

Rangasami Udayan Vs. Manickam Pillai

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Court : Chennai

Decided On : Dec-04-1916

Reported in : 40Ind.Cas.223

Judge : William Ayling and ;Seshagiri Aiyar, JJ.

Appellant : Rangasami Udayan

Respondent : Manickam Pillai

Judgement :

Ayling, J.

1. Appellant before us was the 4th defendant in Original Suit No. 480 of 1915 on the file of the District Munsif of Tirukoilur. He received notice of suit and appeared in person on the 4th September 1915. He was then ordered under Order VIII, Rule 1 of the Civil Procedure Code, to file a written statement and at his own request was allowed time till 21st September 1915 to do so. He again appeared on the latter date, and apparently asked for further time but as the reasons he gave were insufficient in the opinion of the District Munsif, this request was refused. As he did not file the written statement on the 21st September 1915, as required, an order was passed on that date declaring him ex parte.

2. On the 12th October 1915, he applied under Order IX, Rule 7, to have the ex parte order set aside: but this application was dismissed.

3. He then presented a revision petition to this Court against the order dated 21st September 1915, which was dismissed by Coutts Trotter, J., on the 10th March 1916. Against the latter order, he prefers the present Letters Patent Appeal.

4. Respondent was not represented; but at our request Mr. Chandrasekara Iyer was good enough to argue the case for him as amicus curiee.

5. The sole question for disposal is whether the Munsif's order, dated 21st September 1915, declaring appellant ex parte for failure to file a written statement as required is ultra vires.

6. The only provision of law specifically empowering a Court to proceed ex parte is Order IX, Rule 6(1)(a), and this is contingent on the defendant failing to appear. It does not apply to a case in which a defendant appears but fails to file a written statement. Appellant's Vakil contends that there is nothing in the Code penalising disobedience to an order under Order VIII, Rule 1; and that the Court can only proceed under Order X, and examine the defendant orally, recording his admissions and denials. Mr. Chandrasekara Iyer, on the other hand, relies on Order VIII, Rule 10, as impliedly conferring the power to declare a defendant ex parte.

7. Assuming the last mentioned rule to apply, I think it would authorise an ex parte declaration. It runs thus: 'Where any party from whom a written statement is so required fails to present the same within the time fixed by the Court, the Court may pronounce judgment against him or make such order in relation to the suit as it thinks fit.'

8. To summarily pronounce judgment against a party without considering evidence (which the Court is specifically empowered to do under the first part of the rule) is the most drastic measure conceivable; and the power in the alternative to pass any other order it thinks fit must include the power to make any less severe order. It would be a less severe order to defer passing judgment until the evidence of the other side had been recorded and considered. This is what an ex parte declaration amounts to; and it by no means necessarily involves judgment against the person declared ex parte.

9. The difficulty is in deciding whether Rule 10 only applies to a failure to comply with a requirement under Rule 9; or whether it also covers failure to present a written statement required under Rule 1. The word 'so' is certainly ambiguous. Appellant relies on the close juxta position of the two rules and argues that the words 'so required' in Rule 10 can only relate to a requisition under Rule 9; otherwise instead of 'so required' the words used would be 'required under this Order.'

10. On the other hand if this were the intention of the Legislature, there is no object in making a separate rule. The penal clause would more suitably and conveniently form part of Rule 9 (cf. Order X, Rule 4). It would moreover be strange for the Legislature to penalise so heavily the failure to present an additional written statement, when required, and to leave unpunishable the failure to present a written statement when required at the outset of the case: cf., also the case to provide penal clauses in Order X, Rule 4, Order XI, Rule 21, and Order XVI, Rule 20. I do not think that the provisions of Order X afford an adequate explanation. This order merely ensures that the material averments of parties shall, somehow or other, be placed on record at the outset of the trial. The Court may take them down from the mouths of the parties but it also may, as empowered by Order VIII, Rule 1, require the defendant to put his case in writing. And where the Legislature empowers a Court to require a party to do a certain thing, it is most unlikely that it deliberately intended to leave that Court without power to enforce obedience by penalty for disobedience. In fact, the omission of a penalty for disobedience to the requisition under this rule could, in my opinion, only be explained on the ground of oversight, an explanation which, unless compelled to, we should be slow to adopt.

11. And I do not think on a careful consideration of Order VIII that any such conclusion is justified. The rules in the Order intervening between Rules 1 and 9 are all directed to making clear what should be contained in the written statement referred to in the former. They are really of the nature of explanations to Rule 1 and might not inappropriately appear as part of it. If they did and if Rules 9 and 10 stood numbered as Rules 2 and 3, it would, I think, be hard to contend that Rule 3 applied only to Rule 2 and not to Rule 1.

12. It is curious that a point of this nature should not long ago have been covered by authority; but the only case quoted to us is that reported as *Sivarajadhani Nilakantham Pillay v. Kuppagantulu Ramiah Pantulu* 2 M.H.C.R. 811 in which it was held that failure to file a written statement did not justify the trial of a case ex parte. The Code in force at the date of this decision (Act VIII of 1859), however, contained no provision analogous to Order VIII, Rule 10: nor did it empower the Court to require the presentation of a written statement. In my opinion, Rule 10 of Order VIII relates back to Rule 1 as well as to Rule 9; and that the District Munsif's order was not ultra vires.

13. In my opinion, there is no ground for interference and the Letters Patent Appeal should be dismissed.

Seshagiri Aiyar, J.

14. I regret very much I am not able to agree with my learned colleague. The facts have been fully stated in his judgment: but for the fact that an important principle relating to processual law is involved, I would not have considered it necessary to differ from Mr. Justice Ayling's judgment.

15. In my opinion, the District Munsif acted illegally in the exercise of his Jurisdiction in declaring the appellant ex parte. I accept the Munsif's statement that he asked the appellant to file a written statement on the 4th September 1915 when he appeared in person. I do not think the failure to file the written statement entitled the District Munsif to declare the appellant ex parte. It is admitted that he was present on the adjourned date. It sounds incongruous that a defendant who appears in person should be declared ex parte see *Chunni Lal v. Chamman Lal* (1884) A.W.N. 313 , I can understand the Court declaring that his defence should be struck out, and that he is disentitled from filing any written statement in future. From my limited experience of the work on the original side, I know that cases in which defendants fail to file their written statements in time are placed in the Undefended Board. I speak with some hesitation, but I do not think that a defendant who appears but does not file his written statement would be declared ex parte on the original side. The difference between declaring a defendant ex

parte and placing the case in the Undefended Board seems to be this. A defendant declared ex parte has no right of audience until the order is set aside, whereas a person whose written statement has not been received would have an opportunity of cross-examining the plaintiff and his witnesses and of showing that the plaintiff has not proved his case, although he may be debarred from proving his defence. To take a concrete instance, the defence to a money claim may be, that it is barred by the rule of *res judicata*. A defendant whose written statement is not accepted would not be allowed to produce evidence, to prove, this defence: but he could, by cross-examination of the plaintiff and his witnesses, show that the plaintiff is not entitled to the amount He claims. Take another instance; to a suit in ejectment based on title the defence of adverse possession may be the answer. For failure to file his written statement in time, the, defendant may be precluded from adducing evidence to prove this: but, if he appears, he would be permitted to show that the plaintiff has no title. Thus the difference between declaring a defendant ex parte and refusing to accept his written statement thereby striking out his defence is a substantial one. In my opinion, the defendant to whom time has been given to file his written statement and who fails to tender it in time, but who still appears in person should not be subjected to the disqualification of being declared ex parte.

16. An examination of the Orders and rules of the Code of Civil Procedure seems to bear out this view. Order IX, Rule 6(a), makes it a condition precedent to the declaration of ex parte that 'the plaintiff appears and the defendant does not appear.' Rule 11 of the same Order contemplates that when some of the defendants appear and others do not, 'the Court at the time of pronouncing judgment shall make such an order as it thinks fit with respect to the defendants who do not appear.' Apparently under this rule, so long as all the defendants are not ex parte, the defendant who was absent at an earlier stage can take part in the hearing at a subsequent stage. Rule 13 appears to me to be fairly conclusive of the question. This rule enjoins on the Court to set aside the ex parte order if the defendant satisfies the Court 'that he was prevented by any sufficient cause from appearing.' The appearance certainly includes personal appearance. The import of the rule is that the defendant could be declared ex parte for his non-appearance, and not for failure to file a written statement. If failure to file a written statement is a

good cause for declaring a defendant ex parte, the rule should have provided for reasons being, shown for failure to file the written statement in time. The absence of such a provision is very significant. My conclusion is that a declaration of ex parte can only be made for non-appearance of the party.

17. I shall go back a little and examine Order VIII. Rule 1 of that Order is a considerable improvement upon Section 110 of the Code of 1882. Under that section, the written statement could have been tendered at any time; and there was no provision enabling the Court to call for one. Rule 1 supplies that deficiency; but no penalty is imposed for not filing the written statement called for. Rule 9 relates to statements after the filing of the first written statement. Very often the Court may ask the plaintiff to, file a statement in answer to some specific allegations made in the defendant's written statement; or it may be that at the suggestion of the plaintiff or after discovery and inspection, the Court considers that the defendant should file a further statement. Rule 9 enables the Court to get from the parties statements of the above description. Rule 10 prescribes the penalty for failure to comply with such a request. Even if I am prepared to read this rule as enabling the Court to declare a defendant ex parte. I am unable to hold that the words from whom a written statement is so required as referring back to Rule 1. A whole mass of matter intervenes between the two rules, and I consider it would be doing violence to grammar to read the words I have italicised as referring to Rule 1. It may be a case of omission or not, I am unable to connect Rule 10 with Rule 1. Order X, Rule 4, and Order XVI, Rule 20, provide for the contumacious conduct of a defendant who appears. The declaration of ex parte is not among the penalties.

18. Therefore, apart from any decisions, I am of opinion that the order declaring the appellant ex parte was passed without jurisdiction.

19. Sivarajadhani Nilakantham Pillay v. Kuppagantulu Ramiah Pantulu 2 M.H.C.R. 811 directly and Shahzada Pakaktar v. Jakriram Bhokath 11 W.R. 5 and Raghapa v. Parapa 1 Ind. Dec. 145 by implication support this view.

20. I may also say that the exercise of the discretion by the District Munsif seems to have been very arbitrary, although that would not furnish a ground for

interference under Section 115. There was only one adjournment given and on this date, time was granted to other defendants to file their written statements. Therefore there was no object to be gained by debarring the appellant alone for defending the suit. Reference may be made to the observations of the learned Judges in *Ross and Co. v. Scriven* 34 Ind. Cas. 235 which contains very salutary cautions about declaring a defendant ex parte.

21. Before closing the judgment, I must express my indebtedness to Mr. Chandrasekara Iyer for having ably argued the case on behalf of the counter-petitioner who was not represented before us.

22. I would, therefore, reverse the order of the District Munsif declaring the appellant ex parte and I remand the case to him for disposal according to law.

23. As a result, the Letters Patent Appeal is dismissed.

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