

(1982) 11 AHC CK 0031
In the Allahabad High Court
Case No : First Appeal No. 83 of 1981

State of U.P. and Another

APPELLANT

Vs

Dharam Singh Mahra

RESPONDENT

Date of Decision : 04-11-1982

Acts Referred:

Civil Procedure Code Amendment Act, 1976 — Order 27 Rule 5
Civil Procedure Code, 1908 (CPC) — Order 27 Rule 4, Order 27 Rule 5, Order 5 Rule 1,
Order 7 Rule 1, Order 7 Rule 10
Sales Tax Laws Validation Act, 1956 — Section 2

Citation : (1982) 11 AHC CK 0031

Hon'ble Judges : K.N. Singh, J;K.M. Dayal, J

Bench : Division Bench

Advocate : S.N. Upadhyaya, for the Appellant; M.M. Pant, for the Respondent

Final Decision : Allowed

Judgement

K.M. Dayal, J.—The present first appeal has been filed by the State of Uttar Pradesh and another against the judgment and decree dated 24-11-1980, passed by Sri U.P. S. Kushwaha, Civil Judge, Nainital, in Suit No. 41 of 1980. Dharam Singh the Plaintiff Respondent filed a suit for recovery of Rs. 1,30,000/- against the Appellants on 14-8-1980. The suit was ordered to be registered after Munsarim's report and summonses were issued to the Defendants under Order V, Rule 1 of CPC fixing 23-9-1980 for filing Written Statement and 30-9-1980, for settlement of issues. On 23-9-1980, an application, 19-D, was moved by the District Government Counsel, (Civil), on behalf of the State of Uttar Pradesh, praying four months time to file the written statement. The Defendant's application was partly allowed on payment of Rs. 10/- as costs. He was directed to file the written statement by 3-11-1980. On 3-11-1980 again an application 21-D was filed by the Defendant's counsel for time to file written statement. No. specie period was mentioned in the application but it was mentioned that the Written statement had been prepared and sent to the Legal Remembrancer for his approval. The Plaintiff's counsel made the following endorsement on that

application.

Twenty days time may be granted for filing written statement to which I have no objection.

2. From the order-sheet it appears that 24-11-1980 was fixed for filing written statement as well as for settlement of issues. On 24-11-1980 when the case was called, counsel for the parties were present. Another application 22-D was moved on behalf of the State Government for time to file the written statement. It was opposed on the ground that the State cannot be granted more than two months' time under Order XXVII Rule 5 of CPC. The following order was passed by the Civil Judge.

Case called out Counsel for the parties are present. 22-D by State of U.P. for time to file W. S. opposed. According to the provisions of Order XXVII Rule 5 CPC the State can be granted time not exceeding two months to answer the Plaintiff. Two months' time has already been given. This Court is not now empowered to grant further time. Rejected.

Sd/- U.P. S. Kushwaha.

3. After rejecting the application the Civil Judge pronounced the judgment decreeing the suit of the Plaintiff against the Defendant under Order VIII Rule 10 of CPC which is hereinafter referred to as the Code. It appears from the judgment that the Defendant was directed to file its written statement by 24-11-1980. No written statement was filed within the time permitted by the Court and consequently the judgment ought to be pronounced against them under Order VIII Rule 10 of the Code. The Civil Judge further observed that prior to the filing of the suit a notice u/s 80 of the Code has been served upon Defendant as alleged in the plaint. The Defendant did not give any reply. Consequently it was a fit case to pronounce judgment against the Defendant. No documents were examined nor any oral evidence recorded. The Court below did not apply its mind to the facts of the case or whether the Plaintiff could be entitled to a decree even if the allegations made in the plaint were accepted. The decree has been passed, merely on the default of the Defendant in filing its written statement within the time granted by the Court.

4. We have heard the learned Counsel for the parties at length. The learned Standing Counsel has raised two points before us. His first contention is that Order XXVII Rule 5 of the Code did not debar the Court from granting more than two months time to Government for filing Written Statement. His second contention is that the Court below was not justified in pronouncing judgment under Order VIII Rule 10 of the Code. Both the contentions have been vehemently repelled by the learned Counsel for the Plaintiff-Respondent. The argument of the learned Counsel for the Respondent was that the Court has no jurisdiction to grant more than two months time to Government for filing Written Statement and that the judgment could be pronounced against Defendant on his failure to file Written Statement on the date fixed.

5. The following points arise in this appeal:

1. Whether the Court had jurisdiction to extend the time for filing the Written Statement beyond two months permitted by Order XXVII Rule 5 of the Code?
2. Whether the Court below was Justified in pronouncing judgment against the Defendant under Order VIII Rule 10 of the Code ?

POINT No. 1: Whether the Court had jurisdiction to extend the time for filing the Written Statement beyond two months permitted by Order XXVII Rule 5 of the Code ? Rules 4 and 5 of Order XXVII are as under:

4. Agent for Government to receive process: The Government pleader in any Court shall be the agent of the Government for the purpose of receiving processes against the Government issued by such Court.

5. Fixing of day for appearance on behalf of Government: The Court, in fixing the day for the Government to answer to the plaint, shall allow a reasonable time for necessary communication with the Government through the proper channel, and for the issue of instructions to the Government pleader to appear and answer on behalf of the Government and may extend the time at its discretion (but the time so extended shall not exceed two months in the aggregate).

6. Under Order XXVII, Rule 4 of the Code the District Government Counsel is the agent of the Government for the purpose of receiving process against the Government issued by the Court. The Government pleader is authorised to accept notice of the suit issued by the Court in a case against the Government. The next step thereafter is to contact the authorities concerned and seek necessary instructions from the Government to appear, and answer on its behalf. After the Government pleader accepts the notice he cannot admit or deny the liability without consulting the Government. In Government matters the Government pleader is merely an agent. He has no personal interest, knowledge or information about the matter in dispute. He is bound to seek instructions from the department concerned about the claim of the Plaintiff. Order XXVII Rule 5 has been framed for that purpose. In case of private parties the notice is ordinarily served on them directly and they are in a position to file the written statement by the date fixed in the summons, But that is not so in the case of suits against the Government. The District Government Counsel cannot have any knowledge about the controversy and consequently it has been provided in Order XXVII, Rule 5 that the Court in fixing a day for the Government to answer to the plaint shall allow a reasonable time for the necessary communication with the Government through the proper channel and for the issue of instructions to the Government pleader to appear and answer on behalf of the Government. The discretion of the Court has been fettered by an amendment in the Code made by Act No. 104 of 1976: that the time under the Rule could not be extended beyond two months. That only means that the Government counsel could be granted two months' time at the maximum for communicating and seeking instructions from the Government through proper Channel and if necessary answer the plaint.

7. According to the Respondents, answering the plaint cannot mean any thing but filing of the written statement. We are not prepared to accept the same. It is not necessary that the Government should contest each and every case. There may be cases where after consultation with the Department concerned the District Government counsel may advise the Government not to contest the claim and to admit the claim. There may be cases where he may get the instructions to contest the claim but may require documents and further information for preparing and filing a regular written statement. It may be noticed that Order XXVII, Rule 5 of the Code does not mention the word "written statement". What is to be done within two months is to answer the plaint. Order VIII of the Code provides for the written statement. The written statement contemplated by Order VIII, Rule 1 is "a, written statement of his defence." It is not merely an answer to the plaint or appearance and answer on behalf of the Government. It is a document to be prepared according to Orders VI and of the Code. If the legislature intended Order XXVII, Rule 5 for the purpose of filing written statement it would have provided accordingly. It would not have, used the word "to appear and answer on behalf of the government." As in the two provisions i.e. Order VIII and Order XXVII of the Code different words are used they must mean to convey different intention. In Order XXVII, Rule 5 "to appear and answer behalf of the Government" could only mean to convey to the Court the instructions of the Government relating to the Plaintiff's claim. Rule 5 provides for "issue of instructions to Government pleader to appear and answer".

8. The learned Counsel for the Respondent contended that in the Statement Objects and Reasons for the, amendment of Order XXVII Rule 5 of the Code by Act No. 104 of 1976, it was mentioned that the Government sought long adjournments and the amendment was intended to avoid the same. It is quite possible that the legislature might have intended to avoid the delay on behalf of the Government in filing the Written Statements in civil suits. But from the amendment made such an intention is not indicated. There was absolutely no difficulty in using the word "written statement", in Order XXVII Rule 5 of the Code instead of using the words appear and answer" on behalf of the Government. If Rule 5 is read with (SIC) 4 of Order XVII a different intention is conveyed.

9. In The J.K. Cotton Spinning and Weaving Mills Co. Ltd. Vs. The State of Uttar Pradesh and Others, , the Supreme Court held

In the interpretation of statutes the Courts always presume that the Legislature inserted every part thereof for a purpose and the legislative intention is (SIC)at every part of the statute should have effect

Jia Lal v. Delhi Administration AIR (SIC)SC 1781, the Supreme Court held (SIC) is well settled that proceedings of Legislature cannot be called in aid construing a section." We, therefore, the objection of the learned Counsel for the Respondent that the amendment in Rule 5 of Order XXVII of the Code (SIC) made for the purpose of restricting (SIC) right of the Government in seeking (SIC) for filing

written statement.

10. In *M.P.V. Sundararamier and Co. Vs. The State of Andhra Pradesh and Another*, . Section 2 of the Sales Tax Validation Act, 1956 was interpreted. It was held (at P. 488):

It is nothing strange or unusual for a legislature to insert a provision *ex abundanti cautela*, so as to disarm possible objection; but it is inconceivable that it should enact a provision which is wholly inoperative. Of two alternative constructions of which one leads the former and other involves the latter result, there cannot be any question that it is the former that has to be preferred. Nor is it permissible to cut the plain meaning of the terms of the statute on consideration of policy behind the legislation.

when two different words are used in an enactment at different places, they must be presumed to carry different sense.

11. In *K.U. Kulkarni v. Ganpat Hiraji Teli* reported in AIR 1942 Bom 191, it was held "The Legislature, in my opinion, must always be presumed to aim at precision and in so doing would naturally follow a safe rule of always calling the same thing by the same name; If it has used two different expressions, though analogous in nature, in different parts of the same clause, it must be assumed that they were intended to be used in a different sense."

12. In the case of *Mirza Mohd. Afzal Beg and Others Vs. State of Jammu and Kashmir and Others*, it was held "A legislature does not employ expressions of such widely different nature to convey the same meaning. The well settled rule of interpretation is that when there is a change of language, a change of intention must be attributed."

13. The same view was taken by the Jammu and Kashmir High Court in the case of *Sufi Mohd. Akbar and Others Vs. State of Jammu and Kashmir and Another*, .

14. In full Bench case of Mysore High Court, *Veerappa v. State* reported in AIR 1965 Mys 227. it was held that the same words used in one part of Act should ordinarily be given the same meaning.

15. We accordingly hold that the words "to appear and answer" in Order XXVII, Rule 5, do not mean to present "a written statement" of his defence, occurring in Order VIII Rule 1, of the Code. As the litigation on behalf of the Government is to be carried out in a different manner than on behalf of the individuals the provisions of Order VIII Rule 1, have not been incorporated in Order XXVII Rule 5 of the Code.

Point No. 2: Whether the Court below was justified in pronouncing judgment under Order VIII Rule 10 of the Code in the circumstances of the present case?

16. The Standing counsel has argued that in a case like the present one the Court below was not entitled to pronounce judgment in default of the written statement. The provisions of Order VIII, Rule 10 of the Code should not have

been invoked in the present case. Order VIII Rule 10 of the Code applied to a case where the Court had itself called for the written statement or additional written statement or subsequent pleadings. It was not mandatory that in a case where written statement was not filed under Order VIII Rule 1 or Rule 9 of the Code, the Court must pronounce judgment against the defaulting party. In the instant case the Civil Judge did not apply its mind to the reason for seeking time, mentioned in the application, The learned Counsel pointed out that Rule 10 of Order VIII of the Code gave judicial option to the Court to "make such order in relation to the suit as it thinks fit". That clearly implied that in a case like the present one where there was a justification for not filing the written statement on the date fixed, the Court instead of pronouncing the judgment should have proceeded to adjourn the case. It was bound to consider if some less drastic order could be passed. At the worst the Court could have proceeded ex parte against the defaulting Defendant or passed orders for proceeding ex parte.

17. Order VIII, Rule 10 of the Code reads as under:

Procedure when party fails to present written statements called for by Court. Where any party from whom a written statement (is required under Rule 1 or Rule 9) fails to present the same within 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 the suit as it thinks fit, (and on the pronouncement of such judgment, a decree shall be drawn up).

The learned Counsel for the Appellant relied upon Union of India Vs. Bhagwan Dass, . In that case the Defendant sought time to file the written statement. He could not file the same within the time granted. The Court proceeded to pronounce the judgment under Order VIII, Rule 10 of the Code. A learned single Judge of Delhi High Court held that Order VIII, Rule 10 did not apply to the case as the Court had not "required" the Defendant to file the written statement but he sought time to file the written statement of his own. That case however does not apply to our case because by the Act No. 104 of 1976, Order VIII R. 1 of the Code has also been amended making it imperative for Defendant to file the written statement.

18. The matter came up for decision before a Division Bench of Madhya Pradesh High Court in the case of Mathew Elenjical and Another Vs. The Nagpur Roman Catholic Diocesan Corpn. (P) Ltd., . The Division Bench held that under Order VIII, Rule 10, CPC the Court can pronounce judgment against a Defendant on his failure to file the written statement required under Rule 1 or 9 but the words "make such order in relation to the suit as it thinks fit" show that the discretion of the Court had been retained. We are in agreement with the aforesaid decision and we hold that the Court had discretion, in spite of failure of the Defendant to file the written statement, to call upon the Plaintiff to prove the case or to adjourn the case or to afford a further opportunity to the Defendant to file the written statement.

19. The learned Counsel for the Respondent relied upon a case Bindeshwari Kamkar and Others Vs. Radha Tiwari and Others, . It was held by a learned single Judge of Patna High Court that the Defendant had a right to file the written statement where he was not required by the Court till the first day of hearing. After that date he had no absolute light and was at the mercy of the Court. If the Court permitted him to file the written statement and extended the period he could file it otherwise not. That case again does not apply to the present controversy. It does not lay down that the Court has to pronounce judgment" on failure of the Defendant to file written statement within the time permitted by the Court.

20. In another case Smt. Rajrani Saxena v. Yadram Chaurasia reported in AIR 1977 NOC 218 a learned single Judge of Madhya Pradesh High Court held that a general direction in the summons fixing a date for filing written statement was not covered by the words "written statement required by the Court." That case was prior to the amendment of 1976. As the filing of the written statement has been made imperative by the amendment of Order VIII, Rule 1 of the Code in our opinion that case will not apply to the case after the enforcement of the Amendment Act 104 H 1976, i.e., 1st of Feb., 1977.

21. In Binda Prasad Vs. United Bank of India Ltd. and Others, it was held by a learned single judge of Panta High Court that the written statement could be field till the first hearing. The first hearing contemplated by Order VII Rule 1 was the date of settlement of issues. The Court had jurisdiction to accept the written statement even after that date.

22. In another case in Ram Rakhan v. Mahont Govind Das reported in AIR 1948 All 352, a Division Bench held that the Defendant had a right to file the written statement till the date of first hearing. In that case 28th February I was fixed for written statement and 5th of march for issues in the summons. The Defendant did not appear on 25th February nor filed the written statement. An ex parte decree was passed on 28th February. It was held that under Order VIII, Rule 10, CPC the Defendant had an option to file the written statement on or before the first hearing. Consequently the order decreeing the suit ex parte on 28th February, was illegal. It was further held that the Defendant was not compelled to file written statement under Order VIII, Rule 1, unless required by the Court. In view of the Order VIII, Rule 1 of the Code as amended by Act No. 104 of 1976 that case is not applicable to the instant case.

23. Recently the matter came up for consideration before a learned single judge of this Court in Dharam Pal Gupta v. District Judge Etah reported 1982 All Rent Cas 562 : (1982 UPLT NOC 69). learned Judge held that under VIII, Rule 10 it was not imperative to pronounce the judgment on the of plaint on the ground that no written statement has been filed by the Defendant. He held as under:

Therefore, reading Order VIII, Rule 10, CPC along with Order VIII, Rule 5, CPC it seems that even though the filing of written statement has been made obligatory

and the Court has now been empowered to pass a judgment on the basis of the plaint on the ground that no written statement has been filed by the Defendant still, the discretion of the Court has been preserved and despite the non-filing of the written statement the Court may pass any other order as it may think fit (as laid down in Order VII Rule 10) or the Court may in its discretion require any particular fact mentioned in the plaint to be proved as laid down in Order VIII, Rule 5 Sub-rule (2), Code of Civil Procedure.

24. The learned Counsel for the applicant relied upon Mahanth Ram Das Vs. Ganga Das, . The Supreme Court held that where the Court had fixed time peremptorily, the Court still retained the right to extend the time. Even after the period fixed had run out. The Supreme Court further observed as under (at p. 883):

How undesirable it is to fix time peremptorily for a future happening which leaves the Court powerless to deal with events that might arise in between, it is not necessary to decide in this appeal. These orders turn out, often enough to be inexpedient. Such procedural orders, though peremptory. (conditional decrees apart) are in essence, in terrorem, so that dilatory litigants might put themselves in order and avoid delay. They do not, however, completely estop a Court from taking note of events and circumstances which happen within the time fixed.

The case of Mahant Ram (supra) was followed by a Full Bench of our Court in Gobardhan Singh Vs. Barsati, The Full Bench held that where Court had fixed a particular time for doing an act if sufficient cause was made out the Court had jurisdiction to extend that time even though the period had expired. We thus find that the Court below was not justified in refusing adjournment to the Defendant for filing the written statement when the District Government Counsel had put in appearance and by his applications gave out the intention of his client to contest the suit and further the fact that the written had already been prepared and sent to the authorities concerned for verification.

25. Even assuming that the provisions of Order VIII, Rule 10 applied, a case where a huge sum was claimed by the Plaintiff and the Defendant had given out his intention to contest the suit, it was not proper for the Civil Judge to have pronounced the judgment without applying his mind to the fact of the case of the Plaintiff. In our opinion the Government pleader had not been negligent in prosecuting the suit, not the time sought by him was unreasonable. The Civil Judge in such a case should have allowed the Government pleader a reasonable time to file the written statement. Order XXVII, Rule 5 does not fetter the discretion of the Court for granting time to file written statement, nor the discretion given to it by Section 148 and 151 of the Code. The Court retains its power to allow the Government reasonable time to file the written statement after the Government pleader had appeared and given out his intention to contest the suit. Even if in the opinion of the Civil Judge the Defendant was delaying the proceeding it should have proceeded to examine the case of the Plaintiff on merits before passing a decree. It has been held in Smt. Phuljhari Devi v. Mithai Lal reported in

Smt. Phuljhari Devi Vs. Mithai Lal and Others, , that so far as possible the ex parte decree should be avoided. The Court must exercise restraint and its discretion must be based on relevant circumstances before it should proceed to pronounce a judgment without going into the merits of the Plaintiff's claim, In the circumstances of the present case we are of the opinion that the Court below was not right in pronouncing the judgment under Order VIII Rule 10, CPC without going into the merits of the Plaintiff's claim.

26. It may be pointed out that the State Government seeks unnecessary. Adjournments due to lethargy and indecisiveness of its officers. It should be borne in mind that the Government is not on a different footing than other litigants, except as provided under Order XXVII. The other provisions of the Code are applicable to it as to any other litigant. The Court below is directed to dispose of the suit as expeditiously as possible.

27. In the result, the present appeal is allowed. The judgment and decree passed by the Court below is set aside and the case is remanded to it for fresh trial in accordance with law and observations made above. The parties are directed to bear their own costs.