

ORDER SHEET

IN THE HIGH COURT AT CALCUTTA
Civil Appellate Jurisdiction
ORIGINAL SIDE

IA NO: GA-COM/1/2024

APDT/7/2024

WITH

CS/128/2024

MARICO LTD.

VS

J.K. ENTERPRISE & ORS.

(Commercial Division)

BEFORE

The Hon'ble Justice I.P. MUKERJI

-And-

The Hon'ble Justice BISWAROOP CHOWDHURY

Date: 20th March, 2024

Mr. Reetobroto Mitra
with Mr. Balarko Sen &
Mr. Souradal Chowdhury, Advs.
...for appellant.

An affidavit of service is on record. The postal endorsement says that none of the respondents/defendants could be located. The papers sent by post were returned to the advocate-on-record for the appellant/plaintiff by the postal authority.

None appears for the respondents/defendants. The impugned judgement and order dated 31st January, 2024 dismisses an undefended suit.

We regret to note that the learned single judge has proceeded on an erroneous legal premises.

It is an admitted position that the respondents/defendants had not filed their written statements and that the suit was declared undefended by the registry of this court.

As an undefended suit it was tried before the learned single judge.

His lordship has relied upon Order VIII Rule 10 of the Civil Procedure Code which provides that where the defendant does not file a written statement within time, the court could proceed to pronounce judgement against him or make such order in relation to the suit as it thinks fit and proper.

His lordship has failed to appreciate Order VIII Rule 5(2) of the Civil Procedure Code which is in the following terms :

“(2) Where the defendant has not filed a pleading, it shall be lawful for the Court to pronounce judgement 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.”

If one analyses Order VIII Rule 5(2), it is quite plain that upon the defendant not filing a written statement, the court has two options. The first is to pronounce judgement, taking the facts pleaded in the plaint as uncontroverted and true. If the court feels that its conscience would be clear if the plaintiff was asked to prove those facts, it could exercise the second option of asking the plaintiff to do so.

The learned single judge was completely wrong in entertaining the view that once the suit is declared as an undefended suit, the plaintiff is bound to adduce evidence to prove the facts in the plaint.

After the suit is declared as an undefended suit and is called on for trial, both the above options are open to the court. It cannot be said that at that point of time the first option is closed. If the plaintiff insists that without adducing oral evidence the suit be decreed on the averments in the plaint, the court has to consider and deal with such submission. If the court is of the view that it would not be proper to do so, it would use its discretion by asking the plaintiff to prove its case by adducing evidence.

The provision in Order VIII Rule 10 is completely different. According to this provision, the court might pronounce judgement against the party who has not filed a written statement within time or make any other order that it thinks fit and proper. This could only mean a substantive decree or order in the suit. For example, while trying an undefended suit the court might notice that summons have not been duly served on the defendants and might direct such service or dismiss

the suit or while trying such a suit, the defendant appears and prays for time to file the written statement. The court might consider such prayer and allow him to do so. These are examples of the types of orders which are contemplated in Order VIII Rule 10 and not otherwise.

For all these reasons, dispensing with all formalities we took up the appeal for hearing.

We set aside the impugned judgement and order dated 31st January, 2024. We direct that the suit be tried afresh as an undefended suit with an option given to the appellant/plaintiff to prove its case on the basis of the averments in the plaint and the disclosed documents to the extent they are admissible in evidence. If this does not convince the court about the appellant/plaintiff's case it should direct it to prove its case by oral evidence.

We request the learned single judge to entertain, try and determine the suit as an undefended suit within two months of communication of this order preferably.

All interim orders enjoyed by the plaintiff in the trial court will continue till disposal of the undefended suit or until further order.

The appeal (APOT/7/2024) and the connected application (IA NO: GA-COM/1/2024) are disposed of.

(I.P. MUKERJI, J.)

(BISWAROOP CHOWDHURY, J.)