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Date: 21/10/2025

Sukhdeo Rai Vs Ashok Kr. Rai and Others

WP (C) No. 462 of 2004

Court: Gauhati High Court

Date of Decision: March 9, 2004

Acts Referred:
Civil Procedure Code Amendment Act, 2002 â€" Section 15#Civil Procedure Code, 1908 (CPC) â€" Order 8 Rule 1

Citation: AIR 2005 Guw 37 : (2004) 3 GLR 248

Hon'ble Judges: Ranjan Gogoi, J

Bench: Single Bench

Advocate: S.P. Roy, D. Nandi, N. Alam, K. Rajbongshi, V.K. Rai and B.R. Das, for the Appellant; A. Sattar and Kumari, for the Respondent

Judgement

Ranjan Gogoi, J.
Strange indeed is the manner in which the present litigation has meandered for the entire length of the last decade and a

substantial part of the present. It is to halt this unnatural process, that exposes the fragile side of the judicial system, that this Court has attempted to

put the litigation back on its track after an elaborate hearing at the motion stage.

2. The facts in brief may be noticed at the outset.

The Respondent No. 1, herein as the plaintiff, has instituted Title Suit No. 25/91, for a decree of declaration of his title in respect of the suit

property and for recovery of possession. The suit was filed on 8.2.91 and summons was served on the defendant No. 1 in the suit who is the

petitioner herein on 24.9.91 (herein after referred to as the defendant). The defendant appeared and sought time to file written statement, which

was granted to him on several occasions. On 17.3.93, the learned Trial Court fixed the suit for ex parte hearing as till the said date the defendant

had not filed his written statement. However, on 7.2.94, the suit was dismissed for non-prosecution and continued to remain so until it was

restored on 11.6.01. Upon restoration of the suit, the learned Trial Court thought it proper to vacate the order of ex parte hearing passed earlier

and directed the defendant to file his written statement.

The defendant continued to take time and as no written statement was filed, the learned Trial Court proceeding under the amended provision of

Order VIII, Rule 1 of the CPC (amended by the CPC (Amendment) Act, 2002) once again fixed the suit for ex parte hearing, by order dated

2.1.03. Thereafter, it appears that the learned Counsel for the defendant sought leave of the Court to withdraw from the case and the learned Trial

Court permitted the learned counsel to take necessary steps in this regard by issuing notice to the defendant. As no step was taken by the learned

counsel, as directed, the learned Trial Court, by order dated 27.2.03, fixed the case for argument. Thereafter, on 4.6.03, it was pointed out to the

learned Trial Court that in view of the value of the suit, the same would be within the jurisdiction of the Court of the learned Civil Judge, Junior

Division. The said fact being pointed out, the learned Trial Court, thought it proper to place the case records before the learned District Judge,

who by order dated 9.6.03, transferred the case to the learned Civil Judge, Junior Division No. II, Guwahati, for disposal. The aforesaid

development, i.e., transfer of the case to the Court of the learned Civil Judge, Junior Division No. II, Guwahati, was brought to the notice of the

learned counsels appearing for both the sides on 10.7.2003. On 3.9.03, the defendant filed his written statement in the case along with an

application to take the written statement on record. The said prayer having been rejected by the learned Trial Court by order dated 21.11.03, the

instant application has been filed under Article 227 of the Constitution.

2. I have heard Mr. S P Roy, learned counsel for the petitioner and Mrs. M. Kumari, learned counsel for the respondent No. 1.

3. Three broad aspects of the challenge made is noticeable in the arguments advanced by Mr. S P Roy, learned Counsel for the petitioner. Mr.

Roy, has argued that regardless of the past events which had occurred, as the written statement has been filed by the defendant, and the suit has

been instituted prior to the amendment of the Code of Civil Procedure, the learned Trial Court, for the ends of justice, ought to have accepted the

written statement filed instead of deciding to proceed in the matter ex parte against the defendant. Mr. Roy, learned Counsel for the petitioner, has

argued that the provisions of Sections 6, 9 and 15 of the CPC (Amendment) Act, 2002, make it abundantly clear that the amended provisions of

Orders V and VIII of the CPC would not apply to a suit instituted earlier to the coming into force of the CPC (Amendment) Acts of 1999 and

2002 and therefore, the learned Trial Court had clearly gone wrong in refusing the plaintiff''s prayer for acceptance of the written statement by

relying on the amended provisions of Order VIII, Rule 1 of the Code of Civil Procedure. Learned counsel has further argued that the transfer of

the suit by the learned District Judge to the Learned Civil Judge, Jr. Division, No. 2, having been brought to the notice of the defendant on

10.7.03, in any case, the period of 90 days, mentioned in Order VIII, Rule 1, must be computed from the said date. As the written statement was

filed by the defendant on 3.9.2003, the impugned order refusing to accept the same is contended to be contrary to the provisions of Order VIII,

Rule 1 itself. Lastly, it has been argued by Mr. Roy, learned counsel for the petitioner, that even if the Trial Court is assumed to be correct in

rejecting the petitioner"s prayer for acceptance of the written statement, the Trial Court could not have fixed the suit for arguments without giving

the defendant an opportunity to cross-examine the witness/witnesses examined by the plaintiff and further without giving the defendant an

opportunity to lead his own evidence. Reliance in this regard has been placed on an "Apex Court decision in the case of Ramesh Chand

Ardawatiya Vs. Anil Panjwani,

4. Replying to the arguments advanced on behalf of the defendant/ petitioner, Mrs. M. Kumari, learned counsel for the respondent No. 1, has

contended that u/s 15 of the CPC (Amendment) Act, 2002, the provisions of Orders V and VIII, as amended, will not apply to such cases where

the written statement has already been filed prior to the Amendment Acts of 1999 and 2002 coming into force. To the aforesaid extent only, the

amended provisions have not been made retrospective. However, if in a case instituted prior to the Amendment Acts coming into force, where

written statement has not been filed, the provisions of the amended CPC will certainly apply. Learned counsel for the respondent has argued that

the writ petitioner inspite of several opportunities granted prior as well as subsequent to the amendment of the Code of Civil Procedure, had failed

to file his written statement and the written statement filed on 3.9.03 being clearly beyond the period of 90 days of coming into force of the

Amendment Acts, there was no power left in the Court to accept the same. Learned counsel has further argued that the impugned order dated

21.11.03, has been passed in strict compliance with the provisions of the amended CPC and there should be no occasion for this Court to cause

any interference with the said order passed by the learned Trial Court and that too in exercise of powers under Article 227 of the Constitution.

5. The elaborate arguments advanced on behalf of the rival parties have received the anxious consideration of the Court. Section 15 of the CPC

(Amendment) Act, 2002, makes it abundantly clear that the provisions of Orders V and VIII of the amended Code of Civil Procedure, will not

apply to a pending suit where the written statement has been filed by the defendant. However, if in any such pending suit, the written statement has

not been filed, the amended provisions will govern the proceedings in the suit. Section 15 of the Amendment Act, 2000 has not made the

amendments in question retrospective to the extent noted above. In the instant case, though time on several occasions was granted to the

defendant, no written statement was filed before the Amendment Acts of 1999 as well as 2002 came into force. As no written statement was filed

even within 90 days of the Amendment Act of 2002 coming into force with effect from 1.7.2002, the order dated 2.1.2003 was passed rejecting

the prayer for further adjournment and fixing the suit for ex-parte hearing. The written statement eventually filed on 3.9.03 being beyond the

aforesaid period of 90 days, there was no power or discretion left in the Court to accept the delay and take the written statement on record. The

provisions of Order VIII as amended by the Amendment Act of 2002 is particularly stringent and no discretion has been left to the Court to extend

the time for filing the written statement beyond 98 days. Even extension of time beyond the initial 30 days, if granted, is required to be supported

by reasons to be recorded in writing. This being the position, the learned Trial Court cannot be faulted for rejecting the prayer of the plaintiff for

recall of the earlier order and for acceptance of the written statement filed. The impugned order dated 21.11.03 in so far as rejection of the

petitioner''s prayer for acceptance of the written statement is concerned will, therefore, not call for any interference.

6. Coming to the second limb of the case, i.e., correctness of the order dated 21.11.03, fixing the case for arguments, what must be noticed, is that

though initially the case was fixed for ex parte hearing, the counsel for the defendant expressed a desire to withdraw From the case whereupon the

learned Trial Court permitted the counsel to take necessary steps in this regard. As no steps had been taken and none had appeared on behalf of

the defendant, the case was fixed for arguments. The subsequent orders passed in the case would however go to show that after the aforesaid

developments took place, representation had been made before the learned Trial Court on behalf of the defendant. Under Order VIII, Rule 10 of

the Code of Civil Procedure, though the Court is empowered to pronounce judgment against the defendant upon the written reply not being filed, a

wide discretion has been vested in the Court to proceed otherwise. The following observations of the Apex Court in the case of Ramesh Chand

Ardawatiya v. Anil Panjwani, 2003 (7) SCC 370 would be appropriate to be noted at this stage.

Even if the suit proceeds ex parte and in the absence of a written statement, unless the applicability of Order VIII Rule 10 of the CPC is attracted

and the Court acts thereunder, the necessity of proof by the plaintiff of his case to the satisfaction of the Court cannot be dispensed with. In the

absence of denial of plaint averments the burden of proof on the plaintiff is not very heavy. A prima facie proof of the relevant facts constituting the

cause of action would suffice and the Court would grant the plaintiff such relief as to which he may in law be found entitled. In a case which has

proceeded ex parte the court is not bound to frame issues under Order 14 and deliver the judgment on every issue as required by Order 20 Rule

5. Yet the Trial Court should scrutinise the available pleadings and documents, consider the evidence adduced, and would do well to frame the

''points for determination'' and proceed to construct the ex parte judgment dealing with the points at issue one by one. Merely because the

defendant is absent the court shall not admit evidence the admissibility whereof is excluded by law nor permit its decision being influenced by

irrelevant or inadmissible evidence.

7. As the judgment in the present suit has not been pronounced, it will therefore, be necessary for the Trial Court to now proceed in accordance

with the law laid down by the Apex Court in the case of Ramesh Chand Ardawatiya v. Anil Panjwani (supra) and in that context decide as to

whether an opportunity of cross-examination and to lead evidence is required to be conferred to the defendant to arrive at a just and correct

decision in the suit. In view of the inordinate delay that has taken place, the Trial Court will make it utmost endeavour to finalise the suit as

expeditiously as its calendar would permit.

8. The present application will stand closed in terms of the above direction.