

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE A.MUHAMED MUSTAQUE

&

THE HONOURABLE MRS. JUSTICE SHOBA ANNAMMA EAPEN

Friday, the 30<sup>th</sup> day of September 2022 / 8th Aswina, 1944

OP(C) NO. 1139 OF 2018

OS 124/2016 OF III ADDITIONAL SUB COURT, KOZHIKODE

**PETITIONER:**

1. M.M.MADHAVAN NAMBOODIRI, S/O. VASUDEVAN NAMBOODIRI, AGED 83 YEARS, MAKKATT ILLAM, PARAMBATHKAVU AMSOM, KOZHIKODE - 673 602.
2. T.K. PARIYAYIKKUTTY HAJI, AGED 92 YEARS, S/O. AHAMMADKUTTY HAJI, AGED 92 YEARS, PATTAM VEEDU HOUSE, RARICHAN ROAD, ERANHIPALAM, KOZHIKODE - 673 020.
3. T.K.C. MOHAMMED, AGED 48 YEARS, S/O. K.V. IMBICHIPATHUMMA, AGED 48 YEARS, ELAVANCHALIL HOUSE, KODUVALLY, KOZHIKODE - 673 572.
4. MS. MODERN WOOD INDUSTRIES, KODUVALLY P.O., KOZHIKODE, REP.BY ITS PARTNER PLAINTIFF NO. 1 - 673 572.

BY ADVS.SRI.BIJU ABRAHAM & SRI.B.G.BHASKAR

**RESPONDENT:**

1. THE TAHSILDAR, THAMARASSERI 673 573.
2. STATE OF KERALA, REPRESENTED BY THE CHIEF SECRETARY, GOVERNMENT OF KERALA, THIRUVANANTHAPURAM - 695 001.
3. THE PRINCIPAL SECRETARY, REVENUE DEPARTMENT, GOVERNMENT OF KERALA, THIRUVANANTHAPURAM - 695 001.
4. THE DISTRICT COLLECTOR, KOZHIKODE - 673 602.

BY GOVERNMENT PLEADER

BY ADV.SRI.B.PARTHASARATHY (AMICUS CURIAE)

This OP(C) having come up for orders on 30.09.2022; upon perusing the petition the court on the same day passed the following;

(p.t.o)

A. MUHAMED MUSTAQUE  
&  
SHOBA ANNAMMA EAPEN, JJ

“C.R.”

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OP(C).No. 1139 of 2018  
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Dated this the 30<sup>th</sup> day of September, 2022

O R D E R

A.Muhamed Mustaque, J.

Is the time limit fixed under Order VIII Rule 1 of the Code of Civil Procedure for filing a written statement, mandatory or directory in character? This is the question we have to answer in this reference, in the context of non commercial suits before the civil courts.

2. The learned Single Judge, noting the different views of the Apex Court in its various judgments, opined that which of those judgments of the Apex Court should prevail as a binding precedent has to be answered by a Division Bench.

3. We shall refer to the parties with reference to their status in the original suit.

4. We had the advantage of hearing Adv. B.G. Bhasker, assisted by Adv.Biju Abraham, appearing for the plaintiffs in the suit before the court below. We also heard the learned Government Pleader appearing for the Government, who are the defendants in the

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suit. We also heard Adv. B. Parthasarathy, who was appointed as Amicus Curiae in the matter.

5. The plaintiffs filed a suit for a declaration that the Government Order, ordering dispossession of the plaintiffs from the suit premises is illegal and for a consequential injunction to restrain the defendants from dispossessing the plaintiffs from the suit property. In the suit, the copy of the plaint was served on the learned Government Pleader on 3/1/2017 as the plaintiffs required urgent relief in the suit. This service was in accordance with Section 80 (2) of the Code of Civil Procedure.

6. As mandated under the proviso to Rule 1 of Order VIII of CPC, the defendants have to file a written statement within 30 days. The provision further states that the Court has the power to receive written statement beyond 30 days, for reasons to be recorded in writing. But that period shall not be later than 90 days from the date of service of summons.

7. In this case, on 5/4/2017, an application was filed by the learned Additional Government Pleader to receive written statement after the condonation of delay of 47 days in filing the written

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statement. The plaintiffs raised objections in receiving the written statement after the outer limit of the period referred to in Order VIII Rule 1 CPC. Overruling these objections, the learned Sub Judge, in a reasoned order, after advertng to various precedents referred therein, condoned delay in filing the written statement and received the written statement on record. This order is under challenge before the learned Single Judge, invoking Article 227 of the Constitution of India at the instance of the plaintiffs in the suit.

8. The learned counsel Shri B.G. Bhasker, argued *in extenso*. He raised three points for consideration by us:

- i. Whether the outer limit fixed to file written statement under Order VIII Rule 1 is directory or mandatory?
- ii. If this Court holds that it is directory, whether the defendants in the suit have made out a case to condone delay?
- iii. Are the plaintiffs entitled for costs in the event the Court finds that delay can be condoned?

9. We are only answering the reference with respect to the point of law involved. We are of the view that the points (ii) and (iii)

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do not arise for consideration by us. We, therefore, leave open the above points to be considered at an appropriate stage.

10. The short point, according to us, is not the interpretation of Order VIII Rule 1 CPC, to find out whether the time limit fixed therein is mandatory or directory in character. The Apex Court has already interpreted the statutory provisions in various judgments. It is true that as pointed out by the learned Single Judge, there are varying views expressed by the Apex Court in various judgments. Our task, in such circumstances, is to find out which among those judgments is binding upon all the Courts.

11. The line of decisions starting from **Dr. J.J. Merchant v. Shrinath Chaturvedi [(2002) 6 SCC 635]** have adverted to the point involved in this case. In **Dr.J.J. Merchant's** case, the Apex Court at paras.14 and 15 opined as follows:

“14. For this purpose, even Parliament has amended Order 8 Rule 1 of the Code of Civil Procedure, which reads thus:

“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

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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.*”

15. Under this Rule also, there is a legislative mandate that written statement of defence is to be filed within 30 days. However, if there is a failure to file such written statement within the stipulated time, the court can at the most extend further period of 60 days and no more. Under the Act, the legislative intent is not to give 90 days of time but only maximum 45 days for filing the version by the opposite party. Therefore, the aforesaid mandate is required to be strictly adhered to.”

(emphasis supplied)

12. The opinion of the Apex Court as above is in the context of an order arising from the proceedings of the National Consumer Disputes Redressal Commission under the Consumer Protection Act, 1986. The Apex Court had in fact, in **Dr.J.J. Merchant's** case (supra), referred to Order VIII Rule 1 CPC and gave its opinion as above while considering similar provisions under the Consumer Protection Act.

13. In **Kailash v. Nanhku & Others [(2005) 4 SCC 480]**, decided by the Apex Court on 6/4/2005, the Apex Court considered

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the mandate of Order VIII Rule 1 CPC. The question considered was whether the time limit of 90 days as prescribed under the proviso appended to Order VIII Rule 1 CPC is mandatory or directory in nature. The Apex Court held that the time limit fixed is only directory in nature and further opined that the observation by the Apex Court in **Dr.J.J. Merchant's** case is *obiter*.

14. In **Salem Advocate Bar Association v. Union of India [(2005) 6 SCC 344]** decided on 2/8/2005, the Apex Court in context of the challenge made to the constitutional validity of amendments made to the Code of Civil Procedure by the Amendment Acts of 1999 and 2002 in the previous case of **Salem Advocate Bar Assn. (1) v. Union of India [(2003) 1 SCC 49]** considered the question whether the Court has any power or jurisdiction to extend the period beyond 90 days as stipulated in Rule 1 of Order VIII CPC. The Apex Court examined the nature of the provision and opined that the proviso to Order VIII Rule 1 CPC, providing for the upper limit of 90 days to file written statement is directory.

15. In **M/s. R.N. Jadi & Brothers And Others vs Subhashchandra [(2007) 6 SCC 420]**, again the Apex Court

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considered the question of receiving written statement beyond 90 days. The Apex Court held that the time limit prescribed is directory in nature. However, the extension beyond 30 days is not automatic and should be exercised with caution and further held that the extension of time beyond 90 days must be granted only based on the clear satisfaction of the court. Justice P.K.Balasubramanian, in **R.N.Jadi's** case (supra) while concurring with the majority judgment authored by Justice Arjith Pasayat cautioned that the departure from the time fixed of 90 days, to receive a written statement must be based on sufficient justification and the dictum in **Kailash's** case is no authority for receiving a written statement after the expiry of period permitted by law in a routine manner.

16. Various precedents of the Apex Court in reported and non reported cases have placed reliance on **Kailash's** case (supra) and held that Order VIII Rule 1 CPC is only directory. See the judgment in **Mohammed Yusuf v. Faij Mohammad and Others [(2009) 3 SCC 513]**, **Atcom Technologies Limited v. Y.A.Chunawala and Company and Others [(2018) 6 SCC 639]**, **Desh Raj v. Balkishan (D) through proposed Lrs. Ms.Rohini 2020 (1) KLT 440 (SC)]** and

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a recent judgment of the Apex Court in **Bharat Kalra v. Raj Kishan Chabra** in SLP (C) .No. 63 of 2022 dated 9/5/2022.

17. The point that has to be answered by us here, as noted above, is precisely on a point related to precedent. It may be true as rightly pointed out by the learned counsel, Shri B.G. Bhasker that when the Apex Court has expressed its opinion on the interpretation of a statutory provision, whether it forms part of the ratio or not, all the Courts will have to follow the opinion of the Apex Court in regard to the interpretation. {See the Judgment of the Karnataka High Court in **Liyakhath Ali v. H.N. Lohitheshwar [2004 KHC 3853]**}. In **Liyakhath Ali's** case, the learned Single Judge of the Karnataka High Court, in similar circumstances, opined that the interpretation accorded by the Apex Court on a particular statutory provision, is binding on all the Courts. However, we have to note that when a point directly and specifically comes up for consideration before the Apex Court subsequently and the Apex Court decides the matter, the judgment of the subsequent Bench will have to be followed as a binding precedent. The decision in **Dr.J.J. Merchant's** case was rendered in the context of challenge under the Consumer

Protection Act. The opinion expressed in **Kailash's** case, **Salem Advocate Bar Association's** case etc. are on a question directly and specifically involved in those cases. In **Kailash's** case itself, the Apex Court opined that the observations in **Dr.J.J. Merchant's** case are *obiter*. Once the Apex Court holds the view that the earlier judgment is *obiter*, it is not for the High Courts and the other Courts to treat it as a binding judgment. When there is a conflict between an *obiter* and a binding judgment, the Courts are not expected to follow the *obiter*, overlooking the binding judgment. Binding decisions are decisions rendered on a point involved directly and specifically in a particular case. When there are conflicts of opinion expressed by the Apex Court, the Courts are bound by the judgment of the Apex Court on a proposition laid down in a question directly and specifically involved in a case before the Apex Court. It is the ratio decidendi of the judgment that constitutes a binding judgment. The binding judgment is an enunciation of the law, on a point directly and specifically arisen for consideration by the Apex Court. No doubt, even if the point does not directly and specifically arise and there are no binding judgments on the point of law involved, the courts in India

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are expected to follow the opinions even if it is an *obiter* of the Apex Court.

18. The ratio in **Kailash's** case, **Salem Advocate Bar Association's** case etc. clearly would show that the question on interpretation of Order VIII Rule 1 CPC was directly and specifically involved in those cases. The opinion expressed in **Dr.J.J. Merchant's** case, indirectly, on interpretation of the proviso to Order VIII Rule 1 CPC is only an *obiter* and will not form part of a binding judgment. Hence, we answer the reference holding that the proviso to Order VIII Rule 1 CPC, fixing the time limit, is only directory. Reference is answered accordingly. Registry to place the matter before appropriate Court for consideration of the original petition on merits. We also record our appreciation to Shri B.Parthasarathy Advocate who assisted the Court as Amicus Curiae.

Sd/-

**A.MUHAMED MUSTAQUE**

**JUDGE**

Sd/-

**SHOBA ANNAMMA EAPEN**

**JUDGE**

In/ms