

Ct.
No.
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2023

C.O. 4373 of 2016
Vijay Kumar Dalmia
-Versus-
Ultra Tech Cement Ltd. & Anr.

Mr. Rahul Karmakar
Mr. Saunak Mukherjee
Mr. Sourav Guchhait **...For the Petitioner**

Affidavit-of-service filed by the learned Counsel appearing for the petitioner is taken on record.

The opposite parties are not represented.

Order being No. 15 dated September 19, 2016 passed by the learned Civil Judge (Junior Division), 1st Court, Serampore, Hooghly in Title Suit No. 570 of 2015 has been assailed by filing the present application.

By the impugned order learned Court below has been pleased to accept the written statement which was filed by the defendant beyond the statutory period.

Petitioner's case is that the petitioner filed the aforesaid suit along with a prayer for injunction. On November 17, 2015 the opposite party No. 1 had entered appearance in the said suit through his learned Advocate and prayed time to file written statement and written objection. On January 19, 2016 the opposite party No. 1 filed written objection against plaintiff's injunction application. The suit again came up for hearing on March 16, 2016 when the opposite party again filed a petition seeking adjournment to file written statement. But on that date learned Court below rejected the defendant's prayer for time to file written statement as statutory period for filing written statement was over and the Court below was further pleased to fix the next

date for *ex parte* hearing of the suit against the defendant No. 1. On July 16, 2016 the opposite party No. 1 herein filed an application under Section 151 of the Code of Civil Procedure praying for setting aside the posting for *ex parte* hearing of the case against opposite party No. 1 and he also filed written statement on the same day. On September 19, 2016, by the impugned order the learned Court below allowed the defendant's prayer and accepted the written statement filed by the defendant subject to payment of cost of Rs. 1,500/-.

Mr. Rahul Karmakar, learned Counsel appearing for the petitioner submits that the Court below erred in law as well as in fact by making out a third case which was not the case of the parties. The Court below erred in not considering that summon of the suit was received by the opposite party No. 1 on 10th October, 2015 and the date of filing the written statement should be counted from that date under the provision of Order VIII Rule 1 of the Code of Civil Procedure. The Court below also failed to consider that the defendant appeared in the suit after one month of service of summon without filing the written statement, though he filed written objection against the injunction application on January 19, 2016. In fact the Court below failed to appreciate that no cogent reason has been given by the defendant / opposite party as to what prevented him to file the written statement within statutory period.

Mr. Karmakar strenuously argued that the prayer for filing the written statement once rejected, subsequent filing of another application with prayer for setting aside the order of *ex parte* hearing, is barred by law. In fact impugned order for acceptance of written statement is hit by res

judicata owing to the rejection of the application for extension of time to file written statement vide order dated March 16, 2016. In this context he relied upon paragraphs 7 and 8 of the decision in the case of ***Satyadhyan Ghosal and Ors. Vs. Deorajin Debi (Smt) and Anr.***, reported in (1960) SCR 590 and paragraph 11 of the decision in the case of ***U.P. State Road Transport Corporation Vs. State of U.P. and Anr.***, reported in (2005) 1 SCC 444.

Accordingly, he submits that the order impugned suffers from total non-application of mind, without considering the background of the matter. The petitioner has prayed for setting aside the order impugned.

I have considered the submissions made by the petitioner as well as the materials available on record. Learned Court below while allowing the defendant's prayer observed that delay in filing the written statement is for 92 days and he counted the said date from 17th November 2015 i.e. the date when defendant appeared in the suit and not from the date of service of summon. Accordingly, the Court below came to a conclusion that the defendant when inclined to contest the suit, he should be given an opportunity to contest, so that the Court can arrive at a just conclusion about the suit. However, he imposed cost as he found that the ground of delay could have been easily avoided if written statement was sought to be filed through another signatory.

The doctrine of *res judicata* means an issue attaining finality, should not be allowed to be reagitated and it is based on the need of giving a finality to judicial decisions and principle of *res judicata* applies also as between two stages in the same litigation to the extent that an issue having an earlier stage decided a matter in one way

will not allow the parties to re-agitate the matter again at a subsequent stage.

In the instant case Court below on 16.03.2016 was pleased to refuse defendant's prayer and directed to proceed the suit *ex parte*. The question is by such refusal or by making direction that the suit will proceed *ex parte*, he decides any issue finally or not and whether there is any scope to re-agitate the same or not.

Order VIII, Rule 10 provides where any party from whom a written statement is required under Order VIII, Rule 1 or Rule 9, fails to present the same within the time permitted on time fixed by Court, the Court shall pronounce judgement against him *ex parte*. Now if such judgement is pronounced *ex parte*, under Order VIII, Rule 10, prayer for setting aside can be made under Order IX, Rule 13. But if due to defendant's failure to file written statement, instead of pronouncing judgement, Court adjourn the date and fix another date for *ex parte* hearings, then defendant can avail Order IX, Rule 7 and assigning "good cause", for his previous non-appearance, pray that he may be heard in answer to the suit. In such view of the matter the defendant's application dated 16.06.2016 was in fact a prayer made under Order IX Rule 7, read with Order VIII, Rule 10. In view of such matter, when statute provides for recalling earlier order on showing "good cause", the application of *doctrine "res judicata"* as got no application in the present case and as such case laws cited by petitioner cannot have any application in the present context.

It also appears that if the defendant gets opportunity to contest the suit by filing the written statement the highest prejudice that may be caused to the plaintiff,

would be that will the suit could be disposed of on merit after contested hearing and nothing more. It has been settled time again that the rules of procedure are the handmaid of justice. In *Shaikh Salim Hazi Abdul Khayumsab Vs. Mr. Kumar & Ors.*, reported in (2006) 1 SCC 46, Apex Court in this context observed in Paragraphs 9 and 10 as follows :-

“9. *The text of Order 8 Rule 1, as it stands now, reads as under:*

“1. Written statement.—The defendant shall, within thirty days from the date of service of summons on him, present a written statement of his defence:

Provided that where the defendant fails to file the written statement within the said period of thirty days, he shall be allowed to file the same on such other day, as may be specified by the court, for reasons to be recorded in writing, but which shall not be later than ninety days from the date of service of summons.”

Order 8 Rule 1 after the amendment casts an obligation on the defendant to file the written statement within 30 days from the date of service of summons on him and within the extended time falling within 90 days. The provision does not deal with the power of the court and also does not specifically take away the power of the court to take the written statement on record though filed beyond the time as provided for. Further, the nature of the provision contained in Order 8 Rule 1 is procedural. It is not a part of the substantive law. Substituted Order 8 Rule 1 intends to curb the mischief of unscrupulous defendants adopting dilatory tactics, delaying the disposal of cases, causing inconvenience to the plaintiffs and the petitioners approaching the court for quick relief and also the serious inconvenience of the court faced with frequent prayers for adjournments. The object is to expedite the hearing and not to scuttle the same. While justice delayed may amount to justice denied, justice hurried may in some cases amount to justice buried.”

“10. *All the rules of procedure are the handmaid of justice. The language employed by the draftsman of processual law may be liberal or stringent, but the fact remains that the object of prescribing procedure is to advance the cause of justice. In an adversarial system, no party should ordinarily be denied the opportunity of participating in the process of justice dispensation. Unless compelled by express and specific language of the statute, the provisions of CPC or any other procedural enactment ought not to be construed in a manner which would leave the court helpless to meet extraordinary situations in the ends of justice.”*

In paragraph 15 of the said judgment it is also

observed :-

“15. It is also to be noted that though the power of the court under the proviso appended to Rule 1 of Order 8 is circumscribed by the words “shall not be later than ninety days” but the consequences flowing from non-extension of time are not specifically provided for though they may be read by necessary implication. Merely, because a provision of law is couched in a negative language implying mandatory character, the same is not without exceptions. The courts, when called upon to interpret the nature of the provision, may, keeping in view the entire context in which the provision came to be enacted, hold the same to be directory though worded in the negative form.”

In my view the reasoning of Trial Court in support of acceptance of written statement stating that ‘defendant No. 1 having inclined to contest this suit, needs to be given an opportunity to contest the same, in order to do justice to the cause and to arrive at just conclusion of the suit’, is well within the parameters of it’s jurisdiction and does not warrant interference under Article 227 of the Constitution of India. In the exercise of it’s jurisdiction under Article 227, the High Court does not act as an Appellate Court and it is not open to it to review or reassess the evidence on fact upon which the Trial Court has passed the order of restoration.

In view of the aforesaid facts and circumstances of the case I find nothing to interfere with the order impugned which is a reasoned one and the Court below has not exceeded its jurisdiction while passing the said order.

The revisional application, being C.O. 4373 of 2016 is accordingly dismissed.

However, since the case is pending for a considerable period of time the Court below is directed to make every endeavour for expeditious disposal of the suit and to conclude the entire proceeding of the suit, preferably within a period of twelve months from the date of

communication of this order.

Urgent photostat certified copy of this order, if applied for, be supplied to the petitioner, on priority basis on compliance of all usual formalities.

(Ajoy Kumar Mukherjee, J.)