

TWO RECENT JUDGEMENTS OF THE GAUHATI HIGH COURT
– AN APPRAISAL

BY

Sri S.M. Deka
Director,
North Eastern Judicial Officers'
Training Institute. (NEJOTI)

1. PREFACE

The Judgments forming the theme of this essay are : (1) HEMAMANI TALUKDAR –VS- AKSHENDRA KALITA, 2010(4) GLT 395, (2010) 6 GLR 369 dated 27.07.2010; (2) M/S SUPREME ENTERPRISE, ASSAM –VS- M/S ACE 3 MARKETING, ASSAM & ORS, AIR 2010 GAU 152, (2010)6 GLR 326 dated 04.08.2010. The Judgments hereinafter shall be referred to as HEMAMANI TALUKDAR and SUPREME ENTERPRISE respectively. The principal reason which compelled this writing is that both the above judgments contained some elements which appeared to the writer to be at variance with the prevalent practice in the Civil Courts as well as with Law. HEMAMANI TALUKDER being the earlier in point of time is being taken up first.

2. HEMAMANI TALUKDAR

The Judgment deals with the provisions of Order VIII Rule 1 of the Code of Civil Procedure 1908 extant since 01.07.2002. The statement of Law in the Judgment arose in the context of these basic facts. In Title Suit No.12/2009 pending in the Court of Munsiff, Bajali, Pathsala the defendant Hemamani Talukdar obtained a date for filing of her Written Statement on 22.12.2009. Next date fixed for filing the Written Statement was 20.02.2010. On that day through petition No.34/2010 a further date for filing the Written Statement was prayed for. That petition was rejected by Order dated 09.03.2010. The Judgment does not contain the crucial date of service of summons but contains a statement that the prayer for further time rejected on 09.03.2010 was made “after two days of the statutory period prescribed under Order VIII, Rule 1”.

- (i) The High Court considered four decisions of the Supreme Court namely ; KAILASH –VS- NANHKU AND OTHERS (2005)4 SCC 480, RANI KUSUM (SMT) –VS- KANCHAN DEVI (SMT) AND OTHERS,

(2005)6 SCC 705, SALEM ADVOCATE BAR ASSOCIATION, T.N. – VS- UNION OF INDIA, (2005)6 SCC 344, ZOLBA –VS- KESHAO AND OTHERS, (2008)11 SCC 769 as also three decisions of the Gauhati High Court namely ; DALIA GHOSE –VS- JAYANTA GHOSE, 2006(1) GLT 678, AWADH KUMAR YADAV & OTHERS – VS- DHANIRAM SAHU 2007(3) GLJ 635 and DAMAYANTI GOSWAMI AND ORS –VS- KUMAR DAS AND ORS, 2009(4) GLT 757. At para 20 of the Judgment the High Court stated the Law thus :-

“..... in the interest of justice time can be granted for filing the Written Statement by the defendant even after 90 days in exceptional cases..... This Court is of further opinion that a Court is empowered to extend the time even in exercise of its powers vested under Section 148 and 151 of the Code.”

The High Court taking the view as above quashed the Order dated 09.03.2010 passed by the Trial Court.

(ii) The validity of the above statement of Law in the context of quashing by the High Court of the order dated 09.03.2010 passed by the Munsiff, Bajali, rejecting the application for further time to file the Written Statement is the question for consideration. An attempt to answer the question necessarily involves an understanding of the law as to use of precedents in deciding cases. The essence of this aspect of the law can be gathered from a selection of decisions of the Supreme Court such as (1) the Five Judge Constitution Bench decision STATE OF ORISSA –VS- SUDHANSHU SEKHAR MISRA, AIR 1968 S.C. 647, (2) AMBICA QUARRY WORKS –VS- STATE OF GUJRAT, (1987)1 SCC 213 (3) HARYANA FINANCIAL CORPORATION –VS- JAGADAMBA OIL MILLS (2002) 3 SCC 496, (4) BHAVANAGAR UNIVERSITY –VS- PALITANA SUGAR MILLS (P) LTD, (2003)2 SCC 111; (5) BHARAT PETROLEUM CORPORATION LTD –VS- N.R. VAIRAMANI (2004)8 SCC 579 and (6) ISPAT INDUSTRIES LTD- VS- COMMISSIONER OF CUSTOMS, MUMBAI, (2006)12 SCC 583.

(iii) Decisions listed at serial nos. 1, 3 and 4 above are the most lucid and relevant. In SUDHANGSHU SEKHAR (Supra) the Constitution Bench had to distinguish two other decisions of the Supreme Court namely, NRIPENDRA NATH BAGSHI, AIR 1966 SC 447 and RANGA MOHMMED, AIR 1967 S.C. 908, the former relating to power of the Govt. to initiate disciplinary proceedings against a

District Judge and the latter relating to power of the State Govt. to transfer a District Judge on the ground that question before the Supreme Court related to power of the High Court to recall a District Judge posted as Law Secretary. All the three cases centre round the meaning of the expression "Control over District Court" in Article 235 of the Constitution. In that context in para 12 of the Judgment the Supreme Court declared the law as regards use of precedent thus ;-

"A decision is only an authority for what it actually decides. What is of the essence in a decision is its ratio and not every observation found therein nor what logically follows from the various observations made in it."

Para 19 and 21 of HARYANA FINNACIAL CORPORATION (Supra), a Three Judge decision of the Supreme Court reads thus :-

"19. Courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. Observations of courts are not to be read as Euclid's theorems nor as provisions of statute. The observations must be read in the context in which they appear. Judgments of Courts are not to be construed as statute. To interpret words, phrases and provisions of a statute, it may become necessary for Judges to embark upon lengthy discussions but the discussion is meant to explain and not to define. Judges interpret statutes, they do not interpret Judgments. They interpret words of statutes, their words are not to be interpreted as statute."

"21. Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases. Disposal of cases by blindly placing reliance on a decision is not proper."

The Three Judge Bench in BHAVNAGAR UNIVERSITY (Supra) has reiterated the same view on use of precedent in para 59 of the Judgment. Paraphrased or literal version of the same principles of law as to use of precedent can be read in para 18 of AMBICA QUARRY WORKS (Supra) para 9 and 11 of BHARAT PETROLEUM CORPORATION (Supra) and in para 47 to 50 of ISPAT INDUSTRIES LTD (Supra).

- (iv) At the core of these decisions is the principle that ratio decidendi of a decision has to be discovered by discovering the “material facts” on which the precedent is based and the ratio cannot be divorced from the facts. This is almost a resounding reiteration of the Dr. Goodhart’s suggestions on the theory of precedents in his book “Essays in Jurisprudence and the Common Law” mentioned in page 29 of SALMOND ON JURISPRUDENCE, 12TH Edition.
- (v) Keeping this load of principles in mind one may now look at the decisions, four from the Supreme Court and three from the Gauhati High Court, relied on in HEMAMANI to reach the conclusion that a bare application unaccompanied by the Written Statement filed on the 92nd day of service of summons praying for further time to file the Written Statement can be granted as was granted by the High Court. A stark feature of HEMAMANI which stands out is that the consideration of the seven precedents is completely bereft of any factual statement from the precedents. KAILASH (Supra), RANI KUSUM (Supra) and ZOLBA (Supra) are all decisions where the Written Statement was filed but there was delay in filing the same and prayer was made for condoning the delay. In HEMAMANI there is no Written Statement and prayer was only for further time to file the Written Statement. KAILASH (Supra) uses the expression “extension of time” which read in the context means extension of time for acceptance of a Written Statement filed beyond 90 days. SALEM BAR (Supra) considers only a report of the committee. Obviously no facts are there or could be there to be considered. RANI KUSUM (Supra) also is a case of delayed Written Statement. No application like one allowed by the High Court was involved in the case. ZOLBA (Supra) again is a case dealing with a delayed Written Statement and clearly states about condonation of delay and not of extension of time. Similarly the fact situation in DALIA GHOSE (Supra), AWADH KUMAR YADAB (Supra) and DAMAYANTI GOSWAMI (Supra) are quite different. They do not deal with an application filed after expiry of 90 days seeking time to file the Written Statement. None of these seven decisions, because of what has been stated by the Supreme Court as regards use of precedents, can do any duty in HEMAMANI and its conclusion cannot be founded on these decisions. In para 20 of HEMAMANI it has been stated that time beyond 90 days can be extended in exercise of powers under Section 148 and 151 of the Civil Procedure Code. Section 148 can only operate to enlarge the time granted or fixed by the Court and not by the law such as the provision of Order VIII Rule 1. Moreover, Section 148 can operate only to enlarge time prescribed or allowed by the Code and not to enlarge time prohibited by the Code. Thirdly, Section 148 after 01.07.2002 is limited to thirty

days in total. For the extension of time for filing Written Statement one need not go to the general provision. The Special provisions of Order VIII R.1 and Order V R.1 itself provide the power of extension but within upto 90 days from the date of service of summons. Section 151 cannot override the prohibition contained in the Code that is in Order VIII R.1 and Order V. R1. Indeed no Supreme Court Judgment so far has traced the source of power to extend the time beyond 90 days for filing of the Written Statement to the provisions of Section 148 and/or that of Section 151 of the Code. Section 151 only can operate to allow acceptance of a delayed Written Statement for the ends of justice. The inherent power can speak only when the Code is silent on a particular aspect of procedure.

In A. SATHYAPAL -VS- YASMIN BANU ANSARI, AIR 2004 KAR 246 a Division Bench of Karnataka High Court has dealt with the question of in applicability of Section 148 and 151 of the Code in the matter of extension of time beyond 90 days of service of summons for filing the Written Statement at para 36 to 38 at some length.

(iv) To complete the reasoning as above the following additional facts seem apposite. The Supreme Court has spoken on the provisions of Order VIII R1 of the Code at least eleven times in the following decisions.

1. DEBJANI MISHRA -VS- UTTAM KUMAR MISHRA (2004) 13 SCC 427 dated 03.09.2004.
2. KAILASH -VS- NANKHU & ORS, (2005)4 SCC 480 dated 06.04.2005.
3. SALEM ADVOCATE BAR ASSOCIATION -VS- UNION OF INDIA, (2005)6 SCC 344 dated 02.08.2005.
4. RANI KUSUM (SMT) -VS- KANCHAN DEVI (SMT) AND OTHERS, (2005)6 SCC 705 dated 16.08.2005
5. SHAIKH SALIM HAZI ABDUL KHAYUMSAB -VS- KUMAR AND OTHERS (2006)1 SCC 46 dated 18.11.2005
6. ADITYA HOTELS (P) LTD. -VS- BOMBAY SWADESHI STORES LTD AND OTHERS, (2007)14 SCC 431 dated 26.03.2007
7. R.N. JADI BROTHERS AND OTHERS -VS- SUBHASHCHANDRA (2007)6 SCC 420 dated 10.07.2007.
8. ZOLBA -VS- KESHAO AND OTHERS (2008)11 SCC 769 dated 01.04.2008
9. SAMBHAJI AND ORS. -VS- GANGABAI AND ORS. (2008)15 SCALE 522 dated 20.11.2008

10. MOHAMMED YUSUF -VS- FAIJ MOHMMAD AND OTHERS, (2009)2 SCC 513 dated 02.12.2008
11. KONTHOUJAM BEBUNGOU SINGH -VS- THOKCHOM ONGBI GAYABATI DEVI AND OTHERS – Civil Appeal No. 6286/2010 DATED 04.08.2010 (unreported.)

The latest decision listed at Serial No.11 above arose from a decision of the Gauhati High Court reported in 2009(2) GLT 801. The crucial fact that, after all, the Written Statement there was filed within 90 days was not noticed by the High Court. The Supreme Court set aside the order of the High Court and restored that of the Trial Court accepting the Written Statement.

Except the decision of SALEM BAR (Supra) at SL 3 all the other nine decisions deal with acceptance of a delayed Written Statement that is a Written Statement filed after 90 days of service of summons. In a few cases this was done because the Court on its own wrongly fixed a date beyond 90 days for filing of the Written Statement and the Written Statement was filed on the date so fixed by the Court. In some cases this was because the records went to the appellate Court against an interlocutory order. SALEM BAR (Supra) can hardly be called a decision of the Supreme Court in that the Judgment merely introduces the report of the Committee appointed by the Supreme Court. Barring DEBJANI MISRA (Supra) all the ten decision either by express mention or paraphrasing reiterate the Law in KAILASH (Supra) and have followed that decision. Even the Report of the Committee in SALEM BAR (Supra) is an echo of KAILASH (Supra) as regards the provisions of Order VIII Rule 1 of the Code. In KAILASH (Supra) the eventual date for filing of the Written Statement by the respondent/defendant was 03.07.2004 which was within 90 days of the date of service of summons on the respondent in the Election Petition. However the respondent could file the written statement only on 08.07.2004 alongwith a petition for condonation of delay of five days. The Allahabad High Court was convinced of the soundness of the reasons for the delay but felt powerless to accept the Written Statement in view of the mandate of Order VIII Rule 1,. In this background and context in para 27 of the Judgment the three Judge Bench in KAILASH (Supra) interpreting the provisions of Order VIII Rule 1 stated that *“it casts an obligation on the defendant to file the written statement within 30 days from the date of service of summons on him and within the extended time following within 90 days. The provision does not deal with the power of the court and also does not specifically take away the power of the Court to take the Written Statement on record though filed beyond the time as provided for.”*

This statement of the law in Order VIII Rule 1 of the Code is the core of KAILASH (Supra). KAILASH (Supra) no doubt uses the expression “extension of time” latter in the Judgment. The expression has to be understood in the context of the fact situation there. So understood the expression only means extension of time to take the Written Statement filed on record though filed beyond 90 days. In other words that power is nothing but the power of condonation of delay in filing the Written Statement. Indeed the later Judgment like ZOLBA (Supra), SAMBHAJI (Supra), MOHMMED YUSUF (Supra) following KAILASH (Supra) has expressly used the expression condonation of delay. Unfortunately DEBJANI MISRA (Supra) preceding KAILASH (Supra) was not placed before the Three Judge Bench. The expression “condonation of delay” in filing the written statement beyond 90 days of service was expressly dealt with in that Judgment.

- (vi) The Law that emerges from what has been stated above is that the Court can accept a Written Statement filed after 90 days if satisfactory exceptional reasons are shown but the Court cannot grant an application like the one allowed by the High Court in HEMAMANI. That will amount to fixing a date beyond 90 days for filing the written statement in flagrant breach of the provision of Order VIII Rule 1 and Order V Rule 1 of the Code. HEMAMANI eminently deserves reconsideration by a Larger Bench.

3. SUPREME ENTERPRISE

In Money Suit No.97/2009 in the Court of Civil Judge No.1 at Guwahati the defendant No.2 by an application under Order XIV Rule 2 of the Code of Civil Procedure prayed to the court for framing a preliminary issue as to whether the suit is barred under the provision of Section 69(2) of the Indian Partnership Act 1932. The application was rejected on merits by the trial court. The matter was taken to the High Court. The High Court upheld the order of the trial court not on merits but on a procedural point. According to the Judgment of the High Court without first framing all the issues under Order XIV Rule 1 a preliminary issue cannot be framed. Unlike HEMAMANI no case law has been cited and relied on. This interpretation of the provisions of the Order XIV Rule 2 of the Code is being examined hereinafter.

- (i) Order XIV of the Code bears the Title “Settlement of issues and determination of suit.....”. Rule 1 of the order bears the subtitle “framing of issues”. The word “settlement” appears once

more only in the last sentence of Rule 2 of Order XIV. Even before that in Rule 5 of Order V relating to issue of summons the expression “settlement of issues or final disposal of the suit” occurs. The form of summons in Appendix B to the Code follows Rule 5 of Order V of the Code. Order XIV also uses the terms “record”, “try” and “determine” in connection with the term “issue”. The message appears to be that “settlement” and “framing” in relation to issues mean the same thing. Settlement of issues may not mean trial or determination of issues. Unfortunately no case law has traversed the length of this linguistic exercise. In *Advanced Law Lexicon* by P. RAMANATHA Aiyar, 3rd Edition 2005, 2nd Reprint 2007 at page 4318 one finds the following two entries :

Settlement of issues – Ascertainment by the Court of points of dispute in regard to proposition of law or fact between the parties in a Civil Case (OVR 5 C.P.C.)

Settling issues – Deciding the forms of issue to be determined in a trial (3 Steph.com)

It appears that the High Court went by the Order of occurrence of Rule 1(5) and Rule 2 of Order XIV of the Code and held that without completing the exercise under Rule 1(5) Rule 2 cannot be resorted to. Principles of interpretation mandate only harmonious construction of different provisions of a statute. The question to ask is does framing of a preliminary issue if permitted within the restrictions under Order XIV Rule 2, create any disharmony with the provisions of Rule 1(5) of the said Order of the Code ? That question was not asked and answered. Besides both the provisions are purely procedural without any impact on the rights of the parties and without any potential to cause prejudice to any of the parties. Possibly had the High Court been persuaded to read the expression “postpone settlement of other issue” as “postpone framing of other issues” as has been attempted to be read in this writing the Judgment would have been otherwise.

- (ii) From the experience of both sides of the judicial divide one can say that the practice of framing of a preliminary issue is so widespread specially when dealing with applications under the provisions of order VII Rule 11(b) and 11(d) of the Code if the present

interpretation by the High Court is to prevail it may amount to adding one more spoke in the already clogged wheels of justice. It may be noted that Rule 2 has been substantially amended in 1976 to speed up delivery of civil justice.

- (iii) It has been indicated above that there is hardly any direct caselaw available on the question. In that sense SUPREME ENTERPRISE has trodden on virgin ground. However some ninety-five years ago a Division Bench of Calcutta High Court had to consider and answer a reverse argument in RANI KUARMONI SINGH MANDHATA -VS- WASIF ALI MEERZA, XIX C.W.N. 1193 dated the 26th February 1915. The Division Bench interpreting the expression “postpone the settlement of issues of fact” before the 1976 amendment held that these words clearly indicate that the rule also applies where the court has not postponed the settlement of issues of fact. The argument before the Division Bench was that since all the issues had been framed no preliminary issue out of the issues framed can be picked up for trial, an argument which is the exact opposite of what has been held in SUPREME ENTERPRISE. The Division Bench, in effect rules that both the options are open. That is, the court may frame all the issues that arise in the Suit and then pick up one or more from the issues so framed for trial as preliminary issues, if the other restrictive provisions of Rule 2 are fulfilled. The Court may alternatively frame one or more preliminary issue, if permitted by the same restrictive provisions of Rule 2 without first framing all the issues and try it or them.

BHARAT HEAVY ELECTRICALS LTD. -VS- GENERAL CONSTRUCTION CO. AIR 1996 Gujrat 46 seems also to support framing of a preliminary issue before framing of all other issues.

LUFTHANSA GERMAN AIRLINES -VS- VIJ SALES CORPORATION, (1998) SCC 623, ARUN AGARWAL -VS- NAGREEKA EXPORTS (P) LTD AND ANOTHER, (2002)10 SCC 101 and Lastly N.R. GOVINDRAJAN -VS- V.K. RAJAGOPALAN AND OTHERS, (2005)12 SCC 362, a three Judge decision of the Supreme Court appear to support the view that a preliminary issue can be framed first without framing all the issues arising in the Suit. In para 4 of the Judgment the Three Judge Bench rules thus :

“ The appeal is allowed. The impugned order is set aside. The trial court is directed to frame an issue on the question of court fee in terms of the plea raised in

the Written Statement and hear and decide the same as a preliminary issue before proceeding ahead.”

- (iv) The upshot is that SUPREME ENTERPRISE also deserves reconsideration by a Larger Bench.