
(2023) 01 DEL CK 0019

In the Delhi High Court

Case No : Civil Suit (COMM) No. 72 Of 2022, IA No. 1590, 1673 Of 2022

Kleenoil Filtration India Pvt Ltd

APPELLANT

Vs

Udit Khatri & Ors

RESPONDENT

Date of Decision : 05-01-2023

Acts Referred:

Code Of Civil Procedure, 1908 — Order 8 Rule 1, Order 8 Rule 3A, Order 8 Rule 5, Order 8 Rule 5(1), Order 8 Rule 5(2), Order 8 Rule 9, Order 8 Rule 10

Citation : (2023) 01 DEL CK 0019

Hon'ble Judges : C.Hari Shankar, J

Bench : Single Bench

Advocate : Chander M. Lall, Nancy Roy, Aastha Kakkar, Prashant, Nida Khanan

Judgement

C.Hari Shankar, J

1. Can, in a case in which the defendant fails to file written statement in response to the suit within the time stipulated in that regard and remains absent, the suit proceeding, ipso facto, to straightaway decree the suit, without any further process, including the calling for an affidavit-in-evidence from the plaintiff?

2. I had some misgivings on the point. Several orders have been passed by the learned Single Judges of this Court, decreeing the suit in such circumstances. Most of these orders invoke the jurisdiction of the Court under Order VIII Rule 10 of the Code of Civil Procedure, 1908 (CPC).

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.

3. What troubled me was whether, where there was no written statement filed,

the Court could straightaway decree the suit on the basis of the assertions in the plaint without seeking any affidavit-in-evidence from the plaintiff.

4. The question, however, appears to be answered by the judgment of the Supreme Court in *Balraj Taneja v. Sunil Madan* (1999) 8 SCC 396. The Supreme Court, in that case, took stock of Order VIII Rule 5 and Order VIII Rule 10 of the CPC. The Supreme Court proceeded to hold thus, in paras 9, 10, 11, 12, 14, 15, 27 and 29 of the report:

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.

"9. The scheme of this Rule is largely dependent upon the filing or non-filing of the pleading by the defendant. Sub-rule (1) of Rule 5 provides that any fact stated 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 treated as admitted. Under Rule 3 of Order 8, it is provided that the denial by the defendant in his written statement must be specific with reference to each allegation of fact made in the plaint. A general denial or an evasive denial is not treated as sufficient denial and, therefore, the denial, if it is not definite, positive and unambiguous, the allegations of facts made in the plaint shall be treated as admitted under this Rule.

10. The proviso appended to this Rule is important in the sense that though a fact stated in the plaint may be treated as admitted, the Court may, in its discretion, still require such "admitted fact" to be proved otherwise than by such admission. This is an exception to the general rule of evidence that a fact which is admitted need not be proved.

11. Sub-rule (2) provides that if the defendant has not filed his written statement, it would be lawful for the Court to pronounce judgment on the basis of the facts contained in the plaint. The rule further proceeds to say that notwithstanding that the facts stated in the plaint are treated as admitted, the

Court, though it can lawfully pass the judgment, may before passing the judgment require such fact to be proved. The rule is thus in consonance with the Proviso which also requires the fact, even though treated as admitted, to be proved. Thus, the Proviso and Sub- rule (2) read together indicate that where

- (i) an allegation of fact made in the plaint is not denied specifically, or
- (ii) by necessary implication, or
- (iii) stated to be "not admitted" in the pleading of the defendant, or
- (iv) the defendant has not filed the written statement,

such allegations of facts shall be treated as admitted. The Court in this situation can either proceed to pronounce judgment on such admitted facts or may require the plaintiff, in spite of such admission, to prove such facts.

12. Sub-rule (2) quoted above is thus an enabling provision which enables the Court to pronounce judgment on the basis of the facts contained in the plaint, if the defendant has not filed a Written Statement. What is important to note is that even though a Written Statement is not filed by the defendant, the court may still require a fact pleaded in the plaint to be proved.

14. This Rule, namely Rule 10, was also amended by the Code of Civil Procedure (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.

27. In view of the above, it is clear that the Court, at no stage, can act blindly or mechanically. While enabling the Court to pronounce judgment in a situation where no Written Statement is filed by the defendant, the Court has also been given the discretion to pass such order as it may think fit as an alternative. This is also the position under Order 8 Rule 10 CPC where the Court can either pronounce judgment against the defendant or pass such order as it may think fit.

29. 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 the Court should 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 10 CPC. 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. It is a matter of Court's satisfaction and, therefore, only on being satisfied that there is no fact which need be proved on account of deemed admission, the Court can conveniently pass a judgment against the defendant who has not filed the Written Statement. But if the plaint itself indicates that there are disputed questions of fact involved in the case regarding which two different versions are set out in the plaint itself, it would not be safe for the Court to pass a judgment without requiring the plaintiff to prove the facts so as to settle the factual controversy. Such a case would be covered by the expression "the Court may, in its discretion, require any such fact to be proved" used in sub- rule (2) of Rule 5 of Order 8, or the expression "may make such order in relation to the suit as it thinks fit" used in Rule 10 of Order 8."

5. The position, as it emerges from the afore-extracted paragraphs from Balraj Taneja (1999) 8 SCC 396 is that the Court can, in an appropriate case, proceed to decree a suit on the basis of the averments contained in a plaint. However, the word "shall" as it figures in Order VIII Rule 10 of the CPC has been held not to be mandatory, in view of the succeeding provision, in the same Rule, empowering the Court to "make such order in relation to the suit as it thinks fit".

6. Notice may also advantageously be taken of the following passages from the report in *C.N. Ramappa Gowda v. C.C. Chandregowda* (2012) 5 SCC 265, though that case dealt with a situation in which, before proceeding to decree the suit under Order VIII Rule 10, an affidavit-in-evidence was sought from the plaintiff. Significantly, in that case, the Supreme Court held, on facts, that the dispute was not one which could have been decided without oral evidence being tendered.

"23. In the light of the rationes decidendi of the cases cited hereinabove, when we examined the judgement and order of the trial court granting a decree of partition in favour of the plaintiff-appellant, we could notice that the plaintiff-appellant has sought to prove his case that the suit property was a joint family property only on the strength of affidavit which he had filed and has failed to lead any oral or documentary evidence to establish that the property was joint in nature. Even if the case of the plaintiff-appellant was correct, it was of vital importance for the trial court to scrutinize the plaintiff's case by directing him to lead some documentary evidence worthy of credence that the property sought to be partitioned was joint in nature. But the trial court seems to have relied upon the case of the plaintiff merely placing reliance on the affidavit filed by the plaintiff which was fit to be tested on at least a shred of some documentary evidence even if it were by way of an ex-parte assertion.

24. Reliance placed on the affidavit in a blindfold manner by the trial court merely on the ground that the defendant had failed to file written statement would amount to punitive treatment of the suit and the resultant decree would amount to decree which would be nothing short of a decree which is penal in nature.

25. We find sufficient assistance from the apt observations of this Court extracted hereinabove which has held that the effect of non-filing of the written statement and proceeding to try the suit is clearly to expedite the disposal of the suit and is not penal in nature wherein the defendant has to be penalised for non filing of the written statement by trying the suit in a mechanical manner by passing a decree. We wish to reiterate that in a case where written statement has not been filed, the Court should be a little more cautious in proceeding under Order 8 Rule 10 CPC and before passing a judgement, it must ensure that even if the facts set out in the plaint are treated to have been admitted, a judgement and decree could not possibly be passed without requiring him to prove the fact pleaded in the plaint. It is only when the Court for recorded reasons is fully satisfied that there is no fact which needs to be proved at the instance of the plaintiff in view of the deemed admission by the defendant, the Court can conveniently pass a judgement and decree against the defendant who has not filed the written statement. But, if the plaint itself indicates that there are disputed questions of fact involved in the case arising from the plaint itself giving rise to two versions, it would not be safe for the Court to record an ex-parte judgement without directing the plaintiff to prove the facts so as to settle the factual controversy. In that event, the ex-parte judgement although may appear

to have decided the suit expeditiously, it ultimately gives rise to several layers of appeal after appeal which ultimately compounds the delay in finally disposing of the suit giving rise to multiplicity of proceeding which hardly promotes the cause of speedy trial. However, if the Court is clearly of the view that the plaintiff's case even without any evidence is *prima facie* unimpeachable and the defendant's approach is clearly a dilatory tactic to delay the passing of a decree, it would be justified in appropriate cases to pass even an uncontested decree. What would be the nature of such a case ultimately will have to be left to the wisdom and just exercise of discretion by the trial court who is seized of the trial of the suit."

(Emphasis supplied)

7. Failure, on the part of the defendant to file a written statement within the time allowed in that regard cannot, therefore, *ipso facto* and by itself justify invocation, by the Supreme Court, of Order VIII Rule 10 to decree the suit without further process. The Court can undoubtedly do so; but, before that, the Court has to scrutinize the plaint, satisfy itself that there is no contested factual issue, and that, therefore, the averments in the plaint, by themselves, justify decreeing of the suit. The decision is not to be lightly taken. It is only where the issue and the controversy in the plaint and the facts set out therein do not disclose any such fact as would require to be proved by the plaintiff on affidavit, that the Court can proceed to decree the suit without calling for an affidavit in evidence. A finding to that effect, which reflects that it has been arrived at after due application of mind to the averments in the plaint appears, therefore, to be the statutory *sine qua non*, before Order VIII Rule 10 can be invoked to decree a suit without an affidavit-in-evidence of the plaintiff.

8. The Supreme Court has held that there cannot be any straightjacket formula to apply in these cases and that Court would, in every case, had to act on the basis of its own conscience. I also do not deem it appropriate, therefore, to propose any specific instances in which this power can be exercised. The power and authority of the Court to straightway decree a suit on the basis of the averments in the plaint, under Order VIII Rule 10 of the CPC, in the absence of a written statement filed by the defendant cannot, however, be gainsaid, in view of the decision in *Balraj Taneja* (1999) 8 SCC 396.

9. Mr. Lall, learned Senior Counsel for the plaintiff has also placed reliance, in this context, on the second proviso to Order VIII Rule 1, Order VIII Rule 3A6 and the second proviso to Order VIII Rule 5(1)7 of the CPC, as amended and introduced by the Commercial Courts Act, 2015.

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 written statement on such other day, as may be specified by the Court, for reasons to be recorded in writing and on payment of such costs as the Court deems fit, but which shall not be later than one hundred twenty days from the date of service of summons and on expiry of one hundred twenty days from the date of service of summons, the

defendant shall forfeit the right to file the written statement and the Court shall not allow the written statement to be taken on record.

3A. Denial by the defendant in suits before the Commercial Division of the High Court or the Commercial Court. –

(1) Denial shall be in the manner provided in sub-rules (2), (3), (4) and (5) of this Rule.

(2) The defendant in his written statement shall state which of the allegations in the particulars of plaint he denies, which allegations he is unable to admit or deny, but which he requires the plaintiff to prove, and which allegations he admits.

(3) Where the defendant denies an allegation of fact in a plaint, he must state his reasons for doing so and if he intends to put forward a different version of events from that given by the plaintiff, he must state his own version.

(4) If the defendant disputes the jurisdiction of the Court he must state the reasons for doing so, and if he is able, give his own statement as to which Court ought to have jurisdiction.

(5) If the defendant disputes the plaintiff's valuation of the suit, he must state his reasons for doing so, and if he is able, give his own statement of the value of the suit.

Provided further that every allegation of fact in the plaint, if not denied in the manner provided under Rule 3A of this Order, shall be taken to be admitted except as against a person under disability.

10. Mr. Chander Lall's contention is that, by operation of the second proviso to Order VIII Rule 5(1) of the CPC, as introduced by the Commercial Courts Act, the failure, on the part of a defendant, to file a written statement by way of response to a plaint would ipso facto deem the allegations in the plaint to stand admitted.

11. I regret my inability to agree with the said submission.

12. In my opinion, the second proviso to Order VIII Rule 5(1) of the CPC caters to a situation, and envisages a consequence, relatable to Order VIII Rule 3A, in which a written statement has been filed by the defendant. If the written statement, though filed, does not deny any allegation/allegations in the plaint, the second proviso to Order VIII Rule 5(1) of the CPC deems all such allegations to have been admitted.

13. The second proviso to Order VIII Rule 5(1) of the CPC does not, therefore, cater to a situation in which no written statement has been filed; a situation in respect of which the second proviso to Order VIII Rule 1 constitutes a self-contained provision. By operation of the second proviso to Order VIII Rule 1, a maximum period of 120 days is granted to the defendant to file the written statement which, unlike the CPC as applicable to ordinary civil cases, cannot be

relaxed, where the cause is commercial, as held in *Sudhir Kumar @ S.Baliyan v. Vinay Kumar* 2021 SCC OnLine SC 734. The right of the defendant to file the written statement shall, therefore, stand forfeited on the expiry of 120 days.

14. The corollary would, therefore, be that, on the expiry of 120 days from the service of summons in a commercial suit on the defendant, if the defendant has not filed the written statement, the Court can, in an appropriate case, proceed to decree the suit in terms of Order VIII Rule 10 of the CPC. While doing so, however, the Court would have to bear in mind the note of caution sounded in *Balraj Taneja* (1999) 8 SCC 396 and *C.N. Ramappa Gowda* (2012) 5 SCC 265.

15. Accordingly, the doubt that I had stands resolved. The decisions of the Supreme Court cited hereinabove do recognize the power of the Court, in a case in which no written statement is filed despite the expiry of the time available in that regard, for the Court to straightaway decree the suit under Order VIII Rule 10 of the CPC, albeit keeping in mind the principles enunciated in *Balraj Taneja* (1999) 8 SCC 396 and *C.N. Ramappa Gowda* (2012) 5 SCC 265.

16. In order to examine the prayer of Ms. Roy to decree the present suit straightaway in view of failure of the defendant to file written statement in the light of these principles, renotify on 9th January 2023.