

Ganpat Chand Vs. Jeth Mal

Ganpat Chand Vs. Jeth Mal

SooperKanoon Citation : sooperkanoon.com/751871

Court : Rajasthan

Decided On : Oct-21-1982

Reported in : AIR1983Raj146; 1982()WLN649

Judge : Dwarka Prasad, J.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Order 8, Rules 1 and 10; Code of Civil Procedure (CPC) (Amendment), 1976

Appeal No. : Civil Writ Appeal No. 116 of 1981

Appellant : Ganpat Chand

Respondent : Jeth Mal

Advocate for Def. : D.K. Parihar, Adv.

Advocate for Pet/Ap. : A.L. Chopra, Adv.

Disposition : Appeal partly allowed

Judgement :

Dwarka Prasad, J.

1. This appeal has been filed against the order passed by the District Judge, Jodhpur D/- Hay 5, 1981 allowing the defendants' appeal and setting aside the judgment and decree passed by the Munsif, Jodhpur City, Jodhpur dated Dec. 22,

1979 and remanding the case to the learned Munsif with a direction that the defendants be allowed to take part in the proceedings in the suit so as to cross examine the plaintiff's witnesses. He further directed that the defendants would not be entitled to lead evidence in rebuttal.

2. The plaintiff Jeth Mal filed a suit for ejectment and for recovery 'of arrears of rent. It is not in dispute that the defendants failed to file a written statement in spite of several opportunities and ultimately on July 13, 1978 on the defendants' failure to file a written statement, the learned Munsif passed an order directing that proceedings be taken under Order 8, Rule 10 C.P.C. and ex parte evidence be recorded. An application was filed by the defendants under Order 9, Rule 7 C.P.C. requesting that the order passed against them for taking ex parte proceedings be set aside. Learned Munsif dismissed the aforesaid application by his order dated Sept. 19, 1978 after observing that no ex parte order was passed by him, but on July 13, 1978 he had decided to proceed under Order 8, Rule 10 C.P.C. A request by the defendants to reconsider the said order was rejected by the learned Munsif on Oct. 5, 1979. Thereafter the learned Munsif recorded the plaintiff's evidence and decreed the suit ex parte on Dec 22, 1979.

3. The defendants preferred an appeal before the learned District Judge, which was partly allowed by him as mentioned above. Learned District Judge, held that the words 'OR make such order in relation to the suit as if thinks fit' occurring in Order 8, Rule 10 C.P.C. do not permit the trial Court to hear the suit ex parte against the defendant, who has failed to file a written statement. It was, therefore, held that the defendants were entitled to take part in further proceedings in the suit and also to cross examine the witnesses produced by the plaintiff, but without, assigning any reason he directed that the defendants would have no right to examine their evidence in rebuttal.

4. So far as the question of forfeiture of the defendants right to file a written statement is concerned, learned counsel for the defendant-appellants did not advance any argument and in my view rightly. Several opportunities were allowed to the defendants to file their written statement, but they failed to do so and in these circumstances the trial court was fully justified in proceeding under Order 8

Rule 10 C.P.C. It is significant to notice the fact that Order 8, Rule 1 C.P.C. and Order 8. Rule 10 C.P.C. have been amended by the C.P.C. Amendment Act, 1976. Before the aforesaid amendment was introduced under Order 8. Rule 1 C.P.C., the defendant had an option to file a written statement if he so liked but he could be directed by the court to file a written statement. If the defendant did not file a written statement, which he desired to file of his own, it did not amount to an order by the court requiring the defendant to file a written statement and in the absence of the defendant's written statement, the court could proceed further with the suit. But in case, the Court specifically directed the defendant to file a written statement at or before the first date of hearing or within such time which the court may permit in this behalf, then the failure on the part of the defendant to comply with the direction of the court would entail the consequences of attracting the application of Order 8, Rule 10 C.P.C. Now after the amendment of Order 8, Rule 1 C.P.C. the defendant is directed by law to file a written statement at or before the first hearing Or within such time as the court may permit for the purpose and on the failure of the defendant to file his written statement at the first hearing or within the time allowed by the court for the purpose, the court is entitled to take proceedings in accordance with the provisions of Order 8, Rule 10 C.P.C. Thus there is no option now left to the defendant but he had to file his written statement, as laid down in Order 8, Rule 1 C.P.C. But now two courses are open to the court, on the failure of the defendant to file his written statement within the time permitted or fixed by the court, namely, that the court may proceed to pronounce judgment or it may make such other order in relation to the suit as it may think fit. If the trial court does not adopt the first course specified in Order 8. Rule 10 C.P.C. and does not proceed to pronounce judgment against the defendant, then the court may proceed further with the hearing of the suit in such a manner as it may think proper, in the circumstances of the case. The defendant, who has not filed a written statement, in a case where the trial court decides to proceed according to the second part of Order 8, Rule 10 C.P.C., although is debarred from subsequently producing his written statement at some later date, yet he may be allowed to cross-examine the witnesses produced by the plaintiff and he may also be allowed to lead evidence in rebuttal of the allegations made in the plaint and then he can also be allowed to take part in the final arguments, leading to the

decision of the suit It is no doubt true that if the defendant does not file his written statement, as directed by the court, he cannot be allowed to examine any evidence in respect of specific defences that he might have taken in the suit, because it is well settled that where a claim was never made by the presentation of his defence by the defendant, then no amount of evidence can be looked into in respect of a plea which was never put forward. In this connection reference may be made to the decision of their Lordships of the Privy Council in *Siddik Mahomed Shah v. Mt. Saran*, AIR 1930 PC 57 (1).

5. In *Bhageran Rai v. Bhagwan Singh*, AIR 1962 Pat 319 it was held by their Lordships of the Patna High Court that non-filing of the written statement by the defendant cannot be taken to be an admission of the plea advanced in the plaint and the defendant who has not filed a written statement cannot be debarred from giving evidence which traverses the allegations made in the plaint. In *Siai Sinha v. Shivadhari Sinha*. AIR 1972 Pat 81 Untwalia X. as he then was laid down the law in this respect as under:--

'The position of law in such a case is that a defendant, even without filing a written statement can take part in the hearing of the suit. He may cross-examine the plaintiff's witnesses to demolish their version in examination-in-chief. Without written statement, however, he cannot be permitted to cross-examine the witnesses on questions of fact which he himself has not pleaded nor can he be allowed to adduce evidence on questions of fact which have not been pleaded by him by filing any written statement. It should be further made clear that if a defendant files a written statement and does not controvert the allegations in the plaint then tacitly the facts not controverted are said to be admitted, but if he does not file written statement, it cannot be said that he has admitted all the facts pleaded by the plaintiff.'

6. I am in respectful agreement with the view taken by Untwalia J. in the aforesaid case. The same view was also taken in *Bindeshwari Kamkar v. Radha Tiwari*, AIR 1979 Pat 78 and it was held that the correct position in law is that after the date when the Court refuses to extend time to the defendant to file his written statement or the date of first hearing in the suit, it is open to the Court to order that the right

of filing the written statement has been forfeited. Up to that date, it is open to the Court to grant extension of time to the defendant for filing written statement and the Court can either grant further time or refuse to do so. But once the Court refuses to grant further time, or after the date of first hearing, the right of filing written statement is forfeited. But even if the defendant did not file his written statement and no further time is extended to him to do so, yet the defendant would be entitled to take part in the further proceedings in the suit, even in the absence of the written statement, but to the limited extent as laid down by Untwalia, J., in Siai Sinha's case.

7. In *Sushila Jain v. Rajasthan Financial Corporation Jaipur Ltd.*, AIR 1979 Rai 215, Sidhu, J., also took a similar view and upheld an order passed by the trial Court, forfeiting the right of the defendant to file his written statement, when it appeared that the defendant had adopted dilatory tactics and tried to unduly prolong the proceedings and directing the plaintiff to produce evidence in support of her claim in the suit. There was no controversy raised in that case relating to the question that if the plaintiff has led evidence then the defendant should or should not be permitted to lead evidence in rebuttal, in respect of the allegations made in the plain). In the aforesaid case, Sidhu, J., observed as under (para 7):--

'The Court would obviously be faced with a ticklish situation in dealing with a defenant who is determined to prolong the proceedings and is adopting dilatory tactics. If such a defendant requests the Court for extension of time to file his written statement or defence his request should be dealt with on its merits, with reference to the ground alleged for his inability to file the written statement at or before the first hearing. If the court is satisfied that the ground alleged is prima facie reasonable and bona fide, then, without making much fuss over it, it should extend the time and permit the defendant to file the written statement within the extended time. If, on the other hand, the request is not bona fide and reasonable, the court would be justified, and may indeed be under a duty, to refuse such a request. No hard and fast rule can be laid down for determining whether a particular request is bona fide or not. Such a request has to be dealt with on its merits in the circumstances of each case.'

8. In *Chunni Lal Chowdhary v. Bank of Baroda*, AIR 1982 J & K 93 the view taken by Untwalia, J., in *Siai Sinha*, case, AIR 1972 Pat 81 was followed. Learned Chief Justice observed as under (Para 3) :--

'Where the Court decides to proceed to hearing of the suit without the written statement that would not debar the defendant from taking part in further proceedings of the case. His participation would, however, be hedged in by several limitations. He will not be able either to cross-examine the plaintiff's witnesses or to produce his own evidence with regard to any questions of fact which he could have pleaded in the written statement. He will, however, be competent to cross-examine the plaintiff's witnesses in order to demolish their version of plaintiff's case.'

9. A discordant note was, however, struck by a learned single Judge of Delhi High Court in *Union of India v. Bhagwan Dass*, AIR 1976 Delhi 96. In that case, although the learned Judge held that the failure of the defendant to file the written statement does not raise the presumption that the defendant admits all the allegations contained in the plaint so the allegations made by the plaintiff must be deemed to be correct and that the Court should proceed on proved facts, on the basis of the evidence before it. But, the learned Judge observed that the Court should proceed under Order 8, Rule 10, C.P.C. and comparing with the power of the court under Order, 10, Rule 4. of the Code, it was held that after refusing the defendant an opportunity to file a written statement the Court should have proceeded to hear evidence in the suit *ex parte*. In the first place, the aforesaid observations are merely obiter, as in that case the finding of the learned Judge was that Order 8, Rule 10, did not apply to the circumstances of that case, because the defendant was not directed to file the written statement under the unamended Order 8 Rule 1 C.P.C. and that the Court had no jurisdiction to pronounce judgment against the defendant by way of penalty, under Order 8, Rule 10. C.P.C. The learned Judge proceeded to remand the case to the trial Court from the stage of refusing further opportunity to the defendant to file the written statement and directing the plaintiff to produce his evidence. In the second place, I must express my respectful dissent from the view taken by the learned Judge in the aforesaid case, AIR 1976 Delhi 96 because Order 8. Rule 10 C.P.C. does not

provide that the only course open to the Court on the failure of the defendant to file a written statement is to proceed to hear evidence in the suit ex parte. The provision contained in the second part of Order 8, Rule 10 C.P.C. is couched in a language which gives a wide discretion to the Court to "make such order in relation to the suit as it thinks fit.' The Court has to consider the circumstances of each case and is required to pass a reasonable order suitable to the circumstances of that case. There can be no hard and fast rule that in each and every case, where the defendant fails to file a written statement and the court does not think it proper to pronounce judgment against him, then the court is bound to proceed to hear evidence in the suit ex parte. In my humble view, ordinarily the course which Untwalia, J., has pointed out in Siai Sinha's case is the proper course to be followed in such cases and the) defendant should be allowed not only to cross-examine the plaintiff's witnesses but he should also be allowed to lead evidence in rebuttal so as to demolish their version but as pointed out by Untwalia, J., the defendant cannot be allowed to lead evidence in respect of specific defences which have not been raised by him on account of his failure to file a written statement. However, within the limited sphere pointed out above, the defendant could also be allowed to lead his evidence in rebuttal.

The defendant should also then be permitted to take part in the final arguments, before the trial Court proceeds to decide the suit. The aforesaid procedure should also be applied to the present case.

10. In the result, the appeal is partly allowed and the order passed by the District Judge, Jodhpur dated May 5, 1981, is modified to the extent that after the plaintiff's evidence is examined, the defendants would also be entitled to lead their evidence in rebuttal so as to demolish the case set up by the plaintiff. But the defendant would not be allowed to lead evidence on questions of fact which have not been pleaded by him, on account of his failure to file a written statement. After the defendant's evidence in rebuttal is examined, the trial Court should hear the arguments of both the parties before proceeding to decide the suit.