

JOHN
TELEN KOM

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**IN THE HIGH COURT OF MANIPUR
AT IMPHAL**

Mat. App.No.03 of 2021

Mrs. Rahamjan, aged 47 years W/o late Thoiba D/o (Late)
Md. Chaoba of Moijing Thoubalmayum, Khongok, Thoubal
Moijing PO & PS Thoubal, Thoubal District, Manipur Pin
No.795138.

.... Appellant

-Versus-

Mrs. Sana @ Shana aged about 37 years, W/O (Late) Md.
Thouba of Thoubal Kiyam Litanpok, Thoubal Moijing, PO &
PS Thoubal, Thoubal District, Manipur Pin No.795138.

... Respondent

BEFORE
**HON'BLE MR. JUSTICE M.V. MURALIDARAN
HON'BLE MR. JUSTICE A. GUNESHWAR SHARMA**

For the appellants	::	Mr. Md. Jalaluddin, Sr. Adv. assisted by Mr. Juno Rahman, Adv.
For the Respondents	::	Mr. Y. Daljeet, Adv. assisted by Ms. Amee, Adv.
Date of Reserved	::	09.10.2023.
Judgment & Order	::	30.10.2023

JUDGMENT AND ORDER

(CAV)

(M.V. Muralidaran, J)

[1] Heard Mr. Juno Rahman, learned counsel assisting Mr. Md. Jalaluddin, learned senior counsel for the appellant and Ms. W. Amee learned Jr. Counsel to Mr. Y. Daljeet, learned counsel for the respondent.

[2] This appeal is filed by the appellant against the judgment and decree dated 12.4.2021 passed by the learned Judge, Family Court, Thoubal in Mat. (Decl.) Suit No.7 of 2020 invoking the provision of Order 8, Rule 10 of the Code of Civil Procedure, 1908.

[3] The appellant is the defendant and the respondent is the plaintiff in the suit.

[4] The respondent filed Mat. (Decl.) Suit No.7 of 2020 for declaration to declare that she is the legal wife of the deceased Md. Thoiba and to declare that she is entitled to receive all monetary benefits on the death of Md. Thoiba. Since the appellant has not filed the written statement, the learned trial Judge, exercising power under Order 8, Rule 10 of CPC, decreed the suit. Aggrieved by the said decree and judgment, the appellant has filed the appeal.

[5] Mr. Juno Rahman, learned counsel assisting Mr. Md. Jalaluddin, learned senior counsel for the appellant submitted that after the receipt of summon in the suit, the appellant had engaged Mr. A. Jatishwor Singh as counsel to defend her case and despite the appellant's request for filing written statement, the learned counsel has not filed the written statement. Further, the appellant has also no knowledge or information that her counsel failed to file the written statement or even prayed for time for filing the written statement. Accordingly, the Family Court, in exercise of power under Order 8, Rule 10 CPC disposed of the suit on 12.4.2021 without giving proper chance or notice to the appellant for the failure of filing the written statement by her counsel. There was no fault on the part of the appellant in filing the written statement.

[6] The learned counsel further submitted that the learned Judge failed to examine and consider the factum of the existence of the four issues and the appellant who is legally married wife and has also failed to consider the fact that the appellant and the four issues was getting maintenance from Md. Thoiba while he was in service at the rate of Rs.2,200/- per month. The question of getting financial benefits and pensionary benefits by the appellant arising out of the death of her husband is highly permissible under the law, as passed by the Family Court in Cril. (M) Case No.51 of 2006.

[7] The learned counsel next submitted that the respondent has no right to claim to receipt pensionary benefits arising out of the death of Md. Thoiba. Therefore, the judgment and decree dated 12.4.2021 passed by the learned trial Judge is illegal and needs to be set aside. The learned counsel submitted that the appellant is now willing to file her written statement before the Family Court for fresh trial. Further, in the suit, the respondent has failed to implead the issues of the appellant and Md. Thoiba. Since the suit is bad for non-joinder of necessary parties, the impugned judgment and decree is void and the same is liable to be set aside for fresh trial for maintaining justice between the family members of the deceased Md. Thoiba.

[8] The learned counsel for the appellant submitted that because of lock down situations, the appellant could not receive the certified copy of the judgment and decree and she received the copy of the judgment and decree only on 4.8.2021 and immediately thereafter, the appellant has filed the appeal. Therefore, there is no delay in filing the appeal. Thus, a prayer has been made to set aside the judgment and decree of the trial Judge and give a chance to the appellant to file the written statement in the interest of justice.

[9] Per contra, Ms. W. Amee learned Jr. Counsel to Mr. Y. Daljeet, learned counsel for the respondent submitted that the appellant has

intentionally avoided to appear and file the written statement before the Family Court and that the appellant has already enjoyed the retirement benefit of the death of Md. Thoiba. Just after the death of Md. Thoiba, the appellant instead of appearing before the Family Court, went to the BSNL office for finalisation of the pension benefits of the deceased Md. Thoiba. After knowing the act of the appellant, the respondent submitted a representation on 10.9.2020 to the concerned authority of the BSNL for kept in abeyance of the process of pension and for disbursement of the retirement benefits on the death of Md. Thoiba until the final disposal of Mat. (Decl) Suit No.7 of 2020. However, at the pressure of the appellant, the authorities of the BSNL had sanctioned family pension benefits to the appellant vide PPO dated 10.2.2021.

[10] The learned counsel further submitted that the said factum of sanction of family pension to the appellant was brought to the notice of the Family Court and the Family Court directed both the appellant and the respondent to appear before the Court for amicable settlement. However, no amicable solution arrived at between the parties. On the same day, the appellant was also made known to the fact that she has not filed the written statement. After that, the appellant never appeared nor filed the written statement in spite of several adjournments through her counsel.

[11] The learned counsel next submitted that the appellant ought to have filed the written statement on or before 4.1.2021, but never filed her written statement. In fact, the Family Court fixed the date on 6.1.2021 for filing the written statement. Thereafter also, when the matter were fixed on 20.1.2021, 3.2.2021, 20.2.2021, 22.02.2021, 2.3.2021 and 6.4.2021, the appellant has not filed the written statement, nor the appellant sought leave to file the written statement after the lapse of the statutory period. It is not necessary for the Family Court to inform the appellant before passing the order under Order 8, Rule 10 CPC. Since the judgment and decree of the Family Court is within the four corners of the provisions of law, the same needs no interference. Thus, a prayer has been made to dismiss the appeal.

[12] This Court considered the rival submissions and also perused the materials available on record.

[13] According to the appellant, the non-filing of the written statement is because of her counsel not intimating the date of hearing and also despite the request made by her for filing the written statement, the learned counsel has not filed the written statement. Thus, there was no fault on the part of the appellant in not filing the written statement within the statutory period.

[14] On the other hand, the respondent contended that during the initial hearing of the suit, both the appellant and the respondent appeared before the Family Court for amicable settlement and, on the said date of appearance, the appellant was also made to know the fact that she has not filed the written statement. No settlement was arrived at between the parties. Thereafter also, the appellant has failed to appear before the Family Court, nor has he taken efforts to file the written statement through her counsel.

[15] The learned Judge, in his judgment, recorded as under:

“On perusal of records, the present case was filed by the Plaintiff on 09.09.2020. Summons to the Defendant was properly served and the Defendant entered appearance only on 07.10.2020 through Ld. Advocate A.Jatishwor Singh. Thereafter, the present case was listed on 27.10.2020, 24.11.2020, 09.12.2020, 06.01.2021, 20.01.2021, 20.01.2021, 03.02.2021, 20.02.2021, 22.02.2021, 02.03.2021 and 06.04.2021 consecutively. However, even after the lapse of maximum period of 90 days as stipulated in Order VIII Rule 1 of the Code of Civil Procedure, 1908, the written statement of the Defendant was not filed in all these dates nor did the Defendant approach this Court for granting leave to file written statement after the lapse of statutory period. Accordingly, after hearing the Ld. Counsel for the Plaintiff, this matrimonial declaratory suit is disposed of in exercise of the powers conferred under Order VIII Rule 10 of the Code of Civil Procedure, 1908”

[16] As per Order 8, Rule 10 CPC, if any person who is required to file a written statement does not do so within the time period prescribed or permitted by the Court, the Court shall pronounce the judgment against him or issue an order, and a decree shall be drawn up on the pronouncement of the judgment. The provision also makes it clear that the Court cannot extend the 120 days duration prescribed under Rule 10 under any circumstances for commercial disputes.

[17] The question as to the nature of Rule 10 was answered in various Court decisions. For suits involving non-commercial suits, Rule 10 is merely a directory provision and not mandatory. That is, in exceptional circumstances, the time period prescribed in Rule 10 can be extended. If the defendant does not file a written statement, the Court will pass *ex parte* decree against the defendant. The Court, in its discretion, can also grant adjournments for special reasons before passing an *ex parte* decree, but it cannot be granted more than three times.

[18] Admittedly, in the case on hand, the learned trial Judge, after the appellant entered into appearance on 7.10.2020, has given three adjournments which covered the statutory period of 120 days for filing the written statement. It also appears that thereafter also the learned trial Judge adjourned the suit for several occasion and, on 6.4.2021 finally heard the matter and passed judgment and decree on 12.4.2021.

[19] The plea of the appellant is that her counsel has not taken effective steps for filing the written statement within the statutory period despite of the appellant's request. When the appellant appointed her counsel to defend her case, she should be more vigilant in following the proceedings of the suit and she cannot blame her counsel for not filing the written statement. At the same time, it is also the duty of the representing counsel for the party to explain the existence of the provision to file the written statement within the statutory period to the defendant concerned. Whether or not, on the fault of the appellant or her counsel, the written statement was not filed is not a debate in the instant case. On the other hand, the question is whether the appellant has intentionally failed to file the written statement within the statutory period is the question to be considered in the instant case, coupled with the status of the parties as also the nature of the claim made in the suit.

[20] In the present case, the respondent has filed the suit to declare her as legally wedded wife of Md. Thoiba alleging that Md. Thoiba divorced the appellant on 5.1.2006 by giving three talaks before many local heads and villagers as per the customary and three months after the divorce, a marriage was solemnized between the respondent and Md. Thoiba on 15.3.2006 according to Muslim customary and the respondent begotted three daughters born through Md. Thoiba. Md. Thoiba was

suffering from Cancer and died on 24.5.2020 while serving as Mazdoor on regular basis posted at Power Plant (Telegom Bhawan), Imphal. According to the respondent, in the service records in nominee column, the respondent's name mentioned as wife.

[21] On the other hand, the appellant contended that she was married with Md. Thoiba in the year 1985 by holding Nikah and from the wedlock, four children were born. After the birth of last child, Md. Thoiba started neglecting the appellant and he started to keep an extra-marital relationship within other woman. Unable to tolerate, in the month of January, 2006, the appellant was turn out of her husband house and went to her parental house with her minor children.

[22] The appellant admitted the marriage of Md. Thoiba with the respondent during April, 2006. Faced with the financial situation, the appellant and her minor children filed Cril. (M) Case No.51 of 2006 for maintenance and, by the order dated 19.10.2006, the said case was disposed of thereby directing Md. Thoiba to give Rs.2,200/- per month as maintenance from the month of October, 2006. According to the appellant, she is entitled her admissible financial benefits and pensionary benefits arising out of the death of her husband Md. Thoiba.

[23] Admittedly, the talak between the appellant and Md. Thoiba alleged by the respondent is to be proved after a full-fledged trial. Similarly, the Nikah between the respondent and Md. Thoiba is also to be proved only by way of trial. The respondent admitted that during the pendency of the suit, the appellant has withdrawn the pension and terminal benefits under PPO dated 10.2.2021 from the Department of Telecommunications, Office of the Joint Controller of Communications Accounts North Eastern Telecom Circle-II, BSNL, OCB Exchange Building, Dimapur. Thus, this Court is of the view that there are triable issues involved in the suit. Due to non-filing of the written statement, the trial Court exercising power under Order 8, Rule 10 CPC cannot decree the suit as prayed for by the respondent.

[24] Considering the facts and circumstances of the given case and taking note of the fact that the present suit is non-commercial suit, coupled with the fact that triable issues are involved and also the prayer made in the suit, this Court is inclined to treat the present suit as an exceptional one.

[25] Time and again, the Apex Court emphasized the exceptional circumstances of a case as a valid reason for granting permission for filing a written statement after the expiry of the statutory period. Similarly, in a catena of judgments, the Apex Court interpreted the provisions of the CPC which protect the right of the defendant and also provide for the speedy

delivery of justice to the plaintiff. The Apex Court has explicitly interpreted the provisions relating to commercial suits and non-commercial suits. In the case of non-commercial suits, some flexibility is allowed under the provisions, but only in exceptional cases. As stated supra, the pleadings of the parties would establish that the present suit is exceptional one. The reason for not filing the written statement within the statutory period has been explained by the appellant/defendant.

[26] It is pertinent to note that, in a case, especially where a written statement has not been filed within the statutory period, the Court should be a little cautious in proceeding under Order 8, Rule 10 CPC. Before passing the judgment against the defendant exercising power under Order 8, Rule 10 CPC, 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 the 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.

[27] In the instant case, as stated supra, the respondent sought for declaration to declare her as legally wedded wife of Md. Thoiba and to declare that she is entitled to receive all the money benefits on the death of Md. Thoiba. The factum of marriage between the appellant and Md. Thoiba as also the children born from the wedlock are admitted by the respondent. When the respondent sought declaration relief to declare that she is the legally wedded wife of the deceased and also entitled to receive the monetary benefits on the death of Md. Thoiba, she ought to have impleaded the children born from the wedlock of the appellant and Md. Thoiba as defendants in the suit. Similarly, the department in which the deceased was working has also to be added as defendant in the suit for proper adjudication. In the instant case, admittedly, the respondent has failed to do so.

[28] Therefore, in the peculiar facts and circumstances of the case and also in the interest of justice, this Court is inclined to give one more chance to the appellant to file her defence by way of written statement within the stipulated time. Considering the nature of claim made in the suit and also the relationship of the parties, if further time is granted to the appellant for filing written statement, no prejudice would be caused to the

respondent, as the respondent herself admitted that the appellant has withdrawn pension and terminal benefits from the Department. If the appellant files the written statement and based on the pleadings, trial commenced and concluded, the real controversy between the respondent and the appellant would come to light and also the Court of law would render justice to the parties. Therefore, this Court is of the view that the judgment and decree of the Family Court is liable to set aside and remanded the matter back to the Family Court.

[29] For all the reasons stated above, while setting aside the judgment and decree dated 12.4.2021 passed in Mat. (Decl) Suit No.7 of 2020 on the file of Family Court, Thoubal, the case is remanded back to the Family Court, Thoubal with liberty to the appellant to file written statement within fifteen days from the date to be fixed by the Family Court upon the receipt of the copy of this order and thereafter the Family Court shall decide the *lis* between the parties on merits and in accordance with law expeditiously. It is made clear that this Court has not delved into the merits of the *lis* in this order. Only in the peculiar facts and circumstances, this Court passed the aforesaid order. Therefore, this order need not be cited as precedent in any other case. No costs.

JUDGE

JUDGE

FR/NFR

John Kom