

HIGH COURT OF CALCUTTA

BENCH : HON'BLE JUSTICE AJOY KUMAR MUKHERJEE

Date of Decision: 10.05.2024

CIVIL REVISIONAL JURISDICTION

APPELLATE SIDE

C.O. 1562 of 2021

I.A. No. CAN/1/2024

Inland Vikash Limited ...PETITIONER

Vs.

Board of Trustees for the port of Kolkata & Anr. ...RESPONDENTS

Legislation:

Order VII Rule 11, Order VIII Rule 1, Order XXXIX Rules 1, 2, 4, and 9;

Section 151 of the Code of Civil Procedure, 1908

Article 227 of the Constitution of India, 1950

Subject: Civil revision petition challenging the condonation of a 14-year delay in filing a written statement by a government entity, and related issues concerning procedural defaults and judicial discretion under the Code of Civil Procedure and constitutional law.

Headnotes:

Specific performance – Contractual disputes – Plaintiff filed a suit for specific performance against defendant no. 1; interim injunction granted, later contested – Subsequent proceedings led to dismissal of the suit against defendant no. 2 due to non-service of summons – Defendant no. 1's delay in filing written statement contested. [Paras 1-4]

Service of summons – Dispute regarding service – Defendant no. 1's application claiming non-receipt of summons dismissed based on prior participations in the suit – Importance of effective service discussed in light of

procedural fairness and the impact on subsequent judicial proceedings.
[Paras 3, 20, 21, 22]

Condonation of Delay – Court’s discretion under Section 151 CPC – Discretion exercised by trial court in allowing late filing of written statement by defendant no. 1 due to government status criticized and set aside on grounds of lack of satisfactory explanation for the delay and non-adherence to procedural requirements under Order VIII Rule 1. [Paras 5-6, 17-19, 23-27]

Government Litigants – Special considerations for government entities in litigation – Discussion on whether governmental status justifies deviations from procedural timelines – Held that being a government entity does not exempt one from complying with procedural laws unless exceptional circumstances justify such deviation. [Paras 10, 24, 27]

Decision: High Court set aside the order of the lower court that condoned the delay in filing the written statement – Application of the petitioner for ex-parte hearing allowed due to inadequate explanation of delay by the respondent government entity. [Paras 28-30]

Referred Cases:

- Kailash v. Nanhku and others (2005) 4 SCC 480
- Atcom Technologies Ltd v. Y.A. Chunawala and Co. (2018) 6 SCC 639
- Desh Raj v. Balkishan (2020) 2 SCC 708
- Rajesh Poddar v. Nirmala Devi Daga 2019 SCC Online Cal 9177
- Sunil Bansal v. Meeta Bansal 2018 SCC Online Cal 1501
- K.K. Velusamy v. N. Palanisamy (2011) 11 SCC 275
- Bhanu Kumar Jain v. Archana Kumar and another (2005) 1 SCC 787
- Gopal Pal & anr. V. Sankar Prasad Pal & Others 2015 SCC Online Cal 7768
- Lakhan Channa Kanojia v. Pushpa Tanajirao Kadambadne 2018 SCC Online Bom 20128
- State of Bihar and others v. Deo Kumar Singh and others 2019 SCC Online SC 1314
- Amalendu Kumar Bera and others v. State of West Bengal (2013) 4 SCC 52

- Gulu Mohan Alim Chandani v. Harish Mohan Alim Chandani & Ors 2015
SCC Online Cal 1049

Representing Advocates:

For the Petitioner: Mr. Kumar Gupta, Mr. Supratim Laha, Mr. Binay Kumar Jain, Mr. Piyush Jain

For the Opposite Parties: Mr. Subhanakr Nag, Mr. Snehashis Sen, Mr. Danyal Ahmed

Ajoy Kumar Mukherjee, J.

1. Plaintiff / petitioner herein filed a suit being T.S. No. 567 of 2005 against the defendants/opposite parties herein for specific performance of contract allegedly entered into by and between plaintiff and defendant no.1, mandatory injunction and for other reliefs. Along with the plaint the petitioner herein also filed application for injunction under order XXXIX rule 1 and 2. By an order dated April 13, 2005 the court below passed interim order restraining defendant from interfering with the peaceful possession and enjoyment of the suit property by the petitioner and/or transferring and/or dealing with, encumbering the suit premises. The defendant no.1 entered appearance in the suit on April 25, 2005. On September, 20, 2005 the opposite party/defendant filed an application under order VII rule 11 of the Code of Civil Procedure seeking rejection of the plaint. On the same day the said opposite party no. 1 also filed an application under order XXXIX rule 4 of the Code praying for vacating the interim order of injunction passed by the court on 13 April, 2005.

2. Thereafter by the order dated May, 15, 2006 the application filed by opposite party no. 1 under order VII rule 11 of the Code was dismissed on contest. By another order dated July, 6 2006 the application filed by defendant no.1/opposite party no. 1, herein was taken up for hearing in presence of both side and after contested hearing defendant's said application was allowed in part and the order of injunction passed vide order no., 3 dated April 13, 2005 was directed to be continued till disposal of the injunction petition, subject to depositing Rs.2,50,000/- by July, 31st 2006 towards arrear rent/compensation, for occupying the suit premises since 2002.

3. It is submitted on behalf of the petitioner that opposite party no. 1 regularly appeared before the court below and prior to July 18, 2017, the opposite party no.1 never alleged that the summons were not served upon him. The record of the suit also does not suggest that the summon issued to opposite party no.1 was ever returned as unserved. It is further alleged that all on a sudden on July, 18, 2017, the opposite party filed an application under order IX rule 5 of the Code interalia alleging for the first that no summon was served upon the opposite party and prayed for dismissal of the suit on that ground. Said application was disposed of by an order dated June 20, 2018, observing that the opposite party no. 1 herein had already entered appearance on April 25, 2005 and had filed applications in the suit. However learned court below was not satisfied with the manner in which summon was sought to be served upon the defendant no.2 and accordingly dismissed the suit as against the defendant no.2.

4. Being aggrieved by that order the petitioner herein preferred an application under Article 227 of the Constitution of India, before this Court being C.O. No. 2064 of 2018, but said application was rejected by this Court by an order dated 12th March, 2019 observing that no summon was served upon defendant no. 2 and thereby affirmed the order of the court below and the said order was passed in presence of opposite party no.1.

5. Since no written statement was filed by the opposite party no.1, the plaintiff/petitioner filed an application for posting the suit for ex-parte hearing on August, 20, 2019. Thereafter on September, 30th, 2019, the opposite party no.1 filed an application under section 151 of the Code, seeking condonation of delay in filing written statement. It is alleged that save and except the allegation that no summon was served upon the opposite party no.1, he had not given any other explanation as to what caused the delay in filing the written statement. The petitioner herein as plaintiff filed written objection to the said application and petitioner contended that thereafter, on enquiry petitioner for the first time on August 21, 2021 came to know that during lockdown period the prayer for condonation of delay in filing the written statement was allowed by the court below by the impugned order.

6. Being aggrieved by that order Mr. Gupta learned counsel appearing on behalf of the petitioner submits that learned court below had acted with material irregularity in allowing the defendants prayer for condonation of delay and instead he ought to have allowed plaintiffs prayer for posting the suit for ex-parte hearing. He further contended that the court below acted with material irregularity in condoning the abnormal delay of 14 years without

addressing the relevant factor i.e. whether the opposite party no. 1 furnished proper and satisfactory explanation for such delay and thereby court below exceeded his jurisdiction, not vested in him by law. In fact the court below had mechanically condoned the abnormal delay of 14 years, in filing the written statement even though the application filed by opposite party no.1, ex facie did not contain any reason for delay in such filing. He further contended that the court below failed to consider that opposite party no.1 showing the copy of the plaint, which has been served upon him prior to September 20, 2005, prayed before the court for the rejection of the plaint. He also failed to consider that the contention of defendant no.1 that the written statement could not be filed for non-service of summon upon opposite party no. 1, was raised earlier in his application under order IX rule 5 of the code, but such contention was turned down by the court below as well as by this High court and for that reason, such plea is barred by resjudicata. Learned court below acted illegally in allowing the application seeking condonation of delay on the ground that the opposite party no. 1 is a Government litigant. Court below ought to have considered that there is specific provision for filing of the written statement under order VIII rule 1 of the Code and the same cannot be bypassed by resorting to section 151 of the Code. In this context learned counsel for the petitioner relied the following judgments:-

- (a) Kailash Vs. Nanhku and others reported in (2005) 4 SCC 480.
- (b) Atcom Technologies limited Vs. Y.A. Chunawala and Company and others reported in (2018) 6 SCC 639.
- (c) Desh Raj Vs. Balkishan reported in (2020) 2 SCC 708.
- (d) Rajesh Poddar Vs. Nirmala Devi Daga reported in 2019 SCC Online Cal 9177.
- (e) Sunil Bansal Vs. Meeta Bansal reported in (2018) SCC Online Cal 1501.
- (f) K.K. Velusamy Vs. N. Palanisamy reported in (2011) 11 SCC 275.
- (g) Bhanu Kumar Jain Vs. Archana Kumar and another reported in (2005) 1 SCC 787.
- (h) Gopal Pal & anr. Vs. Sankar Prasad Pal & Others reported in 2015 SCC Online Cal 7768.
- (i) Lakhan Channa Kanojia Vs. Pushpa Tanajirao Kadambadne and others reported in (2018) SCC Online Bom 20128.
- (j) State of Bihar and others Vs. Deo Kumar Singh and others reported in (2019) SCC Online SC 1314.

(k) Amalendu Kumar Bera and others Vs. State of West Bengal reported in (2013) 4 SCC 52.

(l) Gulu Mohan Alim Chandani Vs. Harish Mohan Alim Chandani & Ors reported in (2015) SCC Online Cal 1049.

7. Mr. Subhankar Nag learned counsel appearing on behalf of the opposite party contended that in this case time to file written statement started running only after dismissal of the application under order IX Rule 5, which was dismissed in June, 2018. Therefore the court below rightly condoned the delay upon imposition of the cost and therefore, rendered justice to the parties. He further contended that the time to file written statement can only start to run if summons of the suit has been served on the defendants. In the instant case the summons of the suit was never served on any of the defendants. In any of the earlier orders, there is no definite finding either by the Trial court or by the High court that summons was indeed served on defendant no.1. In this context he relied upon para 9 of the case reported in (1998) 7 SCC 123 and para 12,13,14 and 17 of judgment reported in (2017) 9 SCC 447 and the ratio decided in para 3 and 4 of the case reported in 2022 SCC Online SC 613.

8. Mr. Nag in this context also relied upon cases reported in (2012) 12 SCC 461, (2005) 4 SCC 480, (2005) 6 SCC 705.

9. Mr. Nag further argued that it is settled proposition of law that a litigant cannot be made to suffer due to the fault of learned Advocate. In the application for condonation of delay and also in the impugned order there is specific finding to that effect and for which the court below rightly condoned the delay. In this context reliance has been placed upon (1992) SCC Online Cal 18 and (1981) 2 SCC 788.

10. He further argued that it is admitted position that the opposite party is Government concern. Unlike normal citizen or company, it cannot run on its own. It has to follow the decision making hierarchy to take decision including steps to be taken in a pending litigation. Therefore, the Government entities should get special treatment and as a matter of fact section 112 of the Limitation Act grants differential treatment for Government entities. Accordingly the court below rightly allowed defendants prayer, considering the fact that the defendant no. 1 is a State under Article 12 of the Constitution of India. In this context he relied upon (2011) SCC Online Cal 4875 and (2001) SCC Online Cal 383, (2010) 14 SCC 419 and (2011) SCC Online Cal 4875.

11. I have considered submissions made on behalf of both the parties.

12. Before going to further details, even at the cost of repetition, let me reproduce the relevant dates for a quick look over the happenings.

Date	Incident
11 th April 2005	The petitioner herein filed T.S. NO. 567 of 2005 for specific performance of contract.
30 th April, 2005	An ex-parte order of injunction was passed, on the basis of plaintiffs prayer, against the opposite party herein

	restraining them from evicting the petitioner from the suit premises on condition of payment of occupational charges.
September, 20, 2005	Petitioner herein as defendant filed two applications, one under order VII rule 11 seeking rejection of the plaint and the other under order XXXIX rule 4 for vacating of the injunction order.
May 15, 2006	Defendant/petitioner's application under order VII rule 11 was dismissed and against such order an appeal being FA 2670 of 2007 was filed.
6 th July, 2006	Application under order XXXIX rule 4 was partly allowed.
18 th March, 2014	The appeal preferred before the High Court was dismissed for default and thereafter application for restoration was also filed.
10 th July, 2017	An Application under order IX rule 5 was filed by the opposite party contending that summons were not served on the opposite party
20 th June, 2018	Such application under IX rule 5 was partly allowed as the suit was dismissed against defendant no.2.

12 th March, 2019	The said order of dismissal against the defendant no.,2 was affirmed in CO No. 2602 of 2018.
August, 20, 2019	The petitioner filed application for posting the suit for ex-parte hearing.
September 30, 2019	Opposite party filed application under section 151 of the Code of Civil Procedure for condonation of delay and for allowing the opposite party to file written statement.
April 30, 2021	By the impugned order defendants prayer for filing written statement was allowed subject to payment of cost of Rs. 10,000/-.

13. There is no quarrel with the proposition of law that order VIII rule 1 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 in the Code. Though the language of the proviso to rule 1 of order VIII CPC is couched in the negative form but since it does not speak about any penal consequences, flowing from the noncompliance, the consequences of non-compliance may be read in by necessary implication. In various judgments, it has been held that the provisions of order VIII rule 1 being within the domain of procedural law and also considering the object and purpose of enacting the said provision, the directions made therein are directory and not mandatory and as such court is not powerless to permit a delayed written statement being filed if it is required.
14. However, as has been specifically laid down in the amended provision of order VIII rule 1 read with Calcutta High Court amendment that the defendant seeking extension of time beyond the limit laid down in order VIII Rule 1, may not ordinarily be shown indulgence and such extension can only be made beyond 120 days from the service of summons, if it is proved to the satisfaction of the court that the defendant was prevented from filing the written statement earlier due to the circumstances beyond his control. It is expected to be clarified by the court concerned in its order that a departure from time schedule prescribed by order VIII rule 1 was made because the circumstances was exceptional and/or occasioned by reasons beyond the control of the defendant and that such extension is required in the interest of

justice or grave injustice would be caused if the time is not extended. However if it appears to the court that there is laxity or gross negligence on the part of the defendant in filing the written statement the court must be slow in granting such extension.

15. In *Atcom Technologies Vs. Y.A. Chunawala and Company and others* reported in (2018) 6 SCC 639 it was held that time can be extended only in exceptionally hard cases and in such a situation onus upon the defendant is of higher degree to plead and satisfactorily demonstrate a valid reason for not filing written statement within the time schedule.
16. No doubt the provision under order VIII rule 1 are procedural in nature and therefore hand made of justice but that would not mean that the defendant has right to take as much time as he wants in filing the written statement, without giving convincing or cogent reasons for delay and court is supposed to condone the delay mechanically.
17. In *Desh Raj Vs. Bal Kishan*, reported in (2020) 2 SCC 708 it was held in paragraph 15 as follows.

“15. However, it would be gainsaid that although the unamended Order 8 Rule 1 CPC is directory, it cannot be interpreted to bestow a free hand to on any litigant or lawyer to file written statement at their own sweet will and/or to prolong the lis. The legislative objective behind prescription of timelines under CPC must be given due weightage so that the disputes are resolved in a time-bound manner. Inherent discretion of courts, like the ability to condone delays under Order 8 Rule 1 is a fairly defined concept and its contours have been shaped through judicial decisions over the ages. Illustratively, extreme hardship or delays occurring due to factors beyond control of parties despite proactive diligence, may be just and equitable instances for condonation of delay.”
18. A Co-ordinate Bench of this court in *Sunil Bansal Vs. Meeta Bansal* reported in (2018) SCC Online Cal 1501 held in view of the amendment of Order VIII rule 1 and with the incorporation of proviso by the Calcutta High Court amendment of the aforesaid amended provision, applicable to the state of West Bengal, it is clear that the court can extend time beyond the outer cap provided it is proved by the defendant that the circumstances were beyond his or her control. Though the power of the court to extend time has not been taken away in absolute terms but because of the third proviso of order VIII rule 1, the court can extend even beyond the outer limit, subject to the fulfilment of the conditions enshrined therein.

19. Coming back to the present context, it is not in dispute herein that the defendant no.1/opposite party no.1 entered appearance in the suit on 25.04.2005 and he sought to grant permission for filing written statement after more than 14 years by filing an application under section 151 of the Code on 30.09.2019. In view of authorities as quoted above the decisive factor for condonation of delay however is not the length of delay but sufficiency of a satisfactory explanation and as such the extent or decree of leniency to be shown by a court in such cases depends on the explanation given by the defendant in the facts and circumstances of the case.
20. I have already stated that in Atcom Technologies Ltd. Case (supra), the Apex Court has clearly laid down that in such a situation, onus upon the defendant is of higher decree to plead and satisfactorily demonstrate a valid reason for not filing the written statement within the statutory period. In the present context the ground taken by the defendant for not filing the written statement for more than 14 years is that though the suit was filed on 11.04.2005 but till this date, except notice of injunction, no summon of the suit has been served upon the petitioner at any point of time. Moreover, plaintiff had also not taken any step for effecting service of summon upon any of the defendants in respect of the said suit.
21. Now it is admitted position that the defendant appeared in the said suit on 25th April, 2005 and on 28th September, 2005 he also filed two applications one for rejection of the plaint and the other for vacating exparte order of injunction. On perusal of said two applications it appears that the defendant in his application under order VII rule 11 has clearly referred paragraph 1 and the averments made in the pleading and thereby contended that it is crystal clear that the court has no jurisdiction to try the said suit. In para 1(b) of the said application he also referred about the subject matter of the suit property. In para 3 of the Application, the defendant confidently averred that the court has jurisdiction to pass such order about rejection of plaint by looking to the plaint itself, without inviting any written statement or framing any issue. Similarly, in the Application under order XXXIX rule 4, the defendant has also averred in para 4 (d) that it has been admitted in the present suit that the said lessee is no more in occupation of the lease hold property and in para 8 he further averred that the grounds and contention of the plaintiffs canvassed in the plaint and injunction application of the instant suit are absolutely baseless.
22. The above quoted averments clearly demonstrates that the defendant was well aware about the contents of the plaint, when he filed said two applications before the court below in the year 2005. Needless to say, it is not important

in the present context, whether summon was served upon the defendant no.1 or not because through a court summon a party is only asked to appear before the court to answer the allegation levelled against him but for filing a written statement what is really important and what is actually required is whether defendant was aware about the averments made in the plaint or not. It would be an absurd proposition, if I say that a party who has sought for rejection of plaint in the year 2005 was not aware about the averments made in the plaint, at the time of filing said application under order VII rule 11 of the Code. Since defendant was well aware about contents of the plaint from the very beginning i.e. from 2005, the explanation given in favour of not filing the written statement for about 15 years on the ground that summon was not served upon him, does not hold good. Aforesaid averments in both the petitions seeking rejection of plaint and vacating ex-parte order of injunction, clearly suggests that the defendant no.1 was aware about his impleadment as a defendant and in fact he had also participated in the various proceedings in the suit as well as proceedings arising out of the suit for about 15 years, without raising any objection anywhere that the writ of summons was never served upon him. In fact the defendant/opposite party now wishes to stick to mere technicality that there is no service of writ of summon upon him. If such contention made by the defendant is to be accepted then it would amount to give preference to procedural technicalities over substance.

23. From the facts and circumstances of the case as reflected in the list of dates, there is absolutely no scope to say that any prejudice was caused to the petitioner on account of formal non-service of writ of summon, if any. The petitioner/defendant herein also failed to demonstrate how prejudice was caused to him on account of formal non-service of writ of summons, if any, upon him and how it stood in his way for not filing the written statement for long period of time inspite of the fact that he was well aware of the facts of the case and also participated in different proceedings. In fact there is reason to believe from his participation in different proceedings connected with the suit that the defendant no.1 expressly waived the defence of non-receipt of formal writ of summons. Court below inspite of coming to a definite finding in the order impugned that the court's order dated 28th June, 2018, impliedly speaks that summons were served upon the defendant no.1 and further his appearance before the court and filing the application challenging the plaint implies that the summons was served upon the defendant no.1, but without discussing anything about the sufficiency of the explanation given

by the defendant no.1, in support of his prayer for condonation of delay, court below suddenly jumped to a conclusion by making following observation. "I think that doing substantial justice the defendant no.1 who is a government litigant should not be thrown out of court merely holding that it failed to filed written statement in time in support of his order condoning delay in filing the written statement."

24. Accordingly it is apparent that court below basically exercised his discretion only on the ground that the defendant no.1 is a Government concern who should get certain amount of indulgence. Though the said provision under order VIII rule 1 nowhere States that a Government concern is not required to give explanation while filing written statement making abnormal delay, but at the same time I am not unmindful to the fact that certain amount of latitude not impermissible with regard to the State as held in various judicial pronouncements, because the courts are bestowed with the power to condone the delay, if sufficient cause is shown for not filling the written statement within the stipulated time but when it is palpably clear that the defendant no. 1 was well aware and conversant with the issues involved, including the prescribed period of limitation for filing written statement, the defendant no.1/ Government authority cannot claim that they have separate period of limitation. In the absence of plausible or acceptable explanation, I find no reason why the abnormal delay of more than 14 years in filing the written statement is to be condoned mechanically, merely because the Government is a party to the proceeding. I am of the view that the law of limitation binds everybody including the Government specially when gross negligence or deliberate inaction and lack of bonafide are apparent. In such cases if the concession is adopted I am also of the view that it will not advance the cause of substantial justice.
25. In a different context it was held by Apex Court in Santi Devi and others Vs. Kaushallya Devi reported in (2016) 16 SCC 565 is as follow:-
- "14. Having gone through the papers on record, as discussed above, and keeping in mind the spirit of the provision contained in Rule 3 of Order 22 CPC read with Article 120 of the Schedule of the Limitation Act, 1963, in our opinion the first appellate court and the High Court have committed grave error in law in condonation of delay of more than eleven years in moving substitution application, and setting aside the abatement in the present case, particularly when the respondent daughter of the deceased had full knowledge of death of her father and also of the litigation pending

before the first appellate court. Delay cannot be condoned on insufficient grounds and by abusing the process of law. We do not find that any sufficient reason was shown by the respondent before the courts below to get huge delay of eleven years condoned, for setting aside abatement, and her substitution.”

26. Defendant though taken a plea that the lawyer's laches was also involved in the present context but such allegation against lawyer is not specific nor has been substantiated by any cogent document nor it was shown that though State was diligent but the delay caused due to inaction on the part of the lawyer. The case laws cited by the opposite party/ defendant no.1 are also factually distinguishable.
27. In view of aforesaid facts and circumstances of the case as discussed above and keeping in mind the spirit of provisions contained in order VIII rule 1 read with 3rd proviso under the Calcutta High Court Amendment, I am of the view that the court below has committed grave error in law in condoning delay for about 15 years after defendant's appearance in filing written statement, particularly when the defendant no.1/opposite party had full knowledge about the proceeding in suit and had participated in different proceedings arising out of the suit and also miserably failed to explain the delay. I am also not unmindful to the fact that while exercising supervisory jurisdiction under Article 227 of the Constitution of India, this High court should not normally disturb the order, where delay in filing the written statement is condoned in positive exercise of discretion but the aforesaid discussion makes it clear that in the present case exercise of discretion by the court below was whimsical and arbitrary which is far from positive discretion. It is to be remembered that the delay cannot be condoned on insufficient ground and by abusing the process of law, even if the petitioner is a Government concern. Since cause shown by the defendant no.1 is far from satisfactory to condone huge delay of more than 14 years, I have no other option but to set aside the order impugned.
28. Accordingly C.O. 1562 of 2021 is allowed. The order impugned dated 30th April, 2021 is hereby set aside. Consequently plaintiffs application dated 20.08.2019 is allowed. However this order will not preclude defendant from making cross-examination of plaintiff's witnesses, if any.
29. Connected Application is also disposed of accordingly.
30. Urgent photostat certified copy of this order, if applied for, be supplied to the parties, on priority basis on compliance of all usual formalities.

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