

**HIGH COURT OF JAMMU AND KASHMIR
AT JAMMU**

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**CR No. 40/2020
CM No.2182/2020**

*Reserved on: 18.03.2020
Pronounced on: 22.04.2020*

Amit Chawala

..... Petitioner(s)

Through: Mr. Ajay Vaid, Advocate

Versus

Nirmal Chawala and others

.....Respondent(s)

Through: Mr. Amit Gupta, AAG

CORAM:HON'BLE MR JUSTICE SANJEEV KUMAR, JUDGE

JUDGEMENT

1. The power of superintendence vested in this Court by virtue of Article 227 of the Constitution of India is invoked by the petitioner to set aside the order dated 23.01.2019 passed by the learned Ist Additional Munsiff, Jammu (hereinafter referred to as "the trial Court") in a Civil Suit titled *Amit Chawala Vs. Nirmal Chawala and other*. With a view to better appreciating challenge to the impugned order, it would be necessary to set out few admitted facts.

2. A suit was filed by the petitioner on 15.04.2017 before the trial Court.

The trial Court on the same day issued the summons to the respondents and passed ad-interim order of status quo. The summons issued by the trial Court were not formally served upon the respondents, but, it appears that when order of status quo was brought to the notice of the respondents by the petitioner, the respondents immediately engaged the services of a lawyer and accordingly, Shri Rohit Gupta, Advocate appeared in the matter on 14.07.2017 and sought time for filing written statement. The respondents through their counsel, instead, filed an application under Order VII Rule 11 CPC on 20.07.2017. The application was contested by the petitioner and the same came to be dismissed by the trial Court on 01.02.2018. After the dismissal of the application for rejection of plaint filed by the respondents, an application was moved by the respondents on 06.03.2018 along with written statement for seeking permission of the trial Court to file the written statement. The application was considered by the trial Court in the light of the objections filed by the petitioner and the trial Court vide order impugned allowed the application and permitted the respondents to file the written statement. It is this order of the trial Court, which is assailed by the petitioner on the grounds mentioned herein below:-

- (i) That the trial Court did not take note of the amendment of the Order VIII Rule 1 effected by the J&K Civil Procedure Amendment Act, 2018 (hereinafter referred to as 'the Act of 2018'), which was published in the Govt. Gazette on

13.12.2018 and erroneously permitted the respondents to file the written statement even after the expiry of 120 days from the date of service of summons. It is contended that by efflux of stipulated period, the respondents had forfeited their right to file the written statement and the trial Court had no jurisdiction to allow the written statement to be taken on record

(ii) That the trial Court failed to appreciate the fact that an application filed under Order 7 Rule 11 CPC was an independent proceedings and not a substitute for the written statement and therefore, the pendency of the application under Order 7 Rule 11 CPC was no ground to seek the extension of time for filing the written statement.

3. Mr.R.K.S.Thakur of his own appeared for the respondents and contested the plea of the petitioner on the ground that the impugned order was discretionary order passed by the trial Court during the course of the proceedings and, therefore, was not amenable to Revision under Section 115 of CPC. He submits that the remedy available to a party under Article 227 of the Constitution of India, which confers power of superintendence on the High Court is not a substitute for the Revision nor can be invoked to nullify the effect of amendment carried in Section 115 CPC, restricting the right of Revision only against the final order having the effect of terminating the proceedings in the suit. He also relies upon couple of judgments to buttress his arguments that in a case where an application under Order VII Rule 11 CPC has been filed, it is obligatory on the Civil Court to

first dispose of such application before proceeding further in the suit. He, therefore, submits that filing of application under Order VII Rule 11 CPC automatically defers the filing of the written statement. Therefore, a good cause to permit the filing of the written statement having regard to the time taken by the Civil Court in disposing of an application under Order VII Rule 11 CPC. He, therefore, urges that the trial Court, in the given facts and circumstances of the case, has exercised its discretion to meet the ends of justice and, therefore, this Court in exercise of its power superintendence may not interfere with the impugned order.

4. On the other hand, learned counsel for the petitioner places strong reliance upon the recent judgment of the Hon'ble Supreme Court of India dated 12.02.2019 passed in Civil Appeal No.1638 of 2019 titled **M/s SCG Contracts India Pvt. Ltd. Vs. K.S.Chamankar Infrastructure Pvt. Ltd. and others** wherein the Hon'ble Supreme Court of India has in categorical terms held that the Order VII Rule 11 CPC proceedings are independent of the filing of the written statement once a suit has been filed, and that liberty to file an application under Order VII Rule 11 CPC cannot be made as a ruse for retrieving the last opportunity to file the written statements.
5. Having heard learned counsel for the parties and perused the record, it is necessary to set out the provisions of Order VIII Rule 1 as it stood on the date of application seeking permission of the Court to file belated written statement before the trial Court. The Order VIII Rule 1 CPC as it stood on 20.07.2017 reads as under:-

“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 later than ninety days from the date of service of summons.”

6. From the plain reading of extracted Rule, it is abundantly clear that the defendant in a suit at the relevant point of time was obliged to file the written statement within a period of thirty days from the date of service of summons upon him and in case of failure, he was permitted to file the same on such other day as may be specified by the Court, for the reasons to be recorded in writing, but, shall not be later than 90 days from the date of service of summon. This Rule has been interpreted by the Hon’ble Supreme Court in several judgments. A three judges Bench of the Hon’ble Supreme Court in the case of **Salem Advocate Bar Association, Tamil Nadu Vs. Union of India** reported in (2005) 6 SCC 344 in paragraph No.22 held thus:-

“22. In construing this provision, support can also be had from Order VIII Rule 10 which provides that 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, the Court shall pronounce judgment against him, or make such other order in relation to the suit as it thinks fit. On failure to file written statement under this provision, the Court has been given the discretion either to pronounce judgment against the defendant or make such other order in relation to suit as it thinks fit. In the context of the provision, despite use of the word 'shall', the court has been given the discretion to pronounce or not to pronounce the judgment against the defendant even if written statement is not filed and instead pass such order as it may think fit in relation to the suit. In construing the provision of Order VIII Rule 1 and Rule 10, the doctrine of harmonious construction is required to be applied.

The effect would be that under Rule 10 of Order VIII, the court in its discretion would have power to allow the defendant to file written statement even after expiry of period of 90 days provided in Order VIII Rule 1. There is no restriction in Order VIII Rule 10 that after expiry of ninety days, further time cannot be granted. The Court has wide power to 'make such order in relation to the suit as it thinks fit'. Clearly, therefore, the provision of Order VIII Rule 1 providing for upper limit of 90 days to file written statement is directory. Having said so, we wish to make it clear that the order extending time to file written statement cannot be made in routine. The time can be extended only in exceptionally hard cases. While extending time, it has to be borne in mind that the legislature has fixed the upper time limit of 90 days. The discretion of the Court to extend the time shall not be so frequently and routinely exercised so as to nullify the period fixed by Order VIII Rule 1."

7. The provision underwent change when Code of Civil Procedure was amended by the Act of 2018. The amended provision of Order VIII

(i) is also relevant to the same extent and therefore, reproduced as under:-

(i) In Rule 1, for the proviso thereto, the following proviso shall be substituted, namely:-

“Provided that where the defendant fails to file the written statement with the said period of thirty days, he shall be allowed to file the written statement on such other day, as may be specified by the court, for reasons to be recorded in writing and on payment of such costs as the court deems fit, but which shall not be later than one hundred twenty days from the date of service of summons and on expiry of one hundred twenty days from the date of service of summons, the defendant shall forfeit the right to file the written statement and the court shall not allow the written statement to be taken on record.”

8. With the amendment of Order VIII (i) of the Code of Civil Procedure effected w.e.f. 13.12.2018, the discretion of the Court to permit the written statement after the expiry of 120 days has been absolutely

taken away, meaning thereby, that after the amendment of 2018 if the written statement is filed after the expiry of 120 days, the defendant shall forfeit the right to file the written statement and the Court shall have no authority to allow the same to be taken on record thereafter. In the context of provisions of Order VIII Rule 1 and also the rival contentions of the learned counsel for the parties, the following questions arise for consideration in this petition:-

- (i) Whether the amendment to Order VIII Rule 1 carried by the Act of 2018, which was published in the Govt. Gazette on 13.12.2018 is prospective and therefore, is not applicable to the application seeking extension of time to file the written statement filed prior thereto;
- (ii) If the answer to the first question is that the amendment is prospective and was not applicable to the instant case where the application seeking permission of the Court to file the written statement after the expiry of stipulated period was filed, much prior to the amendment; whether the pendency of the application under Order VII Rule 11 CPC filed by the respondents and the time taken in its disposal constitutes sufficient cause and falls in the category of exceptionally hard case for the exercise of discretion by the Civil Court to permit the filing of the written statement even after the expiry of the stipulated period.

9. So far as the first question No.1 is concerned, this Court is of the considered opinion that the subsequent amendment carried to Order VIII Rule 1 by the Act of 2018 on 13.12.2018 is prospective in nature and would not apply to the pending applications moved under the un-amended Order VIII Rule 1. Right to file the written statement within the period stipulated in the Order VIII Rule 1 and to seek extension of filing the written statement even beyond the said period accrued to the petitioner when the period prescribed expired and the respondents made an application for taking written statement on record even after the expiry of stipulated period. Admittedly, at the relevant point of time, the un-amended provision extracted hereinabove, was occupying the field. That apart, the Act of 2018 itself provides in Section 1(2) that it shall come into force from the date of its publication in the Govt. Gazette. In short, Amendment Act does not provide that it would operate retrospectively and take in its sweep to the pending proceedings/applications. That being the clear position, the contention of the learned counsel for the petitioner that law as it existed on the date of the disposing of the application was applicable, sans any substance. It is trite that a statutory provision, unless there is specific mention that it would operate retrospectively, shall be deemed to be prospective. Right to file written statement is a paramount right in civil suit and any amendment affecting such right is substantive and not merely procedural. That being the position, the amendment in question, in the absence of contrary provision, is prospective and shall not apply to pending proceedings.

10. In so far as question No.2 is concerned, answer to this question also poses no difficulty. The Hon'ble Supreme Court of India in the recent judgment of **M/s SCG Contracts India Pvt. Ltd.** (supra) has considered this issue and while distinguishing its earlier judgment in the case of **R.K.Roja Vs. U.S.Rayudu and another**, reported in **AIR 2016 SC 3282** in paragraph No.14 held thus:-

14) Learned counsel appearing for the respondents also relied upon [R.K. Roja vs. U.S. Rayudu and Another](#) (supra) for the proposition that the defendant is entitled to file an application for rejection of plaint under Order VII Rule 11 before filing his written statement. We are of the view that this judgment cannot be read in the manner sought for by the learned counsel appearing on behalf of the respondents. Order VII Rule 11 proceedings are independent of the filing of a written statement once a suit has been filed. In fact, para 6 of that judgment records "However, we may hasten to add that the liberty to file an application for rejection under Order 7 Rule 11 CPC cannot be made as a ruse for retrieving the last opportunity to file the written statement".

11. In the same judgment, the Hon'ble Supreme Court of India also held that the clear, definite and mandatory provisions of Order VII read with Order VIII Rules 1 and 10 cannot be circumvented by recourse to the inherent power under Section 151 CPC to do the opposite of what is stated therein. This way the possibility of invoking Section 151 CPC in the extreme cases too has been taken away.

12. In the face of the aforesaid recent judgment of the Hon'ble Supreme Court of India, the reliance placed by the learned counsel for the respondents on the judgment of **Saleem Bhai and others v. State of Maharashtra and others**, reported in **AIR 2003 SC 759** and **R.K.Roja** (supra) is totally misplaced. I am not impressed with the arguments of learned counsel for the respondents that the judgment

rendered in the case of **M/s SCG Contracts India Pvt. Ltd.** (supra) is *per in curium* as it lays down proposition of law, which is contrary to what has been held by the two bench of the equal strength in the case of **SaleemBhai** and **R.K.Roja** (supra). As a matter of fact, the judgment rendered in the case of **M/s SCG Contracts India Pvt. Ltd.** (supra) has taken note of the judgment rendered in the case **R.K.Roja**. The two judge Bench judgment, in the case of **R.K.Roja** relies upon the judgment of the Supreme Court of even strength in the case of **Saleem Bhai**. One of the Hon'ble Judge Justice Rohinton Fali Nariman was a member of the Division Bench which decided both the cases, that is, the case of **R.K.Roja** and **M/s SCG Contracts India Pvt. Ltd.** (supra) Subsequent Division Bench (two judge Bench) took note of the judgment rendered by a co-ordinate Bench of the same strength in the case of **R.K.Roja** (supra) and clearly held that judgment could not be read in the manner sought for by the learned counsel. My attention was also invited to paragraph No.6 of the judgment where observation has been made "*we may hasten to add that liberty to file an application for rejection under Order 7 Rule 11 CPC cannot be made as a ruse for retrieving the last opportunity to file the written statement.*"

13.In view of the foregoing discussion, my answer to question No.2 is clear and categorical. In the face of law declared by the Hon'ble Supreme Court of India in the case of **M/s SCG Contracts India Pvt. Ltd.** (supra), there is no warrant for the proposition propounded by the learned counsel for the respondents that the time to file the written

statement begins from the date of dismissal of an application under Order 7 Rule 11 CPC. The position is otherwise and the moment summons in suit are served upon the defendants, time to file the written statement starts ticking, the defendant is obliged to file the written statement within thirty days and in case he fails he can apply to the Court for permission to file the written statement and such permission shall be granted by the Court for the reasons to be recorded in writing and on payment of such costs as the Court deems fit. This obligation to file the written statement is independently of the liberty of the defendant to file an application under Order VII Rule 11 CPC. Filing of application under Order VII Rule 11 CPC seeking rejection of the plaint, as correctly held by the Hon'ble Supreme Court of India in the case of **R.K.Roja** (supra) cannot be made as a ruse for retrieving the last opportunity to file the written statement. If the contention of the learned counsel for the respondents is accepted, then the defendants, who are invariably interested to delay the suit would, instead of filing the written statement, file application under Order VII Rule 11 CPC thereby defeating the very object of enacting provision in the shape of Order VII Rule 11 CPC providing for time bound submission of the written statement.

14.In the aforesaid reasons, this Court is of the considered view that the trial Court by passing the impugned order has ignored the settled position of law and has, thus, exercised the jurisdiction not vested in it and has, thereby, caused complete failure of justice. This Court find it a fit case for exercising powers of superintendence vested in it under

Article 227 of the Constitution of India to quash the impugned order.
Accordingly, this petition is allowed and order impugned is accordingly set aside.

(Sanjeev Kumar)
Judge

Jammu

22.04.2020

Madan Verma, PS

Whether the order is speaking: Yes.

Whether the order is reportable: Yes.

