
(1991) 09 MP CK 0002
In the Madhya Pradesh High Court
Case No : C.R. No. 122 of 1991 (G.)

M/s. J.B. Exports Pvt. Ltd.	Vs	APPELLANT
M/s J.C. Mills Regd. Office Birla Nagar, Gwalior		RESPONDENT

Date of Decision : 28-09-1991

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 11 Rule 15, Order 8 Rule 10, Order 9 Rule 6

Citation : (1992) 1 MPJR 133

Hon'ble Judges : Shacheendra Dwivedi, J

Bench : Single Bench

Advocate : N.K. Modi, for the Appellant; J.P. Shrivastava, for the Respondent

Judgement

Both parties of Civil Suit No. 11-B/90 have preferred separate revisions on different grievance, against one order. This order shall govern the disposal of Civil Revision No. 122/91, filed by M/s. J B. Exports Private Limited/ Defendant, against the Plaintiff-M/s J C. Mills, and other Civil Revision No. 153/1991 preferred by M/s. J. C. Mills Plaintiff against M/s. J. B. Exports Private Limited/ Defendant. Both the revisions arise out of the common order passed by the learned 5th Addl. Judge to the District Judge, Gwalior dated 29-4-91.

The order passed by the Court below is challenged in Civil Revision No. 122/91 by Defendant/J. B. Exports as the suit has been ordered to be proceeded against him exparte, whereas. Revision No. 153/91 is by Plaintiff M/s. J. C. Mills on the grievance that instead of pronouncing the judgment under Order 8, Rule 10 C. P. C. the Court adjourned the case for recording of the Plaintiff exparte evidence.

Facts relevant to these revisions are very short. A suit was filed by M/s. J. C. Milts against M/s. J. B Exports Private Ltd on the ground that out the charges of processing, done by the Plaintiff, of the cloth of Defendant, an amount of Rs. 3,06,304.19 p. and interest thereon was recoverable from him.

Service of summons was effected on the Defendant who made appearance on 18-12-1990. Thereafter, the case was fixed for filing of written-statement on

24-1-91, 13-2-91, 14-3-91 and 10-4-91, but the written-statement was not filed and the Court ordered the suit to be proceeded against exparte on 29-4-1991, fixing the case on 15-7-91 for exparte evidence. It is against this order dated 29-4-91 that the above two revisions have been filed.

In revision No. 122/91, the Petitioner/Defendant's counsel Shri N. K. Modi submitted that on appearance in the suit, the Defendant was not supplied the copy of the Plaintiff, as summons sent to the Defendant did not accompany the copy.

It is further submitted that a notice was given by the Defendant to the Plaintiff under Order 11, Rule 15 C. P. C. on 25-4-91 and the Plaintiff's counsel informed the counsel for the Defendant that the documents would be made available for inspection in the High Court Library room on 30-4-91. It is also contended that the Defendant submitted this fact to Court but his prayer of an adjournment for the filing of the written-statement on a date after 30-4-91 was turned down. Shri Modi has further contended that suit has been proceeded exparte against the Defendant under the impugned order, which could be passed under Order 9, Rule 6 C. P. C. only when defedant was not present but the impugned order itself shows that the Defendant was duly represented through counsel who was present in the Court, and had made the prayer for adjournment. On the above submissions, and in the facts and circumstances, the Defendant submitts that the order of the Court below is bad in law.

The contentions of the Defendant M/s. J. B. Exports Private Ltd. are repelled by the Plaintiff, Shri J. P. Shrivastava appearing for the Plaintiff submits that the learned trial Court in the situation when written-statement was not filed, could not adjourn in the case for exparte evidence and was required to pronounce judgment and pass a decree in favour of the Plaintiff, under Order 8, Rule 10 C. P. C.

While first dealing with the point raised by the Plaintiff it is to be seen whether the rule is mandatory or it confers on the Court, a discretion to deal with each on its own facts. A fair reading of the rule shows that the rule has two limbs, and the second limb authorises the Court to pass such orders as it may deem proper.

9 The expression "shall" in the first part of this rule is not intended to whittle down the discretion given to the Court and the word "or" enables the Court to adopt either of the two courses envisaged by the rule namely either it pronounces judgment or makes such orders as it thinks fit. What consequences would entail under the rules is in the judicial discretion of the Court to determine No hard and fast rule can be laid down in this regard. This aspect came up for consideration before the Apex Court in a recent case of Modula India Vs. Kamakshya Singh Deo, and it was observed that:

It will be seen that these rules are only permissive in nature. They enable the Court in an appropriate case to pronounce a decree straightway on the basis of the plaint and the averements contained therein. Though the present language of

Rule 10 says that the Court "shall" pronounce judgment against the Defendant it is obvious from the language of the rule that there is still an option with the Court either to pronounce judgment on the basis of the plaint against the Defendant or to make such other appropriate order as the Court may think fit. Therefore, there is nothing in these rules, which makes it mandatory for the Court to pass a decree in favour of the Plaintiff straightway because a written statement has not been filed. Rule 5 (1) cannot be made use of to sustain the plea that where is no written statement the Court is bound to accept the statements contained in the plaint and pass a decree straightway. These provisions of C. P. C. far from supporting the plea that a decree on the basis of the plaint should follow a failure to file the written statement, rather indicate a contrary position, namely, that even in such cases, it is a matter for the Court to exercise a discretion as to the manner in which the further proceedings should take place.

Therefore, it cannot be said that the Court acted with material irregularity or an illegality in not pronouncing the judgment and in action under second limb of Rule 10 Order 8 C. P. C.

Shri Shrivastava counsel for the Plaintiff has relied upon *Bat Kishan v. Ram Bharose and Others* 1972 J LJ SN 7, but in that case a different view was taken and it was observed that the written statement contemplated by Rule 9 of Order 8 C. P. C. is one that may be required by the Court after the written statement of the Defendant is filed. The provisions of Order 8, Rule 10 are not attracted when the Defendant fails to file his first written statement even though he may have given time to do so at his own request. In *Mahesh Narayana v. Shikar Chand* 1981 MPLJ 47, it was observed that in the absence of an order of the Court requiring the Defendant specifically and fixing time for presenting the written statement under Rule 9 of Order 8 of the Court does not get the jurisdiction to act under Rule 10.

As discussed above the discretion had to be exercised by the Court in the facts and circumstances of a given case and therefore, the view taken by this Court in *Food Corporation of India v. Bhikam Chand Subhash Chand* 1991 1 MPWN 182 and *M/s. N. B. Mehta v. State of M. P.* 1991 (ii) MPWN 2 are also of no help to the Plaintiff as the Court while exercising the discretion in the facts and circumstances of these cases, found it proper on facts that an action under the first limb of Order 8, Rule 10 could be taken.

Now coming to the contention raised by the Defendant, much stress is laid on the provisions of Order 9, Rule 6 Code of CPC to demonstrate on order of proceeding against ex-parte in a suit could be passed against the Defendant only when he failed to appear. The contention may appear attractive, but it has no substance. In the instant case, the Court has proceeded against ex-parte, under the second limb of Order 8, Rule 10, instead of acting under the first limb, as the Court in its discretion was not obliged to pronounce judgment against the Defendant for his not filing the written statement on the date so fixed by the

Court. The second contention of Defendant's counsel that the written statement by the Defendant could not be filed because he was not supplied with the copy of the plaint is also misconceived as the order sheet dated 18-12-90 it self shows that the copy was supplied to Defendant on the every first hearing, after service.

Adverting to the last contention, that Plaintiff himself had given the date, a day later to the date fixed by the Court, for the inspection of documents and still the Court, rejecting the prayer for granting time to file written statement passed the impugned order. Although, it is again in the discretion of the trial Court, but its exercise must be judicial, based on the facts and circumstances. If it appeared, that the Defendant, instead of filing the written statement, was trying to delay the decision by protracting the trial of the suit, the Court would be justified in closing the right of Defendant and in proceeding against ex-parte. The Court must first decide whether a case for granting further time for filing the written statement was made out or not. The Courts should be liberal in constructing the rule and should not take a stringent view.

The suit is based on the business transactions and the list of documents filed with the plaint goes to show that there are as many as 7 documents, on which the suit is stated to be based and these documents were to be inspected the next day. The suit also involves the substantial amount of above 4 lacs. In such circumstances the Court was required to see whether Defendant has come cause for seeking adjournment or was trying to delay the proceedings. The Defendant is a private limited company having its Office at Delhi and the transaction is of the year 1987, wherein according to Plaintiff on different dates, payments were made to the Plaintiff, by the Defendant, in an amount of over 4 lacs and according to Plaintiff himself it was out of these business transactions that the balance amount was being claimed.

As such, under the circumstances the learned trial Court ought to have given time for filing the written statement on imposing costs on the Defendant for compensating the Plaintiff, also for curbing the tenancy of seeking adjournment

The right to defend is a valuable right but it cannot be permitted to be exercised for protracting the proceeding of a suit and therefore, a proper balance between the necessity of an expeditious trial and the opportunity to defend, is required to be maintained by the Court in exercise of proper discretion.

Although, this Court would ordinarily be slow in interfering with the discretion, yet in the above facts and circumstances of the case, and in the interest of justice, particularly when the Defendant, thereafter, has already filed the written statement in the Court below, as stated by the counsel for the Defendant at the Bar, the exercise of proper discretion requires the grant of one more opportunity to Defendant for filing the written statement In this regard, reference to Mathew Elenjical and Another Vs. The Nagpur Roman Catholic Diocesan Corpn. (P) Ltd., is useful. As such the impugned order of proceeding against ex-parte in the suit deserves to be set aside, subject to Defendant's making payment of costs of Rs.

600/-to the Plaintiff.

As a sequel of the above discussion, the revision No. 153/91 is dismissed whereas revision No. 122/91 is allowed and the impugned order dated 29-4-91 is set aside. It is directed that the case would go back to the trial Court to proceed with the trial according to law, from the stage of filing of the written statement. Both the revision petition are accordingly disposed of Costs shall abide the ultimate result of the suit.