

336 Indian Law Reports (Delhi) ILR (2008) I Delhi

A “If the accused persons would have caused harassment or cruelty to Kavita then it is difficult to believe that PW5 would have married with accused Chander Prakash.”

B This observation, I believe, sums up the entire thinking of the learned Additional Sessions Judge. I have already indicated that any interference with the impugned judgment would amount to a reappraisal of evidence. In any event, I have also indicated that the present case is not such an exceptional case as indicated by the various decisions of the Supreme Court where this Court would be within its powers under Section 401 of the Code of Criminal Procedure, 1973 to interfere with an order of acquittal in a revision petition brought by a private party.

For the reasons given above, this revision petition is dismissed.

D

ILR (2008) I DELHI 336
FAO (OS)

E

FINOLEX CABLES LTD.APPELLANT

VERSUS

F

FINOLUX AUTO PVT. LTD.RESPONDENTS

(A.K. SIKRI & ARUNA SURESH, JJ.)

G

FAO (OS) NO. : 137 OF 2007 DATE OF DECISION : 12-07-07

H

Code of Civil Procedure, 1908—Order IX Rule 7—Order XIV Rule 1 & 5—Order XXXIX Rule 1 & 2—Plaintiff owner of the trademark “FINOLEX”—Suit for permanent injunction for restraining the defendant from the use of trademark “FINOLUX”—*Ex parte* stay granted—Defendant proceeded *ex parte* after filling of written statement and reply—Injunction confirmed and suit posted for *ex parte* evidence—Defendant moved an application for setting aside *ex parte* order—Application dismissed by the Single Judge as time barred—Application moved by defendant for framing of issues—

I

Finolex Cables Ltd. v. Finolux Auto Pvt. Ltd. (A.K. Sikri, J.) 337

Application allowed—Appeal filed by plaintiff—Held, on date of non appearance of defendant, *ex parte* injunction was confirmed—Since explanation of the defendant for non appearance on the said date was found to be not justified, defendant has to suffer consequences of confirmation of stay against him—Thereafter, defendant has been appearing regularly and entitled to participate as a matter of right from that stage—No evidence was led by plaintiff—Since pleadings were complete, it would be better if issues were framed so that parties can understand the nature and scope of controversy on which the evidence was required to be led—Issues directed to be framed.

The legal position which is not in dispute and which can be extracted from the conjoint reading of the Supreme Court judgment in the case of Sangram Singh v. Election Tribunal, Kotah, AIR 1955 SC 425 and Division Bench judgment of this Court in M/s. Lotus International & Ors. v. Chaturbhujadas Karnani Textiles (P) Ltd., 65 (1997) DLT 300 (DB) is this :-

(a) if the defendant does not appear on the date of hearing fixed by the Court, the Court has power to proceed *ex-parte* against him;

(b) when the defendant joins and participates in the proceedings at a stage when the plaintiff is yet to examine his witnesses, the defendant shall have right to cross-examine the plaintiff's witnesses, provided such cross-examination has not already been foreclosed. In that event, the Court has also the power to permit the defendant to adduce evidence on his side. It really depends as to at what stage the defendant was set *ex-parte* under Order IX Rule 6 CPC and at what stage he has chosen to seek permission to participate in the proceedings;

(c) the defendant can appear later and move application for setting aside the *ex-parte* order by showing sufficient cause for nonappearance on the date the defendant was proceeded *ex-parte*. If sufficient cause is shown, the Court can set aside the *ex-parte* order and in that case it shall restart the proceedings from the stage when the defendant was proceeded *ex-parte* on the premise that no proceedings were held at all on the date when the

338

Indian Law Reports (Delhi)

ILR (2008) 1 Delhi

- A** defendant was proceeded *ex-parte* and/or on subsequent dates; and
- B** (d) even if the defendant is not able to show good cause, he has right to participate in the proceedings from the stage when he started appearing. However, in that event he has no right to set back the clock and, therefore, if any advantage accrued to the plaintiff on the dates when the defendant had not appeared, that advantage would continue to accrue in favour of the plaintiff.
- C** (Para 10)
- No doubt, issues are to be framed after the filing of the pleadings by the parties and before the evidence starts. It is also not in dispute that when the defendant is proceeded *ex-parte*, normally
- D** issues are not framed and case is put for *ex-parte* evidence of the plaintiff. The learned Single Judge, therefore, did not frame the issues on 21.3.2003 and passed the order directing the plaintiff to file evidence by way of affidavit after proceeding *ex-parte* against the defendant. But the question is as to whether any advantage or right accrued in favour of the plaintiff by not framing of the issues on 21.3.2003. The answer has to be in the negative, as
- E** rightly held by the learned Single Judge. (Para 14)
- F** The matter can be examined from another angle. The defendant has filed the written statement raising various issues/ contentions in the form of its defence. The suit will undergo full-fledged trial in the form of evidence by the plaintiff and cross-examination of the plaintiff's witness(es) by the defendant and evidence of the
- G** defendant, whose witness(es) would be cross-examined by the plaintiff. Will it be proper to have complete trial of the suit in the manner a normal suit proceeds, but without framing of the issues? We are of the opinion that if the issues are framed, it
- H** would be better for both the parties as that would help the parties to understand the nature and scope of the controversy on which they are required to lead their evidence. Rule 1 of Order XIV CPC stipulates that issues arise when a material proposition of fact or law is affirmed by one party and denied by another. These issues
- I** are to be culled out from the pleadings which are already on record. Rule 5 of Order XIV CPC becomes relevant in this context. Though this Rule deals with amendment or striking out issues,

Finolux Cables Ltd. v. Finolux Auto Pvt. Ltd. (A.K. Sikri, J.) 339

the Court is given power to amend the issues or frame additional issues on such terms as it thinks fit "*at any time before passing a decree*". When the Court is given power to amend issues or frame additional issues at any stage of the suit, before the decree is passed, we fail to understand as to why the issues be not framed now, which exercise would be only a reflection of determining as to whether the parties are at variance with each other. It would facilitate the complete adjudication of the controversies involved and would rather be in the interest of both the parties. (Para 15)

Important Issue Involved : In a case where the defendant was proceeded ex-parte, after the completion of the proceedings and later on he joins the proceedings at the stage of evidence, the issues can be framed for understanding the nature and scope of the controversy. Framing of the issues cannot be treated as setting the clock back.

[Di Sh]

APPEARANCES :

FOR THE APPELLANT : Mr. Manmohan Singh, Advocate
FOR THE RESPONDENTS : Mr. Sudhanshu Batra with Mr. Bhuvan Gugnani, Advocates.

CASES REFERRED TO :

1. *M/s. Lotus International & Ors. v. Chaturbhujadas Karnani Textiles (P) Ltd.*, 65 (1997) DLT 300 (DB).
2. *Sangram Singh v. Election Tribunal, Kotah*, AIR 1955 SC 425.

RESULT : Appeal dismissed.

A.K. SIKRI, J.

1. Before we take note of the controversy involved in this appeal and address the same, it would be appropriate to have stock of the factual background in which the said controversy has arisen.

- A** 2. The appellant (hereinafter referred to as 'the plaintiff') has filed suit CS (OS) No. 2347/2000 on the Original Side of this Court for perpetual injunction, infringement of trademark and trade-name, copyright, passing off, rendition of accounts, etc. against the respondent who is the defendant in the said suit (hereinafter referred to as 'the defendant'). The plaintiff is stated to be the owner of trademark FINOLEX and is aggrieved by the user of trademark FINOLUX, mark adopted by the defendant. Along with the main suit, the appellant also filed IA No. 10903/2000 in which the appellant was granted *ex-parte ad interim* injunction. After receiving the summons, the defendant entered appearance and contested the suit by filing written statement and reply. The case was thereafter adjourned on several occasions in order to enable the parties to arrive at a compromise. However, no compromise could be arrived at. When the matter came up for hearing on 21.3.2003, there was no appearance on behalf of the defendant. The learned Single Judge ordered that the defendant be proceeded *ex-parte*. The plaintiff was allowed to lead evidence by way of affidavit. In the application for interim injunction, i.e. IA No. 10903/2000, interim order was also confirmed. Exact order which was passed on that date is as under :-

E

"Suit No. 2347/00

There is no appearance on behalf of the Defendant who is set *ex-parte*. Evidence be led by way of affidavit which should be filed within four weeks from today.

F

Renotify the matter before the Joint Registrar for exhibition of documents on 7.5.2003.

G

IA No. 10903/2000

Interim Order stands confirmed.

H

I.A. stands disposed off."

I

3. On 7.5.2003, when the matter was listed before the Joint Registrar, counsel for the defendant appeared and was apprised that it was proceeded *ex-parte*. Since the plaintiff had not filed its evidence by way of affidavit, further two weeks period for this purpose was granted, subject to the payment of costs of Rs.500/- and the matter was adjourned to 22.9.2003. The defendant, in these circumstances, filed the application under Order IX Rule 7 of the Code of Civil Procedure, 1908 (for short, 'CPC') for setting aside the *ex-parte*

Finolux Cables Ltd. v. Finolux Auto Pvt. Ltd. (A.K. Sikri, J.) 341

order passed against it on 21.3.2003. This application was filed on 28.3.2003. A
The learned Single Judge did not find any sufficient cause disclosed by the
defendant in the said application and, therefore, vide order dated 9.8.2004, this
application was dismissed. It was, however, clarified that *'the defendant is not*
precluded from joining the proceedings but it cannot expect the clock to be B
set back'. It may also be mentioned that the plaintiff had not filed its evidence
or the original documents till then. After the passing of order dated 9.8.2004,
the matter was listed before the Joint Registrar on 25.11.2004, as directed. On
that date, the plaintiff sought further time to file its evidence by way of
affidavit and two weeks time was given as a last opportunity. Still, affidavit C
was not filed and on 8.2.2005, further time of four weeks was granted and the
matter was adjourned by the Joint Registrar for 9.5.2005. The affidavit was
now filed after the aforesaid order, but the deponent did not appear on
9.5.2005 and, therefore, the matter had to be adjourned again for putting D
exhibits on the documents.

4. While these proceedings were pending, the defendant filed appeal
against the order dated 9.8.2004 along with application for condonation of
delay in preferring the appeal as there was a delay of 224 days in filing the E
said appeal. The application for condonation of delay was dismissed by the
Division Bench vide order dated 5.7.2006 {reported as 2006 (33) PTC 474 (Dcl)
(DB)}. As a consequence, the appeal was also dismissed and order dated
9.8.2004 became final.

5. In the meantime, case before the Joint Registrar was adjourned from
time to time to await the outcome of the appeal. After the dismissal of the
appeal, when the matter came up before the Joint Registrar on 31.10.2006, it
was directed that the matter be listed for exhibiting the documents of the G
plaintiff on 7.12.2006. On that date, the deponent/witness was not present
and, therefore, documents could not be exhibited. However, the defendant
now moved IA No. 13625/2006 under Order XIV Rule 1 of the CPC wherein
prayer was made by the defendant that issues be framed in the suit. After H
obtaining the reply from the plaintiff on this application, the learned Single
Judge heard the arguments and vide order dated 22.2.2007 allowed the
application and directed that the matter be listed for framing of the issues on
13.7.2007. Aggrieved by the aforesaid order, the appellant has filed the instant I
appeal.

6. We may point out that the objection of the plaintiff to the aforesaid
application of the defendant was that it was an indirect device adopted by

- A** the defendant in putting the clock back even when the defendant was proceeded *ex-parte* on 21.3.2003 and the said order was not set aside. The defendant was only allowed to join the proceedings and, therefore, matter needed to go forward from the stage when he started appearing.
- B** 7. The manner in which this objection was raised and dealt with by the learned Single Judge can be seen from the following extracts of the impugned order :-
- C** “The application is opposed by the plaintiff. He submits that once the Court has proceeded *ex-parte* on a particular date, it is not open to the defendant, particularly when his application for setting aside the *ex-parte*, as also the appeal in respect thereof have been rejected, to seek to put the clock back by asking the Court to frame issues.
- D** He relies on AIR 1955 Supreme Court 425 which states that the defendant who has been proceeded *ex-parte* has a right of participating in the proceedings on the day to which the hearing of the suit was adjourned. However, he has no right to set back the clock, and unless the defendant can show good cause, he must accept what has gone and may participate from the stage at which he comes. He also relies on 65 (1997) DLT 300 where a Division Bench of this Court held that even if the application filed under Order 9 Rule 7 is not allowed, the Court has power to permit the defendant to join and participate in the suit and cross examine the plaintiff's witnesses provided such cross examination has not already been foreclosed. This Court has also power to permit the defendant to adduce evidence on his side. It really depends as to at what stage the defendant was set *ex-parte* under Order 9 Rule 6 CPC and at what stage he has chosen to seek the permission to participate in proceedings, even if he has not shown good cause for restoration of the status quo ante. In para 24 of the said judgment, the Court states that where the Court has decided to proceed *ex-parte* under Order 9 Rule 6 CPC it means that it really decided to go ahead in the case in the absence of the defendant, and the situation is not akin to one where an *ex-parte* decree or order is passed against the defendant. The court merely records in its minutes that it is proceeding forward in the absence of the defendant. If thereafter the Court has taken some steps in the trial it is open to the defendant to come forward at the later stage and file an application under Order 9 Rule 7 to restore *status quo ante* existing before he was set *ex-parte*. If
- E**
- F**
- G**
- H**
- I**

Finolex Cables Ltd. v. Finolux Auto Pvt. Ltd. (A.K. Sikri, J.) 343

good cause is shown for his absence the Court would allow the application thus relegating him to the same position which existed before he was set *ex-parte*. However, in case good cause has not been shown by the defendant for his earlier absence and the application under Order 9 Rule 7 is rejected, it is still open to the defendant to join and participate in the proceedings at a later stage accepting the events which have taken place in the interregnum as they stand. A
B

It is therefore submitted by the plaintiff that the defendant must accept the position as it stands and since issues have not been framed by the Court before directing the plaintiff to lead its evidence, the defendant by way of present application cannot seek to put the clock back. C
D

A perusal of Order 14 Rule 1 CPC shows that it is in reality the duty of the Court to frame issues where material propositions of fact or law arise which are affirmed by one party and denied by another. Material propositions are those propositions of law or facts which plaintiff must allege in order to show his right in the suit or defendant must show in order to constitute his defence. The purpose of framing issues appears to be to (sic) narrow and define the scope of the disputes between the parties. This exercise is undertaken by the Court not only to enable the parties to focus on the real controversy which they need to address, but also to determine for itself the matter in which further proceedings ought to be undertaken. Under Order 14 Rule 2 CPC, where a Court considers that a matter may be disposed of on preliminary issues and where such issues relates to jurisdiction of the Court or to a bar against the suit created by a law, the Court can postpone the settlement of other issues until after these issues have been determined and then deal with the suit in accordance with the decision in those issues. I may also note that under Order 14 Rule 5 CPC it is open to the Court at any time before passing the decree to amend the issues or frame additional issues as may be necessary for determining the matter in controversy between the parties. Since issues have not been framed in the present suit and the defendant joined the proceedings immediately after 21st March, 2003 and has since then been participating therein, in my opinion, it would be in the interest of the progress of the suit that issues are framed at this stage. E
F
G
H
I

344 Indian Law Reports (Delhi) ILR (2008) I Delhi

- A** By not framing issues on 21st March, 2003, no right or other advantage accrued in favour of the plaintiff. It was merely a case of a procedural lapse which the defendant is now seeking to correct by moving the present application. It cannot be said that the defendant is seeking to set the clock back by requiring issues to be framed at this stage.”
- B**

- C** We have extensively quoted from the impugned order the argument of the plaintiff for simple reason, namely, same self argument is addressed before us and, therefore, it is not necessary to repeat the submissions of learned counsel for the plaintiff/appellant. We, thus, proceed to determine as to whether the approach of the learned Single Judge in this behalf is correct in law or not.

- D** 8. We have already given the extensive account of the proceedings which took place after 21.3.2003. On that date, the defendant was proceeded *ex-parte* and the plaintiff was allowed to lead evidence by way of affidavit. Next date of 7.5.2003 was fixed before the Joint Registrar for this purpose.
- E** What is significant is that the defendant appeared on 7.5.2003 and thereafter as well on each and every date. Another important fact which needs mention is that the plaintiff had not led its evidence by filing the affidavit and much before that the defendant had started appearing. Not only that, the affidavit was filed quite belatedly, even the witness who had sworn the affidavit had
- F** not appeared before the Joint Registrar and, therefore, the documents also could not be exhibited.

- G** 9. Insofar as non-appearance of the defendant on 21.3.2003 is concerned, the explanation given by the defendant was not found to be justified and, therefore, the defendant has to suffer the consequence for non-appearance on that date. To that extent, it is not permissible for the defendant to set the clock back. What it would imply is that if some advantage has accrued to the plaintiff vide order dated 21.3.2003, that would remain intact
- H** and it is not open to the defendant to disturb the same. In this backdrop, we have to determine as to whether the impugned order, vide which the learned Single Judge has decided to frame the issues, amounts to setting the clock back.

- I** 10. The legal position which is not in dispute and which can be extracted from the conjoint reading of the Supreme Court judgment in the case of Sangram Singh v. Election Tribunal, Kotah, AIR 1955 SC 425 and Division Bench judgment of this Court in M/s. Lotus International & Ors. v.

Finolex Cables Ltd. v. Finolux Auto Pvt. Ltd. (A.K. Sikri, J.) 345

Chaturbhujadas Karnani Textiles (P) Ltd., 65 (1997) DLT 300 (DB), is this :- A

- (a) if the defendant does not appear on the date of hearing fixed by the Court, the Court has power to proceed *ex-parte* against him; B
- (b) when the defendant joins and participates in the proceedings at a stage when the plaintiff is yet to examine his witnesses, the defendant shall have right to cross-examine the plaintiff's witnesses, provided such cross-examination has not already been foreclosed. In that event, the Court has also the power to permit the defendant to adduce evidence on his side. It really depends as to at what stage the defendant was set *ex-parte* under Order IX Rule 6 CPC and at what stage he has chosen to seek permission to participate in the proceedings; C
- (c) the defendant can appear later and move application for setting aside the *ex-parte* order by showing sufficient cause for non-appearance on the date the defendant was proceeded *ex-parte*. If sufficient cause is shown, the Court can set aside the *ex-parte* order and in that case it shall restart the proceedings from the stage when the defendant was proceeded *ex-parte* on the premise that no proceedings were held at all on the date when the defendant was proceeded *ex-parte* and/or on subsequent dates; and D
- (d) even if the defendant is not able to show good cause, he has right to participate in the proceedings from the stage when he started appearing. However, in that event he has no right to set back the clock and, therefore, if any advantage accrued to the plaintiff on the dates when the defendant had not appeared, that advantage would continue to accrue in favour of the plaintiff E

11. In the instant case, when the defendant started participating in the proceedings in the suit, evidence in the case had not been led by the plaintiff. Position would have been different had the plaintiff filed its evidence and exhibited the documents before the defendant started appearing again. The plaintiff could also agree that it had drawn some advantage had there been a specific order foreclosing the evidence of the defendant. Learned counsel for the plaintiff fairly concedes that as the evidence is filed much subsequently and in the presence of the defendant, when he had started appearing in the matter, and documents are yet to be exhibited, it is permissible for the defendant H

A to cross-examine the plaintiff's witnesses. He also conceded that after the evidence of the plaintiff is over, the defendant shall have right to lead its evidence.

B 12. As pointed out above, non-appearance of the defendant was only on 21.3.2003. That was not a date fixed for the evidence of the plaintiff nor the plaintiff led any evidence. In fact, on that date application for interim injunction was listed before the learned Single Judge. Because of the defendant's failure to appear, the *ex-parte* injunction was confirmed. Therefore, benefit which has accrued in favour of the plaintiff is that the injunction which is confirmed would remain in operation till the disposal of the suit and the defendant cannot seek recall of that order. However, insofar as the main suit is concerned, nothing had happened on that date except directing the plaintiff to file the evidence and before such an evidence could be filed, the defendant re-appeared on the scene.

C 13. In this background, the question which falls for consideration is as to whether framing of the issues at this stage would amount to putting the clock back even when that entire evidence is yet to be led, namely, the defendant has a right to and is yet to cross-examine the plaintiff's witness(es) and would be entitled to lead its evidence as well.

D 14. No doubt, issues are to be framed after the filing of the pleadings by the parties and before the evidence starts. It is also not in dispute that when the defendant is proceeded *ex-parte*, normally issues are not framed and case is put for *ex-parte* evidence of the plaintiff. The learned Single Judge, therefore, did not frame the issues on 21.3.2003 and passed the order directing the plaintiff to file evidence by way of affidavit after proceeding *ex-parte* against the defendant. But the question is as to whether any advantage or right accrued in favour of the plaintiff by not framing of the issues on 21.3.2003. The answer has to be in the negative, as rightly held by the learned Single Judge.

E 15. The matter can be examined from another angle. The defendant has filed the written statement raising various issues/ contentions in the form of its defence. The suit will undergo full-fledged trial in the form of evidence by the plaintiff and cross-examination of the plaintiff's witness(es) by the defendant and evidence of the defendant, whose witness(es) would be cross-examined by the plaintiff. Will it be proper to have complete trial of the suit in the manner a normal suit proceeds, but without framing of the issues? We are of the opinion that if the issues are framed, it would be better for both

Shree Vinayak Cement Clearing Agency v Cement Corporation of India (Vikramajit Sen, J.) 347

the parties as that would help the parties to understand the nature and scope of the controversy on which they are required to lead their evidence. Rule 1 of Order XIV CPC stipulates that issues arise when a material proposition of fact or law is affirmed by one party and denied by another. These issues are to be culled out from the pleadings which are already on record. Rule 5 of Order XIV CPC becomes relevant in this context. Though this Rule deals with amendment or striking out issues, the Court is given power to amend the issues or frame additional issues on such terms as it thinks fit "*at any time before passing a decree*". When the Court is given power to amend issues or frame additional issues at any stage of the suit, before the decree is passed, we fail to understand as to why the issues be not framed now, which exercise would be only a reflection of determining as to whether the parties are at variance with each other. It would facilitate the complete adjudication of the controversies involved and would rather be in the interest of both the parties.

16. We, therefore, agree with the learned Single Judge that in the facts of this case, framing of the issues cannot be treated as setting the clock back. We may note that in the impugned order the plaintiff is given right to file, amended or additional, affidavits after the issues are framed. We, therefore, do not find any merit in this appeal, which is accordingly dismissed.

No costs.

ILR (2008) I DELHI 347
FAO (OS)

SHREE VINAYAK CEMENT CLEARING AGENCYAPPELLANT

VERSUS

CEMENT CORPORATION OF INDIARESPONDENT

(VIKRAMAJIT SEN & S.L. BHAYANA, JJ.)

FAO (OS) : 129/2006

DATE OF DECISION : 25-07-07

(A) Arbitration and Conciliation Act, 1996 S. 34 Scope for reappraisal of material on the record of arbitral tribunal is