
(1993) 01 BOM CK 0046

In the Bombay High Court

Case No : Criminal Revision Applications No"s. 40 and 44 of 1993

Bhavani Builders

APPELLANT

Vs

State Bank of India

RESPONDENT

Date of Decision : 12-01-1993

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 115, 151

Citation : (1993) 95 BOMLR 862

Hon'ble Judges : N.P. Chapalgaonker, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

N.P. Chapalgaonker, J.

1. Since both these revision applications raise a common question of law and fact, they are being decided and disposed of by this common order.
2. In Special Civil Suit No, 73/1986 and Special Civil Suit No. 218/1987 pending before the learned Civil Judge (S.D.), Jalgaon, defendant/Petitioner herein filed a counter-claim and no reply to the said counter-claim was submitted by the original plaintiff/respondent herein, and therefore, defendant plaintiff in the counter-claim) submitted an application, that the counter-claim be decided as having not been replied. After this application was submitted, but before the learned Judge could exercise his discretion, plaintiff filed a written statement in reply to the said counter claim, and since reply to the counter-claim was received, learned Civil Judge (S.D.), Jalgaon, vide his order dated 26th February, 1991, was pleased to reject application of the defendant to decide the counter-claim in the absence of the reply. This order dated 26th February, 1991 was sought to be reviewed by the defendant, and the learned Jt. Civil Judge (S.D.), Jalgaon, was pleased to reject this application challenge, both, rejection of the application of the plaintiff to decide the counter-claim as well as rejection of the application of the review to review the said order in both the Suits.

3. Shri S. A. Deshmukh, learned Counsel appearing for revision petitioner, submitted that the situation wherein no reply is there in respect of the counter-claim is different than the situation wherein there is no written statement in answer to the plaint. Shri Deshmukh mainly relied on the provisions of Order VIII, Rule 6A, Rule 13 and Rule 12 of the Code of Civil Procedure, 1908. According to Shri Deshmukh, these three provisions, if read together, make it obligatory for the Court to pass a decree in terms of the counter-claim, if a reply within the stipulated time of four weeks is not filed by the plaintiff to the counter-claim filed by the defendant. Shri Deshmukh also submits that the language of Order VIII, Rule 5 of the Code of Civil Procedure, 1908 gives a wide discretion to the Judge in the matters of non-filing of the written statement, whereas such a discretion is not there so far as the counter-claims are concerned. According to Shri Deshmukh, if the Judge fails to pass an order on the counter-claim set out by the defendant, in the absence of reply by the plaintiff, it would amount to non-exercise of jurisdiction vested in law and, therefore, this Court should interfere in exercise of its revisional jurisdiction u/s 115 of the Code of Civil Procedure, 1908. Shri Deshmukh also submits that since the provisions of Rule 6A in Order VIII were overlooked by the learned Judge while passing the original order rejecting application of the plaintiff the review was competent, and the learned Judge has failed to exercise his jurisdiction in rejecting the review application.

4. Rule 6E of Order VIII of the Code of Civil Procedure, 1908 as inserted by Act No. 104 of 1976, reads as follows :-

If the plaintiff makes default in putting in a reply to the counter-claim made by the defendant, the Court may pronounce judgment against the plaintiff in relation to the counter-claim made against him, or make such order in relation to the counter-claim as it thinks fit.

Rule 13 speaks about the counter-claim which the defendant may set up in addition to the set-off which he may claim in a suit filed against him by the plaintiff. It states, that the counter-claim shall not have the same effect so as to pronounce final judgment in the matter. It also lays down, that the plaintiff may file reply to the counter-claim within a period of four weeks after service upon him of a copy of the defendant's counter-claim. Rule 21 provides for the consequence about the default in reply to the counter-claim. It reads as under :-

If the defendant to the counter-claim makes default in putting in reply to the counter-claim, the defendant in the suit, who is the plaintiff to the counterclaim, may, in such cases get the suit set down for judgment on the counterclaim, and such judgment shall be given as the Court shall consider him to be entitled to.

It is true, as we find in the language of Order VIII, Rule 5, the word "discretion" has not been used here by the Legislature. It is also true that the word "shall" has been used by the Legislature. But it simply indicates what judgment should be passed. It has no reference to setting down a suit for judgment on the counter-claim. The word "shall" used in statutory provision will have to be read

in the context in which it is used. As was observed by Hidayatullah, J. in *Sainik Motors, Jodhpur and Others Vs. The State of Rajasthan*, , the word "shall" is ordinarily mandatory but it is sometimes not so interpreted if the context or the intention otherwise demands. Cumulative reading of all these rules goes to show that the counter-claim filed by the defendant is put on par with the suit filed by the plaintiff and the non-filing of the reply in respect of both shall have the same consequence. If the reply is not filed within the time stipulated in the rule, the party filing the plaint or the counter-claim is at liberty to pray to the Court that the judgment be pronounced. The Court is not duty bound to pass a decree merely for asking.

5. The Court has to examine the contentions raised in the plaint or the counter claim even if unanswered, and if it is found, that by the affidavit or other evidence as is on record, the claim made in the said pleading is correct, and the Judge is satisfied about its truth, the Court may pass judgment, as it thinks fit. The provision, that the Court may pronounce judgment, in the absence of the reply, does not lay down, that the Court would be powerless to allow any reply to be filed at a belated stage. If parties come to the Court with the pleading after expiry of such time and if sufficient cause for the delay is shown, it would be always desirable to accept the pleadings, and allow the parties to contest the real dispute in the suit. When the Court has not pronounced the judgment, inherent powers of the Court, as are declared by Section 151 of the Code of Civil Procedure, 1908 would enable the Court to accept the pleading of the defaulted party, and consider it after taking it on record. Even in Order VIII, Rule 6A, which Shri Deshmukh relied, use of the word "may" indicates that the discretion is granted to the Court. Rule 21 gives liberty to the plaintiff to get the suit set down for judgment, and asks the Court to pass the judgment. But this rule is qualified by other provisions of the Code and will have to be read along with Order VIII, Rule 5 and Rule 13 of the Code of Civil Procedure, 1908. The use of the word "shall" in Rule 21 of Order VIII lays down that if the Court feels that defendant's request to get the suit set down for judgment on the counter-claim deserves to be accepted, then the Court shall pronounce the judgment to which the defendant is entitled in the opinion of the Court. Therefore, the discretion is left to the Court whether the suit should be set down for judgment on the counter-claim. If the Court sets the suit for judgment of counter-claim, then the Court is bound to pass the judgment according to the entitlement of the defendant. It does not lay down that the Court is duty bound to pronounce the judgment when the defendant asks and particularly when the written statement to the counter-claim is already filed though late. A reliance can be placed on the judgment of Division Bench of this Court in *Western Coal fields Ltd. through its General Manager (Planning), Coal Estate, Civil Lines. Nagpur v. Dr. Rajkumar and Ors.* 1985 M. L. J. 525 : 1985 M. L. R. 239. Earlier a learned Single Judge of this Court had taken a view, that when there is an order to proceed ex parte in a suit, in the absence of pleading on behalf of the defendant, Court could not invoke inherent powers to meet the situation and allow filing of the written statement at

a belated stage, after the order to proceed ex parte is already passed. The Division Bench was pleased to hold that even after the orders to proceed ex parts have been passed by the learned Judge in a suit. Court would be empowered to allow the written statement to be filed at a late stage, if sufficient cause is made out. Similarly, even in the case of a counter-claim, if written statement is not filed, though the defendant filing the counter claim would be at liberty to pray that his claim be set for judgment, if before the pronouncement of judgment, written statement is filed by plaintiff to the counter-claim, Court would be justified in exercising its inherent powers, and allow filing of the reply to the counter-claim, in case, good cause is shown.

5A. In this view of the matter, the learned Judge was perfectly justified in rejecting the application of the plaintiff to pronounce the judgment since reply to the counter-claim was already filed in the Court. He was also justified in rejecting the application for review. It is true that some negligence was shown by the plaintiff, but such negligence, if brought to the notice of the Court, can always be compensated by the costs which the Court in its discretion may award to the party affected by such negligence. The discretion vested in the Court and its inherent powers are to be used to further the cause of justice. Since in the instant case, the learned Judge has made justice, by exercising his discretion, interference u/s 115 of the CPC is not called for.

6. Both the Civil Revision Applications are rejected summarily.