

(1995) 05 GUJ CK 0011
In the Gujarat High Court

Champaklal Narsidas Shah (Since Decd.) through his Heirs
Chandrakant and Others

APPELLANT

Vs

Babubhai Vithaldas Thakkar and Another

RESPONDENT

Date of Decision : 02-05-1995

Acts Referred:

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

Citation : (1995) 2 GLR 1078

Hon'ble Judges : Sharad D. Dave, J

Bench : Single Bench

Judgement

S.D. Dave, J.—Rule. Learned Counsel Mr. Y.N. Ravani, waives the service of the Rule for the respondent No. 1. On the oral request coming from learned Counsel Mr. S.M. Shah for the petitioners, the respondent No. 2 is ordered to be transposed as the petitioner. Learned Counsel Mr. Shah undertakes to file the appearance on her behalf.

2. The substantial question which falls for my consideration is as to whether when the application to adopt the procedure under Order 8 Rule 10 C.P.C. is preferred by a party to the suit, can the Court straightway pass a decree, without affording a reasonable opportunity of being heard to the other side.

3. The question as indicated above arises in the following facts and circumstances. The original plaintiff, Vinthaldas Thakkar had instituted Regular Civil Suit No. 277 of 1984 before the learned Civil Judge (J.D.), Bhavnagar, against the defendant Champaklal Shah. The dispute between the parties was a limited one, namely, whether the defendant should be prevented from using the walls for placing the show cases to run his business. This suit came to be presented before the trial Court, on April 16, 1984. The right of the defendant to file the written statement came to be closed on June 29, 1984. The matter continued to linger on, but during the interregnum, the application at Exh. 5 filed by the plaintiff was heard and the necessary orders were confirmed in favour of the plaintiff. On December 1, 1987, the application to adopt the procedure under

Order 8 Rule 10 C.P.C. came to be presented by the plaintiff. The copy of the above said application never came to be served either upon the learned Counsel or the defendant, in the proceedings. On the very same day, acting under the provisions contained under Order 8 Rule 10, the trial Court has passed a decree against the defendant. The matter was carried before the District Court, Bhavnagar, of course, unsuccessfully, by filing Regular Civil Appeal No. 6 of 1988. It is in view of these fact that the petitioners, who are the heirs and legal representatives of the original defendant have approached this Court, by way of the present Civil Revision Application.

4. The principal contention coming from learned Counsel Mr. S.M. Shah for the petitioners is that, though the verbalism employed by the Legislature, while framing Order 8 Rule 10 C.P.C. shows the employment of word "shall", it has to be read as "may" and, therefore, the Court proposing to adopt the procedure under the said provision of C.P.C. is invested with a discretion. The learned Counsel further urges that, any judicial discretion is to be exercised in a judicial manner and that a capricious or whimsical discretion cannot be said to be a discretion in eye of law. The learned Counsel urges that, therefore, before such a jurisdiction could be exercised against the defendant, a reasonable opportunity of being heard was required to be given to him and as it is not been done, the judgments and the decrees passed by the Courts below should be set aside.

5. Learned Counsel Mr. Ravani, who appears on behalf of the respondent No. 1 urges that it was the duty of the Court to adopt the procedure under the said provisions of C.P.C. and to take appropriate action in the matter and that it was absolutely not necessary for the plaintiff to remind the Court that the Court has to exercise the jurisdiction vested in it, under the above said provision. The learned Counsel also urges that the defendant had preferred not to remain present before the trial Court and that his right to file the written statement was also closed as held very rightly, by the trial Court and that such a technical contention should not weigh when ultimately substantial justice has been done to the party.

6. When a reference is made to the provision contained under Order 8 Rule 10, it is apparent that it relates to the procedure to be adopted by the Court when a party to the suit fails to present the written statement. Indeed, the word used is "shall". Any how, there is no dispute regarding the interpretation of this word "shall" occurring in the above said provision. The controversy appears to have been resolved by the Supreme Court pronouncement in Modula India Vs. Kamakshya Singh Deo, . The Supreme Court, while examining the provisions contained u/s 17(3) of the W.B. Premises Tenancy Act (12 of 1956) and the provisions contained under Rules 1, 5 and 10 of Order 8 of C.P.C, has said that though the present language of Rule 10 says that the Court "shall" pronounce the judgment against the defendant, it is obvious from the language of the rule that there is still an option with the Court either to pronounce the judgment on the basis of the plaint against the defendant or to make such other appropriate

order as the Court may think fit. The Supreme Court appears to have interpreted the provisions contained under Order 8 Rule 10 C.P.C. which expressly says that, the Court shall pronounce judgment or make such order in relation to the suit. The language employed by the Legislature confers a discretion on the Court either to pronounce judgment against the party failing to present the written statement or to make an appropriate order in relation to the suit. The Supreme Court, therefore, makes it clear that there is nothing in this Rule which would make it mandatory for the Court to pass a decree in favour of the plaintiff straightway because the written statement has not been filed. It is also made clear that it is a matter for the Court to exercise the discretion as to the manner in which the further proceedings should take place. It is, therefore, made abundantly clear, on the basis of the interpretation of Order 8 Rule 10 C.P.C. by the Supreme Court in the above said pronouncement that, despite the employment of word "shall", there is a discretion vested in the Court and that under such a discretion, the Court may pronounce a judgment against the defendant or may make such orders in relation to the suit as it thinks fit.

7. Once it is accepted that it is a matter of discretion invested in the Court as a necessary corollary, it shall have to be accepted that the discretion must be nothing more and nothing less than a judicial discretion. If the plaintiff wanted to remind the Court after a number of years, to exercise this discretion by submitting an appropriate application in the matter, it was the bounden duty of the Court to give a reasonable opportunity of being heard to the defendant who had failed to file the written statement in his defence.

8. Learned Counsel Mr. Ravani urges that the relevant provisions do not casts an obligation upon the plaintiff to make such an application and to remind the Court to adopt the appropriate procedure. The learned Counsel appears, indeed, to be right in his submission. But, the facts as indicated above, would go to show that all of a sudden, in a suit which was filed on April 16, 1984, the relevant application came to be submitted on December 1, 1987. The Court has passed a decree, taking shelter under the provisions of C.P.C. without giving any opportunity whatsoever to the other side to meet with the case. As demonstrated above, the Court could have pronounced a judgment against the defendant or could have passed such orders in relation to the suit as the Court would think fit and proper. It is, therefore, only appropriate to say that the Court was required to give a reasonable opportunity of being heard to the defendant before adopting the procedure under the said provision of C.P.C.

9. It is, indeed, true that the suit came to be filed in April 1984 and the right to file the written statement came to be closed in June 1984. It might be true that the application at Exh. 5, ultimately, came to be decided in favour of the plaintiff. It might further be true that neither the defendant nor the learned Advocate representing his cause had attended the Court on the date on which the matter was posted for hearing. But, this would not disentitle the defendant of his right of a reasonable opportunity of being heard before anything could be ordered

against him or to the peril to his rights. The contention, therefore, coming from learned Counsel Mr. Ravani, in this respect, cannot be countenanced.

10. The learned Counsel urges that the conduct of the defendant as demonstrated by the record would go to show that he was not vigilant enough and was found to be absent on many dates. This again, might be a correct factual position. But, this would not disentitle him to claim and would not take away his right, generated from the right of Natural Justice, of being heard before anything is done by the Court to his peril and that also, under the discretion clause appearing under Order 8 Rule 10 C.P.C. It was also an endeavour on the part of learned Counsel Mr. Ravani to urge before me that, technicalities should not prevent the emergence of substantial justice. This is a recognised principle in law and does not require a deliberation or a debate. But, here, it appears that the technicality, which could be developed by resorting to Order 8 Rule 10 C.P.C., behind the back of the defendant has, resulted in not substantial justice, but in substantial injustice which the Courts below could not have permitted.

11. Because of all this, the contentions raised by learned Counsel Mr. Shah for the petitioner require to be countenanced in preference to the contentions being advanced by learned Counsel Mr. Ravani for the respondent.

12. In somewhat different fact-situation, the learned single Judge of this Court has taken almost a similar view in L.G. Nagar Co-Operative Housing Society Ltd. Vs. Rajendra Construction Co., . The broad principle envisaged by the decision is that, no party to a litigation can be permitted to obtain the orders behind the back of the other party. This decision, of course, supports the view I am taking in the present Civil Revision Application.

13. For all what has been stated above, the present Civil Revision Application succeeds. The same is hereby accordingly allowed and the Rule is made absolute. The judgments and the decrees of the Courts below are hereby set aside and the matter is remanded to the trial Court for the purpose of hearing and deciding the application submitted by the plaintiff under Order 8 Rule 10 C.P.C., after affording a reasonable opportunity of being heard to all the parties. This should be done by the trial Court, within a period of six months from the date of the receipt of the writ of the present orders. Till that is done, the interim relief operating in favour of the plaintiff vide orders below Application at Exh. 5 shall continue to operate.

Learned Counsels agree that the respective parties shall co-operate before the Court below to the fullest extent, for the early disposal of the matter.