
(2014) 05 AHC CK 0208
In the Allahabad High Court
Case No : First Appeal No. 149 of 2014

Khadi Evam Gramodyog Board	Vs	APPELLANT
Purvanchal Janta Gram Sewa Sansthan		RESPONDENT

Date of Decision : 19-05-2014

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 19 Rule 19, Order 20 Rule 4, Order 39 Rule 2(g), Order 47 Rule 1, Order 7 Rule 11
Limitation Act, 1963 — Section 5
Specific Relief Act, 1963 — Section 41

Citation : (2014) 6 ADJ 101 : (2014) 105 ALR 786 : (2014) 5 AWC 4525 :
(2014) 125 RD 250

Hon'ble Judges : Rajesh Kumar Agrawal, J; Dinesh Gupta, J

Bench : Division Bench

Advocate : Arjun Singhal, Advocate for the Appellant; Dinesh Kumar Pandey, Advocate for the Respondent

Final Decision : Allowed

Judgement

1. This appeal has been preferred against the judgement and decree dated 17.12.2011 passed by Civil Judge (Senior Division), Azamgarh in Original Suit No. 61 of 2000 by which the suit of the plaintiff-respondent No. 1 was decreed ex parte. The brief facts which give rise to this appeal are that the plaintiffs-respondents (hereinafter referred to as the respondents) filed O.S. No. 61 of 3000 against the defendants-appellants (hereinafter referred to as the appellants) and State of U.P., who was the proforma defendant for the relief of permanent prohibitory injunction and a decree of damages.

2. The averments made in the plaint is that for establishing Dugdh Utpadan Udhyog, an amount of Rs. 8,90,000/- (Rs. 7,40,000/- for building and machinery and Rs. 1,50,000/- for working capital) was sanctioned by the appellants. However, the appellants disbursed only Rs. 7,40,000/- towards building & machinery and instead of providing Rs. 1,50,000/- as working capital, they proposed to give only Rs. 50,000/- for working capital, which was not sufficient

to start production

3. The plaintiffs-respondents submitted that an additional project for manufacturing of Ghee from Cream, was sanctioned and sought an additional loan of Rs. 15 lac as working capital on 27.3.1998 and appellant No. 1 has sanctioned a sum of Rs. 10,00,000/- as working capital. However, the same was not disbursed and the plaintiffs alleged that on account of non-disbursement of working capital, they could not start the production and as a result of which, the plaintiffs suffered a loss of Rs. 10,000/- per day. When the defendants-appellants on one hand did not disburse the amount of loan for working capital and on the other hand they started recovery of amount of loan, which was given to the plaintiffs-respondents earlier. The plaintiffs were compelled to file this suit for the relief that the plaintiffs be awarded damages at the rate of 10,000/-per day till the payment of Rs. 10,00,000/- as working capital by the defendants and further sought injunction restraining the defendants from recovering the amount of Rs. 7,90,000/- paid to them by means of recovery certificate or coercive measure and also from realizing interest thereon.

4. By the order dated 10.5.2001, the suit was ordered to proceed ex parte. An application was filed to recall the said order and sought to file written statements. However, the application to recall the order was rejected against which a revision was filed by the appellants, which is pending.

5. On 21.1.2006, an application was moved by the appellants to admit written statement 83-A and the same was rejected. A civil revision was filed against the said order, which is also pending before this Court.

6. An application was filed by the defendants under Order 7 Rule 3 & 11 C.P.C. for verification of the plaint as the relief was barred by law and the same remained pending and was not decided even till the passing of ex parte decree.

7. An application 85C1 was also moved seeking permission to cross-examine the witnesses of the plaintiffs. The same was also rejected and the order was challenged byway of writ petition, which was also dismissed.

8. The Civil Judge (Senior Division) vide order dated 17.12.2001 decreed the suit ex parte.

9. Feeling aggrieved, the defendants-appellants moved an application under Order 9 Rule 13 to set aside the ex parte decree and the same was registered as Misc. Application No. 15 of 2012.

10. vide order dated 2.2.2013, the learned Civil Judge (Senior Division) rejected the application under Order 9 Rule 13 against which, first appeal from order was also filed, which was registered as F.A.F.O. No. 747 of 2013, which has been dismissed vide order date 19.9.2013.

11. The defendants-respondents filed the present appeal u/s 96 C.P.C. before this Court. The appeal was barred by time and an application u/s 5 of the

Limitation Act was also moved. The Court allowed the application filed u/s 5 of the Limitation Act and condoned the delay. The regular number allotted to the appeal.

12. The respondents filed review application against the order of condoning the delay. However, the same was dismissed as withdrawn.

13. At the time of admission of appeal, both the parties agreed that the appeal be heard on merits.

14. We have heard the learned counsel for the parties.

15. Learned counsel for the appellants submitted that the judgement and order passed by the Court below is against the facts and material placed on record besides being unsustainable in law.

16. The relief claimed by the appellants regarding restraining the respondents from recovering the amount of loan taken by the plaintiffs by means of recovering certificate or coercive measure and also from realizing interest thereon and for granting damages at the rate of Rs. 10,000/- per day and for direction to defendants to make payment of Rs. 10,00,000/- as working capital and the suit was not maintainable at all and could not have been decreed even ex parte.

17. The relief of injunction, restraining the defendants from recovering the amount of Rs. 7,90,000/- by means of recovery certificate or coercive measure, cannot be granted in view of prohibition contained under the provisions of Order 39 Rule 2(g) of C.P.C. and Section 41 of Specific Relief Act.

18. The Court below committed grave error of law in entertaining the suit and granting the relief. There was an agreement executed between the parties, the Court below has failed to consider that neither the original agreement was filed nor the copy of the agreement was proved by the plaintiffs and the Court below relying on the agreement has decreed the suit ex parte.

19. Clause 19 of the agreement provided for settlement of dispute by arbitration. The jurisdiction of Civil Court in the circumstances was non-existence to decide plaintiffs case on the basis of agreement, which ought to have been referred to arbitrator appointed under the provisions of agreement,

20. Notice as required u/s 80 C.P.C. was not given to defendants in accordance with the provisions and in absence of the same, the suit was legally not maintainable.

21. An application under Order 7 Rule 3 & 11 C.P.C. was filed relating to rejection of plaint in view of bar of law for filing the suit. The suit was also barred under the provisions of clause 35 of Khadi and Gramodyog Board Adhiniyam, 1960, the decree of ex parte without disposing the application under Order 7 Rule 3 & 11 C.P.C. is bad in law.

22. Learned counsel for the appellants further submitted that Court below has wrongly decreed the suit ex parte even without discussing the evidence available on record and without considering the legal position regarding the maintainability of the suit.

23. Learned counsel for the appellants further submitted that all the interlocutory orders refusing to set aside ex parte hearing proceedings, refusing the appellants to file written statement and refusal of permission to appellants to cross-examine the witnesses of the respondents were illegal and the appellants also challenged those orders byway of this appeal.

24. Learned counsel for the appellants further submitted that in view of the above, the appeal deserves to be allowed and the decree passed by the lower Court deserves to be set-aside.

25. In support of his contention, the learned counsel for the appellant has placed following case law:

1. Balraj Taneja and Another Vs. Sunil Madan and Another,
2. Shantilal Gulabchand Mutha Vs. Tata Engineering and Locomotive Company Ltd. and Another,

26. Learned counsel for the respondents submitted that in spite of time granted by the Court, the defendants-appellants failed to file written statement and the Court has rightly proceeded ex parte. Thereafter, several opportunities were given to them but defendants with mala fide intention failed to file the written statement. Even the defendants moved an application for setting aside the ex parte order, which was also rejected by the Court, An application was also moved by the defendants to cross-examine the witnesses, which was also rejected by this Court and the writ challenging the order was also dismissed by the Court. The appellants have already filed an application under Order 9 Rule 13 C.P.C. for setting aside ex parte decree and the same has been rejected by the Court and First Appeal From Order filed against the said order also dismissed by the this Court.

27. Learned counsel for the respondents further submitted that there is no illegality or irregularity in decree of the suit and the appeal has no force and liable to be dismissed.

We are unable to accept the contentions raised by the learned counsel for the respondents.

28. Admittedly, this is an ex parte decree. First of all, the person against whom an ex parte decree has been passed for default of appearance at the time of hearing has following courses/remedies open to him:

- (i) He can file an appeal from ex parte order decree u/s 96(2) C.P.C.
- (ii) He may apply for review of decree under order 47 Rule 1 C.P.C.; or

(iii) He may apply under order 9 Rule 13 for an order for setting aside the ex parte decree.

29. These remedies are concurrent in nature. It is not necessary for a person to First apply under Order 9 Rule 13 for setting aside ex parte decree. He has both options. He may file either appeal or review or an application for setting aside ex parte decree.

30. Though, it is true that when a person against whom ex parte decree is passed chooses to file an appeal from decree, two questions may arise:

(1) whether the appellate Court can consider the reason for defendant's non appearance at the hearing and determine whether the lower Court was right in proceeding ex parte or

(2) whether the only question which the appellate Court can consider is as to whether the evidence on record is sufficient to support the ex parte decree. Whether the appellate Court can see whether the decree can be sustained on merits.

31. In our view, it is clear that it is open to the defendant who has filed an appeal against ex parte decree u/s 96(2) C.P.C. to show from record as it stands that there is an order proceeding ex parte against him. Any error, defect or irregularity in doing so, the ex parte decree can be set aside for re-trial. However the appellate Court cannot consider or the defendant cannot be allowed to show that he was prevented by sufficient cause from appearing at the time of hearing.

32. In view of the above, it is clear that the appellants moved an application for setting aside the ex parte order under Order 9 Rule 13. However, the same was rejected by Senior Division and first appeal from order was filed, which has been rejected by this Court.

33. The first point raised before us by the learned counsel for the appellants is in respect of orders passed by the Court by which the Court has refused to set aside the ex parte hearing proceedings against the appellants. Further, the appellants have also challenged the order rejection of his written statement.

Section 105 of C.P.C. provides as under:

105. Other orders.--(1) Save as otherwise expressly provided, no appeal shall lie from any order made by a Court in the exercise of the original or appellate jurisdiction; but where a decree is appealed from any error, may be set forth as a ground of objection in the memorandum of appeal.

(2) Notwithstanding anything contained in sub-section (1), where any party aggrieved by an order of remand from which an appeal lies does not appeal therefrom, he shall thereafter be precluded from disputing its correctness.

34. The above said section clearly provides that in case of filing an appeal, the appellants can also challenge the other interlocutory orders passed during

pendency of trial of the suit.

35. So far as filing of written statement is concerned, the order 8 Rule 1 C.P.C. provides that the defendant shall, within thirty days from the date of service of summons on him, present a written statement of his defence:

36. Provided that where the defendant fails to file the written statement within the said period of thirty days, he shall be allowed to file the same on such other day, as may be specified by the Court, for reasons to be recorded in writing, but which shall not be later than ninety days from the date of service of summons,

37. Under the old rule as it stood before amendments in 1999 and 2002, the defendant was required to file his written statement at or before the first hearing or within such time as the Court may permit. But Rule 1 in its present form has fixed a time limit within which written statement has to be filed.

38. However, considering the amendments in C.P.C. by Amendments Act 2002, the Apex Court in various judgements in Salem Advocate Bar Association, Tamil Nadu Vs. Union of India (UOI), has held that these rules are not mandatory but directory.

39. In another case, Smt. Rani Kusum Vs. Smt. Kanchan Devi and Others, the Hon"ble Supreme Court has again held the same.

40. While dealing this proviso in Salem Advocate case (supra), the Court has held as under (paras 21 & 22):

21. The use of the word "shall" in O VIII, R 1 by itself is not conclusive to determine whether the provision is mandatory or directory. We have to ascertain the object which is required to be served by this provision and its design and context in which it is enacted The use of the word "shall" is ordinarily indicative of mandatory nature of the provision but having regard to the context in which it is used or having regard to the intention of the legislation, the same can be construed as directory. The rule in question has to advance the cause of justice and not to defeat it. The rules of procedure are made to advance the cause of justice and not to defeat it. Construction of the rule or procedure which promotes justice and prevents miscarriage has to be preferred. The rule of procedure are handmaid of justice and not its mistress. In the present context, the strict interpretation would defeat justice.

22. In construing this provision, support can also be had from O VIII r 10 which provides that where any party from whom a written statement is required under r 1 or r 9, fails to present the same within the time permitted or fixed by the Court, the Court shall pronounce judgment against him, or make such other order in relation to the suit as it thinks fit. On failure to file written statement under this provision, the Court has been given the discretion either to pronounce judgment against the defendant or make such other order in relation to the suit as it thinks fit. In the context of the provision, despite use of the word "shall" the Court has been given the discretion to pronounce or not to pronounce the

judgment against the defendant even if written statement is not filed and instead pass such order as it may think fit in relation to the suit.

41. In another case of Rani Kusum (supra), the Apex Court observed as under:

Order VIII, Rule 1 after the amendment casts an obligation on the defendant to file the written statement within 30 days from the date of service of summons on him and within the extended time falling within 90 days. The provision does not deal with the power of the Court and also does not specifically take away the power of the Court to take the written statement on record though filed beyond the time as provided for. Further, the nature of the provision contained in Order VIII, Rule 1 is procedural. It is not a part of the substantive law. Substituted Order VIII, Rule 1 intends to curb the mischief of unscrupulous defendants adopting dilatory tactics, delaying the disposal of cases causing inconvenience to the plaintiffs and petitioners approaching the Court for quick relief and also to the serious inconvenience of the Court faced with frequent prayers for adjournments. The object is to expedite the hearing and not to scuttle the same. While justice delayed may amount to justice denied, justice hurried may in some cases amount to justice buried.

42. Order 8 Rule 10 provides a condition where the party fails to file written statement called for by the Court then the Court may pronounce judgement against him.

43. The said provision is also held to be directory and in the case of Shantilal Gulabchand Mutha Vs. Tata Engineering and Locomotive Company Ltd. and Another, , relied upon by the appellants. The Apex Court has held that the relief under Order 8 Rule 10 C.P.C. is also discretionary and Court has to be more cautious while exercising such power where the defendant fails to file the written statement. Even in such circumstances, the Court must be satisfied that there is no fact which needs to be proved in spite of deemed admission by the defendant and the Court must give reasons for passing such judgement.

44. Similarly, in the case of Balraj Taneja and Another Vs. Sunil Madan and Another, , the Court also dealt with Order 8 Rule 10 where the written statement has not been filed by the defendant, The case of Balraj Tanega has been referred in the case of Shantilal Gulabchand Mutha.

45. While dealing with the case Bairaj Taneja (supra), the Apex Court has clearly held as under (paras 14 & 15):

14. This Rule, namely Rule 10, was also amended by the CPC (Amendment) Act, 1976 (Act No. 104 of 1976). Prior to its amendment, it was held in a number of decisions that the rule can be invoked only in those situations where the Court has required the defendant to file the Written Statement in terms of Rule 9 of Order 8. A few other High Courts had taken the view that this Rule would be applicable even to those cases where a Written Statement was required to be filed under Order 8 Rule 1 CPC. The conflict of decisions has been set at rest by

providing specifically under this rule that where a party from whom a Written Statement is required either under Rule 1 or Rule 9 of Order 8 fails to present the same within the time permitted or fixed by the Court, the Court shall pronounce judgment against him. or make such order in relation to the suit as it thinks fit. Rule 10 thus governs both the situations where a Written Statement is required under Rule 1 of Order 8 as also where it has been demanded under Rule 9. In both the situations, if the Written Statement has not been filed by the defendant, it will be open to the Court to pronounce judgment against him or make such order in relation to the suit as it thinks fit. 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 of Order 9 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, inasmuch 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.

15. There are thus two separate and distinct provisions under which the Court can pronounce judgment on the failure of the defendant to file Written Statement. The failure may be either under Order 8 Rule 5(2) under which the Court may either pronounce judgment on the basis of the facts set out in the plaint or require the plaintiff to prove any such fact; or the failure may be under Order 8 Rule 10 CPC under which the Court is required to pronounce judgment against the defendant or to pass such order in relation to the suit as it thinks fit.

46. This Court in Sangram Singh Vs. Election Tribunal, Kotah, Bhurey Lal Baya, observed as under (para 33):

(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 O.9, R.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 O.8, R.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.

47. The case of Balraj Taneja was followed in Shantilal Gulabchand Mutha alongwith other Apex Court cases, and observed as under:

In view of the above, it appears to be a settled legal proposition that the relief under Order 8 Rule 10 CPC is discretionary, and Court has to be more cautious while exercising such power where defendant fails to file the written statement. Even in such circumstances, the Court must be satisfied that there is no fact which need to be proved in spite of deemed admission by the defendant, and the Court must give reasons for passing such judgment, however, short it be, but by reading the judgment, a party must understand what were the facts and circumstances on the basis of which the Court must proceed, and under what reasoning the suit has been decreed.

48. Now applying the various judgements of Apex Court, it is clear that the provisions of Order 8 Rule 1 & 10 are directory in nature. In case in hand both the Courts proceeded ex parte against the defendant but there was an application moved by the appellant alongwith their written statement before trial Court for accepting the same. However, the said application was rejected.

49. In our considered view, the Court should have adopted lenient view in this regard and the written statement filed by the appellant, should be taken by the Court.

50. In both the cases Balraj Taneja and Shantilal Gulabchand Mutha, the Apex Court while concluding the case allowed the defendants to file written statement and trial was directed to proceed in accordance with law thereafter.

51. Considering the facts and evidence of this case, the learned counsel for the appellants drew our attention towards judgement passed by the Court below and submitted that judgement does not contain. The argument has some force.

52. Even if the defendant absented himself on the date of hearing and the suit proceeded ex parte did not by itself entitle the plaintiffs to get a decree in his favour, The Court is under an obligation to apply its mind to whatever ex parte evidence or affidavit filed under order 19 of the Code is on record of the case and application of mind must be writ large on the face of record. This is possible only if the Court directs itself to whatever material is on record of the case, analysis the same and then come to any conclusion on the basis of evidentiary value of the ex parte evidence or affidavit brought on record by the plaintiffs. The trial Court ought to have on consideration of pleadings, formulated points for determination. The trial Court ought to consider whether suit was at all maintainable and on the basis of pleadings and material on record plaintiff is entitled for relief claimed.

53. A bare reading of the impugned judgement shows that the Court after narrating the facts pleaded by the plaintiffs mentioned that the defendant is absent and further stated that the plaintiffs proved his case and Court passed ex parte decree, This is totally beyond the description of judgement. The Court has to see whether by any evidence available on record, the plaintiffs have been able to prove his case or not. Even in ex parte proceedings, the plaintiffs have to prove his case beyond reasonable doubt.

54. The impugned judgement cannot be sustained. Even an ex parte judgement should satisfy the description of the judgement as laid down in Order 20 Rule 4. The judgement for its sustenance must contain not only the findings on the points but must also contains what evidence consists of and how it does prove the plaintiffs case. A judgement unsupported by reasons is no judgement in the eye of law. It is well-settled that reasons are the links between the material on record and the conclusion arrived at by the Court. Mere fact that the defendant absented himself on the date of hearing and the suit proceeded ex parte did not by itself entitle the plaintiffs to get a. decree in their favour. The Court was under an obligation to apply its mind to whatever ex parte evidence or affidavit filed under order 19 of the Code is on the record of the case and the application of mind must be writ large on the face of record. This is possible only if the Court directs itself to whatever material is on record of the case, analysis the same and then comes to any conclusion on the basis of evidentiary value of the ex parte evidence or affidavit brought on record by the plaintiffs.

55. In the case of Shantilal Gulabchand Mutha (supra), the Apex Court also deals with similar situation and held as under (para 7):

""Whether it is a case which is contested by the defendants by filing a written statement, or a case which proceeds ex parte and is ultimately decided as an ex parte case, or is a case in which the written statement is not filed and the case is decided under Order 8 Rule 10, the Court has to write a judgment which must be in conformity with the provisions of the Code or at least set out the reasoning by which the controversy is resolved"

56. So far as the merit of this case is concerned, the Court has proceeded ex parte against the defendants and in all attempt by the defendants to file written statement alongwith application, was disallowed by the trial Court and further the defendants were also prevented from even cross-examining the witnesses. An application to set aside the ex parte decree was also rejected by the trial Court.

57. The principle of natural justice has also observed that a person should not be condemned unheard and opportunity should be afforded to the defendants to contest the case on merit.

58. Since the order passed by the trial Court is an ex parte order and the Court has left no option to set aside the judgement and remand the case for deciding it afresh on merits in accordance with law after giving full opportunity to the defendants-appellants to file written statement.

59. Since the Court has simply remanded the case de-novo there is no occasion to the Court to make any observation on merit of the case.

60. In view of the above, the appeal deserves to be allowed and the order dated 17.2.2011 passed by the Civil Judge (Senior Division), Azamgarh in Original Suit No. 61 of 2000 is set aside and the matter is remanded back to the trial Court for

deciding afresh in accordance with law after giving full opportunity to the defendants-appellants to file written statement. However, in the facts and circumstances of the case, there shall be no order as to costs.