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**(2004) 02 BOM CK 0089**

**In the Bombay High Court**

**Case No :** Notice of Motion No. 1086 of 2002 in Suit No. 334 of 1982

Gaurang V. Merchant and Others

APPELLANT

Vs

Madhliso and Co. Pvt. Ltd. and Others

RESPONDENT

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**Date of Decision :** 06-02-2004

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) — Order 9 Rule 13, Order 9 Rule 6

**Citation :** (2004) 2 ALLMR 737 : (2004) 5 BomCR 700 : (2004) 106 BOMLR 153

**Hon'ble Judges :** D.G. Karnik, J

**Bench :** Single Bench

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**Judgement**

D.G. Karnik, J.—This motion is taken out by the defendant Nos. 3 and 4 for setting aside an ex parte decree dated 18th December, 2001 passed by this Court in Suit No. 334 of 1982. The facts, as far as they are relevant for the purpose of the present motion, are stated below :-

2. In the year 1982, the plaintiff filed the suit bearing No. 333 of 1982 against the defendant No. 1 Company and 4 others. The defendant No. 1 was joined as a formal party as a suit involved the shares in the defendant No. 1 Company which stood in the name of defendant Nos. 2 and 3 which were subsequently purchased by defendant Nos. 4 and 5. Suit summons was served on the defendant Nos. 4 and 5 in April 1982 and they filed an appearance in the Court on 22nd April, 1982 through M/s. Nanavati and Tijoriwalla, Advocates and Solicitors. The defendant Nos. 4 and 5 did not file their written statement but changed their advocates and on 15th September, 1982, M/s. Apte and Co, Advocates and Solicitors filed an appearance on their behalf. They also did not file the written statement and on 6th June, 1990, Mr. V.P. Ganesh, Advocate filed an appearance on behalf of defendant Nos. 1, 4 and 5. Even then written statement was not filed and it appears that on 5th September, 2000, Mr. V.P. Ganesh, Advocate signed a "No objection" on the vakalatnama of Mr. Vashi, Advocate for filing his appearance in the suit on behalf of defendant Nos. 4 and 5. Mr. Vashi handed over the vakalatnama filing it in the Court to his clerk who through oversight did

not file it on record. On 5th December, 2001, the suit was called out for ex parte hearing. None appeared on behalf of the defendant and the Court adjourned the matter to 13th December, 2001. On 13th December, 2001, also none appeared for the defendant and the Court adjourned the matter to 14th December, 2001. It appears that the matter did not reach hearing on 14th December but was called out on 18th December, 2001. On that date also, none was present for the defendants. The plaintiff filed an affidavit in support of his suit claim and the Court accepted the said affidavit as examination-in-chief of the plaintiff. After considering the oral evidence of the examination-in-chief in the form of affidavit, the Court decreed the suit of the plaintiff. The defendant Nos. 4 and 5 have thereafter taken out this motion for setting aside of the exparte decree.

3. The learned Counsel for the plaintiff opposes the motion on the following grounds :-

(i) The decree has been passed under Order 9, Rule 5 or 10 and has not been passed under Order 9, Rule 6 of the CPC and therefore, an application for setting aside of the decree made under 6. 9, Rule 13 of the CPC is not maintainable,

(ii) The application is barred by limitation and there is no justifiable reason for condonation of the delay.

(iii) On merits, there is no sufficient cause for setting aside of the decree as there was no sufficient cause for the defendants to remain absent when the suit was heard on 18th December, 2001.

Regarding Ground No. (i)

4. In Dhanwantra R. Joshi and others Vs. Satish J. Dave and others, a Division Bench of this Court has held that there is no provision Of setting aside of a decree passed under Rule 5 or Rule 10 of Order 8 of the CPC for non filing of a written statement. Where a decree has been passed under Rule 5 or Rule 10 of Order 8 of the Code of the Civil Procedure, on account of non filing of a written statement, the only remedy open to the defendant against whom the decree is passed is to file an appeal and an application under Order 9, Rule 13 of the CPC is not maintainable. Therefore, it would be necessary to examine whether in the present case, the decree has been passed under Rule 5 or Rule 10 of Order 8 of the CPC or the Court passed the decree by proceeding exparte under Order 9, Rule 6 of the Code of Civil Procedure. It is true that in the present case, the defendant Nos. 4 and 5 had not filed the written statement. But merely because the defendants had not filed the written statement, it cannot be said that the decree passed on 18th December, 2001 was a decree passed under Rule 5 or Rule 10 of Order 8 of the Code of Civil Procedure.

5. Rule 5 and Rule 10 of Order 8 of the CPC read as under:-

Rule 5. Specific denial. -

(1) 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, 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.

(2) 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, except as against a person under a disability, but the Court may, in its discretion, require any such fact to be proved.

(3) In exercising its discretion under the proviso to Sub-rule (1) or under Sub-rule (2), the Court shall have due regard to the fact whether the defendant could have, or has, engaged a pleader.

(4) 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.

Rule 10 - Procedure when party fails to present written statement called for by Court.-Where any party 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 the case may be, the Court shall pronounce judgment against him, or make such order in relation to the suit as it thinks fit and on the pronouncement of such judgment a decree shall be drawn up.

6. Sub-rule (2) of Rule 5 of Order 8 of the CPC declares that where the defendant has not filed a pleading (written statement), it shall be lawful to the Court to pronounce judgment on the basis of the facts contained in the plaint, except in case of a person under a disability, but the Court may in its discretion require such facts to be proved. Rule 10 of Order 8 of the CPC provides that the Court to pass a decree against the defendant who has not filed the written statement or pass such other order as the Court thinks fit. After considering the provisions of Order 8 of the Code of Civil Procedure, in *Balraj Taneja and Another Vs. Sunil Madan and Another*, the Supreme Court observed in para No. 14 of its judgment.

It is to be noticed that if the written statement is not filed, the Court is required to pronounce judgment against the defendant. The words "against him" are to be found in Rule 10 or Order 8 which obviously means that the judgment will be pronounced against the defendant. This rule also gives a discretion either to pronounce judgment against the defendant or "make such order in relation to the suit as it thinks fit". These words are of immense significance, in as much as they give a discretion to the Court not to pronounce judgment against the defendant and instead pass such order as it may think fit in relation to the suit.

7. Order 8 of the CPC gives a discretion either to pronounce judgment against the defendant or make such order in relation to the suit as it thinks fit. Thus, it is not obligatory on the Court either under Rule 5 or Rule 10 or Order 8 to pass a

decree against the defendant if he or she has not filed a written statement. Rule 5 and r, 10 of Order 8 of the CPC are only enabling provisions which enable the Court to presume, in the absence of the written statement of the defendant, that the facts contained in the plaint to be admitted and to pass a decree or to make such order in relation to the suit as it thinks fit. In this connection, observations made in para No. 29 of the judgment of the Apex Court in Balraj Taneja's case may be quoted :

As pointed out earlier, the Court has not to act blindly upon the admission of a fact made by the defendant in his written statement nor should the Court proceed to pass judgment blindly merely because a written statement has not been filed by the defendant traversing the facts set out by the plaintiff in the plaint filed in the Court. In a case, specially where a written statement has not been filed by the defendant, the Court should be a little cautious in proceeding under Order 8, Rule 19 of the C.P.C. Before passing the judgment against the defendant it must see to it that even if the facts set out in the plaint are treated to have been admitted, a judgment could possibly be [passed in favour of the plaintiff without requiring him to prove any fact mentioned in the plaint.

8. The Court cannot proceed blindly under Order 8, Rule 5 or Rule 10 of Order 8 of the CPC and pass the judgment blindly merely because the written statement has not been filed by the the defendant traversing the facts set out by the plaintiff in the plaint. The Court should be a little cautious and before passing of a judgment against the defendant, it must see to it that even if the facts set out in the plaint are treated to have been admitted, a judgment could possibly be passed in plaintiffs favour, without requiring him to prove any fact mentioned in the plaint. In the present case, this Court has followed this mandate. Though the defendant had not filed the written statement since filing of an appearance in April, 1982, the Court did not pass a decree under Order 8, Rule 5 or Order 8, Rule 10 admittedly till end of November, 2001. Thereafter the suit was listed for hearing on 5th December, 2001 and 13th December, 2001 and was ultimately called out for hearing on 18th December, 2001. Even on that date, the Court did not pass a decree under Order 8, Rule 5 or Order 8, Rule 10 of the CPC but required the plaintiff to adduce evidence (in the shape of an affidavit) to prove the facts stated in the plaint. This would be clear by reading the order of the Court dated 18th December, 2001. In para No. 1 of the order, it is observed:

The plaintiff No. 1 has examined himself and has lead evidence in terms of the affidavit dated 14th December, 2001 which is treated as examination-in-chief.

In para No. 3 of the order, the Court has further observed :

On perusal of the pleadings, evidence and the documents tendered herein, which evidence has not been controverted, I answered all the 3 issued in the affirmative and in favour of the plaintiffs.

Reading of the order as a whole leaves no doubt that the Court did not proceed to pass a decree on the basis that facts are deemed to be admitted by virtue of

absence of written statement of the defendant Nos, 4 and 5. The Court insisted upon adducing of evidence though it permitted the evidence to be adduced in the shape of affidavit. The Court considered the evidence including affidavit evidence adduced by the plaintiff and only thereafter passed the decree. This means that the Court proceeded ex parte under Order 9, Rule 6 of the Code of Civil Procedure.

9. The learned Counsel for the plaintiffs strongly relied upon the unreported judgment of the Single Judge of this Court referred in M/s. Capital Colour Lab. Put. Ltd. v. The Board of Trustees of Port of Bombay and Ors., decided on 25th October, 2002, Coram : D.K. Deshmukh, J. and invited my attention to the following observations of the Court in the said judgment :

In my opinion, reading the provisions of Rule 5 of Order VIII, unless and until either there is an express order made by the Court requiring the plaintiff to lead evidence to prove the facts stated in the plaint or unless such an order can be inferred by necessary implication. Whenever such an order can be inferred by necessary implication, whenever a decree is passed in the absence of written statement, the presumption would be that it is a decree passed under Order VIII.

10. The learned Counsel for the plaintiffs contended that whenever a decree is passed in the absence of the written statement, there is a presumption that it is the decree passed under Order 8 and not decree passed under Order 9. However, the passage quoted above makes it clear that the presumption would be rebutted if there is an order requiring the plaintiff to prove the facts stated in the plaint; such order can be express or implied. In the present case, though there appears to be no express written order directing the plaintiff to adduce evidence, such order can be inferred by necessary implication. Neither on the 8th December, 2001 nor on 13th December, 2001, nor on 18th December, 2001, the Court passed a decree without requiring the plaintiff to adduce his evidence and treated the affidavit of the plaintiff as his evidence. This is clear from the judgment of the Court itself. This shows that the Court did not proceed on the basis that in the absence of written statement, facts mentioned in the plaint are deemed to be admitted but chose to proceed otherwise by requiring the plaintiff to adduce evidence in the shape of affidavit. Hence, the first contention of the learned Counsel for the defendant that the application under Order 9, Rule 13 is not maintainable has to be rejected.

Regarding Ground Nos. (ii) and (iii).

11. Under art. No. 123 of the Limitation Act, an application for setting aside an ex-parte decree is required to be made within a period of 30 days from the date of the decree or where the summons or notice was not duly served within 30 days from the date of the knowledge of the decree. In the present case, summons was duly served on the defendant Nos. 4 and 5 and therefore, period of 30 days is required to be counted from the date of the decree and not from the date of its knowledge. The decree was passed on 18th December, 2001.

Motion for restoration of the suit is filed on 10th April, 2002 i.e. after a lapse of 30 days. Hence, the motion is barred by limitation. The defendant however, has explained the delay and also made out sufficient cause for his absence on 18th December, 2001 when an ex parte decree was passed. He had engaged the advocate in whose favour he had even signed the vakalatnama. He had therefore, reason to rely upon the Advocate for the communication of the dates. A litigant cannot suffer on account of a negligence of the lawyer or his clerk. Advocate's clerk had not filed the vakalatnama. Therefore, name of the new Advocate did not appear, on the Board. New Advocate himself was not aware of the date fixed. He therefore, could not and did not inform the date of the defendant Nos. 4 and 5. The defendant Nos. 4 and 5 were therefore, not aware of the date fixed. In September, 2001, the defendant No. 4 was admitted to the hospital, on account of chest pain. Copies of the case papers and medical reports are annexed to the affidavit of the plaintiff. Taking a broad view of the matter, it can be said that there was a sufficient cause for the defendant's absence and also delay has been sufficiently explained, in the affidavit.

12. One however cannot lose sight of the fact that for a period of 20 years, the defendant Nos. 4 and 5 had not filed the written statement. Therefore, as the matter is to be restored, they must be required to pay not only substantial but extempore costs. I feel that costs of Rs. 10,000/- would meet the ends of justice. In the circumstances, motion is granted in terms of prayer Clause (a) subject to payment of extempore costs of Rs. 10,000/-. Costs to be paid within 4 weeks failing which motion shall stand dismissed.