
(1998) 12 GAU CK 0009
In the Gauhati High Court
Case No : Civil Revision No. 279 of 1994

Sitaram Modi

APPELLANT

Vs

State Bank of India and Others

RESPONDENT

Date of Decision : 09-12-1998

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 8 Rule 1, Order 8 Rule 10, Order 8 Rule 9, Order 9 Rule 13

Citation : (1998) 4 GLT 425

Hon'ble Judges : N.C. Jain, Acting C.J.; J.N. Sharma, J

Bench : Division Bench

Advocate : G.N. Sahewalla, A.K. Goswami and P. Bora, for the Appellant; S.S. Sarma, D.K. Bhatra and C. Das, for the Respondent

Judgement

1. A short but interesting, important and informative question of law arises in the present revision petition which has been filed by a Defendant. The pertinent question of law which arises for decision is as to whether an application under Order 9 Rule 13 of the CPC is maintainable, if a judgment has been pronounced within the meaning of ambit of Order 8 Rule 10 CPC resulting into a decree. Another limb of question is as to what is the true and correct meaning of exparte decree and whether a decree which has been passed after service of summons upon the Defendant in the absence of a written statement can be described to be exparte decree or not.

2. In order to appreciate the aforementioned question of law it is necessary to have a look at the facts of the case. The brief facts are that a Money suit No. 47/89 was filed by the Plaintiff Bank against two Defendants on 15th May" 89. Since no written statement was filed, the trial court on 13.7.90 pronounced the judgment after declining the adjournment. The presence of both the counsels i.e. Defendant No. 1 and 2 was noticed and it was specifically observed that the suit was being decreed against both the Defendants jointly and severally under Order VIII Rule 10 of the CPC with costs. The Defendant-Petitioner who was a

guarantor filed an application under Order 9 Rule 13 of the CPC for setting aside the decree by describing the same as an *ex parte*. The application was dismissed by the order of the trial court dated 15.5.93 which was registered as Misc (J) Case No. 35/90. It has been found in the order that there is no sufficient cause for setting aside the decree. An appeal was carried before the first appellate court which was dismissed being Misc. Appeal No. 4/93. The Petitioner filed the present revision petition. It was argued before the learned single Judge that the decree passed under Order 8 Rule 10 of CPC being *ex parte*, an application under Order 9 Rule 13 of CPC was maintainable. It was further argued that both the remedies i.e. one an application under Order 9 Rule 13 and the remedy of appeal being mutually exclusive, there was no bar in resorting to both the remedies simultaneously. In support of the proposition of law which was canvassed before the learned single Judge, a reported decision of this Court in (1993) 2 GLR 327 Ratanlal Saraf and Anr. v. Mahabir Prasad Agarwalla and Ors. was cited. The learned single judge felt doubtful about the correctness of law laid down in Ratanlal Saraf's case (Supra) referred the matter to Division Bench. This is how the case has been placed before us. Before noticing the arguments, it is necessary to read the two provisions which are reproduced below:

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 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 suit as it thinks fit and on the pronouncement of such judgment, a decree shall be drawn up.

13. Setting aside decree *ex parte* against Defendants—In any case in which a decree is passed *ex parte* against a Defendant, he may apply to the Court by which the decree was passed for an order to set it aside; and if he satisfies the court that the summons was not duly served, or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the Court shall make an order setting aside the decree as against him upon such terms as to costs, payment into Court or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit.

3. Mr. G.N. Sahewalla, learned Counsel Petitioner has argued that where *ex parte* decree was passed under Order 8 Rule 10 on the sole ground that the written statement was not filed, the very fact that a right of appeal is available against *ex parte* decree, the same would be no reason to hold that an application under Order 9 Rule 13 of CPC was not maintainable. In support of the proposition of law Mr. Sahewalla, has relied upon the following decisions of various High Courts:

- (i) A.K.P. Haridas Vs. V.A. Madhavi Amma and Others,
- (ii) M. Manick Peter and Others Vs. K. Surendranathan,
- (iii) N. Jayaraman Vs. Glaxo Laboratories India Ltd., Madras,

(iv) AIR 1985 Kar 77 (M/s. Kuvarp Industries, Bangalore and Anr. v. State Bank of Mysore)

(v) Innovation Apartments Flat Owners Association, Secundrabad Vs. M/s. Annovation Associates, Secundrabad,

4. We have gone through the aforementioned judgments. The ratio of law as has been laid down in these judgment cited at the bar does support the argument of the counsel for the Petitioner. It has been clearly laid down in all these cases that whenever a decree is passed under Order 8 Rule 10 of the Code of Civil Procedure, an application under Order 9 Rule 13 is maintainable as the decree is exparte. It has further been held that the remedy available to Defendant under Order 9 Rule 13 and the remedy of appeal are not inconsistent or mutually exclusive. It is further laid down in the aforementioned judicial pronouncements that there is no bar in resorting to both the remedies successfully or on failure simultaneously or any of them alone. Upon acceptance of one or other, it has been held that the second remedy would become infructuous.

5. Having given our thoughtful consideration to the case law cited by Mr. Sahewalla, we are unable to agree with view expressed by various High Courts. We are in disagreement with the proposition of law as has been laid down. The reasons for disagreeing with the view with order High Courts would be elaborated in the succeeding paragraphs.

6. Order 8 Rule 10 specifically lays down that where a party from whom a written statement is required Ms to prevent the same within time allowed by the Court, the court shall pass judgment against him or making such order in relation to the suit as it think fit. The provision contained in Rule 10 further envisages that on pronouncement of the judgment a decree shall be drawn up. Order 9 Rule 13 which deals with the exparte decree envisages the setting aside of an exparte decree on the satisfaction of the Court that the Defendant was not duly served with summons or that he was prevented by any sufficient cause from appearing where the suit was called for hearing. In order words the situation which is envisaged by Order 9 Rule 13 would be summons are not duly served upon the Defendant and (ii) Despite service of summons, the Defendant was prevented by sufficient cause from appearing in court when the suit was called. Order 8 Rule 10, on the other hand, is attracted in a situation where Defendant is duly served with the summons or he otherwise appears and is called upon to file the written statement but he fails to file one and a judgment and decree is passed upon suh failure. This is what is not envisaged by Order 9 Rule 13. The above mentioned is the view which we have taken from the plain reading of both the provisions and in our considered view no other view is possible. If any other view is taken, it would negate the mandate of the provisions.

7. In the view which we have taken above, we are supported by two judicial pronouncements of High Courts such as Patna and Delhi High Courts. In Satya Narayan Sah Vs. Brij Gopal Mundra it has been held where the defisndant

appeared but did not file written statement after being granted many adjournments and the judgment followed by a decree was passed, it could not be held an *ex parte* decree within the meaning of Order 9 Rule 13 in view of the ammended provision of Order 8 Rule 10 of the CPC and hence there was no need to fix any date for *ex parte* hearing. It was further held in Satya Narayan's case (Supra) that an application under Order 9 Rule 13 of the CPC for setting aside such an *ex parte* decree would not be maintainable as the decree was not an *ex parte* decree. It has been held in the case of The Traders Bank Ltd. Vs. Avtar Singh, that an *ex parte* decree is one which is passed against the Defendant who has not been able to place his case before the court due to non-appearance either because he was not served with the summons or because he could not appear before the Court due to sufficient cause. It has further been held that a decree which was passed by the court under Order 8 Rule 10 of the CPC against the Defendant who fails or neglect to file written statement cannot be said to be an *ex parte* decree and the same cannot be set aside only on an application under Order 9 Rule 13 of the Code of Civil Procedure.

8. As a necessary corollary of the discussion above it can steely be held that two provisions i.e. Order 8 Rule 10 and Order 9 Rule 13 are exclusive of each other. They travel into water tight different compartments. Order 9 Rule 13 comes into play when *ex parte* decree is passed on account of non-service of summons or the Defendant fails to appear, he havig been prevented by any sufficient cause from appearing when the case is called whereas Order 8 Rule 10 of CPC is attracted in a case when the Defendant is served but he fails to file a written statement resulting into pronouncement of judgment and passing of a decree. Such a decree cannot be described to be *ex parte*.

9. For the reasons recorded above and in view of the law laid down in the aforementioned judicial pronouncements with which we agree. The law laid down by this Court in (1993) 2 GLR 327 Ratanlal Sarafd Anr. v. Mahabir Prasad Agarwalla and Ors.) would stand over ruled. If there is any other decided case of this Court on this point, the law laid down therein would also stand over ruled. In view of the proposition of law as has been laid down by us, we hereby dissent with the view taken by single Benches of various High Courts i.e. 1988 Ker 304 (A.K.P. Haridas v. V.A. Madhavi Amma and Ors. M. Manick Peter and Others Vs. K. Surendranathan, N. Jayaraman Vs. Glaxo Laboratories India Ltd., Madras, AIR 1985 Kar 77 (M/s Kuvarp Industries, Bangalore and Anr. v. State Bank of Mysore and Innovation Apartments Flat Owners Association, Secundrabad Vs. M/s. Annovation Associates, Secundrabad,

10. This leads us to determine whether the revision petition filed by the Defendant before this Court should be treated an appeal or not against the main decree and if we do so, what relief the Defendant is entitled to. Since a revision petition can always be treated an appeal and vice versa, we treat the revision as regular appeal against the main decree subject to the payment of court fee of Rs. 2,022/- by the Petitioner whthin a period of two months.

11. Adverting to the question whether the decree passed under Order 8 Rule 10 of CPC should be set aside or not, our answer straightway is in favour of the Defendants who happens to be a guarantor. It appears to us that the trial court has acted with haste in passing the decree as far as the Petitioner-Defendant was concerned. The Petitioner appeared for the first time and that too without service of summons and therefore the trial court would have been better advised to adjourn the case for filing the written statement. The Petitioner having not been granted an appropriate opportunity to file the written statement, the judgment and decree passed under Order 8 Rule 10 of the CPC in our considered view deserves to be set aside which we hereby do.

12. In view of the setting aside of the decree the case is hereby remitted to the trial court for a fresh decision in accordance with law. If the court fee is not paid, the revision petition which has been converted into appeal would stand dismissed.

13. The parties through their counsel appear before the Civil Judge (Senior Division) Tinsukia in connection with Money Suit No. 47/89 on 15th March '99.

In view of the intricate question of law involved in the case, the parties are left their own costs.