

Vimalkumar Nathmal Goenka Vs. Vinod Kumar Nathmal Goenka and ors.

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Court : Mumbai

Decided On : Jun-18-1998

Reported in : AIR1999Bom51; 1999(1)ALLMR594; 1999(1)MhLj180

Judge : D.D. Sinha, J.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Order 8, Rule 10

Appeal No. : Civil Revn. Appln. No. 500 of 1998

Appellant : Vimalkumar Nathmal Goenka

Respondent : Vinod Kumar Nathmal Goenka and ors.

Advocate for Pet/Ap. : A. Shelat, Adv.

Disposition : Application allowed

Judgement :

ORDER

D.D. Sinha, J.

1. Heard Shri Shelat, the learned counsel for the applicant (original defendant No. 3) at length. This Court on 5-5-1998 issued rule and the same was made returnable on 15-6-1998. The learned counsel submitted that the non-applicants were served by hamdast. Even otherwise, the note of office of this Court also

shows that the non-applicants were served. However, none appears for the non-applicants.

2. The learned counsel for the applicant submitted that the present applicant is the original defendant No. 3 and non-applicant No. 1 Vinod Kumar is the plaintiff. Applicant Vimal Kumar and non-applicant Nos. 1 Vinod Kumar and 3 Vimal Kumar are the real brothers. Non-applicant No. 4 Smt. Gulabdevi is mother of applicant and non-applicant Nos. 1 and 3. It is further submitted that non-applicant No. 1/original plaintiff filed Special Civil No. 284/95 against the present applicant and others for recovery of amount of rupees two lacs and seventy thousand.

3. The non-applicant No. 1/plaintiff is a lessor and co-owner of Ginning and Pressing Factory situated at Adilabad, (Andhra Pradesh). He is having 1/4th share in the entire Ginning and Pressing Factory and he is the owner and landlord in respect of 1/4th share in the suit property. The present non-applicant No. 2 is a partnership firm of which present applicant and non-applicant Nos. 3 and 4 are its partners. The partnership firm is carrying on its business at Adilabad and Akola and offices of the said firm are situated at Adilabad and Akola.

4. The learned counsel for the applicant submitted that the applicant/original defendant No. 3 did not file written statement on or before 21-11-1997 and, therefore, order of no written statement was passed against the applicant and the suit proceeded without written statement. The plaintiff examined himself and during his examination-in-chief, proved documents on 12-12-1997. The matter was fixed on 18-12-1997 for arguments. The Counsel for the plaintiff advanced his arguments on that day and the matter was fixed for judgment on 29-12-1997. The learned counsel further submitted that the present applicant sub-mitted application (Exh. 50) on 29-12-1997 for recalling the plaintiff for the purpose of cross-examination by the applicant/defendant No. 3. The present applicant thereafter submitted another application (Exh. 51) on 5-3-1998 for taking written statement on record. The written statement was annexed to the said application. However, Civil Judge, Senior Division, Akola by common order dated 27-3-1998 rejected both the applications (Exhs. 50 and 51). Hence, the applicant has preferred this civil revision application.

5. The learned counsel for the applicant submitted that the impugned order is not just and proper and same is also not sustainable in law. The learned counsel contended that the trial Court has not taken into consideration the purport of Order VIII of Code of Civil Procedure, which deals with written statement. It is submitted that Rule 5 (2) of Order VIII of Code of Civil Procedure does not contain any specific and positive mandate not to accept written statement under any circumstances. It is also submitted that the trial Court is not precluded from entertaining an application for taking written statement on record nor defendant is debarred from making such an application. It is further submitted that Rule 10 of Order VIII of Code of Civil Procedure gives discretion to the Court to permit the defendant to file written statement at any stage prior to pronouncement of judgment. It is the contention of the learned counsel that under Rule 10, the Court can either pronounce judgment against the defendant on his failure to file written statement or pass any order as it thinks fit, which gives discretion to the Court to admit the written statement even at the stage when ex parte hearing was concluded and the Court has fixed the matter for delivery of judgment. The learned counsel contended that the impugned order is, therefore, not just and proper and same is liable to be set aside. In order to substantiate the contentions raised before me, reliance is placed by the learned counsel for the applicant on the judgment of Calcutta High Court in Ramesh Chandra Bhattacharyya v. Corporation of Calcutta : AIR1987 Cal111 , and judgment of this Court in Vithal Ramchandra Patil v. Bhagwat Waman Gaikwad (1996) 2 Mh LJ 1064.

6. In view of the facts and circumstances of the present case, the question which requires consideration by this Court is 'whether the trial Court has a power to entertain the written statement filed by the defendant after the trial Court concluded ex parte hearing of the suit and adjourned the matter for delivery of judgment'.

7. In the instant case, admittedly the applicant/ defendant No. 3 did not file any written statement even though he was given enough opportunity by the trial Court. The suit was fixed for ex parte hearing and evidence of the plaintiff was recorded by the trial Court on 12-12-1997. The matter was fixed on 18-12-1997 for arguments and thereafter it was fixed for judgment on 29-12-1997. It is an

admitted position that on 29-12-1997, the trial Court had neither delivered nor pronounced the judgment. On the other hand, it appears that the matter was adjourned for passing necessary orders on Exh. 50. Thereafter, on 5-3-1998, the applicant filed an application for taking written statement on record (Exh. 51) and the written statement was annexed to that application. Both the above referred applications filed by the applicant were considered by the trial Court on 27-3-1998 and came to be rejected by the trial Court. Exh. 50 was rejected as not maintainable while exh. 51 was rejected on the ground that matter was fixed for judgment on 29-12-1997 and once the matter was fixed for judgment, written statement could not be allowed to be filed nor could be accepted.

8. In order to consider the issue in question, it will be meaningful to consider purport of Order VIII Rule 10 of the Code of Civil Procedure. There is no difficulty in coming to the conclusion that Rule 10 gives discretion to the Court and the Court can permit the defendant to file written statement at any stage prior to pronouncement of judgment. Plain reading of Rule 10 makes it clear that the Court can either pronounce judgment against the defendant in the absence of written statement or pass any order as it thinks fit. In view of the above referred legal position vis a vis Rule 10 of Order VIII of Code of Civil Procedure, the trial Court could have exercised discretion even at the stage when ex parte hearing was concluded and matter was fixed for delivery of judgment on 29-12-1997. However, in the instant case, admittedly the same had not been done by the trial Court and the matter was posted for passing necessary orders on the applications (Exhs. 50 and 51) preferred by the applicant. Since judgment was not pronounced in the matter by the trial Court on the date on which it was fixed for pronouncement of judgment, i.e. 29-12-1997 and the matter was adjourned for passing necessary orders on Exhs. 50 and 51, it cannot be said that the trial Court had exhausted the jurisdiction vested in it as per Order VIII, Rule 10 of Code of Civil Procedure, nor can it be construed that the trial Court had no jurisdiction to accept the written statement. In the present case, the trial Court did not reject Exh. 50 on 29-12-1997 and did not pronounce judgment on 29-12-1997 (date fixed for delivery of judgment) and adjourned the matter to a future date. The entire exercise undertaken by the trial Court clearly shows that it did not exercise jurisdiction vested in it by the first part of Order VIII, Rule 10 of Code of Civil Procedure, i.e. by

pronouncing the judgment on failure to file written statement as required under Order VIII, Rule 1 of Code of Civil Procedure. The present case would fall within the ambit of latter part of Rule 10 of Order VIII of Code of Civil Procedure, i.e. 'or make such order in relation to the suit as it thinks fit'. Hence once the case/suit was adjourned to a future date, it is impliedly clear that the trial Court had exercised discretion contemplated in the above referred latter part of Rule 10 of Order VIII of Code of Civil Procedure. It is, therefore, not possible in the facts and circumstances of the present case to hold that the trial Court was not competent to accept written statement filed by the original defendant No. 3.

9. Since I have already recorded my finding referred above, regarding purport of Order VIII Rule 10 of Code of Civil Procedure, it is not necessary for me to consider the contentions raised by the learned counsel for the applicant in respect of Rule 5 (2) of Order VIII of Code of Civil Procedure.

10. Similar view was taken by this Court in its judgment in *Vithal Ramchandra Patil v. Bhagwat Waman Gaikwad* (1996) 2 Mh LJ 1064. of the said judgment of this Court, it is specifically observed by the single Judge that 'for the ends of justice, if necessary, the written statement can be admitted on the record till the Court proceeds to deliver the judgment'.

11. In the instant case, the applicant has annexed written statement along with civil revision application. In para (12) of the written statement, it is stated that applicant (defendant No. 3) filed Civil Suit No. 21/94 before the District Judge, Adilabad with regard to the suit property on or about 25-8-1994 and claimed partition and separate possession of his undivided share in the various properties including the suit property involved in the present Special Civil Suit No. 2847/95. The present non-applicant No. 1/plaintiff is defendant No. 3 in the above referred suit bearing No. 21/94. It is further stated that the said suit is decreed and it is also directed by the Court that separate 1/4th share of the present applicant/defendant No. 3 be earmarked and to be put in possession of his separate share. It is further stated in the said para of the written statement that present non-applicant No. 1 plaintiff has not intentionally made reference to the suit bearing No. 21/94 and has suppressed the material facts from the Court. After going through the pleadings in

Para (12) of the written statement, the trial Court ought to have allowed filing of the written statement, which is, in my opinion, necessary for the just decision on merits in the suit as well as in the interest of justice.

12. In the result, civil revision application is allowed. The impugned order dated 27-3-1998 passed by the Civil Judge, Senior Division, Akola in Special Civil Suit No. 284/95 on Exhs. 50 and 51 is hereby set aside. The written statement filed by the applicant defendant No. 3 be taken on record. The trial Court is directed to proceed with the suit including allowing the applicant to cross-examine the non-applicant No. 1 plaintiff. No order as to costs.

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