

HIGH COURT OF CHHATTISGARH, BILASPURSecond Appeal No.162 of 2004

1. Vimala Bai (Died and deleted)
2. Ramakant, aged 37 years, S/o Vishnudatt Shukla.
3. Rajnikant, aged 35 years, S/o Vishnudatt Shukla.
4. Dinukant, aged 30 years, S/o Vishnudatt Shukla.
5. Bhuwaneshwar, aged 27 years, S/o Vishnudatt Shukla.
6. Shanta Bai, aged 31 years, D/o Vishnudatt Shukla

All R/o Koharauda, Tah. Baloda Bazar, Distt. Raipur (C.G.)
 (Defendant No.1 to 6)
 ---- Appellants

Versus

1. Shivnarayan, aged 49 years, S/o Chandrika Prasad Shukla, R/o Koharauda, Tah. Baloda Bazar, Distt. Raipur (C.G.)
 (Plaintiff)
2. Chhanni Bai, aged 33 years, D/o Vishnudatt Shukla.
3. Harnarayan, aged 47 years, S/o Chandrika Prasad Shukla

Both R/o Koharauda, Tah. Baloda Bazar, Distt. Raipur (C.G.)

4. State of Chhattisgarh, Through Collector, Raipur (C.G.)
 (Defendants No.7, 8 & 9)
 ---- Respondents

For Appellants:	Mr. Ravindra Sharma, Advocate.
For Respondent No.1:	Mr. Y.C. Sharma, Advocate.
For Respondent No.4 / State: -	Mrs. Meha Kumar, Panel Lawyer.

Hon'ble Shri Justice Sanjay K. Agrawal

Judgment On Board

01/03/2019

1. The substantial question of law involved, formulated and to be answered in the second appeal preferred by defendants No.1 to 6 is as under: -

“Whether the judgment and decree passed by the first appellate court is perverse?”

(For the sake of convenience, parties would be referred hereinafter as per their status shown and ranking given in the suit before the trial Court.)

2. The sole plaintiff filed suit for declaration of title, partition and possession with regard to the suit land mentioned in Schedule A attached with the plaint, total area 2.517 hectares and claimed $\frac{1}{3}$ share in the suit property in which after due service of summons, the defendants were proceeded ex parte and after the affidavit under Order 18 Rule 4 of the CPC was filed and the plaintiff was examined, the trial Court after appreciating oral and documentary evidence on record, dismissed the suit. It is pertinent to mention here that Shivnarayan, the plaintiff herein, also filed Civil Suit No.41-A/2002 (Shivnarayan v. Vimala Bai and others) and both the suits were heard separately and decided separately by separate judgments and both the suits were dismissed. When appeal was preferred the first appellate Court allowed the appeal and also read into the evidence recorded in Civil Suit No.41-A/2002 finding some technical difficulty. Now, the second appeal has been preferred.
3. Mr. Ravindra Sharma, learned counsel appearing for defendants No. 2 to 6 / appellants herein, would submit that the first appellate Court has granted decree in favour of the plaintiff only on the ground that the defendants remained ex parte before the trial Court and did not file any written statement and did not lead any evidence under Order 8 Rule 10 of the CPC which cannot be granted and which is unsustainable and bad in law.
4. Mr. Y.C. Sharma, learned counsel appearing for the plaintiff /

respondent No.1 herein, would support the impugned judgment & decree.

5. I have heard learned counsel for the parties and perused the record with utmost circumspection.
6. It is correct to say that the first appellate Court has granted the appeal filed by the plaintiff on the ground that the defendants neither filed written statement nor evidence was adduced by them. Order 8 Rule 10 of the CPC prior to amendment with effect from 1-7-2002, which applies in the instant case, states as under: -

“R.10. Procedure when party fails 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.”

7. The aforesaid provision was considered by the M.P. High Court in the matter of Mathew Elenjical and another v. The Nagpur Roman Catholic Diocesan Corpn. (P) Ltd.¹ and held that by virtue of Order 8 Rule 10 of the CPC, the Court is not obliged necessarily to pronounce judgment against a defendant merely because the defendant has failed to file the written statement within the time given by the Court and observed as under: -

“Rule 10, therefore, in its ordinary meaning gives the Court a discretion, either to pronounce judgment against the defendant on mere non-filing of the written statement or to make such order in the suit as it thinks fit. This would mean that the Court may in its discretion even grant more time to the defendant by adjourning the case. The Court is not obliged necessarily to pronounce judgment against a defendant merely because the defendant has failed to file the written statement within

1 AIR 1978 MP 39

the time given by the Court.

The rule, no doubt, says initially that the Court shall pronounce judgment against the defendant on his failure to file the written statement required under R. 1 or R. 9 but it then proceeds to enable the Court to "make such order in relation to the suit as it thinks fit." The use of the word 'or', which is normally disjunctive, after "shall pronounce judgment against him" to separate it from the words "make such order in relation to the suit as it thinks fit" shows that the discretion of the Court has been retained in such a situation as well. Moreover, the latter expression would be redundant and meaningless if the Court had no option except to pronounce judgment against the defendant.

The rule of harmonious construction also requires such a meaning to be given to R. 10. On failure of the defendant to file the written statement required under R.1, the Court's power under Sub-r. (2) of Rule 5 is attracted which gives a discretion to the Court to either pronounce a judgment in plaintiff's favour for mere non-filing of the written statement or not to do so, depending on the facts of a particular case. If R. 10 is construed to mean that it leaves no discretion with the Court on defendant's failure to file a written statement under R. 1 and the Court must necessarily pronounce judgment against the defendant for that reason alone, then Sub-r. (2) of R. 5 and R. 10 also cannot be reconciled. The plain meaning of R. 10 giving the word "or" occurring therein its ordinary meaning as a disjunctive instead of needlessly reading it as "and" leaves a discretion with the Court and on that construction there is no disharmony between these two provisions. For this reason also the plain meaning of the rule leaving a discretion with the Court must obviously be preferred."

8. The Supreme Court in the matter of **Modula India v. Kamakshya**

Singh Deo² considering the provision contained in Order 8 Rule 10 of the CPC has held in para 23 that the said provision is permissive in nature and observed as under: -

"23. ... Again under Rule 10 when any party from whom a written statement is required fails to present the same within the time permitted or fixed by the court, the court "shall pronounce judgment against him or make such order in relation to the suit as it thinks fit". It will be seen that these rules are only permissive in nature. They enable the court in an appropriate case to pronounce a decree straightaway on the basis of the plaint and the

2 (1988) 4 SCC 619

averments contained therein. Though the present language of Rule 10 says that the court "shall" pronounce judgment against him, it is obvious from the language of the rule that there is still an option with the court either to pronounce judgment on the basis of the plaint against the defendant or to make such other appropriate order as the court may think fit. Therefore, there is nothing in these rules, which makes it mandatory for the court to pass a decree in favour of the plaintiff straightaway because a written statement has not been filed. ..."

9. In the matter of Balraj Taneja and another v. Sunil Madan and another³, the Supreme Court while interpreting Order 8 Rule 10 of the CPC held that merely because written statement is not filed the court should not proceed to pass judgment blindly and observed as under: -

"25. Thus, in spite of admission of a fact having been made by a party to the suit, the court may still require the plaintiff to prove the fact which has been admitted by the defendant. This is also in consonance with the provisions of [Section 58](#) of the Evidence Act which provides as under :

"58. Facts admitted need not be proved.—No fact need be proved in any proceeding which the parties thereto or their agents agree to admit at the hearing, or which, before the hearing, they agree to admit by any writing under their hands, or which by any rule of pleading in force at the time they are deemed to have admitted by their pleadings:

Provided that the court may, in its discretion, require the facts admitted to be proved otherwise than by such admissions."

26. The proviso to this section specifically gives a discretion to the court to require the facts admitted to be proved otherwise than by such admission. The proviso corresponds to the proviso to Rule 5(1) Order 8 CPC.

27. In view of the above, it is clear that the court, at no stage, can act blindly or mechanically. While enabling the court to pronounce judgment in a situation where no written statement is filed by the defendant, the court has also been given the discretion to pass such order as it may think fit as an alternative. This is also the position under Order 8 Rule 10 CPC where the court can either

3 (1999) 8 SCC 396

pronounce judgment against the defendant or pass such order as it may think fit.

29. ... the Court has not to act blindly upon the admission of a fact made by the defendant in his written statement nor should the court 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 Order 8 Rule 10 CPC. 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. ...”

10. The principle of law laid down in Balraj Taneja (supra) has been followed with approval in the matter of Union of India and others v. Manager, M/s Jain and Associates⁴.

11. In the matter of Bogidhola Tea & Trading Company Limited and another v. Hira Lal Somani⁵ it was held by the Supreme Court that in a case where prima facie case is found out from plaint, but documents being insufficient for passing *ex parte* decree, without adduction of oral evidence, the pleading raised in the plaint could not be said to have been established.

12. In the matter of C.N. Ramappa Gowda v. C.C. Chandregowda (Dead) by LRs. and another⁶, the Supreme Court has held that non-filing of written statement should not have penal consequences and Court should proceed cautiously and exercise its discretion in a just manner, and held as under: -

4 (2001) 3 SCC 277

5 (2007) 14 SCC 606

6 (2012) 5 SCC 265

“25. We find sufficient assistance from the apt observations of this Court extracted hereinabove which has held that the effect of non-filing of the written statement and proceeding to try the suit is clearly to expedite the disposal of the suit and is not penal in nature wherein the defendant has to be penalised for non-filing of the written statement by trying the suit in a mechanical manner by passing a decree. We wish to reiterate that in a case where written statement has not been filed, the Court should be a little more cautious in proceeding under Order 8 Rule 10 CPC and before passing a judgment, it must ensure that even if the facts set out in the plaint are treated to have been admitted, a judgment and decree could not possibly be passed without requiring him to prove the facts pleaded in the plaint.

26. It is only when the court for recorded reasons is fully satisfied that there is no fact which needs to be proved at the instance of the plaintiff in view of the deemed admission by the defendant, the court can conveniently pass a judgment and decree 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 arising from the plaint itself giving rise to two versions, it would not be safe for the court to record an ex parte judgment without directing the plaintiff to prove the facts so as to settle the factual controversy. In that event, the ex parte judgment although may appear to have decided the suit expeditiously, it ultimately gives rise to several layers of appeal after appeal which ultimately compounds the delay in finally disposing of the suit giving rise to multiplicity of proceedings which hardly promotes the cause of speedy trial.”

13. In the matter of Shantilal Gulabchand Mutha v. Tata

Engineering and Locomotive Company Limited and another⁷,

the Supreme Court while noticing and following its earlier pronouncement on the subject i.e. Balraj Taneja (supra), held that Order 8 Rule 10 of the CPC is discretionary and court has to be more cautious while exercising such power where the defendant fails to file written statement and in such circumstances, the court must be satisfied that there is no fact, which needs to be proved, in spite of deemed admission by the defendant and court must give

⁷ (2013) 4 SCC 396

reasons for passing such judgment.

14. In the matter of Gujarat Maritime Board v. G.C. Pandya⁸, the Supreme Court while following the principle of law laid down in Balraj Taneja (supra) has clearly held that in a case where written statement is not filed, the civil court has the jurisdiction to proceed under Order 8 Rule 10 of the CPC, however, orders are not required to be passed in mechanical manner in exercise of powers contained in Order 8 Rule 10 of the CPC.
15. Reverting to the facts of the case in the light of the principle of law flowing from the above-stated judgments (supra) of the High Court and the Supreme Court, it is quite vivid that even though written statement is not filed and no evidence is led by the defendants, but still the trial court must satisfy itself on the basis of oral and documentary evidence on record, whether a decree can be passed granting relief in favour of the plaintiff or not, as the provision contained in Order 8 Rule 10 of the CPC is permissive in nature and not mandatory. In the instant case, the first appellate Court has simply held that since written statement has not been filed by the defendants controverting the allegations contained in the plaint and no evidence was led by them, the plaint allegations are deemed to be admitted and the suit is deemed to be decreed automatically which is contrary to the well settled legal position referred herein-above rendered by the High Court of M.P. and by Their Lordships of the Supreme Court in the aforesaid cases (supra). Therefore, the impugned judgment & decree passed by the first appellate Court is set aside and the matter is remitted to the first appellate Court for

⁸ (2015) 12 SCC 403

hearing and disposal in accordance with law on its own merit within three months from the date of receipt of a copy of this order, as the trial Court has dismissed the suit on merits after discussing the evidence available on record.

16. The substantial question of law is answered accordingly and the appeal is allowed to the extent indicated herein-above. No order as to cost(s).

17. Decree be drawn-up accordingly.

Sd/-
(Sanjay K. Agrawal)
Judge

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