

(1980) 08 AP CK 0007
In the Andhra Pradesh High Court
Case No : A.S. No. 146 of 1978

Kalluri Bhagavanthu and Others

APPELLANT

Vs

Kalluri Maraiah and Others

RESPONDENT

Date of Decision : 01-08-1980

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 20 Rule 4, Order 8 Rule 5(2)

Citation : AIR 1981 AP 414

Hon'ble Judges : Madhava Rao, J;Amareswari, J

Bench : Division Bench

Advocate : P. Sree Rama Murthy, for the Appellant; P. Venkateswarlu, for the Respondent

Final Decision : Allowed

Judgement

Madhava Rao, J.—This appeal is directed against the judgment and decree of the learned Subordinate Judge, Nalgonda in O. S. No. 48 of 1977.

2. Defendants 1 to 3 are the appellants. The judgment of the learned Subordinate Judge is very cryptic and reads as under :

"Written statement not filed. Further time cannot be granted under Order 8. Rule 5 (2), C. P. C. Suit is decreed with costs.""

3. The suit was filed for partition of the plaint schedule properties and for a declaration that the plaintiffs, defendant No. 1, defendant No. 2 and defendants 4 to 6 together have got 115/160th, 38/160th, 1/160th and 6/160th share respectively in the plaint B schedule lands. At the very outset it can be noted that it is not necessary for us to go into the allegations made by the parties for the purpose of disposal of this appeal as no written statement was filed in the suit. The learned Subordinate Judge referred to Order 8, Rule 5 (2), C. P. C. in his order while decreeing the suit. Order 8, Rule 5 (2) reads as under :

"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."

The above sub-rule was inserted by Amendment Act of 1976 and it has to be read keeping in view Sub-rule (1) of Rule 5 which is as follows:-

"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."

Rule 5 (1) envisages that if a fact is not denied specifically or by necessary implication or stated to be not admitted in the pleading of the defendant, it shall be taken to have been admitted. Therefore, the circumstances have to be narrated under which the pleadings in the plaint were taken to have been admitted even though the proof of the same was not required to be made unless the Court further wanted the fact to be proved.

4. The question that arises for consideration is where the defendants have not chosen to file any pleading at all. what view the court should take in the matter. In our view, for that purpose only Sub-rule (2) was added. Even the Statement of Objects and Reasons for the amendment of the Civil P. C. makes the point very clear and Sub-clause (iii) of Clause 61 reads as under :

"Under Rule 5, an allegation of a fact made in the plaint, if not denied, not stated to be not admitted in the pleading of the defendant, is to be taken as admitted. There, is a doubt as to whether this rule applies in a case where the defendant has not filed a pleading at all. New Sub-rule (2) is being inserted to confer a discretion, in such cases, on the Court to treat the allegations in the plaint as admitted and to pronounce judgment on the basis of such allegations."

5. This makes it clear that if the defendant has not chosen to file his written statement, discretion is conferred on the Court to treat the allegations in the plaint as admitted. Therefore, the requirement under Rule 5 (2) to pronounce the judgment under that provision is that the defendant should not have chosen to file his pleading. If he has not chosen to file, the discretion is vested in the Court to treat the allegations made in the plaint as admitted or to require any such facts to be proved.

6. During the course of arguments, it is brought to our notice, that on 8-9-1977 defendants 4 to 6 were called absent and set ex parte. The case was adjourned to 21-9-1977 at the request of defendants 1 to 3 for filing their written statement. On 21-9-1977 the case was again adjourned to 6-10-1997. Ultimately it was again posted to 9-11-1977 on which date the learned Subordinate Judge passed the order under appeal. The defendants-appellants have filed an affidavit in support of the stay petition in para 3 of which it is stated :

"The learned subordinate Judge granted time for filing of written statement on our behalf to 6-10-1977 and the same was extended up to 9-11-1977 by grant of two adjournments on 6-10-1977 and 27-10-1977. Considering the value of the properties involved in the suit and in view of the various facts pleaded by the plaintiffs in the suit we could instruct our advocate to draft the written statement and the same was drafted on 9-11-1977. On that day my advocate in the suit prayed for time for the typing of the written statement, but the learned Subordinate Judge, decreed the suit under Order 8, Rule 5 (2), C. P. C."

7. The above portion of the affidavit filed by the appellants-defendants makes it abundantly clear that a draft written statement was prepared and time was requested for filing the same after getting it typed. Therefore, it is evident that the defendants have chosen to file their written statement in the suit. In these circumstances, in our view. Order 8, Rule 5 (2) should not be invoked at all.

That apart, even if the learned Subordinate Judge has invoked Order 8, Rule 5 (2) it was incumbent upon him to pronounce the judgment on the basis of the allegations made in the plaint. Instead of doing so, the learned Subordinate Judge, decreed the suit with costs. By any stretch of imagination, it could not be treated as a judgment. Order 8, Rule 5 (2) does not contemplate decreeing the suit, but contemplates the pronouncement of judgment, on the basis of the facts contained in the plaint. It will suffice to note that the manner in which the judgment has to be written is mentioned in Order 20, Rule 4, which provides that the Judge has to refer to the facts of the case and points for determination. The order under appeal does not contain either the facts of the case or points for determination, and the learned Subordinate Judge has decreed the suit, which is not contemplated by Order 8, Rule 5 (2).

8. Keeping all these facts in view, we are of the opinion that the judgment of the learned Subordinate Judge is not sustainable. The judgment and decree of the trial Court are, therefore, set aside and the matter is remitted back to the Court below for fresh disposal. The lower Court will permit both the parties to adduce evidence and proceed with the trial of the suit according to law. However, the lower Court is directed to dispose of the matter before the end of December, 1980. Both the parties are directed to appear before the lower Court on 29th August, 1980 and the appellants-defendants will file their written statement within two weeks thereafter.

9. The appeal is allowed accordingly, No. costs. Court-fee paid on the memorandum of appeal will be refunded to the applicants according to the Rules.