

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
AURANGABAD BENCH, AT AURANGABAD.**

Second Appeal No. 0362 of 2013

District : Latur

Shaikh Amiroddin s/o. Mohd.
Abdul Rahim Jafari,
Died through his L.Rs.,

1. Shaikh Jubedabegum
wd/o. Amiroddin Jafari,
Age : 65 years,
Occupation : Household,
R/o. Dastagir Galli,
Ahmedpur,
Taluka Ahmedpur,
Dist. Latur.
2. Shaikh Muniruddin
s/o. Amiroddin Jafari,
Age : 48 years,
Occupation : Business,
R/o. as above.
3. Shaikh Sirajoddin
s/o. Amiroddin Jafari,
Age : 44 years,
Occupation : Business,
R/o. as above.
4. Shaikh Mujiboddin
s/o. Amiroddin Jafari,
Age : 43 years,
Occupation : Business,
R/o. as above.
5. Shaikh Habiboddin
s/o. Amiroddin Jafari,
Age : 40 years,
Occupation : Business,
R/o. as above.

6. Shaikh Moiz s/o. Amiroddin
Jafari,
Age : 38 years,
Occupation : Business,
R/o. as above.

.. Appellants
(Original
plaintiffs)

versus

1. The Chief Officer,
Municipal Council,
Ahmedpur,
Taluka Ahmedpur,
Dist. Latur.

.. Respondent no.01
(Original
defendant)

2. ~~Nagerao s/o. Wamanrao
Phute,
Age : 57 years,
Occupation : Agriculture,
R/o. Ahmedpur,
Taluka Ahmedpur,
Dist. Latur.~~

.. Respondent no.02
deleted.

.....

*Ms. Poonam V. Bodke Patil, Advocate, for the
appellants.*

Mr. V.P. Latange, Advocate, for respondent no.01.

*Respondent no.02 deleted as per Court's order
dated 05th April 2016.*

.....

CORAM : SMT. VIBHA KANKANWADI, J.

DATE : 06TH FEBRUARY 2019

O R D E R :

01. Present appeal has been filed by the legal representatives of original plaintiff, challenging the judgment and decree passed in R. C. A. No. 276 of 2011 by learned District Judge-1, Ahmedpur, District Latur.

The said appeal filed by the predecessor of the present appellants was dismissed on 16-10-2012. In the said appeal, the said appellant / original plaintiff had challenged the judgment and decree passed in R. C. S. No. 135 of 2000 by learned Joint Civil Judge Junior Division, Ahmedpur, District Latur. The said suit was filed by him for permanent injunction.

02. Original plaintiff had come with a case that he is the owner of premises bearing Survey No. 38/1 admeasuring 15 ft x 24 ft situated at Ahmedpur. The said premises was originally owned by defendant No. 2. He was owner of entire survey No. 38/1 admeasuring 1 H, 91 R. Plaintiff had entered into an agreement to purchase the said piece of land admeasuring east-west 15 ft and north-south 24 ft (as described in para 2 of the plaint) with defendant No. 2 on 22-06-1992. He paid amount of Rs.2,000/- on the same day to defendant No. 2 and agreed to pay the balance of Rs.13,000/- on the date of execution of sale-deed. Thereafter, defendant No. 2 had executed a registered sale-deed in favour of plaintiff on 06-04-1999. Defendant No. 1 has no right, title or interest in the said property. Defendant No. 1 is unnecessarily obstructing the plaintiff from peaceful enjoyment of the suit property. Defendant No. 1 has given illegal notice on 01-02-2000 asking plaintiff to pay Rs.16,785/-. The said notice is void. Plaintiff possess the suit premises. Hence, suit was filed for permanent

injunction.

03. Defendant No. 1 failed to file written statement and therefore, suit proceeded without written statement. Suit was dismissed as against defendant No. 2, as plaintiff had failed to take step to serve him summons.

04. Plaintiff has given his affidavit-in-chief. He has also filed certain documents on which he was relying. After considering the evidence on record and hearing the plaintiff; learned Trial Court has dismissed the suit holding that the plaintiff has failed to prove that he has become owner of the suit premises. He has also failed to prove obstruction to the possession by defendant No. 1.

05. Original plaintiff had challenged the judgment and decree in the appeal. After hearing both sides, learned District Judge-1, Ahmedpur dismissed the appeal. It appears that thereafter, plaintiff expired. Hence, legal representatives of original plaintiff have filed this second appeal.

06. Heard learned Advocate Ms. Poonam V. Bodke Patil for appellants and learned Advocate Shri. V. P. Latange for respondent No. 1. It has been vehemently argued on behalf of appellants that both the Courts below have not appreciated the facts and evidence

properly. Both the Courts have not considered the provisions of Order 8 Rule 5 of Code of Civil Procedure. The contentions of the plaintiff were not denied at all by the defendant No. 1. That means, those contents were admitted by the defendant No. 1. Admittedly plaintiff possess the suit property. He has entered the witness-box and deposed that he has purchased the suit property and then he has produced the sale-deed Ex.42 on record for the perusal of the Court. There was no documentary evidence filed on record by the defendant No. 1 showing that the land was ever acquired by the Corporation. Land Survey No. 38/1 admeasuring 1 H, 84 R was shown in the name of defendant No. 2. In fact, when the claim of the plaintiff was not contested by defendant No. 1 and therefore, adverse inference ought to have been drawn against it. The testimony of plaintiffs' witnesses has not been considered properly. Issuance of notice by defendant No. 1 to the plaintiff was amounting to obstruction. Suit ought to have been decreed.

07. Per contra, it has been submitted on behalf of respondent No. 1 that both the Courts below have given concurrent findings. In fact, it appears that plaintiff had come with a case that defendant No. 2 is the owner of the suit property; whereas defendant No. 1 is the owner. Defendant No. 1 used to collect the rent of the suit premises also. The documentary evidence was not showing that defendant No. 2 was

possessing the said property before sale-deed in favour of plaintiff was executed. Under such circumstance, it cannot be said that plaintiff had received the possession of the suit property on the date of sale-deed. Though there was no written statement on behalf defendant No. 1, yet, plaintiff is not relieved from proving his claim. Provisions of Order 8 Rule 5 of Code of Civil Procedure gives discretion to the Court to pronounce the judgment and it is not mandatory. There were many admissions given by witnesses examined by plaintiff which show that defendant No. 1 is the owner of the suit property. Plaintiff has not got title and therefore, he was not entitled to get relief of injunction. No substantial question of law is arising in this matter.

08. Taking into consideration the submissions on behalf of both sides it is required to be considered as to whether any substantial question of law has been made out as contemplated under Section 100 of Code of Civil Procedure, requiring the matter to be admitted. If such substantial question of law has been shown then only it is required to be framed and then the appeal can be admitted. Here in this case, plaintiff has come with a case that defendant No. 2 was the owner of Sr. No. 38/1 admeasuring 1 H. 91 R. Plaintiff is stated to have purchased an area admeasuring 15 ft x 24 ft by getting a sale-deed executed on 06-04-1999 for a consideration of Rs.15,000/-. There was an

agreement to sell executed prior to sale-deed. He claims possession over the suit property. Admittedly, defendant No. 1 had failed to file written statement. That means, though defendant No. 1 had appeared in the matter, did not file written statement within the stipulated period. Learned Advocate for appellant has submitted that both the Courts below have not considered provisions of Order 8, Rule 5 of Code of Civil Procedure and had not given judgment on admission. It would be convenient to consider the provisions of Order 8 Rule 5 of Code of Civil Procedure, first :

5. Specific denial :- (1) Every allegation of fact in the plaint, if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of the defendant, shall be taken to be admitted except as against a person under disability;

Provided that the Court may in its discretion require any fact so admitted to be proved otherwise than by such admission,

(2) Where the defendant has not filed a pleading, it shall be lawful for the court to pronounce judgment on the basis of the facts contained in the plaint, except as against a person under a disability, but the court may, in its discretion, require any such fact to be proved.

(3) In exercising its discretion under the proviso to sub-rule (1) or under sub-rule (2), the court shall have due regard to the fact whether the defendant could have, or has, engaged a pleader.

(4) Whenever a judgment is pronounced under this rule, a decree shall be drawn up in accordance with such judgment and such decree shall bear the date on which the judgment was pronounced.

Thus, it can be seen from the provision that those facts would be taken as admitted by defendant, when defendant fails to deny it specifically expressly or impliedly. Non-filing of written statement may not be always taken as admission by necessary implication. Further, the said provision gives a discretion to the Court to pronounce the judgment. It may not be necessarily in favour of plaintiff only.

09. In the case of **Dhanwantraï R Joshi v/s. Staish J. Dave [1999(1) Bom.C.R. 97]**, the question which was referred to the Division Bench of this Court, was "whether the decree passed in the absence of the defendant and his counsel is a decree passed under Order 9 Rule 6 or is it a decree passed under Order 8 Rule 5 if the same is also passed on the ground that written statement has not been filed". The Division Bench of this Court after considering the relevant provisions under Order 8, 9 and 17 as well as the principles laid down by the Apex Court in **Sangramshingh v/s. Election Tribunal Kotah [AIR 1955 SC 425]** held thus:

"12. In our view, considering the scheme of Order VIII, Rule 5 or Rule 10, as well as Order IX, it is apparent that both operate in different fields. Order VIII, Rule 5, specifically provides that if defendant fails to file Written Statement as contemplated therein, the Court may pronounce judgment on the basis of the facts contained in the plaint, except as

against a person under a disability, or the Court may in its discretion, require any such fact to be proved. If the judgment is pronounced on the basis of the facts contained in the plaint, decree is to be drawn in accordance with Order VIII, Rule 5(4). Similarly, if a party from whom written statement is required under Order VIII, Rule 10, fails to present the same within the time permitted or fixed by the Court, the Court is entitled to pronounce judgment against such party, or make such order in relation to the suit as it thinks fit. If the judgment is pronounced, the decree is required to be drawn up. Such decree pronounced on non-filing of written statement cannot be considered to be an ex parte decree as contemplated under Order IX, Rule 6. These types of decrees are passed because of failure to file written statement. Further, in a case where Written Statement is not filed and at the time of hearing, even if the defendant is present, the Court is entitled to pronounce the judgment and pass decree. If the defendant is absent and the Written Statement as required is not filed, the Court is also entitled to pronounce judgment on the basis of the averments made in the plaint.

13. As against this, under Order IX, the Court is required to follow different procedure. Order IX, Rule 1 provides that on the day fixed in the summons for the defendant to appear and answer, the parties shall be in attendance at the Court house and suit shall then be heard unless the hearing is adjourned to a future day fixed by the Court. This means that suit is fixed for hearing and on the date of hearing if neither parties appears then the suit may be dismissed as provided under Order IX, Rule 3. If the defendant fails to appear on the date of hearing, the Court is required to pass an order that the suit be heard ex parte and to proceed further with the hearing of the suit. This requires recording of evidence and to proceed with the matter. After recording evidence ex parte, the Court can pronounce judgment on the basis

of the evidence which is brought by the plaintiff. In such cases, the suit is not disposed of as provided under Order VIII, Rule 5 or Rule 10 on the basis of the averments made in the plaint”.

10. Therefore, there is no compulsion on the part of Trial Court to pass a judgment, when defendant No. 1 failed to file written statement. It has been observed in **M/S. Clinirx Research Private v/s Bilcare Limited. [APPEAL FROM ORDER (ST) NO. 8010 OF 2017 with CIVIL APPLICATION (ST) NO. 9167 OF 2017 decided by this Court at Principle seat on 14 November, 2017] :-**

“It may also be noted here that when the court proceeds to call upon the plaintiff to prove the facts contained in the plaint, the failure of the defendant to file the written statement does not preclude him from participating in further proceedings, cross- examining the plaintiff and his witnesses and impeaching their credibility and from advancing the arguments and demonstrating that the plaintiff on his own case is not entitled for the reliefs claimed. The only consequence of not filing the written statement would be that the defendant would not be entitled to set up his defence or lead his own evidence. Nevertheless all further proceedings are required to be conducted in accordance with normal rules prescribed by the Code of Civil Procedure in the conduct of the suit”.

11. Defendant No. 1 in this case, has taken part in further proceedings of the suit, when plaintiff was called upon to prove the facts contained in the plaint. There is cross-examination by the defendant No.1 of those witnesses who were examined on behalf of plaintiff. Under such circumstance, entire evidence

was required to be considered. Both the Courts below have not committed any procedural error on this point.

12. When the plaintiff was asked to prove his case and he as well as his witnesses have been cross-examined on behalf of defendant No. 1, then the entire evidence of the witnesses is required to be considered. Plaintiff has produced 7 x 12 extract of year 1998-1999 showing defendant No. 2 as owner of the said land. He has also produced on record the sale-deed at Ex.42. However, in his cross, he has admitted that he himself had filed an application before defendant No. 1 on 25-09-1980 praying that the suit premises be given to him on rent. He has also admitted that he has paid rent for first 11 months @ Rs.2/- per sq. ft. An agreement for rent was executed between him and defendant No. 1 on 15-12-1980. He has then admitted that after those first 11 months, he has not paid rent for the said premises. Thus, it can be seen from the conduct of plaintiff that he was accepting that defendant No. 1 as owner of the suit property and therefore took the said piece of land on rent from defendant No. 1. His entry in the premises was as tenant. Thereafter, he has not paid the rent. Now he is denying the ownership of his erstwhile landlord, which can not be legally permitted.

13. Plaintiff's witness Fisake has admitted in her cross that Sr. No. 38/1 was acquired by

Government. Another witness Sayyad Chand also admits that Tahsil office, Hospital, Post Office are situated in Sr. No. 38/1 and the said land has been acquired by Government. It appears that no entry about the same has been taken in 7 x 12 extract. That does not give any advantage to defendant No. 2 or plaintiff. The document of 7 x 12 extract is not a document of title. Further, when it was within the knowledge of plaintiff that defendant No. 1 was owner of the said property, when he had taken the premises on rent in 1980 from defendant No. 1; then the burden was still on the plaintiff to prove that on the date of sale-deed or prior to that title got vested in defendant No. 2 by virtue of some document or law. When the land was admittedly acquired by the Government, the earlier owner had no right to transfer the same to anybody. Plaintiff has not examined defendant No. 2 as his witness. He was the best witness to prove that he had ownership over the suit property on the date of execution of sale-deed Ex.42. In spite of knowledge of all these things, plaintiff had entered into transaction of purchase with defendant No. 2. When defendant No. 2 himself had no title over the suit property, he could not have passed any better title to plaintiff. Therefore, both the Courts have correctly held that plaintiff has failed to prove that he is lawfully possessing the said property.

14. Plaintiff has also come with a case that

defendant No. 1 is obstructing his possession over the suit land. The suit notice is said to be the cause of action. It is to be noted that by issuing said notice, defendant No. 1 had called upon plaintiff to pay rent. Asking tenant to pay rent by issuing notice will not amount to obstruction to the possession. In fact, it appears that since 1981, plaintiff has not paid rent. Instead of taking action for eviction, the defendant No. 1 has simply asked plaintiff to pay rent. It is stated that if rent is not paid then action for attachment will be taken. That means till the date of notice, defendant No. 1 was considering plaintiff as tenant. Defendant No. 1 had taken legal action and therefore, it does not amount to obstruction.

15. Both the Courts below have appreciated the legal points and factual aspects properly. No substantial question of law has been raised, hence the appeal is not admitted / dismissed.

16. At this stage, learned Advocate appearing for the appellant submits that stay should be granted to the order of this Court in order to facilitate the appellant to approach to Hon'ble Supreme Court. It will not be out of place to mention here that the suit filed by the appellant came to be dismissed. The First Appeal preferred by him has been dismissed on 16-10-2012. The rejection of the First Appeal does not show that after the dismissal of the appeal, any

application was filed for injunction or any such kind of relief for protecting the possession of the appellant. Under such circumstance, when no order which would protect the possession of the appellant was ever obtained after the dismissal of the appeal, the prayer now orally made by learned Advocate for appellant can not be granted. Hence, it is rejected.

(Smt. Vibha Kankanwadi)
JUDGE

.....