
(2015) 03 BOM CK 0067

In the Bombay High Court

Case No : Writ Petition No. 3802 of 2013

Ashok Kundalrai Mohekar

APPELLANT

Vs

The National Textile Corporation Ltd. and Others

RESPONDENT

Date of Decision : 12-03-2015

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 17 Rule 2, Order 8 Rule 10, Order 8 Rule 5, Order 9 Rule 13, Order 9 Rule 6

Citation : (2015) 4 BomCR 494

Hon'ble Judges : A.S. Chandurkar, J.

Bench : Single Bench

Advocate : Anjan De, Counsel, for the Appellant; S.P. Kshirsagar, Advocates for the Respondent

Final Decision : Dismissed

Judgement

A.S. Chandurkar, J.—The petitioner-original plaintiff has filed the present writ petition being aggrieved by the order dated 02.04.2013 passed by the first appellate Court allowing the appeal filed by the respondent nos. 1 and 2 and setting aside the judgment and decree passed in Regular Civil Suit No. 35 of 2005.

2. The facts in so far as the same are relevant are that, the petitioner is the owner of the suit premises which is occupied by the respondent nos. 1 and 2 as tenant paying monthly rent of Rs. 3085/-. The petitioner issued notice dated 02.12.2004 and terminated the tenancy of the respondents. Thereafter, suit for possession of the property in question came to be filed on 14.01.2005.

3. On being served with the suit summons the respondent nos. 1 and 2 appeared before the trial Court and sought time to file written statement. Time came to be granted vide orders passed below Ex. 11,12,13. However, the application seeking time to file written statement vide Ex. 14 came to be rejected on 07.07.2005 and the case was thereafter fixed for no written statement evidence. The petitioner thereafter filed his affidavit in lieu of evidence. Subsequently, he also filed certain

documents on record. Thereafter the plaint also came to be amended. After grant of sufficient time thereafter, the plaintiff was examined but he was not cross examined by the defendants and ultimately by judgment dated 24.10.2007 the suit came to be decreed.

4. The respondent Nos. 1 and 2 thereafter filed proceedings for setting aside the ex-parte decree along with application for condonation of delay. The delay came to be condoned by imposing costs of Rs. 3000/- on the respondent nos. 1 and 2. The Small Causes Court however rejected the application filed under provisions of Order 9 Rule 13 of the Code of Civil Procedure (for short the Code) on the ground that despite sufficient opportunity the written statement had not been filed. It was further held that application under provisions of Order 9 Rule 13 was not maintainable.

5. The respondent Nos. 1 and 2 being aggrieved by said order filed Miscellaneous Civil Appeal challenging the same. The first appellate Court recorded a finding that the plaintiff had filed his affidavit evidence and the suit was thereafter decided. It was not the case of the decree being passed under provisions of Order 8 Rule 5 and Rule 10 of the Code. It, therefore, set aside the ex-parte decree by allowing the Miscellaneous Civil Appeal. Being aggrieved by aforesaid adjudication, the petitioner-original plaintiff has filed the present writ petition.

6. Shri Anjan De, learned counsel appearing for the petitioner submitted that the first appellate Court erred in setting aside the judgment of the trial Court. According to him as no written statement came to be filed by the respondent nos. 1 and 2, the trial Court was justified in proceeding further and thereafter deciding the suit. It was submitted that provisions of Order 8 Rule 5 of the Code permit filing of an affidavit in support of the claim and such affidavit had been filed by the petitioner. It was, therefore, urged that the provisions of Order 9 Rule 13 were not at all applicable and hence the impugned judgment could not be sustained. In support of said submission the learned counsel for the petitioner relied upon the judgment of the Division Bench in Dhanwantra R. Joshi and others Vs. Satish J. Dave and others, . According to him therefore the proceedings filed by respondent nos. 1 and 2 for setting aside the ex-parte decree were not tenable and the only remedy available was filing an appeal. It was then submitted that as the Court had observed that it was proceeding without written statement of the respondent nos. 1 and 2, it was not open for the first appellate Court to have treated the decree as passed as an ex-parte decree. Relying upon the judgment of learned Single Judge, in Ramchandra Ramgopal through Jugalkishore Kothari Vs. Kamalkishore Rungta and Others, , it was submitted that the superior Court could not hold that trial Court had proceeded in a particular manner especially when the trial Court had indicated the provisions under which it had passed the order. It was also submitted that the first appellate Court was not justified in permitting respondent nos. 1 and 2 to file their written statement especially when the order passed below Ex. 14 had become final. The learned counsel, therefore, submitted that the impugned

judgment deserves to be set aside.

7. Shri S.P. Kshirsagar, learned counsel appearing for respondent nos. 1 and 2 on the other hand supported the impugned judgment. According to him as the plaintiff had filed his affidavit evidence and had also produced documents on record it was clear that the judgment of the trial Court was not one passed under provisions of Order 8 Rule 5 of the Code. He submitted that as the trial Court had considered the evidence on record along with documents as filed, the decree as passed was ex-parte in nature and hence application for setting aside the same was legally tenable. In support of his submission the learned counsel relied upon Balraj Taneja and Another Vs. Sunil Madan and Another, , C.N. Ramappa Gowda Vs. C.C. Chandregowda (Dead) by L.Rs. and Another, and Gaurang V. Merchant and Others Vs. Madhliso and Co. Pvt. Ltd. and Others, . He also submitted that as the first appellate Court had exercised discretion by setting aside the ex-parte decree, there was no reason to interfere with the impugned judgment in the facts of the present case.

8. I have carefully considered aforesaid submissions. I have also gone through the roznama of the case that was relied upon by learned counsel for the parties. Perusal of said roznama indicates that on three occasions the respondent nos. 1 and 2 had been granted time to file written statement. On the 4th occasion application vide Ex. 14 came to be rejected on 07.07.2005. The case was thereafter fixed for no written statement evidence. On 12.02.2006 the plaintiff submitted his affidavit in lieu of evidence. Thereafter, vide Ex. 16 an application for amending the plaint was moved. Similarly, vide Ex. 17 the plaintiff sought permission to file certain documents on record. The defendants vide Ex. 19 sought time to file reply to the applications at Exs. 16 and 17. Similarly, such requests were made for grant of time vide Exs. 20 and 21 and ultimately on 24.11.2006 reply came to be filed vide Ex. 22 to the application seeking amendment of the plaint. On the same day the application vide Ex. 16 was allowed and amendment was permitted to be carried out. The case was thereafter again fixed for no written statement evidence. Thereafter on 20.03.2007 the plaintiff sought permission to file additional affidavit vide Ex. 23. Said permission was also granted. Vide Ex. 26 filed on 24.09.2007 the plaintiff sought permission to file additional affidavit after which he came to be examined. Certain documents came to be exhibited vide Exs. 28 to 32. The plaintiff thereafter filed pursis vide Ex. 33 and closed his side. The suit was thereafter adjourned for evidence of the defendants but on account of absence of the defendants the suit proceeded further. Ultimately on 24.10.2007 in absence of the defendants the suit came to be decreed.

9. The aforesaid facts indicate that though application vide Ex. 14 came to be rejected on 07.07.2005 various further steps were taken by the plaintiff to amend the plaint, file documents on record, and to file additional affidavit on record. The plaintiff thereafter examined himself wherein four documents came to be exhibited after which the case was fixed for evidence of the defendants. In

these facts therefore the question is whether decree as passed by the trial Court could be said to be an ex-parte decree.

10. In *Principal Collector of Customs and another Vs. M/s. Capital Colour Lax Pct. Ltd.* And another 2007(6) Maharashtra Law Journal 225, the Division Bench has held that where the plaintiffs were permitted to place documents on record and after perusing such documents if the suit was decreed then such exercise could not be said to be either under provisions of Rule 5 or Rule 10 of Order 8 of the Code. In *Lachhiram Chudiwala (H.U.F.) Vs. Bank of Rajasthan Limited* 2007(1) Maharashtra law Journal 315, it was observed that if the Court passes an order that the suit be heard ex-parte and there proceeds to hear the suit ex-parte, records evidence and then pronounces the judgment, then the same cannot be treated as one made under provisions of Order 8 Rule 5 or Rule 10 of the Code. In *Badrinarayan s/o Raghunath Sharma Vs. Suresh Nathamal Gothawal* 2002(4) Maharashtra Law Journal 522, it was held that if the judgment was to be delivered on the principle of non-traverse, then there is no necessity to adjourn the matter for hearing and invite the plaintiff to lead evidence. In said case it was held that as the plaintiff was so invited and thereafter judgment was delivered when the defendant was absent, it was a judgment under provisions of Order 9 Rule 6 read with Order 17 Rule 2 of the Code and therefore remedy under Order 9 Rule 13 was available. Similarly in *The Steamship Mutual Underwriting Association (Bermuda) Ltd. and Others Vs. Thakur Shipping Company Limited and Others*, , it was held that the suit can be decreed ex-parte only on recording evidence.

11. The question that was considered by the Division Bench in *Dhanvantarai R. Joshi (supra)* was whether a decree passed under Order 8 Rule 5 or Rule 10 of the Code could be set aside by filing an application under Order 9 Rule 13 of the Code. It was held that provisions of Order 8 Rule 5 or Rule 10 and provisions of Order 9 operate in different fields and hence where a decree is passed under Order 8 Rule 5 or Rule 10 of the Code, then application under Order 9 Rule 13 was not maintainable. It has also been observed in paragraph 13 as under:

"13. If the defendant fails to appear on the date of hearing, the Court is required to pass an order that the suit be heard ex-parte and to proceed further with the hearing of the suit. This requires recording of evidence and to proceed with the matter. After recording evidence ex parte, the Court can pronounce judgment on the basis of the evidence which is brought by the plaintiff. In such cases, the suit is not disposed of as provided under Order VIII, Rule 5 or Rule 10 on the basis of the averments made in the plaint." The aforesaid indicates that if the Court proceeds with the hearing of the suit and records evidence ex-parte, then the suit is not disposed of as provided under Order 8 Rule 5 or Rule 10 of the Code. The Supreme Court in *Balraj Taneja (supra)* has observed that there is discretion with the Court to proceed under provisions of Order 8 Rule 5 of the Code if it finds fit. It is however observed that the Court has to cautiously consider the averments in the plaint if it desires to decide the suit on that basis. Similar, view

has been taken in C.N. Ramappa Gowda (supra).

12. From the aforesaid it is, therefore, clear that if the plaintiff was called upon to lead evidence and he thereafter filed various documents on record which came to be exhibited and after considering the same a decree came to be passed in absence of defendant, the same was an ex-parte decree. In the present case, the record indicates that the Court did not pass any judgment on account of failure of the defendants to file written statement. The case was kept for no written statement evidence after which plaintiff initially amended the plaint, led his evidence and an opportunity was given to the defendants to cross examine the plaintiff. Hence, judgment passed thereafter cannot be termed as a judgment delivered either under Order 8 Rule 5 or Order 8 Rule 10 of the Code. Merely because the Small Causes Court had observed that the judgment had been passed without written statement, that would not mean that said observation can prevail even when it is evident from the record that the judgment as passed was not under Order VIII Rule 5 or Rule 10 of the Code. Though the judgment has been passed without the written statement on record, it is after calling upon the plaintiff to lead evidence and prove his case. Hence, ratio of the decision in Jugalkishore Kothari (supra) cannot apply in the aforesaid facts. The application therefore moved by the defendants under Order IX Rule 13 of the Code was perfectly tenable.

13. The first appellate Court while allowing the application moved by the respondent nos. 1 and 2 was satisfied that a case had been made out for setting aside the ex-parte decree. While condoning the delay in moving said application before the trial Court, evidence of the parties had been recorded. The first appellate Court after considering the entire matter was satisfied that a case had been made out for setting aside the ex-parte decree. It, therefore, proceeded to impose costs of Rs. 5000/- on the respondent nos. 1 and 2 while setting aside the ex-parte decree. While doing so it placed the respondent nos. 1 and 2 in the same position as required prior to setting aside the ex-parte decree. Such course was permissible in view of the law laid down by the Supreme Court in Arjun Singh Vs. Mohindra Kumar and Others, . The submission in that regard made on behalf of the petitioner therefore cannot be accepted.

14. In view of aforesaid discussion it is clear that first appellate Court was justified in allowing the Miscellaneous Civil Appeal filed by respondent nos. 1 and 2. Said adjudication is in accordance with law and does not suffer from any jurisdictional error. It is, however, to be noted that the suit as filed is of the year 2005 and hence the trial Court is directed to decide the same by the end of December 2015. Subject to aforesaid direction, there is no case made out to interfere in the writ petition. The same is therefore dismissed with no order as to costs.