

(1957) 01 AHC CK 0031
In the Allahabad High Court
Case No : Civil Revision No. 521 of 1953

Pt. Gopi Charan Bajpai and Others	Vs	APPELLANT
Pt. Ram Prasad Awasthi and Others		RESPONDENT

Date of Decision : 23-01-1957

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 8 Rule 1, Order 8 Rule 10

Citation : AIR 1957 All 283 : (1957) 27 AWR 896

Hon'ble Judges : Mukerji, J

Bench : Single Bench

Advocate : S.N. Misra and B.R. Avasthi, for the Appellant; P.N. Shukla, M.N. Shukla and Gopi Krishna Sahai, for the Respondent

Final Decision : Allowed

Judgement

Mukerji, J.—This is an application in revision by a number of defendants to a suit that had been filed u/s 92 of the Code of Civil Procedure.

2. On the 4th of October, 1952, the court made an order directing proceedings against defendant No. 6 to proceed ex parte. On the 15th of November, 1952 proceedings against defendant No. 7 were directed to proceed ex parte. By an order dated 17th February 1953, the Court decided to proceed ex parte against all the defendants because, in spite of several opportunities being given, no written statement had been filed by any of the defendants. The 21st of March, 1953, was fixed for final hearing of the suit. On the 18th of March, 1953, the defendants made an application praying that they be permitted to file written statements and proceedings be no more taken ex parte against them. This application of theirs was disposed of by the court below by its order dated 20th March, 1953, in the following terms:--

"Application No. 37/C by defendants 1 to 7 asking for setting aside of above order and permission to file written statement. The above order is clear and there is no justification for setting it aside or allowing a written statement to be

filed at this stage. Application No. 37/C is therefore rejected. Suit to proceed ex parte as already ordered."

3. On behalf of the defendants it is contended in this revision that the order of the learned Judge of the court below refusing to permit the defendants to file their written statement and refusing them to appear in the suit was unjustified under the law. It was contended by Mr. B. R. Avasthi that the defendants had the right to put in their written statement and appear in the case if they chose to do so before the final hearing of the case had been completed. Reliance was placed by him on two decisions of this Court, both reported in the Allahabad Law Journal Reports for the year 1922.

The two cases are Mannu and Another Vs. Tulshi, .

4. In the case of Mannu v. Tulsi (A), Banerji, J., held that an order made by the court below that the proceedings in the case would be ex parte against the defendant did not preclude the defendant from appearing at a later stage in the suit, so long as an ex parte decree had not been passed; and further it was held that it was not necessary for the defendant to have that order set aside.

5. In the case of Bhagwat Prasad Tewari v. Muhammad Shibli (B) Banerji, J., sitting with Stuart, J., held that

"An order directing that a suit should" proceed against a defendant ex parte does not preclude him from appearing on a subsequent date before the suit is decreed and offering to file a written statement and to produce his witnesses."

In Bhagwat Prasad Tewari's case (B) It is not quite clear whether the Bench thought that Bhagwat Prasad Tewari, who was the defendant in that case, had also a right to file a written statement. The order that was made in that appeal was one of remand to the court of first instance with direction to re-admit the suit as against Bhagwat Prasad Tewari and try it according to law. That order, however, indicated, by implication, that Bhagwat Prasad Tewari was to have the right to file a written statement, but the question, whether he had such a right or not in view of the provisions of Order 8, was not specifically determined in that case.

6. A party has two rights, the right to file a written statement and the right to appear at the hearing. A party's right of appearance at the trial is not the same as a party's right to file a written statement and it does not, therefore, follow, in my opinion, that if the right of a party to file a written statement has in some way been affected, then his right of appearance also is thereby affected, nor does it follow vice versa that if a party has the right to appear at the hearing, he has also the right at that stage to file a written statement. Order 8, Rule 1 of the CPC says that

"The defendant may, and, if so required by the Court, shall, at or before the first hearing or within such time as the Court may permit, present a written statement of his defence."

Where the court requires a party to file a written statement by a certain date, then either the party has to file his written statement by that date or may with the permission of the court file it at a later date. If the party does not comply with the directions of the court in that matter, then the consequences mentioned in Rule 10 of Order 8 are bound to follow. The consequences mentioned in Rule 10 are:

"Where any party from whom a written statement is so required fails to present the same within the time fixed by the Court, the Court may pronounce judgment against him, or make such order in relation to the suit as it thinks fit."

In the case before me the defendants were called upon to file their written statement. They were given several opportunities to file such written statement but they did not do so within the time prescribed by the court. Under the circumstances the court, made an order directing the proceedings to proceed "ex parte" against them. What the meaning of the words "proceeding ex parte" would be has presented some difficulty to courts. A similar matter came up for consideration before their Lordships of the Supreme Court in the case of Sangram Singh Vs. Election Tribunal, Kotah, Bhurey Lal Baya, and it was pointed out 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;"

Their Lordships further point out that Order 9, Rule 7 makes it clear that unless good cause is shown the defendant could not be relegated to the position that he would have occupied if he had appeared, . which means that a defendant could not put in a written statement unless he was allowed to do so and he could only be allowed to do so if the court considered the defendant entitled to an indulgence. If the court considered otherwise, then the consequences mentioned in Rule 10 of Order 8 must follow.

Their Lordships further point out what the consequences of Rule 10 are to be in a particular case has to be determined on the facts and circumstances of that case. The discretion given by Rule 10 has to be judicially exercised by the Court. In some cases the court may consider it appropriate to grant time on payment of costs; in other cases it may not grant any time; and there may be cases where the court may grant time to file a written statement without, awarding costs to the other side. In this case before me, it cannot be said that on its facts and circumstances the trial Judge was wrong in exercising his discretion against the defendants and in not permitting them to file their written statement, for obviously the defendants had ample opportunity to do so.

On the authority of the Supreme Court the defendants in the present case certainly had the right of appearing at the trial even if the order of the court was that proceedings against them were to be "ex parte". But that does not, as I have already pointed out, entitle them to file their written statement.

7. In the order of the court below, which has been made subject of this revision, there is no specific "debarring", so to speak, of the defendants from appearing at the trial and giving evidence, but the consequences of an order to proceed with the suit "ex parte" are likely to be interpreted to mean that the defendants would not be permitted even to lead evidence at the trial.

After the application dated the 18th of March, 1953, had been dismissed by the court below by its order under revision, the applicants made another application on the 28th of March, 1953, whereby they prayed not only for the review of the order of the 20th of March, 1953, but also prayed that they be permitted to prosecute their defence. This application too was dismissed by the court below by its order dated the 1st of April, 1953, and apparently, therefore, the prayer to defend the case was also rejected.

As I have pointed out above, a party has the right to lead evidence on the issues framed in the case even though there has been an order, earlier in the case, to the effect that proceedings in the case would be "ex parte", provided of course there has not been an "ex parte" decree already,

8. I, therefore, allow this application in revision and modify the order of the court below dated the 20th of March, 1953, to this extent that the defendants will not be precluded from appearing at the trial and leading evidence, even though they would be precluded from putting in written statements.

9. The costs of this petition would be borne by the parties; the applicants, who have partially succeeded in this Court, cannot claim to have the costs because they were guilty of laches,