SCC Online Web Edition, Copyright © 2018
Page 1 Friday, July 13, 2018
Printed For: Mr. Vivek Kantawala
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Maharashtra Law Journal

shows that at 14 centers the result remained same after recount. No recount could be conducted in relation of Kajleshwar-5 and Kajleshwar-6. The other reason that there was no inconsistency in postal ballots is totally irrelevant for the purpose of said order. Recount at Kajleshwar-5 and Kajleshwar-6 has not been held as EVM developed some technical snag and was not accessible.

6. In view of this position the votes received at Kajleshar-5 and Kajleshwar-6 by petitioner or by respondent No. 6 lost their relevance. Recount of these two centers was must. As it could not be held, it is apparent that there was no complete recount. The learned District Judge-1, Washim has overlooked this aspect of the matter. After recount is undertaken, original counting is meaningless and cannot be used for any purpose whatsoever. Here process of recount is still not complete.

7. Learned District Judge has misdirected the entire inquiry. There was no question of examining the validity or otherwise to the order granting recount. There was no question of parties leading evidence as fact of error in EVM machine was never in dispute. When election petitioner demonstrated that data in EVM for these two centres was destroyed, the learned District Court should have considered its impact on election process. It could not have fallen back on original result which was discarded already by the Returning Officer. Reply filed by respondent Nos. 1 and 12 before this Court does not even touch this aspect of the matter. The order granting recount could not have been indirectly set at knot by the District Court.

8. Learned counsel for petitioner has stated that interest of justice can be met with by permitting fresh polling at Kajleshwar-5 and Kajleshwar-6 centres. I, do not find anything wrong in accepting the said request made. Hence, respondent Nos. 1 and 12 are directed to hold fresh polling only at two centres i.e. Kajleshwar-5 and Kajleshwar-6 and thereafter to complete the incomplete recount in accordance with the law. The person securing maximum number of votes in such recount shall be declared elected for remainder of the term of the body.

9. In this situation, as respondent No. 2 is already functioning as Member, she is permitted to continue as member till the result of such recount is declared.

10. Writ Petition is partly allowed. Rule is made absolute in the aforesaid terms, with no order as to costs.

Petition partly allowed.

ACCEPTING WRITTEN STATEMENT BEYOND PRESCRIBED TIME : POWER IS DISCRETIONARY

(Smt. Roshan Dalvi, J.)

NOUSHAD VALAPPAD *Petitioner.*

vs.

SUNAYNA TARAKAD @ SUNAYNA NOUSHAD VALAPPAD *Respondent.*

Civil Procedure Code, O. 8, R. 1 — *Written statement — Power of Court to accept written statement filed beyond time — It is discretionary — It can be*

W. P. No. 6077 of 2010 in Family Court Petition No. A 498 of 2009 decided on 20-10-2010. (Bombay)

SCC Online Web Edition, Copyright © 2018
Page 2 Friday, July 13, 2018
Printed For: Mr. Vivek Kantawala
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Maharashtra Law Journal

exercised only judiciously and reasonably — Not to be exercised when no case for such exercise is made out.

Power to accept written statement filed beyond time is implicit in any Court. It is discretionary. It can be exercised only judiciously and reasonably. It cannot be sought to be exercised upon browbeating the Court. It should not be exercised when no case for such exercise is made out. It can never be sought or claimed as a right of a defaulting party. It can only be claimed upon first submission to the rule of law and further plea of sufficient course for the delay necessitating the inherent power of the Court being exercised with an end to do justice when deserved. The husband has not shown the Court any sufficient cause for not filing the written statement within time or even for not filing the written statement in the extended time granted by the Court by adjourning the Petition to 5th January, 2010. The husband has not taken out any application for condonation of delay in filing the written statement upon showing sufficient cause at all. In fact no such cause is shown. This Writ Petition is taken out by a defaulter. Granting a writ to such a defaulter and setting aside the orders legitimately passed would be travesty of justice. This case is merely of unexplained, unreasoned default. It is seen that on 5th January, 2010, the order of no written statement was rightly passed. The application again to set aside the same order was rightly rejected on 22nd February, 2010. The rejection was correct because there was "No Written Statement" even on that date. Hence the order dated 5th January, 2010 now does not deserve to be set aside at all. (Paras 24 to 28)

For petitioner : *Mohan Pillai* instructed by *Smt. Madhavi M. Pillai*
For respondent : *Vivek Kantawala with Ms. Sneha Nanandkar* instructed by *M/s Vivek Kantawalla and Co.*

List of cases referred :

1. *M/s R. N. Jadi and Brothers and ors. vs. Subhashchandra, AIR 2007 SC 2571* (Para 25)
2. *Info Edge (India) Ltd. and ors. vs. Mr. Sanjeev Goyal, Civil Suit (O.S.) No. 783/2006 decided on 16-11-2007* (Para 26)

ORDER :— Rule, made returnable forthwith.

2. The Petitioner husband has applied for quashing the orders of the Family Court, Mumbai dated 5th January, 2010 and 5th April, 2010 in the Divorce Petition. The husband as well as his Advocate were absent before the Court on 5th January, 2010. The order dated 5th January, 2010 rejects an application filed by the Clerk of the Advocate of the husband for adjournment.

3. It also grants the application of the Respondent wife who had applied for an order of "no written statement" in her Petition for Divorce.

4. The order dated 5th April, 2010 is for the grant of interim maintenance upon the application for maintenance taken out by the wife.

5. Though both the orders are completely different, they both are sought to be challenged in this Petition together.

6. The Petition for divorce was filed by the wife on 17th February, 2009 and registered on 3rd March, 2009. Service of the Petition was directed and the Petition was adjourned to 18th April, 2009. Service has been effected on 26th March, 2009.

SCC Online Web Edition, Copyright © 2018
Page 3 Friday, July 13, 2018
Printed For: Mr. Vivek Kantawala
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Maharashtra Law Journal

7. On the next date of hearing, which was on 18th April, 2009 the husband remained absent. However since the summons was not returned the Petition was adjourned to 11th June, 2009.

8. On 11th June, 2009 the summons, which was duly served was considered. The husband remained present. Certain applications were taken out and the Petition was adjourned to 30th July, 2009.

9. On 30th July, 2009 the husband remained absent. The written statement was not filed as enjoined in the Civil Procedure Code. On 15th September, 2009 the conciliation report was filed upon the parties remaining present. On 5th November, 2009 again the husband remained absent and the Petition was adjourned to 16th December, 2009.

10. On 7th November, 2009 the husband took out two applications, one for access to his child and the other to take the matter on board. Since the say of the wife was required, the applications were also adjourned to 16th December, 2009 to which date the Petition was already adjourned.

11. On 16th December, 2009 also the husband did not file his written statement. The wife made an application for proceeding without the written statement. The application was adjourned for the say of the husband to 5th January, 2010.

12. Even on 5th January, 2010 the husband did not file his written statement. He did not remain present. His Advocate did not remain present. His Advocate's Clerk made an application for adjournment. That application was rejected. The wife's application for proceeding without written statement was granted. The Petition came to be adjourned to 22nd February, 2010.

13. On 27th January, 2010 the husband made application to set aside the order of proceeding without written statement. That application was adjourned to 22nd February, 2010 along with the Petition.

14. On 22nd February, 2010 that application came to be rejected and hence the order of proceeding without written statement came to be confirmed.

15. The husband contends that he had affirmed his written statement, it was sought to tendered, but not accepted.

16. This procedure is seen to be endemic in the Family Court, which was specifically constituted not to have such time consuming, elaborate, redundant procedures of making applications after applications instead of replying to the main application itself.

17. The Family Court is required to act in family matters for bringing to an end the dispute between the parties without recourse to tardy procedures. Consequently, the main Petition has to be replied first. All the contentions in the main Petition being replied, can be considered by the Court at one time. The issue of maintenance, access etc., would be considered along with or in the main Petition.

18. It is seen that the husband has scant regard for the breach of the law or the orders of the Court. He did not comply with the basic requirement of filing his written statement promptly. It should have been filed within 30 days of the service of the summons. It is taken to be a lawful right not to file written statement for 90 days. In this case even after 90 days the written statement was not filed. The husband absented himself and applied for adjournment or appeared

SCC Online Web Edition, Copyright © 2018
Page 4 Friday, July 13, 2018
Printed For: Mr. Vivek Kantawala
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Maharashtra Law Journal

in Court and failed to file his written statement, but took out applications to "take matter on board" and to set aside the order of "No Written Statement" rather than tender the written statement itself. The Roznama of the Family Court shows two applications disposed of by two orders on 5th January, 2010. One was the rejection of the application for adjournment tendered by the Clerk of the Advocate of the husband. The other was the order granting the application of the wife for "No Written Statement" taken out on the previous date of hearing being 16th December, 2009.

19. Even thereafter on the next date of hearing the husband failed to produce or tender written statement and request the Court to take in on file. No Court would have refused such a request. But instead, the husband took out an application "to take the matter on board". It is esoteric how a party who has been refused the right to file written statement in accordance with law can direct the Court to take his matter on board. Such application was rightly rejected.

20. On the further date of hearing being 22nd February, 2010 also the husband did not tender his written statement and request the Court to take it on file. He filed two other applications instead. Those were to set aside orders passed on 5th January, 2010. As aforesaid, one order dated 5th January, 2010 rejected his application for adjournment. The other was the order of "No Written Statement" i.e. to proceed with the Suit ex parte or without the written statement. They were rightly rejected.

21. The ex parte decree was not passed on 22nd February, 2010 though the Petition was ripe for such decree. That was because the Husband took out the aforesaid two applications, which though were disposed off, the Petition was again adjourned.

22. Mr. Pillai on behalf of the husband claims that thereafter the husband affirmed his written statement and sought to tender it to Court which was rejected. There is no noting of the Court in that behalf. Such oral claim cannot even be countenanced. The husband has shown the Court an affirmation of a written statement which is produced from his custody. It is not understood that if his written statement was ready on 22nd February, 2010, why was not that not got affirmed and tendered to Court and why were two needless, redundant, applications made to Court instead and why the Family Court was burdened to decide such applications instead of being shown the husband's defence in the Petition on merits. This shows not only disobedience of the law, but impudence to Court. It is seen that the learned Judge has proceeded perfectly, correctly and appropriately. It is also seen that the wife has made a legitimate application for bringing to an end her dispute by an order of the Court, as all her allegations remained uncontroverted. The husband callously and impudently ignored her Petition by failing to reply to it all together.

23. It is time that the inappropriate practice of sabotaging the entire spirit of the Family Court's act by parties and/or the Advocates by taking out needless applications and not replying to the main application itself be brought to the end it deserves.

24. The husband has not shown the Court any sufficient cause for not filing the written statement within time or even for not filing the written statement in the extended time granted by the Court by adjourning the Petition to 5th January,

SCC Online Web Edition, Copyright © 2018
Page 5 Friday, July 13, 2018
Printed For: Mr. Vivek Kantawala
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Maharashtra Law Journal

2010. The husband has not taken out any application for condonation of delay in filing the written statement upon showing sufficient cause at all. In fact no such cause is shown to this Court too.

25. Mr. Pillai relied upon the judgment of the Supreme Court in *M/s R. N. Jadi and Brothers and ors. vs. Subhashchandra, AIR 2007 SC 2571* which observes about the Court's power to accept written statement filed beyond time. Of course, such power is implicit in any Court. It is discretionary. It can be exercised only judiciously and reasonably. It cannot be sought to be exercised upon browbeating the Court. It should not be exercised when no case for such exercise is made out. It can never be sought or claimed as a right of a defaulting party. It can only be claimed upon first submission to the rule of law and further plea of sufficient course for the delay necessitating the inherent power of the Court being exercised with an end to do justice when deserved.

26. Mr. Pillai also relied upon another judgment of the single Judge of the Delhi High Court in the case of *Info Edge (India) Ltd., and ors. vs. Mr. Sanjeev Goyal, in Civil Suit (O.S.) No. 783/2006 decided on 16-11-2007* which is on materially different parameters. That is the case of exceptional circumstances beyond the control of the Defendant in filing his written statement. This case shows no circumstances at all why the indulgence of the Court can be sought. This case is merely of unexplained, unreasoned default.

27. Under these circumstances this Writ Petition is taken out by a defaulter. Granting a writ to such a defaulter and setting aside the orders legitimately passed would be travesty of justice. It is seen that on 5th January, 2010 the order of no written statement was rightly passed. The application again to set aside the same order was rightly rejected on 22nd February, 2010. The rejection was correct because there was "No Written Statement" even on that date. Hence the order dated 5th January, 2010 now does not deserve to be set aside at all.

28. As a corollary it is seen that the wife's case must be considered Ex parte for want of any defence whatsoever.

29. Her application for interim maintenance was considered on 5th April, 2010. Even to that application on merits no reply was filed. The husband has produced the reply affirmed by him in the Family Court before this Court today! The Family Court passed an order of interim maintenance on 5th April, 2010, when both parties were present and heard. The Court's order cannot be faulted on any score. The husband can blame only himself. It is not only improper, but mischievous to challenge an order passed upon statements not controverted in the competent Court.

30. The Advocate for the husband now contends that the affidavit in reply to the application for interim maintenance was sought to be tendered after affirmation to the Court, which was not accepted. His statement cannot be accepted. Though the husband has filed various redundant applications including "application to take the matter on board", "application for setting aside the order dated 5th January, 2010", he has not taken out any application to tender his reply to the interim application for maintenance. He has also not served a copy of the said reply upon the wife.

31. Consequently, the order granting interim maintenance also cannot be faulted.

SCC Online Web Edition, Copyright © 2018
Page 6 Friday, July 13, 2018
Printed For: Mr. Vivek Kantawala
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Maharashtra Law Journal

32. The entire exercise of not filing the reply within time and then seeking to set aside the order passed in a Writ Petition is fraught with impertinent mischief.

33. The Writ Petition completely lacks bona fides and is, therefore, dismissed with costs.

34. There is no interim order continuing in this petition. None can be continued.

Petition dismissed.

COMPLAINT OF DISHONOUR OF CHEQUE : PROCESS CAN BE ISSUED ON THE BASIS OF AFFIDAVIT FILED

[Full Bench]

(Mohit S. Shah, C. J., V. M. Kanade and Smt. R. P. SondurBaldota, JJ.)

RAJESH BHALCHANDRA CHALKE *Petitioner.*

vs.

STATE OF MAHARASHTRA and another *Respondents.*

(a) Negotiable Instruments Act (as amended by Act No. 55 of 2002) SS. 145, 138 and Criminal Procedure Code (2 of 1974), S. 200 — *Complaint of dishonour of cheque — Issue of process — It is open to the Magistrate to issue process on the basis of the contents of the complaint, the documents in support thereof and the affidavit submitted by the complainant in support of the complaint.*

Once the complainant files an affidavit in support of the complaint before issuance of the process under section 200, Criminal Procedure Code, it is thereafter open to the Magistrate, if he thinks it fit, to call upon the complainant to remain present and to examine him as to the facts contained in the affidavit submitted by the complainant in support of his complaint. But then it is a matter of discretion and the Magistrate is not bound to call upon the complainant to remain present before the Court and to examine him upon oath for taking decision whether or not to issue process on the complaint under section 138 of Negotiable Instruments Act. For the purpose of issuing process under section 200 of the Code of Criminal Procedure, 1973, it is open to the Magistrate to rely upon the verification in the form of affidavit filed by the complainant in support of the complaint under section 138 of the Negotiable Instruments Act, 1881 and the Magistrate is not obliged to call upon the complainant to remain present before the Court, nor to examine the complainant or his witnesses upon oath for taking the decision whether or not to issue process on the complaint under section 138 of the Act. It is only if and where the Magistrate, after considering the complaint under section 138 of the Negotiable Instruments Act, 1881 and the documents produced in support thereof and the verification in the form of affidavit of the complainant, is of the view that examination of the complainant or his witness is required, that the Magistrate may call upon the complainant to remain present before the Court and examine the complainant and/or his witness upon oath for taking decision whether or not to issue process on the complaint under

---

Cri. W. P. No. 2523 of 2010 along with Cri. Appln. No. 3478 of 2010 decided on 7-12-2010. (Bombay)