

(1960) 10 PAT CK 0015
In the Patna High Court
Case No : Civil Revision No. 848 of 1960

Binda Prasad

APPELLANT

Vs

United Bank of India Ltd. and Others

RESPONDENT

Date of Decision : 27-10-1960

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 14 Rule 1, Order 5 Rule 1, Order 5 Rule 5, Order 8 Rule 1, Order 8 Rule 10

Citation : AIR 1961 Patna 152

Hon'ble Judges : Raj Kishore Prasad, J

Bench : Single Bench

Advocate : Lalnarain Sinha and Awadh Kishore Prasad, for the Appellant; Jyotirmoy Ghosh, Girjapati Sanyal and C.B. Belwarior, for the Respondent

Final Decision : Allowed

Judgement

Raj Kishore Prasad, J.—This application, in revision, by defendant 3, Binda Prasad, is directed against the order of the court below rejecting his written statement.

2. The sole question for determination is, whether the written statement, filed by the petitioner, long after the settlement of the issues, should be accepted?

3. The facts are these: On the 27th April, 1957, the plaintiff filed a mortgage suit, claiming a sum of Rs. 1,36,124.17 nP., on account of overdraft advances, against the petitioner, defendant 3; his father, defendant 1; and, his brother, defendant 2. On the 21st December, 1957, defendant 2, and, on the 27th February, 1958, defendant 1, filed their respective written statements. Next day, that is, on the 28th February, 1958, issues were settled. Defendant 3, however, did not, till that stage, appear, or, file any written statement.

4. More than two years later, five special witnesses, namely, P. W. 1, P. W. 2 and P. W. 3, on the 19th April, 1960; P. W. 4, on the 9th August, 1960; and, P. W. 5, on the 10th August, 1960, were examined by the plaintiff, and, cross-examined

by defendants 1 and 2.

5. After the examination of the aforesaid last special witness, the court below fixed the 18th August, 1960, for hearing. On that date defendant 3 appeared and filed his written statement about two and a half years after the settlement of the issues in the suit. On the 19th August, 1960, the plaintiff filed an objection to this written statement. Defendant 3 also, on the 20th August, 1960, filed a petition showing cause for his previous non-appearance and for late filing of his written statement and praying for its acceptance.

6. The court below took up the matter on the 20th August, 1960, and, by its order of that date, as already indicated, rejected the said written statement of the petitioner.

7. On behalf of the petitioner, Mr. Lalnarain Sinha, the learned Government Advocate, argued that the reasons given by the court below for rejecting the written statement are not sound and, therefore, the petitioner may be put to terms and his written statement accepted.

8. On behalf of the plaintiff-opposite party No. 1, however, Mr. Jyotirmoy Ghosh, supported the order under revision, and contended that the petitioner should have filed his written statement, as required by Rule 1, Order 8, CPC (hereinafter referred to as "the Code"), at or before the first day of hearing, which means the date when the issues were settled that is, the 28th February, 1958, and, he not having done that, his written statement has rightly been rejected. He, further, argued that the petitioner by his new written statement, wanted to raise new defence, which was not raised before, either by his father, defendant 1, or, by his brother, defendant 2, and, therefore, if the written statement of the petitioner is accepted at this late stage, it will complicate the issues and unnecessarily delay and prolong the hearing of the suit in the court below.

9. Mr. Ghosh, in support of his contention, relied on Rule 1, Order 8, of the Code, which provides that-

"1, The defendant may, and, if so required by the court, shall, at or before the first hearing or within such time as the court may permit, present a written statement of his defence";

and, submitted that the expression "first hearing", occurring in Rule 1, means the date of settlement of issues in the suit, as held in *Kodi Makku Naicker v. Agathiappa Goundar* AIR 1949 Mad 622 and, in *Kaloo Vs. Mt. Imaman*, , and, as such, the petitioner was bound to file his written statement at or before the date of settlement of issues, but this was not done, and, therefore, the court below rightly rejected his written statement.

10. Mr. Ghosh also relied, in support of his above contention on Rule 1, Order 13, of the Code, and submitted that the expression "first hearing of the suit", used in Rule 1, Order 13, means the date of the settlement of the issues, as held by a Division Bench of this Court in *Mt. Taibunnissa Begum Vs. Jagdip Pandey* and

Others, , and, also by a Division Bench of the Calcutta High Court in Lakhi Narain Sarangi v. Ramchandra Bhunya 14 CLJ 146 and, therefore, the expression, "first hearing", used in Rule 1, Order 8, must also mean the date of the settlement of the issues.

11. In interpreting a Code of Procedure, it would be useful at the outset, to keep in mind the rule of its interpretation, as laid down by the Supreme Court, in Sangram Singh Vs. Election Tribunal, Kotah, Bhurey Lal Baya, . A passage from the judgment of Bose, J. who pronounced the unanimous decision of the Supreme Court, in the just mentioned case, is very apposite and may aptly be read here. Bose, J. at page 429, said:

"Now a code of procedure must be regarded as such. It is "procedure" something designed to facilitate justice and further its ends; not a penal enactment for punishment and penalties; not a thing designed to trip people up. Too technical a construction of sections that leaves no room for reasonable elasticity of interpretation should therefore be guarded against (provided always that justice is done to "both" sides) lest the very means designed for the furtherance of justice be used to frustrate it.""

"Next, there must be ever present to the mind the fact that our laws of procedure are grounded on a principle of natural justice which requires that men should not be condemned unheard, that decisions should not be reached behind their backs, that proceedings that affect their lives and property should not continue in their absence and that they should not be precluded from participating in them. Of course, there must be exceptions and where they are clearly defined they must be given effect to. But taken by and large, and subject to that proviso, our laws of procedure should be construed, wherever that is reasonably possible, in the light of that principle."

12. In the light of the above principle, I now turn to the material Rules in the First Schedule to the Code of Civil Procedure.

13. It is relevant to note that the Rules draw a distinction between the first hearing and subsequent hearings, and, that the first hearing can be either (a) for settlement of issues only, or, (b) for final disposal of the suit.

14. First, there is Order 5, Rule 1, which provides (so far as is material) as follows:

".... a summons may be issued to the defendant to appear and answer the claim on a day to be therein specified.

This summons must state, as required by Rule 5, Order 5, whether the hearing is to be for settlement of issues only or for final hearing.

15. Then comes Order 8, Rule 1, which expressly speaks of "the first hearing". When a summons is issued stating whether the hearing is for settlement of

issues only, or, for the final disposal of the suit, in either event, Rule 1, Order 8, comes into play, and, if the defendant does not present a written statement of his defence, the court can insist that he shall; and, if, on being required to do so, he fails to comply, Rule 10, Order 8, provides (so far as is material) that

"".....the court may pronounce judgment against him, or make such order in relation to the suit as it thinks fit."

16. This invests the court with the widest possible discretion and enables it to see that justice is done to "both sides"; and also to witnesses if they are present.

17. Rule 1, Order 8, however, has reference to the date fixed in the summons for filing written statement. If the defendant is not ready with written statement on that date, he may apply for further time. If he does not appear and it is proved that summons has been duly served on him, "the court may proceed ex parte" under Rule 6, Order 9. A defendant is not compelled to file a written statement unless definitely directed by court to do so.

18. The penalty under Rule 10, Order 8, applies only to some default of a party under Rule 9, Order 9; and, an order under Rule 10, Order 8, cannot be passed when a defendant fails to file written statement under Rule 1, Order 8.

19. We have seen above that Rule 1, Order 8, provides that the defendant may present a written statement of his defence at or before "the first hearing", or, within such time as the court may permit. Rule 1, Order 13, then requires the parties or their pleaders to produce, "at the first hearing of the suit", all the documentary evidence of every description in their possession or power. Order 14, thereafter, deals with settlement of issues. Rule 1(5), Order 14, lays down that "at the first hearing of the suit" the court shall, in the manner laid down therein, frame and record the issues on which the right decision of the case appears to depend.

20. A party to a suit, as such, is not bound to put in a written statement; if he does not do so, he is taken to admit the allegations in the plaint, but he is entitled to appear and submit any argument open to him on the plaint. If the defendant does not appear at the first hearing, the court can proceed ex parte, which means that it can proceed without a written statement; and, Order 9, Rule 7, makes it clear that unless good cause is shown the defendant cannot be relegated to the position that he would have occupied if he had appeared.

That means that he cannot put in a written statement unless he is allowed to do so, and if the case is one in which the court considers a written statement should have been put in, the consequences entailed by Rule 10, Order 8. must be suffered. What those consequences should be in a given Case is for the court, in the exercise of its judicial discretion, to determine. No hard and fast rule can be laid down. In some cases an order awarding costs to the plaintiff would meet the ends of justice; an adjournment can be granted or a written statement can be considered on the spot and issues framed. In other cases, the ends of justice

may call for more drastic action: Sangram Singh Vs. Election Tribunal, Kotah, Bhurey Lal Baya, .

21. From the foregoing provisions of the Code, and, the above scheme of the material Rules of the Code, therefore, it is plain that the expression "first hearing", used in Rule 1, Order 8, when the summons, issued as required by Rules 1 and 5, Order 5, is for settlement of issues only, means the date of settlement of issues, that is, the day when the issues are framed, and recorded, as required by Rule 1(5), Order 14, of the Code.

22. The contention of Mr. Ghosh, therefore, that, in the present case, as the summons issued to the petitioner was for settlement of issues only, the "first hearing", used in Rule 1, Order 8, would mean the date of settlement of issues, must be accepted as correct.

23. Defendant 3, therefore, in the present case, as required by Rule 1, Order 8, of the Code, should have filed his written statement at or before the first hearing, that is, at or before the date of the settlement of the issues.

24. The crucial question, however, is: Should a written statement, filed after the settlement of the issues, as here, be, as a rule rejected?

25. The answer must be in the negative. Every case must depend on its individual facts. Whether such a written statement should be accepted or not, in a particular case, will, as such, depend on the facts of that case on the basis of which the Court will exercise its own judicial discretion. No cut-and-dry formula, of universal application, can, possibly, be laid down for the guidance of the Court.

26. The answer to the above question, however, is to be found in Rule 9, Order 8, where the hearing of the suit has not started, as here, and, also in Rule 7, Order 9, where the court has adjourned the hearing of the suit ex parte against a defendant, which are to the following effect; ORDER VIII.

"9. No pleading subsequent to the written statement of a defendant other than by way of defence to a set-off shall be presented except by the leave of the Court and upon such terms as the court thinks fit, but the court may at any time require a written statement or additional written statement from any of the parties and fix a time for presenting the same," ORDER IX.

"7. Procedure where defendant appears on day of adjourned hearing and assigns good cause for previous non-appearance. Where the court has adjourned the hearing of the suit ex parte, and the defendant, at or before such hearing, appears and assigns good cause for his previous non-appearance, he may, upon such terms as the court directs as to costs or otherwise, be heard in answer to the suit as if he had appeared on the day fixed for his appearance".

27. Rule 9, Order 8, lays down, inter alia, that no pleading subsequent to the written statement of a defendant, other than by way of defence to a set-off, shall be presented except by the leave of the court and upon such terms as the court

thinks fit. Under this rule either party may, with leave of the court, file a supplementary statement. No supplemental written statement, however, can be filed after plaintiff's case is closed. Rule 9, therefore, invests the court with the widest possible discretion and enables it to accept a written statement filed subsequently after the settlement of the issues upon such terms as the court thinks fit. Rule 7, Order 9, further provides that if at "an adjourned hearing", where the court has, for non-appearance of a defendant, adjourned the hearing or the suit ex parte against him, the defendant appears and assigns good cause for his "previous non-appearance" he can be heard in answer to the suit, as if he had appeared on the day fixed for his appearance, "upon such terms as the Court directs as to costs or otherwise". This cannot be read to mean that he cannot be allowed to appear at all if he does not show good cause. All that it means is that he cannot be relegated to the position he would have occupied if He had appeared.

28. Rule 7, Order 9, covers the case of a defendant who did not appear at all on the first hearing date and the suit was adjourned after declaring him ex parte as also a defendant who absented after filing written statement.

29. In both cases the ex parte order only covered the period during which the defendant was actually absent and it did not act as a bar to his resuming appearance in the suit at the stage in which it then was if he appeared subsequently and wanted to put forward his evidence or defence, as the case may be, after showing good cause for his previous non-appearance.

30. Here is a case in which defendant 3, the petitioner, with whom we are concerned, did not appear at the first hearing.

31. Rule 7, Order 9, like Rule 9, Order 8, invests the court with the widest possible discretion and enables it to accept a written statement, even where the defendant, who has not appeared previously and the suit has been adjourned for ex parte hearing against him, appears on the day of adjourned hearing and assigns good cause for previous non-appearance, "upon such terms as the court directs as to costs Or otherwise".

32. The court, therefore, both in a case covered by Rule 9, Order 8, and Rule 7, Order 9, has a discretion which it must exercise. Its hands are not tied by the so-called ex parte order, and if it thinks, they are tied by Rule 9, Order 8 or Rule 7, Order 9, then it is not exercising the discretion which the law says it should, and in a given case, interference may be called for.

33. It is not correct, therefore, to say that a written statement, filed after the settlement of the issues, must necessarily, as a rule be rejected as a matter of course as contended by Mr. Ghosh.

34. The next question is: Did the court below rightly exercise its discretion on the facts of the present case, in rejecting the written statement of the petitioner?

35. In the instant case, the petitioner filed a petition on the 20th August, 1960

two days after the filing of his written statement showing cause for his previous non-appearance and for the consequent delay in filing his written statement, and for its acceptance but it does not appear from the judgment under revision that this petition was at all taken into consideration. I do not find any mention of it any where even in the order sheet of the court below of the 20th August, 1960. Admittedly, the trial of the suit had not till then commenced and the regular hearing of the suit had not yet started.

Only some special witnesses, namely, P. Ws. 1 to 5, had been examined by the plaintiff. In these circumstances in my opinion, the court below has acted unreasonably and has ignored relevant facts and adopted unjudicial approach and as such, it is the duty of this Court, although sitting in revision, to interfere with the trial courts exercise of discretion in this particular case. I do not think therefore, that it was a proper exercise of its discretion by the court below, to reject the written statement and thereby to shut out the defence of the petitioner simply, because he filed his written defence very late after the settlement of the issues.

36. As observed by Bose J., in Sangram Singh Vs. Election Tribunal, Kotah, Bhurey Lal Baya, :

"But broadly speaking, after the various factors have been taken into consideration and carefully weighed the endeavour should be to avoid snap decisions and to afford litigants a real opportunity of fighting out their cases fairly and squarely. Costs will be adequate compensation in many cases and in others the court has almost unlimited discretion about the terms it can impose provided always the discretion is judicially exercised and is not arbitrary."

The first ground given by the court below, and urged in this Court by Mr. Ghosh, based on the late filing of the written statement after the settlement of the issues must therefore, be rejected. It was then contended by Mr. Ghosh that the statement of the plaintiffs, towards the end of paragraph 11 of the plaint, that, "So far as the plaintiff is aware of, it does not hold any goods in pledge" has not been specifically denied, by defendants, 1 and 2, as required, by Rule 3, Order 8, and therefore, as provided by Rule 5, Order 8, the just mentioned averment of the plaintiff in its plaint, must be taken as admitted by defendants 1 and 2, and as such to permit defendant 3 now to deny it, would not only complicate the issues, but also allow him to raise a new defence which was not raised by defendants 1 and 2, necessitating, protracted trial due to new evidence, which would be given by both sides.

37. Rules 3 and 5, Order 8 are in these terms:

"3. Denial to be specific. It shall not be sufficient for a defendant in his written statement to deny generally the grounds alleged by the plaintiff, but the defendant must deal specifically with each allegations of facts of which he does not admit the truth, except damages."

"5. Specific denial: Every allegation of fact in the plaint, if not denied specifically or by necessary implication or stated to be not admitted in the pleading of the defendants shall be taken to be admitted except as against a person under disability.

Provided that the court may in its discretion require any fact so admitted to be proved otherwise than by such admission."

38. Rule 3, Order 8 lays down that a general denial of the grounds alleged, in the plaint shall not be sufficient, but each and every allegation of fact must be specifically dealt with. It does not of course mean that every allegation in the plaint should be reproduced at length in the written statement for the purpose of denial. The main allegations which form the foundation of the suit, should be dealt with in that way and expressly denied. Such facts should be taken up separately as far as possible in the order stated in the plaint and defendant should either admit them or deny or state definitely that he does not admit.

39. From Rule 3, Order 8 therefore, it is plain that it requires that the defendants must take each fact which is alleged against him separately and say that he admits it or denies it, or does not admit it. It is not merely denial which is meant, but the rule covers non-admission for the defendant is to deal specifically with every allegation of fact of which he does not admit the truth, the exception being in the case of only damages. Rule 4, Order 8, makes it further clear by laying down that the denial of allegations of fact in the plaint by a defendant must not be evasive denial, he must not do so evasively, but answer the point of substance. Rule 41 is an amplification of Rule 3.

Evasive denial, therefore, is not sufficient; the purport and effect of the denial must be clear and distinct. Rule 5, further provides that every allegation of fact in the plaint will be taken to be admitted (i) if not denied specifically, or (ii) if not denied by necessary implication or (iii) If not stated to be not admitted. Rule 5 is really a rule of construction of defendant's pleadings. It does not apply where no written statement has been filed. The rule, in Rule 5, is known as doctrine of non-traverse.

The first paragraph of rule 5, as such states what amounts to admission of fact in a pleading, Rule 5 therefore, embodies the doctrine of non-traverse by providing that every allegation of fact in the plaint, if not denied in the written statement, shall be taken to be admitted by the defendant, the only exception being in the case of a person under disability. A statement by the defendant in his pleading that an allegation is not admitted is equivalent to a denial by necessary implication.

The doctrine embodied in Rule 5, however, does not apply where the averments in the plaint are vague and inconclusive. Before the introduction of this new rule 5 in the Code of 1908 it was held by Lord Kingsdown in *Mt. Ammdmoyee v. Sheeb Chunder Roy* 9 Moo I. A. 287 at page 301 (PC), that courts will not apply to pleadings in India the strict rule that averments in a plaint not traversed in the

answer, are to be taken as admitted.

40. In the light of the above principles, let us now examine the facts of the present case.

41. It is true that defendant 2 has not specifically dealt with, or specifically denied, paragraph 11 of the plaint, in his written statement, and as such, facts stated therein will be taken to be admitted by defendant 2. But from the written statement of defendant 1, it will appear that he has specifically dealt with the allegations of fact in paragraphs 7, 9 and 11 of the plaint, in paragraph 9 of his written statement, and, therein he has stated that the allegations in paragraphs 7, 9 and 11 of the plaint are not admitted.

Furthermore, in the same paragraph 9 of his written statement, defendant 1 has stated certain facts and then towards the end of that paragraph 9 has said that allegations contrary to those in paragraph 11 of the plaint, are false and incorrect. It is true that if the defendant 1 had simply alleged in paragraph 9 of his written statement that "Paragraph 11 of the plaint is not admitted" it would not have been specific denial of such allegations of fact in paragraph 11 of the plaint. But in the present case, on reading paragraph 9 of the written statement as a whole, it cannot be said as contended for, that it amounts to admission by defendant 1, of paragraph 11 of the plaint.

42. As Goddard L. J. said in *Pinson v. Lloyds and National Provincial Foreign Bank, Ltd.* (1941) 2 All ER 630 which was quoted with approval by Sellers L. J. in *Inland Revenue Commissioners v. Jackson*, (1960) 3 All ER 31:

"A bare traverse is a perfectly good plea provided that all that is thereby intended is to put the plaintiffs to proof of his case. It may be, however, that concealed in a traverse there is an affirmative case, and this may well be so when the traverse is of a negative averment. If it is clear to the court, either from the nature of the case or from the admission of counsel or otherwise, that it is intended to set up an affirmative case, so that the traverse is what has been described as a pregnant negative, then it seems to me that particulars of the affirmative case ought to be delivered. Otherwise, both the opposite party and the court will be in doubt as to what issues are to be determined at the trial."

43. In these circumstances I am unable to accept the contention of Mr. Ghosh that paragraph 11 of the plaint has not been denied even by defendant 1.

44. Rule 5, Order 8, on which strong reliance was placed by Mr. Ghosh, itself, lays down the three circumstances mentioned before, in which allegations of fact in the plaint can be taken to be admitted. One of them is if an allegation of fact in the plaint is not stated to be not admitted in the pleading of the defendant. Rule 5, Order 8, therefore, clearly contemplates that if any allegations of fact in the plaint is "stated to be not admitted in the pleading of the defendant" in that case it shall not be taken to be admitted.

The expression "not admitted" is a specific denial within the meaning of Rule 5,

Order 8. Exactly similar is the position here. The statement relied upon of the plaintiff at the end of paragraph 11 of the plaint, has in specific terms, been "said to be not admitted" by defendant 1 in paragraph 9 of his written statement. Such statement that the allegation is not admitted is equivalent to a denial even by necessary implication.

In this view, I do not think it is correct to say that the petitioner alone has for the first time denied the aforesaid allegations of fact in paragraph 11 of the plaint, on which alone over emphasis was laid by Mr. Ghosh, and therefore, if the written statement of the petitioner is accepted, it will not only completely change the issues in the case, but, also greatly complicate them, and enable the petitioner to raise a new defence. I would, therefore, reject also the above second ground of Mr. Ghosh, which is also the second ground of the court below.

45. In view of the fact that this suit involves a claim of over a lac of rupees, it would be unnecessary waste of time and money and also harassment to both the parties, if after the suit is decided in the absence of defendant No. 3 without his written statement, and, then after the decision in the suit an appeal is taken by the aggrieved party to the first appellate Court and on appeal, the first appellate court takes the view that it is necessary that the written statement of defendant 3 should be admitted and he also should be given an opportunity to contest the suit, and then the suit is remanded to the court below for a fresh decision after accepting the written statement of defendant 3 and giving him an opportunity to defend the suit.

Considered from all these aspects I think that it would serve the ends of justice, and it would also be in the interest of both the parties, in order to afford them a real opportunity of fighting out their case fairly and squarely to permit the written statement of defendant 3 to be accepted so that all the issues involved in the suit and all questions of fact and law arising between the parties, may be decided by the Court below in presence, of all the parties concerned once for all. Costs in the present case will be adequate compensation.

For these reasons, I would allow the application, set aside the order, complained of, of the court below, and make the rule absolute.

46. I, accordingly, direct that the written statement filed by defendant 3, should be accepted but on this condition only that he, that is defendant 3, pays a sum of Rs. 500 (Rupees five hundred only) to the lawyers appearing for the plaintiff opposite party 1 in the court below, within one month, from getting notice, of the arrival of the records of the suit from the court below, failing which the written statement of defendant 3 shall stand rejected and the order under revision confirmed and this application stand dismissed with costs, and the suit will then be heard in default of the written statement of the petitioner,

47. The court below on payment of the cost, within the time specified above will accept the written statement of the petitioner and recast the issues, or frame new issues, if necessary, arising on the written statement of the petitioners, and

after giving an opportunity to all the parties, including the petitioner to adduce such evidence as they like decide the suit expeditiously in accordance with law.

48. Although I am allowing this application of the petitioners, and ordinarily costs should follow the event, yet in the present case in view of the long delay made by the petitioner in filing his written statement, he must pay the costs of this application also to the plaintiff opposite party 1, and accordingly, I direct that a further sum of Rs. 100 (Rupees one hundred) only should be paid by the petitioner to Mr. Jyotirmoy Ghosh, advocate for the plaintiff opposite party 1 in this Court, by the 14th November, 1960 on obtaining a receipt from him, which must be filed in this Court, failing which also this application shall stand dismissed with costs and this order stand vacated and the order under revision of the Court below stand confirmed.

49. The records of the suit will be sent down to the court below after the 15th November, 1960, with an intimation if the costs of this application payable by the petitioner to the advocate of the plaintiff opposite party 1, in this court, as directed above has been paid or not.