
(2015) 04 MP CK 0008
In the Madhya Pradesh High Court
Case No : Writ Petition No. 13975/2013

Tukaram

APPELLANT

Vs

Fulsingh and Others

RESPONDENT

Date of Decision : 06-04-2015

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 12 Rule 6, Order 5 Rule 8, Order 8 Rule 10,
Order 8 Rule 5
Constitution of India, 1950 — Article 227
Evidence Act, 1872 — Section 58

Citation : (2015) 04 MP CK 0008

Hon'ble Judges : S.R. Waghmare, J.

Bench : Single Bench

Advocate : O.P. Sharma, Learned Counsel, for the Appellant; Kamlesh Mandloi,
Learned Counsel, Advocates for the Respondent

Final Decision : Dismissed

Judgement

S.R. Waghmare, J.—By this petition under article 227 of Constitution of India, the petitioner Tukaram Barela and others were aggrieved by the order dated 08/10/2013 passed by Civil Judge Class II, Ketiaya, District Badwani, M.P, closing the right of the defendant to lead evidence yet the Court did not finally decide the matter in terms of Order 8 Rule 10 of the C.P.C.

2. Briefly stated the facts of the case are that the petitioner had filed a Civil Suit for declaration and permanent injunction and the defendant had failed to file Written Statement and the Court taking action under Order 8 Rule 10 of the C.P.C. closed the right of the defendant to lead evidence and listed the matter for passing of final decision. However, the plaintiff had also filed an application under Order 39 rule (1)(2) of C.P.C. to which the defendants filed reply and in the reply it was also stated by the respondent that the closure of right to defend and listing the matter under Order 8 Rule 10 of C.P.C. was contrary to the provisions of law since the Court had failed to pass the order treating the matter to the ex-parte and even in the matter of injunction, and right of cross examination could

not be closed. And considering the application the learned Judge of the lower Court has passed the impugned order dated 08/10/2013 and held that even if the Written Statement had not been taken on record in the reply to the application under Order 39 Rule (1)(2) of the C.P.C., the pleadings of the plaintiff had been controverted and hence it would be appropriate to grant opportunity of cross examination of the witnesses to the defendant and passed the order granting further date for hearing. Being aggrieved by the said order the petitioner has filed the present petition under rule 227 of Constitution of India.

3. Counsel for the petitioner vehemently urged the fact that under Order 8 Rule 10 of the C.P.C., clearly mandates that:

"when the Written Statement has not been presented within the time permitted or fixed by the Court, as the cause 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". Counsel stated that under the circumstances when the Court had closed the right of the defendant/respondent then merely granting him the right of cross examination was not the right course under the provisions of law. The Court should have proceeded to pass the judgment since the available rights had to be given to the plaintiff because his pleadings had remained in-controverted and placing reliance on *Om Prakash Gupta Vs. Union of India (UOI) and Another*, Counsel stated that the Apex Court had clearly allowed that when the defendant was granted time to file Written Statement and it had not been filed for more than two years, order granting further time to the party was injustice and the application under Order 8 Rule 10 mandates that Court had to pronounce the judgment against the defendants and the suit had to be allowed. Counsel for the plaintiff petitioner urged vehemently that similar application had been moved by the plaintiff in the present case also which has not been considered and right to cross examination had been granted to the defendant which is contrary to the spirit of Order 8 Rule 10 C.P.C. and the provisions of law. Counsel prayed that the impugned order be set aside.

4. Per Contra, Counsel for the respondents has vehemently urged the fact that merely because the right to defendant had been closed because the Written Statement had not been filed the plaintiff had right to resist/traverse the facts averred in the plaint and especially when there are disputed facts the court should not be in a hurry to pass judgment under Order 8 rule 10 of C.P.C. Counsel for the respondent placed the reliance on *Balraj Taneja and Another Vs. Sunil Madan and Another*, whereby the Apex Court held thus:

"Having regard to the provisions of O.12, R.6; O.5, R.8, specially proviso thereto; as also S.58 of the Evidence Act, the Court has not to act blindly upon the admission of a fact made by the defendant in his Written Statement nor the Court should proceed to pass judgment blindly merely because a Written Statement has not been filed by the defendant traversing the facts set out by the plaintiff in the plaint filed in the Court. In a case, specially where a Written

Statement has not been filed by the defendant, the Court should be a little cautious in proceeding under O.8, R.10, C.P.C. Before passing the judgment against the defendant it must see to it that even if the facts set out in the plaint are treated to have been admitted, a judgment could possibly be passed in favour of the plaintiff without requiring him to prove any fact mentioned in the plaint. It is a matter of Court's satisfaction and, therefore, only on being satisfied that there is no fact which need be proved on account of deemed admission, the Court can conveniently pass a judgment against the defendant who has not filed the Written Statement. But if the plaint itself indicates that there are disputed questions of fact involved in the case regarding which two different versions are set out in the plaint itself, it would not be safe for the Court to pass a judgment without requiring the plaintiff to prove the facts so as to settle the factual controversy. Such a case would be covered by the expression "the Court may, in its discretion, require any such fact to be proved" used in sub-rule (2) of Rule 5 of Order 8, or the expression "may make such order in relation to the suit as it thinks fit" used in Rule 10 of Order 8." Counsel for the respondent fully supported order of the Court below and stated that the petition was without merit and the same be dismissed.

5. On considering the above, I find that although the argument of the Counsel for the petitioner is attractive on the first blush, it cannot be acceded to primarily because substantive justice must be done between the parties and in the present case for some reasons or other the defendant was delayed in filing the Written Statement, which is also available on record. However the Court has already denied him the right to defend by closing his right to file written statement but the actual evidence against the defendant could have not been taken by the Court ex-parte. Besides placing reliance on Balraj Taneja (supra); I find that Apex Court has also held that it would not be safe for the Court to pass a judgment without requiring the plaintiff to prove the facts so as to settle the factual controversy and the same is covered by the expression "the Court may, in its discretion, require any such fact to be proved as used in sub-rule (2) of Rule 5 of Order 8 of C.P.C." And in this light I find that the petition could not be allowed; besides such a stand would also be against the principles of natural justice; and principles of audi alteram partem; undoubtedly, the right has accrued to the plaintiff but the defendants also should not be left remedy less. In view of the above, I find that the petition deserves to be dismissed on this ground alone.

6. Therefore, with the aforesaid observations, the petition is dismissed as being without merit.