

(1998) 09 BOM CK 0040

In the Bombay High Court

Case No : Notice of Motion No. 2956 of 1995 in Suit No. 1557 of 1990

Dhanwantra R. Joshi and others

APPELLANT

Vs

Satish J. Dave and others

RESPONDENT

Date of Decision : 30-09-1998

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 15 Rule 3(1), Order 17 Rule 1, Order 17 Rule 2, Order 5 Rule 1, Order 5 Rule 5

Citation : (1998) 4 ALLMR 509 : (1999) 1 BomCR 97 : (1999) 4 CivCC 143

Hon'ble Judges : M.B. Shah, C.J.;Y.S. Jahagirdar, J

Bench : Division Bench

Advocate : P.S. Gidwani, instructed by C.C. Chayya, Shailesh Shah, P.K. Samdhani, Ammet B. Naik and Arief Bookwala, for the Appellant; Salil Shah and S.G. Walam, Subodh Joshi, instructed by . P.K. Shroff and Co., for the Respondent

Judgement

M.B. Shah, C.J.—The learned Single Judge by his order dated 10th November, 1997 has referred the matter to a Division Bench for deciding question "whether a decree passed in the absence of the defendant and his Counsel is a decree passed under Order IX, Rule 6 or is it a decree passed under Order VIII, Rule 5 if the same is also passed on the ground that the written statement has not been filed."

2. Main controversy is that whether a decree passed under Order VIII, Rule 5 or 10 of the Code of Civil Procedure) (C.P.C., for short) can be set aside by filing an application under Order IX, Rule 13 of C.P.C. The learned Judge has referred to various decision of this Court, wherein justice Lodha Vyas, as he then was, Justice Palshikar and Justice Lodha have taken the view that a decree under Order VIII, Rule 5 can only be passed in presence of the defendant, on account of failure to file Written Statement. Justice Kapadia has held that a decree under Order VIII, Rule 5 can be passed even in absence of defendant. From the referring judgment, it appears that a contention was raised that such a decree passed under Order VIII, Rule 5 can be set aside by filing an application under Order IX, Rule 13 of C.P.C. Other judgments are to the effect that only appeal is

required to be filed. Because of the contrary judgments, the matter is referred to a larger Bench.

3. At the outset, we note that the learned Single Judge, in case of *Rashtriya Chemicals and Fertilizers Ltd. v. Ota Kandla Pvt. Ltd.*, reported in 1992 Mah.L.J. 266, arrived at the conclusion that where the defendant is served and represented by Counsel, but fails to file his written statement despite opportunity given to him, the decree passed against him would be one under the provisions of Order VIII, Rule 10 of the C.P.C. For setting aside such decree, an application under Order IX, Rule 13 is not maintainable.

Against that judgment appeal was preferred and the Division Bench of this Court (P.O. Desai, C.J. & S.H. Kapadia, J.,) had dismissed the aforesaid Appeal by holding that:-

"We are in agreement with the reasoning and conclusion of the learned Single Judge. This is not a case in which the decree could be regarded as having been passed ex-prate and, therefore, Notice of Motion No. 1735 of 1990 taken out by the appellants to have the decree set aside was rightly held to be not maintainable"

Further the aforesaid case of *Rashtriya Chemicals and Fertilizers Ltd. v. Ota Kandla Pvt. Ltd.* was also referred by the Division Bench of this Court. (Ms. Sujata Manohar, C.J., & Dr. B.P. Saraf, J.,) in (Appeal No. 169/94 decided on 31st March, 1994), and the Court has held that there was no reason to take a different view from the one taken by the learned Single Judge.

4. We also do not find any reason to differ from the view taken in the case of *Chemicals and Fertilizers Ltd.* (supra) for the reasons stated below.

5. For this purpose, we would straightaway refer to the exhaustive decision on Order IX of C.Rashtriya P.C. of the Apex Court in the case of *Sangram Singh Vs. Election Tribunal, Kotah, Bhurey Lal Baya*, . The Court in that case specifically referred to Order V, Rules, 1, 5 & 8 which provide for what is required to be stated in the summons. Thereafter, the Court considered that Order VIII, Rule 1 specifically speaks of "the first hearing". As against this, Order IX speaks of "Appearance of parties and consequence of non-appearance".

6. In the light of the aforesaid provisions, this controversy is required to be appreciated. Under Order VIII, Rule 1, the defendant is required to file Written Statement of his defence at or before the first hearing or within such time as the Court may permit. Sub-rule (2) of Rule 1 requires the defendant to enter such documents in a list and to annex it with the Written Statement. Rule 5 specifically provides that every allegation of fact in the plaint, if not denied in the pleading of the defendant, shall be taken to be admitted, except as against a person under disability, and on the basis of the pleading. Order VIII, Rule 5(2) provides "Where the defendant has not filed a pleading, it shall be lawful for the Court to pronounce judgment on the basis of the facts contained in the plaint".

However, it is the discretion of the Court to direct the plaintiff to prove the facts stated in the plaint. Sub-Rule (4) of Rule 5 specifically provides that whenever a judgment is pronounced under this rule, a decree shall be drawn up in accordance with such judgment and such decree shall bear the date on which the judgment was pronounced. Under rule 10 the Court is also entitled to pronounce a judgment and draw a decree in cases where parties from whom a Written Statement is required (under Rule 1 or Rule 9) fails to present the same within the time, permitted or fixed by the Court. As stated earlier Rule 1 of Order VIII specifically provides that the defendant shall at or before the first hearing or within such time as the Court may permit, present a written statement of his defence. If this is not done, the Court can pass a decree under Order VIII, Rule 10. Similarly, under Rule 9, the Court may at any time require Written Statement or additional written statement from any of the parties and fix a time for presenting the same. If this is not done, a decree as stated above under Rule 10 can be passed. There is no provisions in Order VIII for setting aside such decree by filing an application.

7. Next stage is under Order IX. Order IX as stated above specifically speaks about "appearance of parties and consequence of non-appearance". Now at this stage, we refer to the detail discussion of the Apex Court in Sangram Singh's case (supra) on Order IX.

(24) Rule 1 of Order 9 starts by saying--

"On the day fixed in the summons" for the defendant to appear and answer" and the rest of the rules in that order are consequential on that. This is emphasised by the use of the word "postponement" in Rule 6(1)(c) of "adjournment" in Rule 7 and of "adjournment" in Rule 1. Therefore, we reach the position that Order 9, Rule 6(1)(a), which is the rule relied on, is confined to the first hearing of the suit and does not "per se" apply to subsequent hearings? see *Zeinulabdin Khan v. Ahmed Raza Khan*, 5 Ind. App. 233 at p. 236 (P.C.) (I).

(25) Now to analyse Rule 6 and examine its bearing on the first hearing. When the plaintiff appears and the defendant does not appear when the suit is called on for hearing, if it is proved that the summons was duly served-

" (a) the Court may proceed "ex parte"".

The whole question is, what do these words mean? Judicial opinion is sharply divided about this. On the one side is the view propounded by Wallace, J., in (A.I.R. 1925 Mad. 1274(H) that "ex parte" merely means in the absence of the other party, and on the other side is the view of O'Sullivan. J., in *Hariram Revachand v. Paribhdas Mulchand*, AIR 1945 Sind 98 at p. 102(D), that it means that the Court is at liberty to proceed without the defendant till the termination of the proceedings unless the defendant shows good cause for his nonappearance. The remaining decisions, and there are many of them, take one or the other of those two views.

(26) In our opinion, Wallace, J., and the other Judges who adopt the same line of thought are right. As we have already observed, our laws of procedure are based on the principle that, as far as possible, no proceeding in a Court of law should be conducted to the detriment of a person in his absence. There are of course exceptions, and this is one of them. When the defendant has been served and has been afforded an opportunity of appearing, then, if he does not appear, the Court may proceed in his absence. But, be it noted, the Court is not directed to make an "ex-parte" order.

Of Course the fact that it is proceedings "ex-parte" will be recorded in the minutes of its proceedings but that is merely a statement of the fact and is not an order made against the defendant in the sense of an "ex-parte" decree or other "ex-parte" order which the Court is authorised to make. All that Rule 6(1) (a) does is to remove a bar and no more. It merely authorises the Court to do that which it could not have done without this authority, namely to proceed in the absence of one of the parties. The contrast in language between Rule 7 and Rule 13 emphasises this.

(27) Now, as we have seen, the first hearing is either for the settlement of issues or for final hearing. If it is only for the settlement of issues, then the Court cannot pass an "ex-parte" decree on that date because of the proviso to Order 15, Rule 3(1) which provides that can only be done when "the parties or their pleaders are present and none of them objects".

On the other hand, if it is for final hearing, an "ex-parte" decree can be passed, and if it is passed, then Order 9, Rule 13 comes into play and before the decree is set aside the Court is required to "make an order to set it aside". Contrast this with Rule 7 which does not require the setting aside of what is commonly, though erroneously, known as "the "ex-parte" order".

No order is contemplated by the Code and therefore no order to set aside the order is contemplated either. But a decree is a command or order of the Court and so can only be set aside by another order made and recorded with due formality.

(28) Then comes Rule 7 which provides that if at "an adjourned hearing" the defendant appears and shows 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."

This cannot be read to mean, as it has been by some learned Judges, that he cannot be allowed to appear at all if he does not show good cause. All it means is that he cannot be relegated to the position he would have occupied if he had appeared.

(29) We turn next to the "adjourned" hearing. That is dealt with in Order 17, Rule 1(i) empowers the Court to adjourn the hearing and whenever it does so it must fix a day "for the further hearing of the suit", except that once the hearing

of the evidence has begun it must go on from day to day till all the witnesses in attendance have been examined unless the Court considers, for reasons to be recorded in writing, that a further adjournment is necessary. Then follows Rule 2-

"Where, on any day to which the hearing of the suit is adjourned, the parties or any of them fail to appear, the Court may proceed to dispose of the suit in one of the modes directed in that behalf by Order 9 or make such other order as it thinks fit".

(30) Now Rule 2 only applies when one or both of the parties do not appear "on the day fixed" for the adjourned hearing. In that event, the Court is thrown back to Order 9 with the additional power to make "such order as it thinks fit". When it goes back to Order 9 it finds that it is again empowered to proceed "ex parte" on the adjourned hearing in the same way as it did or could have done, if one or other of the parties had not appeared at the first hearing, that is to say, the right to proceed "ex parte" is a right which accrues from day to day because at each adjourned hearing the Court is thrown back to Order 9, Rule 6.

It is not a mortgaging of the future but only applies to the particular hearing at which a party was afforded the chance to appear and did not avail himself of it. Therefore, if a party does appear on "the day to which the hearing of the suit is adjourned", he cannot be stopped from participating in the proceedings simply because he did not appear on the first or some other hearing.

(31) But though he has the right to appear at an adjourned hearing, he has no right to set back the hands of the clock. Order 9, Rule 7 makes that clear. Therefore, unless he can show good cause, he must accept all that has gone before and be content to proceed from the stage at which he comes in. But what exactly does that import? To determine that it will be necessary to hark back to the first hearing.

(32) We have already seen that when a summons is issued to the defendant it must state whether the hearing is for the settlement of issues only or for the final disposal of the suit (Order 5, Rule 5). In either event, Order 8, Rule 1 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 "the Court may pronounce judgment against him, or make such order in relation to the suit as it thinks fit." Order 8, Rule 10.

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: a matter on which we shall dwell later.

(33) We have seen that 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 Order 8, Rule 10 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.

(34)..... (35).....

(36) Therefore, Order 9, Rules 6 & 7 do not apply in terms. But we have been obliged to examine this order at length because of the differing views taken in the various High Courts and because the contention is that Order 17, Rules 6 and 7, and there, according to one set of views, the position is that once an "ex parte" "order" is "passed" against a defendant he cannot take further part in the proceedings unless he gets that "order" set aside by showing good cause under Rule 7. But that is by no means the case.

(37) If the defendant, does not appear at the adjourned hearing (irrespective of whether or not he appeared at the first hearing) Order 17, Rule 2 applies and the Court is given the widest possible discretion either-

"to dispose of the suit in one of the modes directed in that behalf by Order 9 or make such other order as it thinks fit".

The point is this. The Court 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 Order 9, Rule 7 then it is not exercising the discretion which the law says it should and, in a given case, interference may be called for."

8. From the aforesaid judgment, it is clear that the word "ex parte" has a specific connotation and for that procedure is prescribed under Order IX, Rule 6. Under Rule 6, if the defendant fails to appear when the suit is called out for hearing and if it is proved that the summons was duly served, then Court can make an order that the suit be heard ex parte and record the evidence and pass a decree. Order IX nowhere provides that on the basis of the averments made in the plaint, Court can pass a decree. Court has to proceed with a suit in absence of the defendant and try the suit and pass appropriate decree. Further the order of ex parte hearing also could be set aside under Rule 7, if good cause is shown for non-appearance. Similarly, under Rule 8, when defendant appears and plaintiff fails to appear, the Court may dismiss the suit, unless the defendant admits the claim or part thereof, and in that case the Court is required to pass a decree against the defendant upon such admission. Similar are the provisions under Rule 10 and Rule 11, in case of non-attendance of one or more of several plaintiffs or defendants respectively. Rule 12 provides for consequence of non-attendance by

the plaintiff or the defendant, who has been ordered to appear in person. In this context, if Rule 13 of Order IX is considered, it would be clear that the phrase "in any case in which decree is passed ex parte against defendant" would mean and apply in those cases where the Court has proceeded and passed an order under Rule 6 and has passed a decree after recording evidence. That means a decree is passed after hearing the plaintiff in absence of the defendant. With regard to dismissal of the suit or passing of decree on admission, as provided under Rule 8, there are specific provisions for setting aside such decree in Rule 9, which provides that if sufficient cause for non-appearance when the suit was called out for hearing is shown, the Court is empowered to make an order setting aside the dismissal upon such terms as to costs or otherwise as it thinks fit and thereafter the Court is required to proceed with the suit.

9. As against this, Order VIII provides that if defendant is served with the summons, then he is required to file a written statement and if the defendant fails to file a written statement, discretion is given to the Court to pass a decree on the basis of the averments made in the plaint. For this purpose, Rule 5 of Order VII is clear. Order VIII, Rule 5(2) provides that if the defendant has not filed pleading, it shall be lawful for the Court to pronounce judgment on the basis of the facts contained in the plaint. However, passing of such decree depends upon the discretion of the Court and Court may insist the plaintiff to prove certain facts.

10. Considering the aforesaid provisions, in our view, the word "ex parte" as mentioned in Order IX, Rule 13 has a definite connotation to mean a decree which has been passed after following Order IX, Rule 6. After amendment in 1977 in Rule 6, it has been specifically mentioned that Court can make an order that "suit be heard ex parte". As stated above, that order can be set aside under Rule 7 and defendant can be given an opportunity of hearing in answer to the suit, as if he has appeared on the day fixed for his appearance.

11. Further, even if the order directing the suit to be heard ex parte is not set aside, the defendant is not debarred from taking part in further proceedings, if he appears on the adjourned date. While considering the provisions of Order IX, Rules 6 & 13, in the case of Arjun Singh Vs. Mohindra Kumar and Others, , the Court has held that everything which is likely to happen in the trial Court vis-a-vis non appearance of the defendant at the time of hearing of the suit has been provided for in Order IX, Rule 7 and Order IX, Rule 13. Order IX, Rule 7 and Order IX, Rule 13 exhaust the whole gamut of situation that may arise during the course of trial. The Court has held that in a case where the stage of first hearing is passed and hearing is fixed for disposal of the suit and on the date of hearing for disposal of the suit, if defendant is not present on such date, the effect of proceedings is exparte. The evidence of the plaintiff might be taken and the judgment might be pronounced. In that case Order IX, Rule 13 would come in. The defendant is also entitled to file an appeal against the judgment and decree. Second eventuality which may happen is the entirety of the evidence of the

plaintiff could not be concluded on the hearing day on which the defendant is absent and something might remain so far as the trial of the suit is concerned for which purpose there might be a hearing on an adjourned date. Under Order IX, Rule 7, if the defendant appears on such adjourned date and satisfies the Court by showing good cause for his non appearance on the previous day or days he might have the earlier proceedings recalled "set the clock back" and have the suit heard in his presence. On the other hand, if he fails in showing good cause, then also he is not penalized in the sense of being forbidden to take part in the further proceedings of the suit or whatever might still remain of the trial. Only thing is, he cannot claim to be relegated to the position that he occupied at the commencement of the trial.

12. In our view, considering the scheme of Order VIII, Rule 5 or Rule 10, as well as Order IX, it is apparent that both operate in different fields Order VIII, Rule 5, specifically provides that if defendant fails to file Written Statement as contemplated therein, the Court may pronounce judgment on the basis of the facts contained in the plaint, except as against a person under a disability, or the Court may in its discretion, require any such fact to be proved. If the judgment is pronounced on the basis of the facts contained in the plaint, decree is to be drawn in accordance with Order VIII, Rule 5(4). Similarly, if a party from whom written statement is required under Order VIII, Rule 10, fails to present the same within the time permitted or fixed by the Court, the Court is entitled to pronounce judgment against such party, or make such order in relation to the suit as it thinks fit. If the judgment is pronounced, the decree is required to be drawn up. Such decree pronounced on non filing of written statement cannot be considered to be an ex parte decree as contemplated under Order IX, Rule 6. These types of decrees are passed because of failure to file written statement. Further, in a case where Written Statement is not filed and at the time of hearing, even if the defendant is present, the Court is entitled to pronounce the judgment and pass decree. If the defendant is absent and the Written Statement as required is not filed, the Court is also entitled to pronounce judgment on the basis of the averments made in the plaint.

13. As against this, under Order IX, the Court is required to follow different procedure. Order IX, Rule 1 provides that on the day fixed in the summons for the defendant to appear and answer, the parties shall be in attendance at the Court house and suit shall then be heard unless the hearing is adjourned to a future day fixed by the Court. This means that suit is fixed for hearing and on the date of hearing if neither parties appears then the suit may be dismissed as provided under Order IX, Rule 3. 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.

14. Further, under Order IX, Rule 13, the defendant is entitled to file application for setting aside ex parte decree on two grounds, namely (i) that the summons was not duly served and (ii) that he was prevented by any sufficient cause from appearing when the suit was called on for hearing. This also indicates that the suit is required to be fixed for hearing and on the date of hearing the defendant is absent.

15. In this view of the matter, in our view, application under Order IX, Rule 13 is not maintainable when the Court has passed a decree under Order VIII, Rule 5 or Rule 10 of the C.P.C. There is no provision in Order VIII for setting aside a decree passed under Rule 5 or 10 thereof for non-filing of Written Statement. The only remedy open in such cases is to file an appeal against such decree. Decree under Order VIII, Rule 5 or Rule 10 is passed because of the specific provisions under Order VIII that 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 defendant, then it shall be taken to be admitted except against a person under disability, and thereafter there is a provision that the Court has discretion to pronounce judgment on the basis of the facts contained in the plaint. This scheme is totally different from the scheme of passing ex parte decree under Order IX.

16. The reference stands disposed of accordingly.