

(1995) 03 BOM CK 0013

In the Bombay High Court

Case No : Civil Rev. Application No. 273 of 1995

Laxman Zingraji Adhau

APPELLANT

Vs

Sushila Zinguji Thakre and Others

RESPONDENT

Date of Decision : 22-03-1995

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 8 Rule 5, Order 8 Rule 6, Order 8 Rule 9, 115, 151

Citation : (1995) 4 BomCR 677 : (1995) 97 BOMLR 74 : (1996) 1 MhLj 67

Hon'ble Judges : R.M. Lodha, J

Bench : Single Bench

Advocate : M.N. Ingale, for the Appellant;

Final Decision : Dismissed

Judgement

R.M. Lodha, J.—Heard Mr. Ingle, the learned Counsel for the applicant.

2. The only contention raised by Mr. Ingle is that the trial Court while rejecting the application under Order 9, Rule 13 of the Code of Civil Procedure, 1908 (for short, the "C.P.C.") as not maintainable, has relied upon State Bank of India Vs. Himalayan Tiles and Marble Pvt. Ltd. and Others, and the judgment of this Court in S.B.I. v. Himalayan Tiles, is based on the judgment of this Court in Rashtriya Chemicals and Fertilizers Ltd. Vs. Ota Kandla Pvt. Ltd., . Mr. Ingle submits that the judgment in the case of Rashtriya Chemicals & Fertilizers v. Ota Kandla, is based on the judgment of this Court in Manomal v. Gangadhar 1982 Mah.L.J. 188 and the said judgment in Manomal's case has been overruled by this Court in Western Coalfields Limited v. Rajkumar Kanhiyalal Bhiwapurkar & others 1986 Mah.L.J. 525. Thus Mr. Ingle submits that the basis of all these judgments in State Bank of India and Rashtriya Chemicals' case was Manomal's case and Manomal's case having been overruled by this Court in WCL's case, revision application may be admitted and referred to larger Bench to decide the correctness of the view expressed in State Bank of India v. Himalayan Tiles, (cited supra) and Rashtriya Chemicals v. M/s. Ota Kandla Limited, (supra).

3. The aforesaid controversy has arisen because in the civil suit filed by the plaintiff non-applicants against the applicant/defendant, the trial Court proceeded under Order 8, Rule 5(2) of C.P.C. and passed the decree on 26-3-91 against the applicant. According to the applicant, the said decree was ex-parte and he made an application under Order 9, Rule 13 C.P.C. for setting aside that decree. By the impugned order, the application under Order 9, Rule 13 C.P.C. has been rejected as not maintainable.

3-A. In *Shriram Surajmal v. Shriram Jhunjhunwalla* AIR 1936 Bom. 285, Beaumont, C.J. on construction of the then Order 8, Rule 5 of C.P.C. observed that under Order 8, Rule 5, every allegation of fact in plaint must be taken as admitted unless stated to be not denied or admitted by the defendant and where there is no pleading of the defendant, there can be no denial or non-admission on his part and is bound by all the allegations in the plaint. Thus, the view taken by this Court had been emphatic that the provisions contained in Order 8, Rule 5 C.P.C. have to be construed strictly.

4. Beaumont, C.J. while sitting with Wassoodew, J., in *Vinayak Shreedhar Kulkarni v. Chintaman Vaman Kulkarni* AIR 1938 Bom. 470, held as under :---

".....The plaintiff is a minor suing by his next friend to enforce an oral agreement for the payment of money. The defendant seems to have avoided service for about a year, but he was eventually served, and was directed to file a written statement by 12th June, 1935. He did not file a written statement but applied for further time, putting in a doctor's certificate saying that he was ill. The learned Judge rejected that application, pointing out that although the defendant might be ill there was no reason why he should not have given instructions to his pleader on which a written statement could have been filed. The learned Judge thereupon made an order, "case is fixed for hearing ex parte". It is not uncommon to make an order of that nature where no written statement is put in, but such an order cannot be justified. The Judge should have directed that the case be fixed for hearing in default of written statement. A party is not bound to put a written statement; if he does not do so, he is taken to admit the allegations in the plaint, but he is entitled to appear and submit any argument open to him on the plaint; for instance that the plaint discloses no cause of action, or that the claim is time barred. However, the order in this case seems to have been treated as meaning no more than that the suit would be heard in the absence of a written statement, because when the suit was called on, the defendant's pleader was present, and he put in an application that he might be allowed to withdraw. No order was made upon that, but it is quite clear that neither the defendant nor his pleader was in any way prevented from addressing the Court. The learned Judge heard evidence on behalf of the plaintiff, and passed a decree and then an application was made under Order 9, Rule 13, to have the decree set aside. That application was rejected and from that order an appeal was summarily dismissed by Macklin, J., from whose decree the present appeal is brought. We think there is no case for setting aside ex-parte decree....."

4. In *Manomal v. Gangadhar*, (cited supra), the learned Single Judge of this Court held as under :---

"5. In the present case, the question that arises is whether the Court has proceeded under Order 8, Rule 5 or has proceeded under Order 9, Rule 6 of the CPC in proceeding ex-parte. For that purpose, it will be necessary to find out the circumstances and particularly the context in which the order came to be passed. The record discloses that earlier on three occasions, the Court had granted time to the defendant to file written statement. When the defendant applied for the fourth time on 13-4-1981, it appears that the same was opposed by the plaintiff. The plaintiff while opposing the application after setting out the facts that on earlier occasions time was granted, further stated that not only the application be dismissed with costs but the Court should proceed to decree the claim under Order 8, Rule 5 of the CPC for not filing the written-statement. After the endorsement it appears that the Court rejected the application. Not only that, but the Court further passed an order on the plaint that the defendant had not filed the written statement and the plaintiff was required to prove his case by affidavits. In my opinion, these circumstances read in the context of the endorsement and the order of the Court, clearly show that the Court proceeded under Order 8, Rule 5 of the Code of Civil Procedure, When the Court required the plaintiff to file affidavits, it was acting under Order 8, Rule 5 and in its discretion required the plaintiff to prove the facts otherwise by such admissions, and called upon the plaintiff to prove the facts by affidavits.

6. The next question that arises is having proceeded under Order 8, Rule 5 of the Code of Civil Procedure, could the Court treat its earlier order as an ex-parte order. Such an order proceeding ex-parte against a party to the suit is contemplated by Order 9, Rule 6 of the Code of Civil Procedure. It is important to note that an ex-parte order contemplates that after service of summons, if the defendant fails to appear when the suit is called on for hearing in such a case the Court may make an order that the suit be heard ex-parte. It is the failure of the party to appear before the Court after it is served with a summons to appear on a particular date that gives rise to an ex-parte order. In the facts of the present case, not only the defendant was duly served but he appeared whenever the case was called on for hearing and applied for time to file written statement. On three occasions the same was granted. On the fourth occasion also the defendant appeared before the Court and applied for an adjournment in order to enable him to file written statement. If these are the facts, then, in my view, the order, which was passed by the Court, could not be called as an ex-parte order because in pursuance of the summons the defendant did appear and had taken part in the proceedings and requested the Court to grant him time. It was, no doubt, open to the Court even under these circumstances to proceed ex-parte treating that mere appearance of the defendant without any assistance is no appearance. But that would be a different matter. The Court not only rejected the application, but also ordered the plaintiff to file affidavits on a specific understanding that no written statement has been filed by the defendant. In such circumstances, the

order passed on 13-4-1981 cannot be called an ex-parte order. Obviously, this order not being an ex-parte order, the provisions of Order 9, Rule 6 were not attracted."

5. Again the question, whether an application under Order 9, Rule 14 C.P.C. for setting aside the decree is maintainable which has been passed under Order 8, Rule 10 C.P.C. where the defendant is served and represented by his counsel but fails to file his written statement despite opportunity given to him arose in *Rashtriya Chemicals*" case (cited supra) and this Court held thus :---

"8. In these circumstances, on the plain reading of the above reproduced provisions of law, I have no hesitation in coming to the conclusion that the present notice of motion is not maintainable. The decree sought to be set aside is passed under Order VIII, Rule 10 in the presence of the counsel representing the defendants. A Division Bench of this Court (Beaumont, C.J. and Wassoodew, J.), the case of *Vinayak Shreedhar Kulkarni v. Chintaman Vaman Kulkarni*, reported in AIR 1938 Bombay 470, while refusing to set aside an order passed for want of written statement in view of the fact that the defendant was represented, *inter alia*, observed :---

"A party is not bound to put in a written statement if he does not do so, he is taken to admit the allegations in the plaint, but he is entitled to appear and submit any argument open to him on the plaint; for instance that the plaint discloses no cause of action, or that the claim is time barredBut we are satisfied that inasmuch as the defendant was represented at the hearing by his pleader, if he had really had any reason to advance why the plaintiff's claim should not be decreed, he would have advanced it."

From the above observations it is clear that when the defendant is present or his counsel representing him is present, the decree passed is not strictly speaking an ex-parte decree as contemplated by Order IX, Rule 13 because the said provision contemplates absence of the defendant. In the case before me. it is not a decree passed under Order IX, Rule 6, and therefore, procedure provided under Order IX, Rule 13 is not available to the defendants. I find support for my view in the decision of a learned Single Judge (Palshikar, J.) of this Court (Nagpur Bench) in *Manomal Kushaldas Sindhi v. Gangadhar Pannalal Rai*, reported in 1982 Mah.L.J. 188, and relied by Mr. Divekar, the learned Counsel for the plaintiffs.

9. In the said matter 1982 Mah.L.J. 188, summons to the defendant having been issued, the defendant appeared on 12th September, 1980 and applied for time to file written statement. Time was granted and the case was adjourned to 13th October, 1980. On that date again another application for grant of time for filing written statement was made and the same was also granted and the case was adjourned to 11th November, 1980. A third application for the same purpose was made on 11th November, 1980. The defendant, without filing written statement, raised a plea under Maharashtra Slum Areas (Improvement, Clearance and Re-development) Act, 1971, praying for dismissal of the suit. However, on 13th

March, 1981, the defendant filed an application to the effect that he did not want to press his application for dismissal of the suit and the case was adjourned to 13th April, 1981. On that date again the defendant came up with an application for time to file written statement which application was resisted by the plaintiff praying that the application for grant of time be dismissed and the suit be decreed under Order VIII, Rule 5 of the Code of Civil Procedure. Thus, the Court rejected the defendant's application for grant of time and passed an order on the plaint that the defendant had not filed written statement and the plaintiff was required to prove his case by affidavit and the case was adjourned to 30th April, 1981. In the mean-while, on 20th April, 1981 the defendant filed an application under Order IX, Rule 7 of the CPC for setting aside the earlier alleged ex-parte order and the trial Court, coming to the conclusion that the order passed on 13th April, 1981 was an ex-parte order, allowed the defendant to file written statement and the same was admitted on record. This last order was challenged by the plaintiff by way of a revision and in the revision the learned Single Judge of this Court held that the order passed by the trial Court on 13th April, 1981 clearly showed that the Court had proceeded under Order VIII, Rule 5 of the Code of Civil Procedure, the trial Court could not treat its earlier order as ex-parte and that such an order for proceeding ex-parte against the party to the appeal was contemplated by Order IX, Rule 6 of the CPC and that order under Order IX, Rule 6 is because of the failure of a party to appear on a particular day. It was further held that not only the defendant was duly served to appear but he appeared whenever the case was called on for hearing and applied for time to file written statement and, in these circumstances, the order which was passed by the trial Court could not be called an ex-parte order. It was further held that Court, having proceeded under Order VIII, Rule 5, could not have jurisdiction to set at naught the provisions of Order VIII, Rule 5 because in so doing the Court would be free to change its mind and allow the defendant to file written statement and proceed and if such course is permitted the provisions of Order VII, Rule 5 will be rendered nugatory."

6. In *S.B.I. v. Himalayan Tiles*, (cited supra) this Court again reiterated the legal position that an application under Order 9, Rule 13 C.P.C. for setting aside the judgment pronounced in favour of the plaintiff for want of pleadings of the defendant under Order 8, Rule 5 or Rule 10 of C.P.C. is not maintainable, because such decree cannot be said to be an ex-parte decree under Order 9, Rule 6 of C.P.C. Thus, the consistent view of this Court is that the judgment passed by exercising power under Order 8, Rule 5 C.P.C. cannot be said to be an ex-parte decree under Order 9, Rule 6 and, therefore, the application under Order 9, Rule 13 of C.P.C. for setting aside such judgment and decree would not be maintainable. The reason is obvious inasmuch as while passing the judgment by invoking the power under Order 8, Rule 5 C.P.C. or Order 8, Rule 10 C.P.C., the Court is required to go into the merits of the case set up by the plaintiff, though, of course, the merits of the plaintiff's case are required to be seen in the absence of any pleadings by the defendant. It is only when the Court is satisfied

that the plaintiff's case deserves to be decreed, such judgment and decree is passed and, therefore, any judgment and decree passed by invoking the aforesaid power cannot be equated with the ex-parte decree passed under Order 9, Rule 6 C.P.C. Consequently, an application under Order 9, Rule 13 C.P.C. for setting aside such decree would not lie and cannot be held to be tenable.

7. Since Mr. Ingle has mainly relied upon the judgment of the Division Bench of this Court in Western Coalfields Limited's case (supra), the said case may now be considered. The said judgment was delivered by the Division Bench of this Court on reference made by the Single Judge of this Court for reconsideration of the view expressed in Manomal v. Gangadhar 1982 Mah.L.J. 188, holding that in view of the provisions of Order 8, Rule 5(2) of C.P.C., no application u/s 151 C.P.C. was entertainable. In the said reference, the Court was required to see the correctness of Manomal's case (supra) and the following observations were made in the said judgment :---

"A further question arises as to whether the Court has a power to allow the defendant to file a written statement inspite of the fact that the Court has proceeded under Order 8, Rule 5 of the C.P. Code and whether for setting aside such order, the inherent powers of the Court could be invoked. It is well settled principle that the inherent powers of the Court could be invoked to meet the ends of justice. It obviously means that there is apparent injustice done to a party, but there is no provision in the CPC to remedy that injustice. It is only under these circumstances that the inherent powers can be invoked. Certainly such powers cannot be invoked to set at naught the express provisions of the Code. Here is a provision which enables the Court to pronounce a judgment when the defendant has not filed a written statement. The Court proceeds under Order 8, Rule 5 and requires the plaintiff to file affidavits and if the Court were allowed to exercise its inherent powers, it would certainly set at naught the provisions of Order 8, Rule 5 of the CPC because the Court will be free to change its mind and allow the defendant to file a written statement and proceed. If such a course of conduct is permitted by the Code, the provisions of Order 8, Rule 5 will be rendered nugatory."

8. In the aforesaid context, the Division Bench of this Court in Western Coalfields Limited's case (supra) held that the view of the learned Single Judge in Manomal's case (supra) that on the face of provisions of Order 8, Rule 5(2) of C.P.C., the Court is precluded from exercising its inherent powers, is no more good law. To that extent, Manomal's case has been overruled by the Division Bench. The Division Bench has not overruled the judgment of Manomal's case (supra) so far as it has been held therein that an application under Order 9, Rule 13 C.P.C. was not maintainable and tenable for setting aside the judgment and decree passed in exercise of the power under Order 8, Rule 5 C.P.C. or Rule 10 of C.P.C. Even in Western Coalfields Limited's case, the Division Bench with reference to Order 9 C.P.C. held that Order 9 would have no application in the matters relating to Order 8, Rule 5 C.P.C. as the Court did not proceed ex-parte.

Therefore, there is no merit in the contention of the learned Counsel for the applicant that Manomal's case has been overruled in its entirety. As observed above, the Division Bench has only overruled that part of observations in Manomal's case (supra) whereby it has been held that the Court is precluded from exercising its inherent powers u/s 151 C.P.C. in the face of the provisions of Order 8, Rule 5(2) C.P.C. The Division Bench has not overruled the decision in Manomal's case (supra) so far as it has been held that an application under Order 9, Rule 13 C.P.C. is not maintainable to set aside the judgment and decree passed by the Court in exercise of the powers under Order 8, Rule 5 or Rule 10 C.P.C.

9. Rather, as observed above, the consistent view of this Court right from the year 1938 is that a judgment and decree pronounced in exercise of the powers under Order 8, Rule 5 C.P.C. is not an ex-parte decree and an application for setting aside the judgment and decree passed in exercise of the powers under Order 8, Rule 5 or Rule 10 C.P.C. is not maintainable. The trial Court has, therefore, rightly dismissed the application filed by the applicant under Order 9, Rule 13 C.P.C. and the said order does not suffer from any infirmity warranting interference by this Court.

10. Consequently, there is no merit in this revision application and the same is dismissed in limine.