
(1999) 09 BOM CK 0002
In the Bombay High Court
Case No : First Appeal No. 49 of 1990

Shri Narayan Biraman Shindore	Vs	APPELLANT
Sau. Shantabai Laxman Shinde		RESPONDENT

Date of Decision : 01-09-1999

Acts Referred:

Citation : (2000) 1 ALLMR 172 : (1999) 101 BOMLR 855

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

Bench : Single Bench

Final Decision : Dismissed

Judgement

R.M. Lodha, J.—This first appeal is at the instance of original defendant impugning the judgment and decree passed by the IIIrd Joint Civil Judge, Senior Division, Nasik on 19.10.98.

2. Sou. Shantabai Laxman Shinde (respondent herein and for short "plaintiff hereinafter") filed the suit against Shri Narayan Biraman Shindore (appellant herein and for short "defendant") for specific performance of the contract. The plaintiff set up the case in the plaint that Survey No. 22 admeasuring 2 acres located at Gangapur, is owned by the defendant which is adjacent to Survey No. 30/2 owned by plaintiff. On 27.7.77, the defendant agreed to sell the land comprising of Survey No. 22 for a consideration of Rs. 34,000/-, at the rate of Rs. 17,000/- per acre to the plaintiff. The plaintiff paid a sum of Rs. 15,000/- in cash to the defendant towards part consideration of the agreement. According to the terms of the contract, the sale deed was to be get executed by the month of April, 1984 and the remaining consideration was required to be paid by plaintiff to defendant at the time of execution of sale deed. The plaintiff requested defendant on various occasions for execution and registration of sale deed but the defendant did not do the same and, therefore plaintiff was constrained to issue notice to the defendant calling upon him to execute the sale deed and get it registered but that was not complied with necessitating the filing of the suit for specific performance of contract. The summons issued to the defendant by the

Trial Court were served upon him and on 15.4.86, the defendant put in his appearance through his Advocate. The Advocate for the defendant on that day prayed for time for filing written statement which was granted. Thereafter, on various occasions, time for filing written statement was sought for by the defendant's Advocate which was granted but no written statement was filed and suit was ordered to proceed without written statement by order dated 19.6.87. The plaintiff was permitted to file affidavit in support of her claim. The plaintiff filed affidavit of her husband (Exhibit 21) and the Trial Court on 19.10.88 decreed the plaintiffs suit.

3. Mr. Pungalia, learned Counsel appearing for appellant contended that though the written statement was not filed by the defendant but when the Advocate for defendant pleaded no instructions, it was incumbent upon the Trial Court to issue notice to defendant for his appearance before passing the decree against him. He relied upon the decision of the Apex Court in *Malkiat Singh and Another Vs. Joginder Singh and Others*, .

4. The undisputed facts are : the defendant was served with summons and he put in his appearance through his advocate on 15.4.86. On that day, the Advocate for defendant prayed for time for filing written statement which was granted and the matter was adjourned to 23.6.86. On 23.6.86, the Advocate for defendant applied for time for filing written statement and accordingly, the Trial Court adjourned the matter to 21.7.86, The Advocate for defendant again applied for time for filing written statement on 21.7.86 and the matter was adjourned to 18.9.86 for filing written statement. On 18.9.86 also the advocate for defendant prayed for time for submitting written statement. The time was granted and matter was adjourned to 17.10.86. The prayer for filing written statement continued to be made by the Advocate for defendant on 17.10.86, 20.12.86, 13.1.87, 17.2.87 and 3.4.87 which were granted liberally by the Trial Court. On 3.4.87, the Trial Court made it very clear that last chance was granted to defendant for filing written statement and the matter was adjourned to 20th June, 1987. On 20th June, 1987, the Advocate for defendant pleaded no instructions. The Trial Court ordered the suit to proceed against the defendant for want of written statement and permitted the plaintiff to file affidavit-in-support of her claim. The plaintiff filed affidavit of her husband. The matter was adjourned on subsequent dates of hearing but the defendant and his Advocate remained absent and as observed above, the Trial Court decreed the suit on 19.10.88. In the backdrop of these admitted facts, the contention of the learned Counsel for appellant needs to be examined whether it was incumbent upon the Trial Court to give notice to defendant when his Advocate pleaded no instructions. In *Malkiat Singh's* case (supra), upon which strong reliance was placed by the learned Counsel for appellant, it was held thus:-

There is no denying the fact that the appellant had engaged a counsel to defend them in the civil suit. The counsel for the appellants pleaded "no instructions" but the Court did not issue any notice to the appellants, who were admittedly not

present on the date when their counsel reported no instructions in the Court. It is nobody's case that the counsel informed them after he had reported no instructions to the Court. The appellants only came to know about the order dated 18.11.1991 and the ex-parte decree dated 8.2.1992 when they approached their counsel on 6.6.1992. It was within four days thereafter that the appellants filed an application under Order 9, Rule 13. of the C.P.C. for setting aside the order dated 18.11.1991 and the decree dated 8.12.1992.

The appellants in their application clearly pleaded that they were neither careless nor negligent and as soon as they learnt about the ex parte decree dated 8.2.1992 and the order dated 18.11.1991, they filed the application to set aside the order and ex parte decree. A perusal of the record also reveals that the appellants were neither careless nor negligent in defending the suit. They had engaged a counsel and were following the proceedings. In this fact situation, the Trial Court, which had admittedly not issued any notice to the appellants after their counsel had reported no instructions, should have, in the interest of justice, allowed that application and proceeded in the case from the stage when the counsel reported no instructions. The appellants cannot, in the facts and circumstances of the case, be said to be at fault and they should not suffer in taking this view, we are fortified by a judgment of this Court in *Tahil Ram Issardas Sadarangani and others Vs. Ramchand Issardas Sadarangani and another*, wherein the bench opined (Para 4 of AIR):-

It is not disputed in the present case that on March 15, 1974 when Mr. Adhia, Advocate withdrew from the case, the petitioners were not present in Court. There is nothing on the record to show as to whether the petitioners had the notice of the hearing of the case on that day. We are of the view, when, Mr. Adhia withdrew from the case, the interests of justice required, that a fresh notice for actual date hearing should have been sent to the parties. In any case in the facts and circumstances of this case we feel that the party in person was not at fault and as such should not be made to suffer.

5. The glaring facts in Malkiat Singh's case as reflected from the report are : the appellants before the Apex Court who were the defendants in the suit were convicts for the murder of one Harpal Singh and sentenced to suffer life imprisonment vide judgment of the Criminal Court dated 1.4.85; the plaintiffs who were respondents before the Apex Court, on 16.8.89 filed the suit for damages to the tune of Rs. 1 lac against the defendants for declaration of the income of the family members which they used to get from deceased Harpal Singh; the defendants contested the claim and filed their written statement and engaged the counsel to defend the suit: the issues were framed on the basis of the pleadings of the parties and two witnesses were examined for and on behalf of the plaintiffs and the Advocate for defendants cross-examined those witnesses; thereafter, on 18.11.91, the Advocate for defendants pleaded no instructions and as a result thereof, the proceedings proceeded ex-parte against the defendants and on 8.2.92 an ex parte decree was passed against the

defendants by the Trial Court : on 6.6.92, when the enquiry was made by the defendants, that advocate informed that he had pleaded no instructions as a result of which proceedings proceeded ex-parte against the defendants and ex-parte decree was passed on 8.2.92 : the defendants then engaged another advocate, made an application under Order 9, Rule 13 of the C.P.C. for setting aside the ex-parte order as well as ex-parte decree. The said application for setting aside the ex-parte decree was dismissed by the Trial Court and maintained upto the High Court but was allowed by the Apex Court with the observations aforequoted. The observations made by the Apex Court in paras 6 and 7 of the report were made in the context of the facts which I have already referred. It is clear therefrom that upon service of summons, the defendants filed written statement and engaged the Advocate to defend them. The Advocate for the defendants was appearing throughout upto two witnesses were examined by the plaintiffs and then pleaded no instructions. The defendants were lodged in jail undergoing life imprisonment. In these circumstances the Apex Court held "... In this fact situation, the Trial Court which had admittedly not issued any notice to the appellants after their counsel had reported no instructions, should have, in the interest of justice allowed that application and proceeded in the case from the stage when the counsel pleaded no instructions...." The facts and circumstances of the present case are entirely different. In the present case, after service of summons, the defendant put in appearance but did not file any written statement. The Advocate for defendant prayed for filing written statement 10 times which was granted liberally by the Trial Court and ultimately after giving 10 adjournments to the defendant for filing written statement, the Court made it clear in its order dated 3.4.87 that last chance was granted for filing written statement. Even that order was not complied with and no written statement was filed and on the next date, the Advocate for defendant pleaded no instructions. These facts clearly reveal that the defendant was grossly negligent in conduct of the case and it appears that he had no defence to set up and therefore, did not file written statement. The Advocate can only file written statement on the basis of information given and facts supplied by the party. Despite seeking adjournments on more than ten occasions by defendant's Advocate if defendant did not instruct the advocate, obviously he had no choice but to plead on instructions. There is no such rule, and at least I do not find any, that even if defendant does not choose to file written statement despite repeated adjournments sought by his Advocate and granted by the Court, and then his Advocate pleads no instructions, it is obligatory upon the Court to give notice to the defendant before proceeding further in the suit. Malkiat Singh (supra) is not an authority for such proposition as canvassed by the learned Counsel. In the circumstances, the Trial Court was not required to give any notice to the defendant when his counsel pleaded no instructions.

6. No other point was urged.

7. Resultantly, I do not find any ground for interference in the judgment and decree passed by the Trial Court on 19.10.88 and first appeal is accordingly,

dismissed with no order as to costs.