ORDER SHEET

IN THE ISLAMABAD HIGH COURT, ISLAMABAD.
JUDICIAL DEPARTMENT.

Writ Petition No. 318/2021

Sakhawat Husain

Versus

Civil Judge (East), Islamabad, etc.

S. No. of order/ proceedings	Date of order/ Proceedings	Order with signature of Judge and that of parties or counsel where necessary.
	04.05.2021	Mr. Zia Hussain Raja, Advocate for the petitioner.

The petitioner is aggrieved by order dated 18.12.2020 whereby his right to file written statement was closed by the learned Civil Court in exercise of powers under Order VIII Rule 10 of the Code of Civil Procedure, 1908 **("CPC")**.

2. Learned counsel for the petitioner stated that the petitioner appeared before the court for the first time on 07.01.2020 as defendant No.1 and that he was only given one opportunity to file his written statement and on such date he sought an adjournment because he was not in possession of certain documents that he wished to rely on while preparing the written statement. Learned counsel further stated that section 26A of CPC, (as amended), provides for at least two opportunities for filing written statement subject to payment of cost and the learned trial court disregarded the said provision of law while passing the impugned order.

3. Despite issuance of repeat notices, no body appeared on behalf of the respondents.

4. The basic contention of the learned counsel for the petitioner is that since appearance of the petitioner before the learned Civil Court for the first time on 07.01.2020 six dates for hearing of the case were fixed and that proceedings were only conducted on one date of hearing i.e. 14.11.2020, when the petitioner sought adjournment because he needed to acquire certain crucial documents for purposes of preparation of written statement. He stated that on four hearing dates no proceedings took place due to Covid-19 related instructions of the High Court or due to a strike call. On the basis of record, the learned counsel for the petitioner argued that in essence the petitioner only sought one adjournment for filing of the written statement for sufficient cause and on the next date of hearing i.e.18.12.2020 the impugned order was passed and his right to file written statement was closed. He submitted that the impugned order is in breach of section 26A of CPC which provides the defendant at least two opportunities to file written statement.

5. As the respondents have not elected to appear before the Court, nothing has been said in rebuttal. I have reviewed the file. It appears that after the petitioner appeared before the learned Civil Court for the first time on 07.01.2020, he was directed to file written statement on 25.02.2020. The matter was then fixed for 25.02.2020, 16.04.2020, 16.06.2020 and 14.09.2020. No proceedings took place on the first three dates due to situation arising out of Covid-19. And the order dated 14.09.2020 records that the matter is being adjourned without any proceedings due to strike of the local Bar. However, the order also directed the petitioner to file written statement by 14.11.2020. On 14.11.2020 the petitioner sought an adjournment to acquire relevant record to prepare his written statement. In order dated 14.11.2020 the learned Civil Court also issued a notice to the petitioner under Order VIII Rule 10 of CPC. However, the order does not state that upon failure of the petitioner to file his written statement on 18.12.2020, his right to file the written statement would be closed. Such right was, however, closed through the impugned order on 18.12.2020.

6. The Order VIII Rule 10 of CPC states the following:

> ***10. Procedure when party fails to present written statement called for by Court.*** *Where any party from whom a written statement is so required fails to present the same within the time fixed by Court, the Court may pronounce judgment against him, or make such order in relation to the suit as it thinks fit.*

7. It is patent from the language of the aforesaid Rule that it vests in the Civil Court considerable discretion to pass an appropriate order. Such appropriate order could range from being a warning to imposition of costs to closing of the right to defend or even pronouncement of judgment. The order of the learned Civil Court dated 14.11.2020 while referring to Order VIII Rule 10 of CPC did not identify the penal action that the learned Civil Court was contemplating in the event that the petitioner did not file his written statement on the next date of hearing.

8. Section 26A of CPC states the following:

> *"**26A. Written statement and proposed issues by the defendant.**__(1)The defendant shall file written statement not later than thirty days from the date of service to the plaintiff:*
>
> *Provided that if the defendant fails to file written statement on the date fixed, the court may grant an opportunity to file the same not later than fifteen days subject to payment of adjournment costs:*
>
> *Provided further that if the defendant fails to file after the opportunity given under the first proviso, a final opportunity may be given by the Court to file the written statement not*

later than fifteen days subject to payment of adjournment costs after which the defendant shall lose the right of defence and the Court shall close the right to defend the case:

Provided also that the written statement may be allowed to be filed by the Court upon payment of costs to be determined by it, if the defendant through an application supported by an affidavit, satisfies the Court that he had just and sufficient cause and the Court record reasons for it.

(2) The defendant shall file proposed issues along-with the written statement:

Provided that if no issues are proposed by the defendant, the Court shall permit the defendant to file proposed issues not later than seven days upon payment of cost to be determined by the Court.

(3) The defendant shall provide additional copies of written statement and of the documents annexed therewith for each of the parties and the Court."

9. The scheme of section 26A of CPC is such that it contemplates provision of two opportunities to a defendant to file a written statement. The defendant is under an obligation to file his written statement within thirty days from the date of service. If he fails to do so the court has the discretion to grant him an opportunity to file the written statement within a period of fifteen days subject to payment of adjournment costs. If the defendant fails to avail this opportunity the court may give him a further opportunity of fifteen days to file the written statement subject to payment of

adjournment costs. And if the defendant fails to avail the second opportunity as well the court is to close his right to defend the case. The proviso of section 26A(1) vests further discretion in the court to provide a further opportunity to the defendant to file the written statement subject to payment of cost, if the defendant can satisfy the court through an application supported by an affidavit that he has just and sufficient cause for the delay in filing his written statement.

10. The order sheet in the case suggests that first opportunity was provided on 07.01.2020 requiring the petitioner to file the written statement by the next date of hearing i.e. 25.02.2020.The petitioner did not file his written statement on the said date and matter kept getting adjourned for other reasons for which the petitioner was not responsible, as stated above, and second direction was issued by order dated 14.09.2020, even though the order on such date also noted that the case is being adjourned without any proceedings. The third opportunity, together with reference to penal action under Order VIII Rule 10, was provided by order dated 14.11.2020. Benefit of doubt in favour of the petitioner can only arise because (a) on 14.09.2020 the court adjourned the case without any proceedings due to a strike and it

was on the same date that the court also provided the second opportunity to the petitioner to file written statement, and (b) in the order dated 14.11.2020 the court referred to Order VIII Rule 10 pursuant to which it could have granted a further opportunity subject to payment of cost as opposed to following the scheme of section 26A and stating that subject to payment of cost this was the final opportunity for filing of written statement pursuant to second proviso of section 26A(1) of CPC.

11. It is an obligation of a party to proceedings before a court to diligently pursue his case or defence, as the case may be. The scheme of section 26A of CPC, (as amended), is now clear: it provides a timeline of two months within which the Civil Court has the discretion to afford two opportunities to the defendant to file his written statement failing which his right to defend the case stands closed. The second proviso of section 26A is not in question in the instant matter as no application was filed by the petitioner before the court explaining that it had just and sufficient cause for the delay in filing of the written statement thereby seeking another opportunity. Given that the amendment in CPC made through the Code of Civil Procedure (Amendment) Act, 2020 is a recent event and

the impugned order does not seem to have been passed keeping in view the provisions of section 26A, this petition is not being dismissed on the basis that the petitioner had an adequate remedy under the third proviso of section 26A to file an appropriate application explaining the cause of delay to the learned Civil Court. In any event such application would need to be filed before an order is passed by a Civil Court under section 26A of CPC closing the right of defence to the defendant. Where the Civil Court notes in the order sheet that a final opportunity is being provided to the defendant to file written statement under the second proviso of section 26A(1) of CPC, the appropriate remedy for the defendant is to file an application explaining the delay under the third proviso of section 26A. The failure of a defendant to avail such opportunity before the Civil Court might be sufficient cause to dismiss a constitutional petition challenging an order closing the right to defend the case on the basis that the aggrieved defendant failed to avail the appropriate statutory remedy under section 26A(1) of CPC. That is however not the situation in the instant case as the petitioner was never put on notice that his right to defence would stand closed if he did not file his written statement pursuant to order dated 14.11.2020,

and consequently he never had occasion to file an application under the third proviso of section 26A(1) of CPC.

12. It must be noted that while section 26A(1) vests discretion in the Civil Court to grant additional opportunities to a defendant to file his written statement, the exercise of this discretion is still subject to payment of adjournment costs. The language used in the second proviso of section 26A(1) seems to be of a mandatory nature as it clearly provides that in the event that the defendant fails to avail two opportunities to file written statement, subject to payment of adjournment costs, he shall lose his right to defence and the court shall close his right to defend the case. Use of word 'shall' together with section 26A(1) prescribing a penal consequence i.e. the defendant losing his right to defence, reflects that the provisions in section 26A(1) are of a mandatory nature that must be enforced in letter and true spirit. Therefore, it is essential for the Civil Court to bear in mind that the total time period prescribed in the CPC for filing of written statement does not exceed two months and the second set of 30-days after the passage of initial 30-days can be afforded to a defendant in two blocks of fifteen days each, but subject to payment of adjournment costs.

13. Section 35-A of CPC introduced through the Cost of Litigation Act, 2017 provides the following:

> ***"35A. Adjournment costs****.-If, on the date fixed for hearing in any proceedings, a party to the proceedings or any other person, despite service of notice, fails to appear or comply with any order of the Court or mandatory provision of the Code or any other law for the time being in force, seeks an adjournment for such purpose, the Court shall, for sufficient cause and reasons to be recorded, grant such adjournment on the condition that such party or person shall pay to the other party, costs of adjournment which shall not be less than five thousand Rupees per adjournment or such higher amount as may be prescribed from time to time:*
>
> *Provided that if the Court is satisfied that the adjournment being sought is on account of unavoidable reasons beyond the control of the party concerned, which reasons shall be recorded by the Court, the Court may grant adjournment without imposing adjournment costs:*
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> *Provided further that if the Court finds that there is a tendency of seeking repeated adjournments by any party on such grounds, the Court may not grant adjournment without imposing the adjournment costs as the Court may deem fit."*

14. As is evident from the language of section 35A of CPC, the minimum cost to be imposed for grant of adjournment is Rs.5000/- per adjournment or such higher amount as prescribed from time to time, and further that

the court in dealing with a litigant who exhibits the propensity to seek repeated adjournments may impose higher adjournment costs. Therefore, the right to grant an adjournment is a matter of discretion for the Court. But in the event that the court grants an adjournment without imposing adjournment costs, it is under an obligation to record reasons as to why imposition of costs is not in the interest of justice in a case where the adjournment is being sought for unavoidable reasons. In a nut-shell the court has only limited discretion not to impose adjournment costs, and when it exercises such discretion, it must pass a reasoned order explaining why such discretion has been exercised.

15. As discussed above, the facts in the instant case are distinguishable. Orders of the learned Civil Court dated 14.09.2020 and 14.11.2020 are not unequivocal and consequently the benefit of doubt is being given to the petitioner. However, this Court in its discretionary equitable jurisdiction cannot be oblivious to the fact that the petitioner appeared before the learned Civil Court for the first time on 07.01.2020 and was unable to file his written statement till the end of the year on the date fixed for 18.12.2020. The propensity of parties

to drag out each step in the trial process delays judicial proceedings and the adjudication of disputes which is choking our system for judicial delivery of justice and must be censured.

16. Taking into account the ambiguity in the orders of the learned Civil Court and its non-conformance with the scheme of section 26A,the impugned order is being set aside. However, in view of the conduct of the petitioner and his failure to file his written statement for almost a year after he first appeared before the learned Civil Court, the learned Civil Court is directed to provide one final opportunity to the petitioner to file his written statement subject to payment of cost of Rs.30,000/- to the plaintiffs in the suit. The petition is accordingly disposed of.

17. The office is directed to share a copy of this order with the learned District and Sessions Judges, Islamabad (East and West) for their perusal, along with a copy of (i) the Code of Civil Procedure (Amendment) Act, 2020, through which section 26A has been introduced, and (ii) the Cost of Litigation Act, 2017, through which section 35A of the CPC has been substituted and section 35B of the CPC has been added.

(BABAR SATTAR)
JUDGE

Saeed.