

**IN THE HIGH COURT AT CALCUTTA
CIVIL REVISIONAL JURISDICTION
APPELLATE SIDE**

PRESENT:

The Hon'ble Mr. Justice Subrata Talukdar

CO 2107 of 2011

**Amalesh Mondal & Anr.
-vs.-
Animesh Mandal & Ors.**

For the Petitioner : *Sri Jiban Ratan Chatterjee
Dipankar Aditya*

For the Opposite Party : *Shri Joydip Kar
Shri Saurav Sen
Shri Saurav Sengupta
A.M. Saha*

Heard on : *16/07/2014, 21/07/2014*

Judgement on : *19/12/2014*

Subrata Talukdar, J.: In this application under Article 227 of the Constitution of India the petitioners have challenged the Order No. 17 dated 10th June, 2011

passed by the Ld. 10th Bench, City Civil Court, Calcutta in Title Suit No. 5659 of 2009. By the said impugned order the Ld. Trial Court was pleased to hold as follows:-

- a)** That the present petitioners, who are the defendants in Title Suit No. 5659 of 2009 filed an application on 15th December, 2010 praying, inter alia for condonation of delay in filing their written statement. Against the said application the present Opposite Parties, who are plaintiffs in Title Suit No. 5659 of 2009 filed their objection.
- b)** The Ld. Trial Court observed that the suit was filed by the OP/plaintiff on 6th November, 2009 for declaration, permanent injunction and consequential damages. The Plaintiff no.1 sought a declaration that he is alone entitled to use the trade mark of Ray & Martin as well as 'Prosnobichitra', 'Uttarbichitra' and 'Bichitra' in respect of such business being carried out through his authorised persons/licensed users in relation to teaching manuals, books, channels, question papers, student guide books etc.

The Plaintiff no.1 also sought a declaration and injunction that the defendants shall have no right to use such trade mark.

- c)** Upon institution of the suit on 20th November, 2009 summons were issued upon the defendants. The records show that the summons were sent vide postal receipt no. 6369 on 20th November, 2009 by the Kolkata General Post Office. The summons were delivered on 23rd November, 2009.

However, on behalf of the present petitioners/defendants it has been submitted that towards the end of June, 2010 the defendant no.1 received the copy of the summons of the suit along with the copy of the plaint and it was written on the summons that the date fixed for appearance was 9th March, 2010. The said summons were marked as Annexure B to the application filed by the defendants for condonation of delay in filing their written statement.

d) Therefore, in the view of the Ld. Trial Court it was clear that on 20th November, 2009 the summons in the suit were issued upon the defendant no.1 requiring the defendant no.1 to appear in Court on and by 9th March, 2010 and the defendants admittedly received such summons on 23rd November, 2009. The Ld. Trial Court also took notice of the decision of the Hon'ble Apex Court in ***Kailash Vs. Nanhku & Ors.*** reported in **(2005) 4 SCC 480** which was relied upon by the defendants on the point that the provisions of Order 8 Rule 1 CPC are directory and not mandatory. Relying on ***Kailash (supra)*** the defendants prayed for an opportunity to contest the suit by filing their written statement. The defendants also relied upon a decision of this Hon'ble Court in ***Dilip Tarafdar Vs. Manika*** reported **(2006) 1 CLJ 202** on the point that in the event time is extended for filing written statement, the Court is required to record reasons for the same.

e) The Ld. Trial Court then took the view that in the light of the decision of the Hon'ble Apex Court in ***Kailash Vs. Nanhku (supra)***, in exceptional cases it is possible for the Court to extend the time for filing written statement by examining in the facts of each case whether such exceptional circumstances

exist which would justify the failure of the defendants to file written statement within the prescribed period.

However, in the further view of the Ld. Trial Court in the facts of the present case it does not appear that the defendants have been able to make out an exceptional case justifying extension of time to file written statement.

f) Discussing the facts on record, the Ld. Trial Court found that the defendants received the summons of the suit on 23rd November, 2009 and soon thereafter they ought to have taken steps to draft the written statement without waiting for any other date to cause their appearance in court. The Ld. Trial Court therefore held the view that there appear obvious laches on the part of the defendants to file their written statement within the prescribed date and hence such written statement cannot be accepted. Accordingly, the application filed by the defendants dated 15th December, 2010 stood rejected and the next date was fixed on 26th August, 2011 for ex parte hearing.

Being aggrieved the defendants have preferred the present application being CO 2107 of 2011.

Shri Jiban Ratan Chatterjee, Ld. Senior Counsel appearing for the present petitioners/defendants has made the following submissions:-

i) Drawing the attention of this Court to the application filed by the defendants for condonation of delay appearing at Page 16/Annexure 'P1' of CO 2107 of 2011 Shri Chatterjee has submitted that in the said application it is, inter alia, pleaded that on 6th July, 2007 date was fixed by the Ld. Trial Court for service return. On 6th July, 2007 the petitioner appeared in

the suit by filing vakalatnama and prayed for extending the date for filing the written statement. The Ld. Trial Court then fixed 27th August, 2010 for filing written statement and admittedly such written statement was filed on the said date, i.e. 27th August, 2010.

- ii)** It is further pleaded by Sri Chatterjee that on 26th November, 2009 the defendants received notice to show cause along with the copy of injunction application with annexures. However, no copy of the plaint accompanied the injunction application. That two separate copies of the injunction application were served and the defendant no. 1 not only accepted his copy of the same but also accepted the copy of the defendant no.2 in his capacity as the proprietor of the defendant no.2. Thereafter on receipt of copies of the injunction application the same was handed over to their Ld. Advocate for preparing the written objection and due to failure on the part of the Ld. Advocate to take timely steps, such written objection could not be prepared within due time.
- iii)** That sometime around the end of June, 2010 the defendant no. 1 received a copy of the summons of the suit along with the copy of the plaint in which it was stated that the next date was fixed on 9th March, 2010 for appearance. The defendant no. 1 thereafter appointed a new advocate and upon proper enquiry came to learn of the fact that the interim order of injunction was made absolute on 12th May, 2010 due to non-appearance by their Ld. Advocate. The defendant no.1 also came to learn of the fact that the next date was fixed on 6th July, 2010 for SR & AD.

On 6th July, 2010 the defendants appeared in the suit for the first time through their new advocates with the prayer for extending the time to file their written statement. In the above premises Shri Chatterjee argues that the next date was fixed on 27th August, 2010 for filing written statement and admittedly on the next date, i.e. 27th August, 2010 the written statement was filed. Shri Chatterjee further points out that it is the specific case of the defendants that neither the summons of the suit nor the copy of the plaint was served on 26th November, 2009. On 21st November, 2009 except the two copies of the injunction application no other summons or documents were received by the defendants till, the end of June, 2010.

Therefore, Shri Chatterjee strongly denies the allegation that there were intentional laches on the part of the defendants to take proper steps in accordance with law. Shri Chatterjee also denies that there was a deliberate delay in filing the written statement or that such written statement is time barred. He strongly argues that the duty under law to file the written statement arises only after the summons in the suit, including copy of the plaint, have been served and received by the defendants.

- iv)** Shri Chatterjee takes this Court to the orders of the Ld. Trial Court passed from time to time. He submits that by the order dated 6th July, 2010 it has been recorded that a petition has been filed by the defendants praying for time to file the written statement on the grounds stated therein. Such prayer has been considered and allowed and the time was fixed on 27th August, 2010 for filing written statement.

Shri Chatterjee further points to the fact that the order dated 6th July, 2010 was passed in presence of the plaintiffs. He also submits that the order dated 6th July, 2010 has never been challenged by the plaintiffs.

- v) Further taking this Court to Order No. 12 dated 27th August, 2010 Shri Chatterjee points out that the Ld. Trial Court was pleased to record that the defendant no1 has filed the written statement, although copy thereof has not been served. The plaintiffs also entered appearance on 27th August, 2010 and the Ld. Trial Court was pleased to fix 8th September, 2010 for acceptance of written statement. On 8th September, 2010 vide Order No. 13 it was recorded by the Ld. Trial Court that the plaintiffs have filed an objection petition praying for an order not to accept the written statement. The said objection was taken on record and the next date was fixed on 15th December, 2010. The defendants were directed to file their response to the objection petition of the plaintiffs by the next date.
- vi) Shri Chatterjee also takes this Court to Order No. 14 dated 15th December, 2010 by which it is recorded that the defendnants filed an application praying for condonation of delay in filing their written statement which was served on the plaintiffs. The said objection of the plaintiffs dated 8th September, 2010 along with the application of the defendants for condonation of delay was ultimately decided by the order impugned no. 17 dated 10th June, 2011 and time was refused to be extended for accepting the written statement. Shri Chatterjee submits that the Ld. Trial Court

committed error by not accepting the facts with regard to the actual service of summons on the defendants.

- vii)** Shri Chatterjee, therefore, strongly argues that exceptional circumstances have been made out by the defendants justifying extension of time to file written statement. Such exceptional circumstances pertain to the inaction on the part of their Ld. Advocate to take steps within due time. He also points out that no written objection was filed by the plaintiffs to the application taken out by the defendants for extending the time to file written statement. In support of his submission Shri Chatterjee relies upon para 45 of ***Kailash Vs. Nanhku & Ors (supra)*** and on **(2008) 11 SCC 769** in the matter of ***Zolba Vs. Keshao & Ors.***

Relying on both the above noted decisions Shri Chatterjee points out that the Hon'ble Apex Court was pleased to hold that where exceptional circumstances have been admittedly made out, the Court will be justified in extending the time to file written statement. Shri Chatterjee has also relied upon an unreported decision of this Court in **CO 2688 of 2011** in the matter of ***Sachindra Nath Banerjee Vs. Ananto Das & Anr.***

Per contra Shri Joydeep Kar, Ld. Counsel appearing for the plaintiffs/Opposite parties has asserted that although it is settled by the Hon'ble Apex Court that it is necessary for an exceptional case to be made out for extending the time to file written statement, in the facts of the present case no such exceptional case has been made out.

Shri Kar places before this Court the provisions of **Order 9 Rule 7, Order 8 Rule 1 and Order 5 Rule 1 CPC**. He also places before this Court **Paragraphs 40, 41 & 42 of *Kailash Vs. Nanhku*** (supra).

He submits that from the records it will be clear that the defendants first approached the Ld. Court on 6th of July, 2010, i.e. already after a lapse of 120 days.

Taking this Court to Section 27 of the General Clauses Act as well as Section 114 of the Evidence Act Shri Kar points out that from the postal receipts annexed to the application filed by the plaintiffs under Order 39 Rules 1 & 2 read with Section 151 CPC it will be apparent that the presumption of good service has arisen in favour of the plaintiffs in respect of both the notices of injunction and of the summons in the suit. Shri Kar also submits that the onus is on the defendants to prove that the defendant no.1 received the summons in June, 2010. According to Shri Kar the facts of this case show that such onus was not discharged by the present petitioners/defendants deserving exceptional consideration justifying extension of time to file written statement following ***Kailash Vs. Nanhku*** (supra).

Taking this Court to the order dated 6th July, 2010 Shri Kar points out that no reasons were assigned in the said order extending the time to file the written statement. According to Shri Kar the interim injunction was granted on November, 2009 after the show cause was issued and as per the postal communication both the show-cause and injunction petitions as well as the summons in the suit were served upon the defendants.

In support of his argument Shri Kar relies upon the following decisions:-

(2007) 6 SCC 555 at paras 12, 13 & 14 in matter of **C.C. Alavi Haji Vs. Palapetty Muhammed & Ors.**

(2008) 13 SCC 689 at paras 22 to 24 in the matter of **Subodh S. Salaskar Vs. Jayprakash M. Shah and Anr.**

(2010) 9 SCC 157 at paras 15 to 20 in the matter of **Greater Mohali Area Development Authority & Ors. Vs. Manju Jain & Ors.**

(2008) 11 SCC 769 in the matter of **Zolba Vs. Keshao & Ors.**

(2009) 3 SCC 513 at paras 9 to 13 in the matter of **Mohammed Yusuf Vs. Faij Mohammed and Ors.**

Shri Kar has argued that the decision reported in **(2007) 6 SCC 420 at paras 11 & 15** has qualified the view taken by the Hon'ble Apex Court in **Kailash Vs. Nanhku (supra)** and therefore there is no justification to extend the time in favour of the defendants for filing the written statement. Shri Kar argues that the order impugned warrants no interference.

Heard the parties. Considered the materials on record.

At the very outset the attention of this Court is drawn to the supplementary affidavit filed on behalf of the O.P.s/Defendants. From the said supplementary affidavit it transpires that the suit summons were sent to the defendants through Court vide Postal Registration nos. 6368 and 6369, both dated 21st November, 2009. The show-cause of the injunction application was also served through Court vide Postal Registration nos. 6370 and 6371.

From the said supplementary affidavit it also transpires that in respect of Postal Registration nos. 6369 and 6370 which are respectively the suit summons and the injunction show cause despatched to the defendant no.2, the Postal Authority has informed the Ld. Advocate for the O.P.s that the articles were delivered under registered post on 23rd November, 2009.

By Order no. 1 dated 6th November, 2009 the Ld. Trial Court was pleased to issue summons upon the defendants and to file written statement from the date of service. The next date was fixed on 9th of March 2010. By Order no. 2 dated 16th November, 2009 the Ld. Judge-In-Charge was pleased keep the injunction application of the plaintiffs on record. By Order no.3 dated 17th November 2009 the Ld. Judge-In-Charge upon consideration of the materials on record did not find it fit to grant any interim injunction at that stage and fixed 17th December 2009 for SR and AD. By order dated 17th December, 2009 the Ld. Judge-In-Charge was pleased to record that SR and AD upon the defendant no.2 has not yet returned after service. However, the AD upon the defendant no.1 has returned after service and, the defendant no.1 has not appeared on the said date. The learned Judge-In-Charge was, therefore, pleased to fix 15th January 2010, awaiting service return and acknowledgement due of the defendant no.2.

By Order no.5 dated 15th January 2010 the Ld. Trial Court was pleased to direct the plaintiffs to take fresh steps for service of notice upon the defendant no.2. By Order no.6 dated 6th March 2010 the service return upon the defendant no.2 was returned after service as per the report of the Bailiff. Accordingly, 7th April 2010 was fixed for ex parte hearing of the injunction application. By Order

No.7 dated 9th March 2010 the Ld. Trial Court was pleased to record that the SR and AD have not **(emphasis supplied)** returned after service. Therefore, 6th of July 2010 was fixed for SR and AD of summons.

As already noticed above in this judgment by Order no.11 dated 6th July, 2010 the Ld. Trial Court was pleased to record the appearance of the defendants and the prayer made by the defendants for time to file written statement on the grounds stated therein. The Ld. Trial Court, on perusal of the said petition, allowed such prayer for filling the written statement. The next date for filing of the written statement was fixed on 27th of August 2010. It is a fact, which has been argued by Shri Chatterjee, that the written statement was filed on the next date fixed, i.e. 27th August 2010. It is also a fact that the Ld. Trial Court accepted filing of the written statement on 27th August 2010 and such acceptance was not challenged by the plaintiffs before a higher forum.

In the light of the sequence of events elucidated above this Court cannot lose notice of the fact that although by the order dated 6th March, 2010 the Ld. Trial Court fixed 7th April 2010 for ex parte hearing of the injunction application by recording service on the defendant no.2 as per report of the Bailiff, by Order no.7 dated 9th March 2010 the Ld. Trial Court was again pleased to record that SR and AD had not returned after service. Having recorded such the Ld. Trial Court was then pleased to fix 6th July 2010 for SR and AD of the summons.

In the above backdrop no infirmity can be found in the conduct of the defendants for praying before the Ld. Trial Court on 6th July, 2010 to file the written statement by the next date.

Again, no infirmity can be found in the conduct of the defendants for having filed the written statement on the next date, i.e. 27th of August 2010. To the mind of this court the view expressed by the learned Trial Court that the summons sent vide Postal transaction no. 6369 dated 21st November 2009 was delivered on 23rd November 2009 as recorded in Order No.17 dated 10 June 2011 and, therefore, the defendants were under obligation to take steps with effect from the date of the receipt of the summons, contradicts the record vide Order No.7 dated 9th March, 2010 to the effect the SR and AD have not yet returned after service prompting the learned Trial Court to fix 6th of July 2010 for SR and AD of summons.

To the further mind of this court in the light of the order dated 9th March 2010 the step taken by the defendants to cause their appearance on the next date that is 6th July, 2010 and to file their written statement by the next following date, i.e. 27th August 2010 cannot be faulted. In the considered view of this Court the opinion expressed by the learned Trial Court vide order impugned dated 10th of June 2011 to the effect that in view of the service of summons on the defendant no.1 on 23rd November , 2009 “*defendants have nothing say about the matter any further*” does not stand to reason.

Ex facie it does transpire that the learned Trial Court did not close the issue of service of summons as on 9th March 2010, although the Ld. Trial Court conveyed such impression through the order impugned dated 10th June 2011 that service of summons on the defendant no.1 was completed on 23rd of

November, 2009 and the report of the Bailiff had indicated service on the defendant No.2.

In spite of conveying such impression the issue of service of summons was revived by the learned Trial Court vide its Order No.7 dated 9th March, 2010 by fixing a fresh date, that is 6th July 2010 for SR and AD of summons. Admittedly, on 6th July, 2010 the defendant entered appearance and on 27th August 2010 they filed their written statement.

In the above backdrop this Court cannot persuade itself enough to accept the view of the Ld. Trial Court that “ *when the defendants have received summons of the suit on 23rd November 2009 they should have taken steps in drafting the written statement on the appointed date of hearing without waiting for arriving of the date appointed in the summons for his appearance in the Court.*” In the above premises this Court finds that the learned Trial Court ought to have condoned the delay in filing the written statement and accepted the same.

From the catena of judgements cited at the Bar it is necessary to notice ***Kailash Vs. Nankhu (supra) and Zolba Vs. Keshao and Ors*** (supra). In both the judgements the Hon’ble Apex Court was pleased to interpret the provisions of Order no.8 Rule 1 CPC holding that the same was not mandatory in character and, the Court should not ordinarily deny opportunity to a litigant of contest in an adversarial legal process. The Court should not also be rendered remediless to repair an extreme situation for the ends of justice. The Hon’ble Apex Court was also pleased to consider the meaning of what constitutes ‘*sufficient cause*’ for condoning the delay in filing the written statement. In the opinion of the Hon’ble

Apex Court in an exceptional situation it would be open to the Court to permit a party to file its written statement.

This Court also cannot lose sight of the fact that the present litigants are members of the same family claiming the right of user of a Trademark. From the plaint of Title Suit no. 5659 of 2009 which is a suit for declaration, permanent injunction, accounts and damages -- a copy whereof is annexed to the supplementary affidavit filed on behalf of the petitioners/defendants -- it does transpire that both the plaintiffs and the defendants claim to be publishers of books, note books, guide books etc. associated with the Trademark by the name of Ray & Martin. The publications enjoy immense popularity in the form of guide books right up to Class XII and have gained immense commercial popularity.

While on behalf of the plaintiffs it is claimed that the defendants are infringing the Trademark and proprietary rights of the Plaintiff no.1 inasmuch as such Trademark has been created by the plaintiff No.1 by dint of hard labour and expertise, on the other hand the written statement of the defendants reveals that the Trademark in question, viz Ray & Martin was the proprietary creation of their late father and predecessor-in-interest, Sri Paran Chandra Mondal. According to the defendants, the family business of the late Paran Chandra Mondal was distributed among his legal heirs and the plaintiffs along with the answering defendants were responsible for managing the business of publication by the name and style of M/s Calcutta Publishers and enjoying the trade name of Ray & Martin.

The intense family battle was noticed by the Ld. Trial Court vide its Order no.5 dated 15th January 2010. The Ld. Trial Court was pleased to record as follows:-

“Perused the case record and the other documents on record. The petitioners have instituted the suit mainly for infringement of a registered Trademark. It is also seen at the same time that the petitioner no.1 and the defendant no.1 are brothers by relation.”

Such observation is also reflected in the order of the Ld. Trial Court dated 17th November 2009.

Therefore, in the considered view of this Court it would be out of sync to impute that any of the parties would act in a lackadaisical manner so as to lose their valuable right of running the business under the Trademark. To the further mind of this Court the facts of this case do not permit that the defendants deserve to be non-suited at the threshold.

In the backdrop of the above discussion this Court finds that the order impugned dated 10th June 2011 deserves to be set aside. Accordingly, the order dated 10th June 2011 passed by the Ld. 10th Bench City Civil Court at Calcutta in Title Suit no. 5659 of 2009 is set aside with a direction upon the Ld. Trial Court to accept the written statement filed on behalf of the defendants subject to payment of cost of RS. 5000/- in favour of the plaintiffs/O.P.s.

CO 2107 of 2011 is accordingly **allowed**.

There will be, however, no order as to costs.

Urgent Xerox certified photocopies of this judgment, if applied for, be given to the parties upon compliance of all requisite formalities.

(Subrata Talukdar, J.)