

**IN THE HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT JAMMU**

CM(M) No. 72/2023

Reserved on: 24.04.2024

Pronounced on: 03 .05.2024

Chaman Lal son of late Sh. Pallu Ram resident of village Mehmoodpur
Tehsil Bishnah District Jammu

...Petitioner

Through: - Mr. R.K.S.Thakur Advocate.

Vs.

1 Sh. Mohd Sharief son of late Sh. Roshan Din resident of village Jinder
Khurd, Tehsil Bishnah.

2. Sh. Sudesh Kumar adopted son of late Sh. Sansar Chand resident of
Suketar Tehsil and District Reasi

...Respondents

Through: - Ms Zoya Bhardwaj Advocate for R-1
Mr. Rakesh Chargoitra Advocate for R-2

CORAM: HON'BLE MR. JUSTICE SANJAY DHAR, JUDGE

JUDGMENT

1 The petitioner has filed the instant petition under Article
227 of the Constitution challenging orders dated 28.05.2022 and
31.10.2022 passed by the learned Sub Judge (Municipal Magistrate,
Jammu ['trial Court' for short] whereby the written statements filed by
the respondents have been taken on record.

2 Heard and considered.

3 It appears that the petitioner/plaintiff has filed a suit
seeking a declaration that sale deeds dated 31.01.2009 and 25.02.2009
executed by wife of respondent No.1/defendant No.1 in favour of

respondent No.2/defendant No.2 in respect of certain lands situated at village Mehmoodpur, Tehsil Bishnah are *null, void* and ineffective. A further declaration that order No. TB/OQ/2021-22/317-19 dated 16.07.2021 passed by Tehsildar, Bishnah is *null and void*, has also been sought. The petitioner/plaintiff has further sought a permanent prohibitory injunction restraining the respondents/defendants from interfering in the suit land.

4 The record of the trial Court reveals that the suit was presented on 18.09.2021 and summons were directed to be issued to the respondents/defendants on the said date. It seems that a caveat petition was filed by the counsel on behalf of respondent/defendant No.2. Since, the counsel for defendant No.2 was out of station, as such, notice could not be served upon him. The learned trial Court vide order dated 24.09.2021 passed an interim order directing the parties to maintain status quo on spot. Minutes of the proceedings of the trial Court reveal that on 11.11.2021, Advocate Salil Gupta appeared on behalf of defendant No.2 and sought time to file written statement and on 16.12.2021, Advocate Kamal Saini filed a Vakaltanama on behalf of defendant No.2 and sought time to file written statement, however, no written statement was filed by defendant No.2.

5 On 12.05.2022, the defendants were given last opportunity to file the written statement. On 28.05.2022, defendant No.1 filed his written statement and the same was taken on record. However, defendant No.2 did not file any written statement. Minutes of the proceedings further show that on 30.09.2022 counsel for defendant No.2 filed written

statement, however, an objection was raised by the counsel for the petitioner/plaintiff that the same is time barred and cannot be taken on record. The case was adjourned to 31.10.2022 for advancing arguments on this issue.

6 On 31.10.2022, upon a concession made by learned counsel for the petitioner/plaintiff, written statement filed by defendant No.2 was taken on record subject to payment of costs of Rs.2000/- and the case was adjourned to 09.01.2023. On 09.01.2023, defendant No.2 was not present and the case was adjourned to 24.02.2023, on which date, the learned Presiding Officer was not available. On 24.03.2023, counsel for defendant No.2 offered to pay costs, but the counsel for the petitioner/plaintiff refused to accept the same and submitted that he has challenged order dated 31.10.2022 before the High Court.

7 The petitioner/plaintiff has challenged the impugned orders dated 28.05.2022 and 31.10.2022 passed by the learned trial Court on the ground that the written statements have been filed by both the defendants after the expiry of 120 days of their service of summons, therefore, in terms of Order 8 Rule 1 of CPC, they have forfeited their right to file the written statement. Thus, it was not open to the trial Court to allow the written statements to be taken on record. It has been contended that the provisions contained in Order 8 Rule 1 of CPC, as applicable to the Union Territory of Jammu & Kashmir, are mandatory in nature and even a concession on the part of counsel for the petitioner/plaintiff would not vest power with the Court to accept the written statement of defendant

No.2 who has filed his written statement after the expiry of 120 days from the date of service of summons.

8 Learned counsel appearing for the respondents/defendants, on the other hand, have contended that so far as defendant No.1 is concerned, the prescribed period for filing written statement would start running against him only w.e.f 01.03.2022 because in terms of the directions issued by the Supreme Court in the case of **Cognizance for extension of Limitation** (Suo Motu Writ Petition (C) No.3/2020), period between 15.03.2020 till 28.02.2022 has to be excluded while computing the stipulated period and when the said period is excluded, the written statement filed by defendant No.1 is well within time.

9 Regarding defendant No.2, it has been contended that once it was conceded by learned counsel for the petitioner/ plaintiff that he had no objection to the filing of written statement by defendant No.2 after the expiry of 120 days, the plaintiff had waived his right, therefore, he is estopped from resiling from such waiver.

10 So far as the case of defendant No.1 is concerned, as already noted, as per the minutes of the proceedings, he has come to know about the filing of the suit on 16.12.2021 when Advocate Kamal Saini filed a Vakaltnama on his behalf. It is pertinent to mention here that there is no report relating to service of summons upon the defendants available to indicate that the defendants were served prior to 11.11.2021/16.12.2021. So we have to presume that defendant No.1 came to know about the proceedings on 16.12.2021 when his counsel

filed a vakaltanama and defendant No.2 came to know about the proceedings on 11.11.2021 when his counsel appeared on his behalf.

11 In view of Covid-19 pandemic, the Supreme Court, in the case of **Cognizance for extension of Limitation** (supra), issued certain directions from time to time. The last such directions were issued by the Supreme Court on 10.01.2022 which are reproduced as under:

“(i) The order dated 23.03.2020 is restored and in continuation of the subsequent orders dated 08.03.2021, 27.04.2021 and 23.09.2021. It is directed that the period from 15.03.2020 till 28.02.2022 shall stand excluded for the purposes of limitation as may be prescribed under any general or special laws in respect of all judicial or quasi-judicial proceedings.

(ii). Consequently, the balance period of limitation remaining as on 03.10.2021, if any, shall become available with effect from 01.03.2022.

(iii) In cases where the limitation would have expired during the period between 15.03.2020 till 28.02.2022, notwithstanding the actual balance period of limitation remaining, all persons shall have a limitation period of 90 days from 01.03.2022. In the event the actual balance period of limitation remaining, with effect from 01.03.2022 is greater than 90 days, that longer period shall apply.

(iv) It is further clarified that the period from 15.03.2020 till 28.02.2022 shall also stand excluded in computing the periods prescribed under [Sections 23 \(4\) and 29A](#) of the Arbitration and Conciliation Act, 1996, [Section 12A](#) of the Commercial Courts Act, 2015 and provisos (b) and (c) of [Section 138](#) of the Negotiable Instruments Act, 1881 and any other laws, which prescribe period(s) of limitation for instituting proceedings, outer limits (within which the court or tribunal can condone delay) and termination of proceedings”

12 In view of the aforesaid direction, it is clear that the period from 15.03.2020 till 28.02.2022 has to be excluded for the purpose of limitation as may be prescribed under any general or special law in respect of all judicial or quasi judicial proceedings. In view of these directions of the Supreme Court, in the instant case, period from 16.12.2021 to 28.02.2022 has to be excluded while calculating the period stipulated under Order 8 Rule 1 of CPC for the purpose of filing of the written statement by defendant No.1. The same has to be reckoned w.e.f 01.03.2022. Defendant No.1 has filed the written statement on 28.05.2022. Thus, he has filed the written statement well within the stipulated period of 120 days from 01.03.2022.

13 Learned counsel for the petitioner/plaintiff has contended that in the instant case, defendant No.1 has, all along, appeared before the trial Court through his counsel and therefore the condition that prevailed due to Covid-19 pandemic did not actually impact the said defendant so as to prevent him from interacting with his counsel and filing the written statement. It has been submitted that the order of the Supreme Court in the case of **Cognizance for extension of limitation** (supra) would not be applicable to the facts of the present case. Reliance in this regard has been placed by him upon a judgment of Delhi High Court in the case of **HT Media Limited and another vs. Brainlink International Inc. and another**, (CS(Comm) No. 119/2020, decided on 17.12.2021).

14 It is correct that even prior to 01.03.2022, defendant No.1 did appear before the trial Court through his counsel, but during the

proceedings prior to 01.03.2022, the counsel for defendant No.1 has throughout sought time to file the written statement and except filing vakatnama, he has not filed any application or pleading on behalf of defendant No.1 before the trial Court. So it is not a case where defendant No.1 had filed any interim application or any other pleading or document before the trial Court prior to filing of his written statement which means that there is no material on record to show that Covid-19 pandemic conditions did not prevent defendant No.1 from interacting with his counsel.

15 The Supreme Court in the case of **Cognizance for extension of Limitation** (supra), was persuaded to issue directions for extension of period of limitation in respect of all judicial and quasi-judicial proceedings keeping in view the horrific conditions prevailing in the world during the relevant period. It was risky for the people to interact with each other and, therefore, it was a difficult situation for the litigants to interact with their lawyers and visit their offices to sign the pleadings and instruct them for filing of pleadings on their behalf. It is, in these circumstances, that the Supreme Court passed the directions quoted hereinbefore. As already noted, in the instant case, there is nothing on record to show that despite covid-19 pandemic conditions, defendant No.1 was able to interact with his counsel.

16 In **HT Media's case** (supra), the defendant therein prior to filing his written statement had filed a number of applications before the trial court and it is for this reason that the Delhi High Court in the aforesaid case concluded that the pandemic did not actually impact the

defendant in interacting with his counsel. However, the position in the instant case is entirely different, as such, the ratio laid down by Delhi High Court in the aforesaid case cannot be made applicable to the present case. The contention of learned counsel for the petitioner/plaintiff in this regard is bound to be rejected

17 That takes us to the issue as to whether the concession made by the plaintiff in allowing defendant No.2 to file the written statement can be acted upon or not. The impugned order dated 31.10.2002 clearly shows that the counsel for the plaintiff expressed his no objection to the filing of written statement by defendant No.2 and taking of the same on record subject to payment of costs. The order-sheet bears the signature of counsel for the plaintiff on its margin. The question that arises for determination is whether the right accrued in favour of the plaintiff on account of non-filing of written statement by defendant No.2 within the stipulated period of 120 days could be waived by him.

18 The right that had accrued in favour of plaintiff on account of default of defendant No.2 for filing the written statement within the stipulated time is neither a Constitutional, nor a fundamental right, which cannot be waived by a person. The right which has accrued in favour of the plaintiff on account of default of defendant No.2 arises out of the provisions contained in order 8 Rule 1 CPC which is admittedly a mandatory statutory provision. A statutory right can certainly be waived by a person, therefore, the contention of learned counsel for the petitioner/plaintiff that the plaintiff could not have waived the right that had accrued in his favour on account of default of defendant No.2, is

without any substance. It is a well known position of law that even a right under a mandatory provision can be waived. Therefore, once the counsel for the plaintiff expressed his no objection to the filing of written statement by defendant No.2, the Court had no option, but to take the same on record.

19 It has been contended by learned counsel for the petitioner/plaintiff that his junior Associate had appeared on behalf of the plaintiff on 31.10.2022 and he was not knowing the consequences of making the concession. The argument advanced by learned counsel for the petitioner/plaintiff cannot be accepted because it is not the case of the petitioner/plaintiff that counsel Sh. Gourav Arora, who had appeared on his behalf on the said date, was not authorized to appear. Apart from this, on the previous date i.e on 30.09.2022 counsel for the plaintiff had objected to the filing of written statement by defendant No. 2 and on his request, the matter was listed for hearing of arguments on the said issue meaning thereby it was well within the knowledge of counsel for the plaintiff that mandatory period of 120 days for filing of the written statement had expired and in spite of having this knowledge, counsel for the plaintiff made a concession on 31.10.2022. From this, it can be inferred that it was a conscious decision taken by counsel for the plaintiff and that it was not an inadvertent error on his part.

20 It has been further contended that even the amount of costs has not been paid by defendant No.2. In this regard, it is to be noted that on 24.02.2023 learned President officer was on leave and on the next date i.e 29.03.2023, counsel for the plaintiff refused to accept the costs.

Thus, there is no default on part of defendant No.2 in offering the amount of costs to the plaintiff. The argument of learned counsel for the petitioner/plaintiff in this regard deserves to be rejected

21 In view of the foregoing discussion, this Court does not find any patent perversity or gross illegality in the impugned orders passed by the trial Court. Therefore, it will not be open to this Court to exercise its supervisory jurisdiction under Article 227 of the Constitution to interfere in the impugned orders. The petition lacks merit and is dismissed accordingly.

Interim directions, if any, shall stand vacated.

(Sanjay Dhar)
Judge

JAMMU
03.05.2024
"Sanjeev "

Whether order is reportable: Yes