IN THE HIGH COURT OF KARNATAKA AT BENGALURU

THE HON'BLE MR. JUSTICE B. VEERAPPA

WRIT PETITION No.56785/2015(GM-DRT)

Dated:28-06-2019

SMT.MANJULA vs. CANARA BANK and Another

O R D E R

The petitioner filed the present writ petition against the order dated 2.7.2015 made in O.A. No.463/2014 on the file of the Presiding Officer, Debts Recovery Tribunal ('DRT' for short), Bangalore as per Annexure-A.

2. It is the case of the petitioner that the Respondent No.1 claimed that the Respondent No.2 i.e., the husband of the petitioner, who had deserted her had availed loan facilities of Rs.18.00 lakhs and Rs.2.00 lakhs from the bank and the petitioner stood as guarantor for the loan obtained by the husband. On the basis of the same, the respondent No.1 – bank filed an application for recovery of dues under Recovery of Debts Due to Banks and Financial Institutions Act, 1993 in O.A. No.463/2014.

3. It is further contended that the 1st respondent while filing the application had tendered the address of the

godown owned by the petitioner. The Respondent No.1 - bank has filed the application by mentioning the address of a *godown* which is standing in the name of the petitioner at Madawara while she was residing at Parimalanagar, Nandhini lay-out, Bangalore. The husband of the petitioner (Respondent No.2) is a vagabond and there has been a marital disconcert between the petitioner and the Respondent No.2 right from the year 2005 and in the year 2011, the Respondent NO.2 had come to her stating that hewanted to do a Fixed Deposit in the name of their daughter - Kum. Shalini and got her signatures on certain un-filled documents. While obtaining signatures, it is also stated that the bank would fill up the remaining portion of the documents and that the petitioner would be the guardian for the Fixed Deposit at Canara Bank, Chikkabidarakallu branch. Thereafter the petitioner requested the 1st respondent bank officials that the 2nd respondent was trying to cheat the bank and trying to move the machinery and requested the bank to discharge her from surety on 9.5.2013. Thereafter legal notice also issued by the bank to the petitioner.

4. When the matter came up before the DRT on 2.7.2015, the defendant Nos.1 and 2 (petitioner and respondent No.2 herein) were placed *exparte* and posted for plaintiff's evidence. On the same day, the Tribunal by

invoking the provisions of Order 8 Rule 10 of the Code of Civil Procedure allowed the O.A. as sought for by the applicant with costs and directed the office to issue Recovery Certificate (RC) and to do the needful. Hence the present writ petition is filed.

5. I have heard the learned counsel for the parties to the lis.

6. Sri Mohammed Sultan Beary, learned counsel for the petitioner contended with vehemence that when the matter came up before the DRT on 2.7.2015 for evidence, the DRT placed the defendant No.1 and 2 (petitioner and the 2nd respondent) *exparte* and proceeded to allow the O.A. even without verifying the pleadings and evidence and without assigning reasons. The order passed by the DRT is not a speaking order and cannot be sustained. He would further contend that merely because the defendants had not filed the written statement and were placed *exparte*, it does not mean the Court should abdicate its function and duty to find out as to whether the plaintiff has made out a case for decree or not. He further contended that the Court is empowered to pass a decree on the very date on which the defendant fails to file his defence in writing. However, the Court is not relieved from examining the averments in

the plaint. Therefore he sought to allow the writ petition.

7. Per contra, Sri H.S. Rukkoji Rao, learned counsel for the respondent No.1 – bank contended that the present petitioner and the 2nd respondent are due the bank a sum of Rs.25,96,784/- as on the date of filing the O.A. Since the present petitioner was placed *exparte*, the DRT was justified in allowing the application. Therefore he sought to dismiss the writ petition.

8. I have given my anxious consideration to the arguments advanced by the learned counsel for the parties and perused the material on record carefully.

9. It is an undisputed fact that the 2nd respondent who is the husband of the petitioner has borrowed loan from the 1st respondent – bank and the petitioner stood as guarantor for the loan amount obtained by the husband. Since the respondent NO.2 - husband has not paid the loan amount, the bank issued notice and thereafter initiated proceedings in O.A. No.463/2014. The DRT by an order dated 9.4.2014 granted *exparte* order of Temporary Attachment in favour of the respondent No.1 – bank and against the respondent No.2 as sought for in the application

and issued suit summons. The matter was being posted from time to time for taking steps for defendant Nos.1 and 2 (present petitioner and respondent No.2). Ultimately, when the matter was posted on 2.7.2015, the DRT placed defendant Nos.1 and 2 *exparte* and proceeded to pass the impugned order invoking the provisions of Order 8 Rule 10 of the Code of Civil Procedure as under:

> *"By invoking the order 8 Rule 10 of CPC, the present O.A. is allowed as sought by applicant with costs.*
>
> *Office is directed to issue R.C., further do the needful"*

10. A careful reading of the provisions of Order 8 Rule10 of the Code of Civil Procedure makes it clear that if the defendant does not file the written statement, it may be lawful for the Court to pronounce judgment on the basis of the facts contained in the plaint. It does not mean that the Court should abdicate its function and duty to find out as to whether the plaintiff has made out a case for decree or not. It is also not in dispute that the Court is empowered to pass a decree on the very day on which the defendant fails to file his defence in writing. However, the

Court is not relieved from examining the averments made in the plaint as held by the Division Bench of this Court in the case of Mallayya vs. Totayya reported in ILR 1989 KAR 807,wherein at paragraphs 4 and 6 it is held as under:

> *4. Before examining the decided cases of the Supreme Court relied upon by Mr. Adi, it would be useful to extract Rule 10 of Order VIII of the Code of Civil Procedure, which is as follows:*
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> > *VIII. 10. <u>Procedure when party fails to present written statement called for by Court</u>:— Where any party from whom a written statement is required under Rule 1 or Rule 9 fails to present the same within the time permitted or fixed by the Court, as the case may be, the Court shall pronounce Judgment against him, or make such order in relation to the suit as it thinks fit, and on the pronouncement of such Judgment, a decree shall be drawn up.*
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> *The language employed after the 1976 amendment clearly demonstrates that the old law that in a suit in which summons to the defendant was issued only for settlement of*

issues and the Court could not, in the absence of the appearance of the defendant or contest by defendant, proceed to pass Judgment on the very date indicated in the summons for appearance, has been put an end to and the Court is empowered to proceed to pass a decree on the very date on which the defendant fails to perform an act, which is required to be performed i.e., enter his defence in writing. Beyond that, it does not make any other change, in our view.

This question fell for consideration before a Division Bench of this Court in the case of State of Karnataka v. Hemraj Achalchand [ILR 1985 Kar 951.] . In the said case, the defendant State of Karnataka failed to appear on the date that was set down for settlement of issues, namely, 17-1-1974. In that position, the Court proceeded to note the following in the order sheet.

"Defendant absent. Placed ex parte. Suit decreed as prayed for."

On appeal, a Division Bench of this Court speaking through Venkatachallah, J., as he then was in this Court (now a Judge of the Supreme Court) expressed himself for the Bench in the following manner:

"The expression 'Judgment' in Rule 5(2) and Rule 10 of Order 8 has the same connection as it has in its definition in Section 2(9) CPC. A 'Judgment' means 'the statement given by the Judge of the grounds of a decree or order.' The power of the Court to require any fact, which must otherwise be taken to have been admitted by non-traverse to be proved otherwise than by such deemed admission, itself implies and carries with it the need for an application of the mind to all circumstances relevant to the issue including the one referred to in sub-rule (3). Such application of the mind must be manifest from the record of the proceedings. It may, indeed, happen in a conceivable case that if all the facts contained in the plaint are taken to be admitted even then, the plaintiff may not be entitled, in law, to the relief he claims. The Court must apply its mind and make it manifest that it has done so.

4. The Court need not write an elaborate Judgment. There can, in the very nature of things, be no hard and

fast rule, valid for all occasions, prescribing what document, to be eligible to be called a 'Judgment' in cases where defendant does not file a pleading and where the Court proceeds to pronounce a 'Judgment' on the basis of facts contained in the plaint, must contain. It must necessarily depend on the facts and circumstances of each case. However, there are certain minimal essentials inherent in the idea of a 'Judgment' as defined in Section 2(9) CPC. This much at least, it must disclose: that Judge has applied his mind to the nature of the suit-claim and to the aspect whether, it the facts contained in the plaint are taken to be admitted, the suit-claim is entitled to succeed. This is apart from cases where, in the circumstances, a Judge feels the need to call for proof of facts independently of the admission by non-traverse."

and allowed the appeal for want of application of mind by the Court below.

While we certainly cannot disagree with the conclusions reached by the learned Judges, we

have no doubt that nothing in the language employed in Rule 10 of Order VIII CPC does away with the requirements of proof of the plaint allegations despite implied admission by non-denial either while expressly traversing the plaint allegations or where the defendant is placed ex parte or where the defendant has not filed pleadings within the prescribed time in terms of Rule 9 of Order VIII CPC.

6. In the result, the appeal is allowed to the extent indicated above. The matter is remitted with a direction that the trial Court should proceed to examine the plaintiff or his witnesses in support of the plaint allegations and if the defendant desires to cross-examine that witness, he shall be permitted to do so in the light of the decision of the Supreme Court relied upon by us and subject to the limitation imposed by the Supreme Court on the scope of cross-examination. "

11. The Hon'ble Supreme Court in the case of Charan Lal Sahu v. Union of India reported in AIR 1990 SC 1480 held that the Court should not resort to the drastic step under Rule 10. The defendant can be put on terms like award of costs. The term 'ends of justice' mean, justice not only to the defendant and to the other side, but also to the witnesses

and others, who may be inconvenienced. After all the various factors have been taken into consideration and carefully weighed. The endeavour of the Court should be to avoid snap decisions and to afford the parties a real opportunity of fighting out their case fairly and squarely.

12. The Hon'ble Supreme Court while considering the provisions of Order 8 Rule 10 of the Code of Civil Procedure in the case of Shantilal Gulabachand Mutha v. Tata Engineering and Locomotive Company Limited and another reported in (2013)4 SCC 396 held at paragraphs 8,9 and 13 as under:

> *8. In Bogidhola Tea & Trading Co. Ltd. v. Hira Lal Somani [(2007) 14 SCC 606 : AIR 2008 SC 911] this Court while reiterating a similar view observed that a decree under Order 8 Rule 10 CPC should not be passed unless the averments made in the plaint are established. In the facts and circumstances of a case, the court must decide the issue of limitation also, if so, involved. (See also Ramesh Chand Ardawatiya v. Anil Panjwani [(2003) 7 SCC 350 : AIR 2003 SC 2508] .)*
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> *9. In view of the above, it appears to be a settled legal proposition that the relief under Order 8 Rule 10 CPC is discretionary, and court*

has to be more cautious while exercising such power where the defendant fails to file the written statement. Even in such circumstances, the court must be satisfied that there is no fact which needs to be proved in spite of deemed admission by the defendant, and the court must give reasons for passing such judgment, however, short it be, but by reading the judgment, a party must understand what were the facts and circumstances on the basis of which the court must proceed, and under what reasoning the suit has been decreed.

13. As the trial court failed to meet the parameters laid down by this Court to proceed under Order 8 Rule 10 CPC, the judgment and decree of the trial court dated 12-11-2003 [TELCO Ltd. v. Deccan Coop. Urban Bank Ltd., Suit No. 1924 of 1988, order dated 12-11-2003 (Bom)] is set aside and the case is remanded to the trial court to decide afresh. The appellant is at liberty to file the written statement within a period of 3 weeks from today and the trial court is at liberty to proceed in accordance with law thereafter. As the matter is very old, we request the trial court to conclude the trial expeditiously. The original record, if any, may be sent back forthwith.

13. Admittedly in the present case, it is the duty upon the DRT to verify the pleadings and evidence of the plaintiff, if any and ultimately find out as to whether the plaintiff has made out case for decree or not based on the pleadings and the evidence, but the DRT straightaway invoked order 8 Rule 10 of the Code of Civil Procedure and allowed the application without assigning any reasons. The impugned order passed by the DRT is not a speaking order. That is not intention of the Legislature while enacting the provisions of Order 8 Rule 10 of the Code of Civil Procedure. Therefore the impugned order cannot be sustained.

14. For the reasons stated above, the impugned order dated 2.7.2015 made in O.A. No.463/2014 passed by the DRT is hereby quashed. The matter is remanded to the DRT for reconsideration afresh after giving opportunity of hearing to the petitioner and proceed in accordance with law. The petitioner is directed to appear before the DRT on 15th July 2019.

Ordered accordingly.