

**Wipro Ltd. and Another Vs. Baba Enterprises**

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**SooperKanoon Citation :** [sooperkanoon.com/466148](http://sooperkanoon.com/466148)

**Court :** Allahabad

**Decided On :** Jan-17-2000

**Reported in :** 2000(2)AWC996

**Judge :** D.K. Seth, J.

**Acts :** [Code of Civil Procedure \(CPC\), 1908](#) - Sections 115 - Order 10, Rules 1, 2 and 4 - Order 14, Rules 1(1) and 3 - Order 18

**Appeal No. :** Civil Revision No. 17 of 2000

**Appellant :** Wipro Ltd. and Another

**Respondent :** Baba Enterprises

**Advocate for Def. :** Shyam Sunder Tripathi, Adv.

**Advocate for Pet/Ap. :** Ranjit Saxena, Adv.

**Judgement :**

**D. K. Seth, J.**

1. Leave is granted to amend the preamble to the Section 115 application.
2. Original Suit No. 274 of 1996 pending before the learned Additional Civil Judge (Senior Division), First Court, Dehradun, was fixed for framing of Issues on 9th September, 1998. On the said date, no one on behalf of the defendant was

present. The suit was fixed for hearing ex parte on 9th November, 1998. On the said date, an application was filed for recalling the order for hearing ex parte. On the ground that the said application was not affirmed by an affidavit as well as on the question of merit, the said application was dismissed by an order dated 9th December, 1999. This order has since been challenged in this revision.

3. Mr. Ranjit Saxena. learned counsel for the revisionists submits that since the date was fixed for framing issues, it was open to the Court to settle the issues even if the parties were not present on the basis of the issues that might have been suggested or proposed by the plaintiff. Non-appearance of the defendants on the date fixed for framing issues cannot be a ground for fixing the suit for hearing ex parte. He further contends that even then before the ex parte hearing an application was made. It was the duty of the Court to give an opportunity to the defendant to contest the proceedings since even today the date is fixed on 15th February, 2000 for hearing ex parte. He further contends that Court should not have taken a technical view on account of absence of affirmation of the application by affidavit. Therefore, the order should be set aside and the revisionists should be given opportunity to contest the proceedings.

4. Mr. Shyam Sunder Tripathi. learned counsel for the respondent on the other hand contends that unless the application is affirmed on oath, there is no material before the Court to ascertain the truth of the statement made In the application in order to find out a ground for setting aside the order for hearing ex parte. He further contends that it is apparent from the order sheet that the defendant had been guilty of misconduct to the extent of delaying the process. In fact, the defendant is not interested in the hearing of the suit. They are out to delay the process. According to him, there is no infirmity in the order itself. The defendant had dragged the process for the last four years in one way or the other through ingenious method. Therefore, no indulgence should be shown to them. The revision should be dismissed.

5. I have heard both the learned counsel at length.

6. In the present case, the date was fixed for settlement or framing of issues. The procedure for framing of issues are provided in Order XIV of the Code of Civil

Procedure. Rule 1, sub-rule (1) thereof provides that issue arises when a material proposition of fact or law is affirmed by the one party and denied by the other. Material proposition is defined in sub-rule (2) as those propositions of law or fact alleged by the plaintiff in order to show his right and the defendant alleges to constitute his defence. In view of sub-rule (3), each proposition affirmed by one and denied by other forms distinct issue. which in terms of sub-rule (4) be of fact or of law. The method or mode through which issues are to be framed is prescribed in sub-rule (5). This sub-rule requires that at the first hearing of the suit, the Court shall frame or record issues after reading the plaint and the written statement, if any, and after examination under Order X. Rule 2 and after hearing the parties or their pleader ascertaining upon what material proposition of fact or law the parties are at variance.

7. Thus, it is apparent that it is the duty of the Court to frame Issue after reading the plaint and written statement. So far as examination of the party or parties are concerned, the same is governed under Order X, Rule 2.

8. Under Order X. Rule 1, the Court is supposed to ascertain from the party or his pleader or the person accompanying the pleader the admission or denial of the case of the either of the parties. Rule 2 is resorted to for elucidating the matter in controversy from the pleader or person accompanying him. The object of this Rule as held in *Ganga v. Tilukram*, (1888) ILR 15 Cal 533 : 15 IA 119. is to determine the disputes between the parties. 'But this power is Intended', as observed in *Manomohan v. Mst. Ramdei* . 'to be used by the Judge only when he finds it necessary to obtain from such party information on any material question relating to the suit and ought not to be employed so as to supersede the ordinary procedure of trial as prescribed in Order XVIII'. As held in *Arunagiri v, Vasanharoya*, AIR 1949 Mad 707 : 1949 MLJ 373. this does not provide for an examination on oath and does not contemplate the defendant being put into the box, and examined and cross-examined before the plaintiff concludes his evidence. Rule 4 prescribes the consequence of refusal or inability of the pleader to answer. In such case, the Court may postpone the hearing and direct the party to appear in person. Sub-rule (2) prescribes the consequence of failure of the party to appear without lawful excuse by enabling the Court to pronounce

judgment.

9. Thus, the question of examination under Order X is somewhat informal. The purpose of examination can be served if the pleader is able to answer. It is not necessary that the party must be examined if the pleader can answer, the presence of the party would not be necessary. The presence of the party would be mandatory only when the pleader is unable to answer. Even then in such a case, the date is to be postponed with a direction to a party to appear on a date appointed. Only when on such appointed day if the party fails to appear without lawful excuse, then only the question of pronouncement of judgment arises. However, the Court may, instead of pronouncing judgment, may pass such orders in relation to the suit as the Court may think fit and which may include fixing date for ex parte hearing. But if sufficient cause is shown for non-appearance which is a lawful excuse, then the order may be recalled. Thus, without there being orders under Rule 4. Court has no jurisdiction either to pronounce judgment or to fix date for ex parte hearing.

10. Then again. Order X is a stage before the issues are framed under Order XIV. If the Court has not resorted to Order X earlier before framing issues, then the Court has to signify after having examined the plain and written statement that it requires to resort to Order X, Rule 2 and on such date, if the pleader is unable to answer, it has to resort to Rule 4 of Order X.

11. Rule 3, Order XIV, prescribes the materials from which issues are to be framed, such as (a) allegations made on oath by the parties or by any person present on their behalf or made by the pleader of such parties ; (b) allegations made in the pleadings or in answer to interrogatories delivered in suit : (c) the contents of the documents produced by the parties.

12. Rule 3, Order XIV, enables the Court while framing Issues to take into account besides the pleadings and replies to the interrogatories, the allegation made by the parties or by their pleaders and the documents produced by the parties. Thus, it is not always necessary that in the absence of the party issues cannot be framed. In case it cannot be framed in that event the party is to be directed to appear on a date appointed. This proposition stands clear and ratified by reason of Rule 4,

Order XIV, which provides that 'where the Court is of opinion that the issues cannot be framed without the examination of some persons not before the Court or without the inspection of some document not produced in the suit, it may adjourn the framing of issues to a future day, and may.....compel attendance of any person or the production of any document.....'

13. It may, however, be noted that Order XIV, does not provide for any provision for pronouncing of judgment or for passing such order as to fixing of date for ex parte hearing. Rule 4, Order XIV, also omits to incorporate what is provided in Order X, Rule 4. It is only when Order X is resorted to the proposition may follow. In the absence of the party, the Court has to resort to Rule 4, Order XIV, read with Rules 2 and 4 of Order X, as the case may be. It cannot assume Jurisdiction to fix a date for ex parte hearing without resorting to Rule 4, Order XIV, read with Rules 2 and 4 of Order X.

14. If the date is fixed for framing the issues, it is not necessary that the parties should appear before the Court. The Issues are to be framed if suggested by the parties on the basis of suggestion. But the Court is not bound to accept the suggestions. It has to frame issues from the materials specified in Order XIV, Rule 3. Even if the parties do not appear, it is open to the Court to frame issues according to its own wisdom even without the Issues being suggested by the parties from the materials referred to in Rule 3, Order XIV. Non-appearance of the parties on the date fixed for framing issues cannot be a ground for fixing date for hearing ex parte or passing an order for ex parte hearing.

15. Be that as it may. An application was filed. The Court could have put the defendant on terms in order to set aside the order for ex parte hearing though, however, unless the application is affirmed on oath, it can very well be said that there is no material before the Court to ascertain the truth made in the application. Signing of the application by the counsel does not satisfy the requirement. Inasmuch as the statements made in the application are the statements of the party which requires verification on oath by the party or its agent. The signature of the counsel appended to the application does not amount to affirmation of the contents of the application. Thus. It seems that the defendant was not very serious

about the matter. At the same time, it is apparent on the examination of the order sheet that the defendants have not deposited the cost awarded on account of certain adjournments.

16. Be that as it may. Since the order for ex parte hearing was passed on a wrong premise, therefore, the technical infirmity in the application should not be allowed to overshadow the situation. In view of the situation, the order dated 9th September, 1998 appears to be an order passed illegally and with material irregularity and as such, the same is liable to be set aside and recalled.

17. Learned counsel for the opposite party, however, contends that the order dated 9th September, 1998 has not been challenged by the revisionists. But the challenge of the order dated 9th December, 1998 is also an order which refused to recall the order dated 9th September, 1998 and as such the said order is very much within the scope and ambit of the revisional application. The challenge thrown to the order dated 9th December, 1998 is also a challenge to the order dated 9th September, 1998. Then again in a revisional application, when it is brought to the notice of the Court, the Court is empowered to look into any orders even if it is not challenged and set the things right when it appears that the Court had exceeded its Jurisdiction.

18. In the facts and circumstances of the case, therefore, the order dated 9th December, 1998 as well as the order dated 9th September, 1998 are, hereby, set aside. The suit be heard on merit by giving opportunity to the parties to adduce evidences in support of their respective cases.

19. Since it is found that the defendant had been delaying the process, therefore, the defendant be put on terms and is directed to deposit in the Court a sum of Rs. 65,000. which shall be invested in a term deposit by the learned trial court for a term as the learned trial court may decide and such deposit shall be renewed from time to time subject to the result of the suit. The defendant shall also furnish security to the satisfaction of the learned trial court, for a further sum of Rs. 65,000. Such deposit is to be made within a period of three months from today. The security may be furnished within the same period. The defendant shall not take further adjournment unless it is extremely necessary. The hearing of the suit

be expedited, if possible the learned trial court may endeavour to dispose of the suit within a period of one year.

20. With these observations, this revision is allowed to the extent Indicated above.

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