

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.18506 of 2012

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JITENDRA PRASAD SINGH, REGISTERED GOVERNMENT CONTRACTOR
AND SUPPLIER ROAD AND BUILDING, R/O MOHALLA LAL KATHI
COMPOUND NEAR CIVIL LINES, P.S. CIVIL LINES, DISTRICT GAYA

.... PETITIONER/S

VERSUS

1. THE STATE OF BIHAR THROUGH COLLECTOR, GAYA DISTRICT GAYA
2. THE ENGINEER-IN-CHIEF-CUM-SPECIAL SECRETARY-CUM-ADDITIONAL COMMISSIONER, RURAL ENGINEERING ORGANIZATION, RURAL DEVELOPMENT DEPARTMENT, BIHAR, PATNA, VISHWASARAIYA BHAWAN, PATNA.
3. THE WORK COMMISSIONER, VILLAGE- ENGINEERING ORGANIZATION RURAL DEVELOPMENT DEPARTMENT.
4. THE CHIEF ENGINEER, RURAL DEVELOPMENT, R.E.O. DEPARTMENT BIHAR, VISHWASWARAIYA BHAWAN, PATNA.
5. THE SUPERINTENDING ENGINEER, R.E.O. MAGADH CIRCLE, GAYA, NEW AREA BISAR, P.S. CIVIL LINES, P.O. H.P.O. GAYA, DISTRICT GAYA.
6. THE EXECUTIVE ENGINEER R.E.O. WORK DIVISION, GAYA, AT VIKAS BHAWAN, COLLECTORIATE, GAYA.

.... RESPONDENT/S

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Appearance:

For the Petitioner/s : Mr. VIKAS KUMAR, ADV.

For the Respondent/s : Mr. DEVENDRA KR SINHA, AAG-2

Mr. PRAMOD KUMAR SINHA, AC to AAG-2

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CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI

CAV ORDER

Date: 08-01-2016

Petitioner/plaintiff has challenged the order dated 16.08.2012 passed by Sub-judge-IVth, Gaya in Money Suit No.2 of 2007 whereby and whereunder the learned lower court had admitted evidence of one DW Narendra Kumar as well as further provided opportunity to respondent/defendant to adduce evidence.

2. Shorn of unnecessary details, the facts of the case reveals institution of money suit at the end of the petitioner/plaintiff asking for following reliefs.

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- A. A money decree for Rs.4,31,332.00 be passed against the defendants together with the interest @ 12% p.a. from the date of the finalization of bill till the date of disposal of the suit.
- B. Interest pendente lite and further @ 12% be also decreed till realization.
- C. Cost of the suit.
- D. Any other relief or reliefs to which the plaintiff is found entitled be given to him.”

The respondents/defendants appeared and took adjournments time without number for filing W.S. which they failed to file whereupon lastly vide order dated 01-09-2009, the respondents/defendants were debarred from filing W.S. however, the suit proceeded in terms of Order-VIII Rule-10 of the CPC. It is evident that during course of examination of petitioner/plaintiff witnesses respondents had an opportunity to cross-examine. After closure on of petitioner/plaintiff case, an opportunity was given to the respondents/defendants to led evidence but having been failed on that very score lastly, vide order dated 19.03.2012 case of respondent/defendant was closed. Then thereafter, on 16.08.2012 the respondents/defendants came up with a witness and filed his deposition on affidavit which was resisted by the petitioner/plaintiff which was not accepted by the learned lower court and admitted the

evidence by the order impugned, hence this petition.

3. Learned counsel for the petitioner submitted that as the respondent/defendant failed to file W.S. on account thereof, two options were available before the learned lower court while proceeding with the suit. The first one should have pronounced judgment and if not, then would have passed appropriate order. Proceeding with the trial, examining the witnesses on behalf of petitioner/plaintiff is the outcome of second event. Because of the fact that no W.S. was filed on behalf of respondents/defendants on account thereof, though he was entitled to cross-examine the petitioner/plaintiff's witness but was not entitled to adduce evidence on his side. Therefore, granting of adjournment after closure of the petitioner/plaintiffs case enabling the respondent/defendant to adduce evidence was illegal. In likewise manner, the learned lower court acted in contravention of spirit of Order-VIII Rule-10 CPC while admitting evidence of DW in spite of objection raised on behalf of petitioner/plaintiff as well as acted illegally in granting further adjournment on this score.

4. At the other end the learned AC to AAG-2 representing the respondent /defendant submitted that application of Order-VIII Rule-10 of the CPC is only for enabling the court to proceed with the trial in absence of W.S. having at the end of the defendant. It did not debar the defendant to participate in trial as well as examine witnesses. That

being so, giving an opportunity to the defendant to adduce evidence on his behalf is just, legal and proper and on account thereof, the order impugned did not attract interference.

5. Before coming to in weave the issue so involved, it looks better to incorporate Order-VIII Rule-10 of the CPC.

“10. Procedure when party falls to present written statement 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 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 the suit as it thinks fit and on the pronouncement of such judgment a decree shall be drawn up.”

6. From plain reading of the aforesaid rule, it is apparent that two options have been made available to the court in case the defendant fails to file W.S. within the stipulated period as granted by the court. The first one permits the court to pronounce judgment on the material available on the record while the second one to pass such order in relation to the suit as it thinks fit. Because of the fact that learned lower court had proceeded with the trial that means to say the learned lower court had opted the second option.

7. Now the only question rests whether defendant, having failed to file W.S. is completely debarred, if not, then what kind of privilege he has. The aforesaid controversy was under consideration

before the Division Bench in *Govind Ram Agarwalla vs. Harsukhrai Doshit & Ors.* reported in *1969 PLJR 65* wherein at para-5 it has been held:

“5. As is the common notion of law in a case where the defendant fails to put in a written statement within the time allowed by the court, a suit is posted for ex parte hearing perhaps under the impression that the court is empowered to do so under Order 9, Rule 6(1)(a) of the Code. But that is not correct. The said provision reads thus:

“ 6. (i) Where the plaintiff appears and the defendants does not appear when the suit is called on for hearing, then-
(a) if it is proved that the summons was duly served, the court may proceed ex parte;”

Where the defendant appears and prays for time to file a written statement either on the first date or on an adjourned date, it is not a case where he does not appear, and the court cannot proceed to hear the suit ex parte or post it for ex parte hearing. It has been pointed out in several decisions, some of which will be adverted to hereinafter in my judgment, that there is a distinction between a case proceeding to hearing ex parte and a case proceeding to hearing in the presence of the party but



without the written statement. Where a defendant appears and files a petition for time to put in a written statement, but time is refused, the suit should be merely put up for hearing, and on the date so fixed, the defendant may take part in the hearing of the suit, but he will have to take such a part without a written statement, unless and until he could persuade the court to accept his written statement in accordance with the provision of law contained in Rule 7 of Order 9 of the Code. But he cannot be debarred from taking part in the hearing of the suit by posting it for ex-parte hearing. It is not necessary in this case to lay down as to what extent the defendant can take part in the hearing without a written statement. Just for the sake of guidance of the court below, attention may be drawn to the Full Bench decision of the Calcutta High Court in (1) J.B. Ross & Co. V.C.R. Scriven (I.L.R. 43 Calcutta 1001 :A.I.R. 1917 Calcutta 269) and a Bench decision of this Court in (2) Gobind Gorhi V. Baldeo Ram (A.I.R. 1930 Patna 293). As against that, reference also may be made to a Bench decision of this Court in (3) N. Ram V. B. P. Khemani (1964 B.L.J.R. 197). Broadly speaking, the distinction may be pointed out thus: if the suit is taken up for ex-parte hearing, the defendant is debarred from



taking any part in the proceeding either by way of cross-examining the plaintiff's witnesses or by adducing his own evidence on points, on which he may adduce even without a written statement. But where he takes part in the proceeding without a written statement at the time when the evidence is being adduced, he has got certain rights, because he is not completely debarred from taking part in the proceeding, such as cross-examining the plaintiff's witnesses and adducing his own evidence by way of a mere denial of the plaintiff's case and not adducing his evidence on questions of fact which he has not pleaded by putting in his own written statement. The observations which I have made here are just for the sake of emphasizing the distinction between the hearing of a suit ex parte and the hearing of a suit in presence of the defendant without the filing of his written statement, and not for exhaustively laying down the law as to what are the rights of the defendant at the hearing in which he takes part without the written statement."

8. Therefore, giving an opportunity to the respondents/defendants to adduce evidence by the learned lower court is found in conformity with the finding recorded by the Division Bench in *Govind Ram Agarwalla* (supra) but should be relating to

denial of the plaintiff's case.

9. Now coming to the order impugned, it is evident that vide order dated 19.03.2012 the case of the respondent/defendant was closed. Although, by the order impugned the learned lower court had admitted evidence of witness Narendra Kumar but without recalling the aforesaid order dated 19.03.2012.

10. That being so, the order impugned did not justify its prevalence and is accordingly, set aside. Petition is allowed. However, it is made clear that in case so prayed for on behalf of respondent/defendant, the learned lower court will pass appropriate order in accordance with law in the background of observation as made herein before.

(Aditya Kumar Trivedi, J.)

Patna High Court
Dated 8th day of Jan., 2016
Prakash Narayan

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