

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO.2658 OF 2012
ALONGWITH
NOTICE OF MOTION NO.1002 OF 2010
IN
SUIT NO.92 OF 1982

Harikishan Vedprakash Agarwal & Anr. ... Plaintiffs
Vs.
Burjor Joshi & Ors. ... Defendants
Ms. Amreen Mansuri, Adv. i/b. D R Jhuriya, Adv. for plaintiffs.
Mr. Homi J Chibber, Defendant No.7 present in person.

CORAM : MRS. ROSHAN DALVI, J.
DATE : 10th April, 2015.

ORDER

1. Counsel on behalf of the plaintiffs, upon instructions, applies for time four weeks time on the ground that the advocate for the plaintiff is bed ridden. The suit is of 1982. It would not be proper to adjourn this Notice of Motion for such length of time when the plaintiffs' own evidence is pending. It would be counterproductive to the rights of the plaintiffs themselves. The plaintiffs are informed that the Court may take up this matter on Monday, 13th April, 2015 so that counsel on behalf of the plaintiffs who appears today may address the court. However, the plaintiffs do not desire to have the matter argued on 13th April, 2015. Hence the Notice of Motion is required to be heard.

2. The plaintiffs have taken out the above Notices of Motion, in the suit which has been filed in 1982, for passing exparte decree and refusing opportunity to the defendant to cross examine the plaintiff's witness. The defendants having been served the writ of summons, have appeared but not filed any written statement.

Defendant No.4 has expired. His heirs have been brought on record as defendants Nos.4(a) to 4(c). The other defendants have not filed any written statement. They claim that defendant No.4 filed written statement on behalf of all other defendants. The plaintiffs refute this contention. The defendants would be entitled to adopt the written statement of any other defendant instead of filing a similar written statement themselves. However, such application is not shown to have been made yet. Hence for want of their written statement the defendants, other than defendant No.8, would not be able to make out any case by themselves. Under such circumstances they would not be entitled to file their affidavit of evidence. However, since the defendants have appeared, the defendants have every right to cross examine the plaintiff's witness to show to the Court the truth or otherwise of the plaintiff's claim. That right of the defendants cannot be taken away by non-filing of their WS. The Court would have to see the case of the plaintiffs proved by the plaintiffs or unproved by the plaintiffs or disproved by the defendants for which the plaintiffs evidence would be required to be tested by their cross examination.

3. The plaintiffs have applied for exparte decree against defendant for want of WS. That would be passed upon seeing plaintiff's evidence including the plaintiff's cross examination, but without any further evidence of the defendant and without seeing any independent case of the defendants.

4. The plaintiffs have tendered a compilation of an earlier Notice of Motion of 2009 in this suit and orders passed in this suit as also in Contempt Petition as also some judgments. Hence the compilation of the plaintiff will have to be considered along side the

law relating to recording of evidence.

5. To consider to grant the relief of *exparte* decree to the plaintiff or the judgment in favour of the plaintiff the provisions of CPC would have to be seen under **Order 9 Rule 6(a)** if the summons is duly served and the defendant fails to appear the Court may make an order that the suit may be heard *exparte*.

This would be when the defendant never appears in Court upon the service of the writ of summons at all and never files his written statement. The court has no means of knowing what is the defence of the defendant. The Court would place the suit on board for *exparte* decree and pass the *exparte* decree upon uncontroverted averments in the plaint.

6. Under **Order 8 Rule 5 (2)** of the CPC, if the defendant has not filed a pleading (which is the written statement) the Court can pronounce judgment upon the facts contained in the plaint but, the Court may require such facts to be proved.

This would be the case when the defendant appears upon the service of the writ summons but does not file any written statement. The Court can pronounce the judgment but the judgment may be pronounced upon the facts stated by the plaintiff being proved. To prove such facts the plaintiff must file an affidavit of evidence and an affidavit of documents along with his documents. The Court would consider the oral and documentary evidence. The defendant has appeared in the suit but the defendant has not filed any written statement. Hence the defendant shall have to be heard but shall not be entitled to place on record his independent case or his evidence in support thereof. He shall only assist the Court against the plaintiff's

case. Hence for the proof of facts by the plaintiff in his affidavit of evidence the defendant may cross examine the plaintiff. It is only then that the facts stated in the affidavit would stand proved since the defendant had appeared in the suit.

7. **Order 8 Rule 10** is much the same. Where defendant does not file written statement within time fixed by the Court, the Court shall pronounce judgment against him.

This would be done by the Court upon suing the plaintiff's case in his pleadings and evidence and the defendant's assistance by arguing and cross examining the plaintiff, without more.

8. Consequently when the defendant has appeared an ex parte decree is never passed. The judgment is pronounced. The judgment may be upon the facts as stated in the plaint, without more. The judgment may also be upon the facts stated in the plaint which are directed to be proved. For carrying out such direction the defendant must have the right of cross examination of the oral evidence led by the plaintiff.

9. This is one such case. The defendants have been served. Some of the defendants have expired. Their heirs have been brought on record. Some other defendants have expired. Their heirs were already on record and continued on record. A group of these defendants is defendant Nos.1 to 7. One of these defendants has filed his written statement. The other defendants could have adopted that written statement instead of filing a similar written statement. The other defendants have not filed any separate written statement. It appears that they have not applied for adopting the written statement

who has filed the written statement. The Court may have, in the interest of justice, allowed any defendant to adopt the written statement of any other defendant and decide the disputed question and the issues that arise between the parties on merits or even allow them to file their separate written statements at any time.

10. In the case of **Vimalkumar Nathmal Goenka Vs. Vinod Kumar Nathmal Goenka AIR 1999 BOMBAY 51** it has been held that written statement of the defendant can be accepted in time before pronouncing the judgment – even after the ex parte hearing of the suit concluded and the date was fixed for delivery of judgment.

11. The defendants desire to cross examine the plaintiff's witness. The defendants have, in fact, cross examined the plaintiff's witness extensively. 153 questions have been asked spanning 66 pages of the cross examination.

12. The plaintiff would now contend that the defendant cannot cross examine the plaintiff and the Court must pronounce the judgment in favour of the plaintiff granting a decree as prayed by the plaintiff without giving the defendants the right of cross examination. This cannot be countenanced. This would tantamount to not giving the defendants the right of natural justice though they have appeared in the suit consequent upon the summons being served. This would result in complete failure of justice. When the suit has proceeded to this extent, the cross examination of the plaintiff's witness must be completed and so much evidence which would come on record would have to be appreciated by the Court.

13. Of course, those defendants who have not filed any written statement and who have not adopted any written statement of any defendant shall not be allowed to make out their own case and to prove it because no such case is shown on pleadings. All that the defendants would be entitled to is to cross examine the plaintiff to disprove the case of the plaintiff which shall be considered on its own merits.

14. It has been held in the case of **Pt. Gopi Charan Bajpai Vs. Pt. Ram Prasad Awasthi AIR 1957 ALLAHABAD 283 on page 183** by the Allahabad High Court thus:

A party has two rights, the right to file a written statement and the right to appear at the hearing. A party's right of appearance at the trial is not the same as a party's right to file a written statement and it does not, therefore, follow, that if the right of a party to file a written statement has in some way been affected, then his right of appearance also is thereby affected.....

A party has the right to lead evidence on the issues framed in the case even though there has been an order, earlier in the case, to the effect that proceedings in the case would be ex parte, provided of course there has not been an ex parte decree already.

15. This was in a suit which was directed to proceed ex parte for want of the written statement of the defendant. The Court referred to the earlier judgment of that Court observing:

“An order directing that a suit should proceed against a defendant ex parte does not preclude him from appearing on a subsequent date before the suit is decreed and offering to file a written statement and to produce his witnesses.

This right of the defendant has been partly curtailed in the judgment

in the case of **Siai Sinha Vs. Shivadhari Sinha AIR 1972 PATNA 81** in which it was held that:

When a suit is not placed for ex parte hearing, a defendant can take part in the hearing of the suit even without filing a written statement and cross examine the plaintiff's witnesses, as non-filing of the written statement will not amount to admission of all the facts pleaded in plaint.

In that case the suit was not directed to proceed ex parte. The Court observed :

The position of law in such a case is that a defendant, even take part in the hearing of the suit. He may cross-examine the plaintiff's witnesses to demolish their version in examination-in-chief. Without written statement, however, he cannot be permitted to cross-examine the witnesses on questions of fact which he himself has not pleaded nor can he be allowed to adduce evidence on questions of fact which have not been pleaded by him by filing any written statement.

It thereafter clarified further that,

It should be further made clear that if a defendant files a written statement and does not controvert the allegations in the plaint then tacitly the fact not controverted is said to be admitted, but if he does not file written statement, it cannot be said that he has admitted all the facts pleaded by the plaintiff [see for reference a Bench decision of the Calcutta High Court in J. B. Ross and Co. v. C. R. Scriven, ILR 43 Cal 1001= (AIR 1917 Cal 269 (2))]. Keeping this position of law clearly in mind, the court below is directed to permit the petitioner to take part in the proceedings in the suit at the time of the hearing.

16. Defendant No.8 is an independent and separate defendant. Defendant No.8 has filed its written statement. Defendant No.8 can cross examine the plaintiff's witness. Defendant No.8 would be entitled also to file its affidavit of evidence, affidavit of documents as also the documents themselves and lead oral and documentary

evidence.

17. The plaintiff has tendered a bulky compilation of all that has transpired in the suit and certain typewritten copies of judgments. Though the Court has gone through the compilation, it is seen most of what has been contended in it is not relevant to decide the above notices of motion. The plaintiff has annexed judgments in Land Acquisition Reference, Contempt Petition and suits. Only so much as is relevant would be considered. The plaintiff has exhibited an order by *Director of North Eastern Judicial Officers' Training Institute* without showing the names of the parties or the citation relating to Order 8 Rule 1 of the CPC. Since the citation is not shown the order cannot be considered except as the argument of the plaintiff. The period of time for filing written statement has been considered therein. However, that does not come up for consideration because the defendants have not sought to file any written statement.

18. In the case of **Bal Gopal Maheshwari & Ors. Vs. Sanjeev Kumar Gupta, Supreme Court in Civil Appeal No.7279 of 2013** which relates to striking of a defence for failure to pay the rent does not apply to this case.

19. The judgment in the case of **Shri Mahesh Narain Maheshwari & Anr. Vs. M/s. J S D Properties & Ors., High Court of Allahabad in Civil W P No.54790 of 2007**, relates to the period of time required to be granted to take written statement on record if the written statement is not filed within the period prescribed under Order 8 Rule 1 of the CPC.

20. Whilst observing that the procedure is the handmaid of justice and the Court must always be anxious to do justice and to prevent victories by way of technical knockouts, the Court observed the length to which it can go to grant time to file written statement. The observations in that judgment also strictly do not apply to this case, except perhaps the above observation which would apply to all matters of procedure. Similar in the case of **R. N. Jadi & Brothers Vs. Subhashchandra (2007) 6 SCC 420** in para 14 of which it is observed : “Processual law is not to be a tyrant but a servant, not an obstruction but an aid to justice. Procedural prescriptions are the handmaid and not the mistress, a lubricant, not a resistant in the administration of justice.” This is though the rule is “couched in a negative language implying mandatory character.”

21. In the case of **Rajendra Kumar Yadav Vs. Shobha Rani Yadav, High Court of Allahabad in Writ C No.40511 of 2014**, also relied upon by the plaintiffs, the Court considered the power to take into account the defence of the defendants.

However in this case the defendant Nos.4 and 8 filed written statement. Those defendants can lead evidence, produce documents and prove the issues the onus of which would lie upon them. The other defendants must rest only with cross examining the plaintiff to disprove the case of the plaintiff, if at all, and to argue on the evidence led by the plaintiff.

22. Consequently the only order that can be passed in the above notices of motion is that the plaintiff's witness shall be liable to be cross examined by the defendants who appeared in the suit.

23. Since the plaintiff's advocate is now stated to be bedridden, the commission shall proceed in June, 2015. The parties shall appear before the same commissioner on 9th June, 2015 at 5 pm and thereafter on fixed by the commissioner.

24. Since extensive cross examination is already led the defendants shall continue and complete any further cross examination within 2 sittings of the Court Commissioner failing which they shall pay the entire cost of the commission, the fees of the commissioner as charged by the commissioner and the costs to the plaintiff fixed at Rs.10,000/- per day of commission.

25. Once the evidence of the plaintiff is closed the suit shall be placed on board for arguments.

26. Both Notices of Motion are disposed of accordingly.

(ROSHAN DALVI, J.)