He argued that though Hon'ble Apex Court has held that receiving of written statement after expiry of 90 days cannot be allowed in routine manner. He argued that the defendant was diligently contesting the present suit. The written

statement could not file due to the pendency of the application filed under Order 7 Rule 11 of the CPC.

18. In support of his argument he relied on *Methodist case* cited supra. Wherein Hon'ble Bombay High Court observed that *where interim applications are to be decided or are pending and delay occurs in filing written statement that could be sufficient ground to condone the delay*. In this case the application under Section 9 of the CPC and application under Order 7 Rule 11 of the CPC was filed. But in that case the d was contesting the suit.

19. Further, advocate for defendant submitted that defendant was diligently engaging in the proceeding of the present suit. The application under Order 7 Rule 11 of the C.P.C. was filed. It was unfortunately rejected by this court. He argued that due to the pendency of the said application, he could not file written statement on record. Per contra, advocate for plaintiff submitted that the pendency of the application under Order 7 Rule 11 of the C.P.C. is not ground to delay in filing the written statement. In this regard advocate for defendant relied on *R. K. Roza case* cited supra wherein Hon'ble Apex Court in para no. 6 observed that

“ Once an application is filed under Order VII, Rule 11 of CPC, the court has to dispose of the same before proceeding with the trial. There is no point or sense in proceeding with the trial of the case, in case the plaint (Election Petition in the present case) is only to be rejected at the threshold. Therefore, the defendant is entitled to file the application for rejection before filing

his written statement. In case, the application is rejected, the defendant is entitled to file his written statement thereafter (See Saleem Bhai and others v/s State of Maharashtra and others). But once an application for rejection is filed, the court has to dispose of the same before proceeding with the trial court. To quote relevant portion from paragraph-20 of Sopan Sukhdeo Sable case (AIR 2004 SC 1801 Para 23):

“ 20 Rule 11 of Order 7 lays down an independent remedy made available to the defendant to challenge the maintainability of the suit itself, irrespective of his right to contest the same on merits. The law ostensibly does not contemplate at any stage when the objections can be raised, and also does not say in express terms about the filing of a written statement. Instead the word “shall” is used, clearly implying thereby that it casts a duty on the court to perform its obligations in rejecting the plaint when the same is hit by any of the infirmities provided in the four clauses of Rule 11, even without intervention of the defendant”.

20. Further, *In Saleem Bhai case (supra), this Court has also held that ... “ A direction to file the written statement without deciding the*

application under Order VII, Rule 11 cannot but be a procedural irregularity touching the exercise of jurisdiction of the trial court". However, we may hasten to add that the liberty to file an application for rejection under Order VII Rule 11 of CPC cannot be made as a ruse for retrieving the lost opportunity to file written statement.

21. Considering the aforesaid legal position in the case of *R. K. Roja* case cited supra that the defendant has indeed stated in his application that due to the pendency of the application filed under Order 7 Rule 11 of the C.P.C ,he could not adduce the written statement. The record of the case indeed shows that the application of the defendant filed under Order 7 Rule 11 of the CPC was pending. It was finally decided on 24.11.2017.

22. Now the question is to consider the factum of prejudice to whom it will cause. In this regard, advocate for plaintiff argued that due to the delay at the hands of the defendant, they could not proceed in the matter expeditiously. And which ultimately resulted in delay to get the possession of suit property. On the contrary, advocate for defendant argued that as such no serious prejudice will cause to the plaintiffs. He argued that if the present application will allowed, then ultimately it helps the court to decide the case on merits.

23. I consider submissions of both advocates. As it is settled position that all the rules of procedure are the handmaids of justice. The language employed by the draftsman of procedural law is liberal 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 deny the opportunity of participating in the process of justice dispensation. At this point I wish to be guided by the landmark judgment of **Rani Kusum v/s Kanchan Devi AIR 2005 SC** wherein Hon'ble Apex Court held that the Amendment Act 2002 dealt with and targateed only of the obligation of the defendant and not the power of the courts to accept a written statement filed beyond the stipulated time in that consequences flowing from non extension of time are not specifically provided.

24. After *Nankhu* case cited supra there remains no controversy that the proviso to Rule 1 of Order 8 of the Code of Civil Procedure is directory and not mandatory. And the time limit of 90 days stipulated therein can be extended. But at the same time, in order to deter the defendant with a view to compensate the plaintiff for the delay, the Court has every power to impose heavy costs upon the defendant which would be payable to the plaintiff. Considering the entire record of the case, the parties were contesting the application filed under Order 7 Rule 11 of the Code of Civil Procedure. It was adjourned for one reason and another for various dates. The reasons assigned by the defendant are satisfactory. Now the defendant has filed the written statement along with the present application.

25. Now in these circumstances in order to achieve the object of the procedural law to complete the trial expeditiously and to minimize the litigation, I think by giving an opportunity to the defendant to adduce the written statement on the recored would help the court to decide this case in expeditious manner. Further, by

allowing the defendant to adduce his written statement would help to decide the present case on merits. On the contrary, in my opinion no serious prejudice will cause to the plaintiffs. But at the same time the plaintiffs are going to be compensated with costs from the defendant for the inconvenience and delay caused to them. Thus, in view of Section 35 of the Code of Civil Procedure, I think Rs.4,000/- (In words Rupees Four Thousands only) would be just and appropriate amount of costs. Thus, considering the aforesaid discussion, I pass following order,

: ORDER :

- 1) The application is allowed subject to costs of Rs.4000/- (In words Rupees Four Thousands) payable to the plaintiffs.
- 2) No written statement order is hereby set aside.
- 3) The defendant is permitted to file written statement on record.
- 4) Parties and their Advocate proceed in the case expeditiously and take note of order.

Date: 20.06.2018

(V. V. Kulkarni)
Civil Judge Junior Division,
Shegaon, District Buldana.

