C.N. RAMAPPA GOWDA

v.

C.C. CHANDREGOWDA (DEAD) BY LRS. & ANR.

(Civil Appeal No. 3710 of 2012)

APRIL 23, 2012

[T.S. THAKUR AND GYAN SUDHA MISRA, JJ.]

Code of Civil Procedure, 1908 - Or. 8, r.10 - Non-filing of written statement - Duty of Court - Held: In a case where written statement has not been filed, the Court should be a little more cautious in proceeding under Or.8 r.10 CPC and before passing a judgement, it must ensure that even if the facts set out in the plaint are treated to have been admitted, a judgement and decree could not possibly be passed without requiring him to prove the fact pleaded in the plaint - It is only when the Court for recorded reasons is fully satisfied that there is no fact which needs to be proved at the instance of the plaintiff in view of the deemed admission by the defendant, the Court can conveniently pass a judgement and decree against the defendant who has not filed the written statement - But, if the plaint itself indicates that there are disputed questions of fact involved in the case arising from the plaint itself giving rise to two versions, it would not be safe for the Court to record an ex-parte judgement without directing the plaintiff to prove the facts so as to settle the factual controversy - In the instant case, the trial court decreed the suit without assigning any reason how the plaintiff was entitled for half share in the property - The same was absolutely cryptic in nature wherein the trial court did not critically examine as to how the affidavit filed by the plaintiff in support of his plea of jointness of the family was proved - Assertion is no proof and hence, the burden lay on the plaintiff to prove that the property had not been partitioned in the past even if there was no written statement to the contrary or any evidence of rebuttal -

The trial court clearly adopted an erroneous approach by inferring that merely because there was no evidence of denial or rebuttal, the plaintiff's case could be held to have been proved - The High Court was legally justified in setting aside the judgement and decree of the trial court and allowing the appeal to the limited extent of remanding the matter to the trial court for a de-novo trial after permitting the defendant-respondent to file the written statement - However, since the disposal of the suit for partition has now been dragged into a protracted retrial of the suit, it is legally just and appropriate to balance the scales of equity and fairplay by awarding a sum of rupees twenty five thousand by way of a token cost to the Plaintiff/Appellant to be paid by the Defendant/Respondent expeditiously as the impugned order of the High court directing retrial shall be given effect to only thereafter.

The appellant had filed a suit for partition and separate possession of landed property which according to his case was a joint family property. The defendants-respondents were served with the notice in response to which Vakalatnama was filed by their advocate. However, in spite of numerous opportunities, no written statement was filed by the defendants-respondents and subsequently, the trial court directed the plaintiff-appellant to lead evidence. The plaintiff filed his evidence by way of affidavit along with certain documents. On the basis of the pleadings and the ex-parte evidence adduced by the plaintiff in support of his case, the trial court decreed the suit in favour of the plaintiff-appellant and held him entitled to a decree of partition to the extent of half share in the landed property. The defendants-respondents thereafter filed appeal before the High Court. The High Court set aside the judgment and decree passed by the trial court and remanded the matter to the trial court for its retrial and consideration of the matter afresh. The defendants-respondents were also granted liberty to file written statement and produce the documents and

the trial court was directed to dispose of the suit on merits. The decree of partition which the plaintiff-appellant had already got executed in his favour was made subject to the result of retrial of the suit.

The questions which required determination in the present appeal were: 1) Whether the High Court exceeded its jurisdiction by directing the trial court for retrial of the suit and permitting the defendants to file written statement and documents without assigning any justifiable and legally sustainable reason particularly when the defendants-respondents were admittedly served with the summons and were also duly represented by their advocate in the trial court (ii) Whether the defendants-respondents who had chosen not to file written statement in spite of several opportunities granted by the trial court, could be granted fresh opportunity by the High Court to file written statement and order for retrial resulting into delay and prejudice to the plaintiff-appellant from enjoying the fruits of the decree in his favour and (iii) Whether the trial court before whom the defendants failed to file written statement in spite of repeated opportunities could straightway pass a decree in favour of the plaintiff without entering into the merits of the plaintiff's case and without directing the plaintiff to lead evidence in support of his case and appreciating any evidence or in spite of the absence of written statement, the trial court ought to try the suit critically appreciating the merits of the plaintiff's case directing the plaintiff to adduce evidence in support of his own case examining the weight of evidence led by the plaintiff.

Dismissing the appeal, the Court

HELD: 1.1. The plaintiff-appellant has sought to prove his case that the suit property was a joint family property only on the strength of affidavit which he had filed and

A has failed to lead any oral or documentary evidence to establish that the property was joint in nature. Even if the case of the plaintiff-appellant was correct, it was of vital importance for the trial court to scrutinize the plaintiff's case by directing him to lead some documentary B evidence worthy of credence that the property sought to be partitioned was joint in nature. But the trial court seems to have relied upon the case of the plaintiff merely placing reliance on the affidavit filed by the plaintiff which was fit to be tested on at least a shred of some C documentary evidence even if it were by way of an ex-parte assertion. Reliance placed on the affidavit in a blindfold manner by the trial court merely on the ground that the defendant had failed to file written statement would amount to punitive treatment of the suit and the D resultant decree would amount to decree which would be nothing short of a decree which is penal in nature. [Para 13] [466-F-H; 467-A-B]

1.2. The effect of non-filing of the written statement and proceeding to try the suit is clearly to expedite the E disposal of the suit and is not penal in nature wherein the defendant has to be penalised for non filing of the written statement by trying the suit in a mechanical manner by passing a decree. In a case where written statement has not been filed, the Court should be a little more cautious F in proceeding under Order 8 Rule 10 CPC and before passing a judgement, it must ensure that even if the facts set out in the plaint are treated to have been admitted, a judgement and decree could not possibly be passed without requiring him to prove the fact pleaded in the G plaint. It is only when the Court for recorded reasons is fully satisfied that there is no fact which needs to be proved at the instance of the plaintiff in view of the deemed admission by the defendant, the Court can conveniently pass a judgement and decree against the H defendant who has not filed the written statement. But, if

the plaint itself indicates that there are disputed questions of fact involved in the case arising from the plaint itself giving rise to two versions, it would not be safe for the Court to record an ex-parte judgement without directing the plaintiff to prove the facts so as to settle the factual controversy. In that event, the ex-parte judgement although may appear to have decided the suit expeditiously, it ultimately gives rise to several layers of appeal after appeal which ultimately compounds the delay in finally disposing of the suit giving rise to multiplicity of proceeding which hardly promotes the cause of speedy trial. However, if the Court is clearly of the view that the plaintiff's case even without any evidence is prima facie unimpeachable and the defendant's approach is clearly a dilatory tactic to delay the passing of a decree, it would be justified in appropriate cases to pass even an uncontested decree. What would be the nature of such a case ultimately will have to be left to the wisdom and just exercise of discretion by the trial court who is seized of the trial of the suit. [Para 14] [467-C-H; 468-A-B]

Balraj Taneja And Another. v. Sunil Madan And Another, **(1999) 8 SCC 396: 1999 (2) Suppl. SCR 258;** *Kailash vs. Nanhku And Ors.* **(2005) 4 SCC 480: 2005 (3) SCR 289 - relied on.**

2. In the instant case, the trial court has decreed the suit without assigning any reason how the plaintiff is entitled for half share in the property. The same is absolutely cryptic in nature wherein the trial court has not critically examined as to how the affidavit filed by the plaintiff in support of his plea of jointness of the family was proved on relying upon Ex.P-1 to P-10 without even discussing the nature of the document indicating that the suit property was a joint property. Ex.P-1 to P-10 are the preliminary records viz. Atlas, Tipni Book, R.R. Pakka

A Book, Settlement Akarband, sale deeds etc. The trial court although relied upon these documents, it has not elaborated critically as to why these documents have been believed without indicating as to how it proves the plea that the property always remained joint in nature and B had never been partitioned between the parties. Even if the trial court relied upon these documents to infer that the property was joint in nature, it failed to record any reason as to whether the property was never partitioned among the coparceners. It is a well acknowledged legal C dictum that assertion is no proof and hence, the burden lay on the plaintiff to prove that the property had not been partitioned in the past even if there was no written statement to the contrary or any evidence of rebuttal. The trial court clearly adopted an erroneous approach by D inferring that merely because there was no evidence of denial or rebuttal, the plaintiff's case could be held to have been proved. The trial court, therefore, while accepting the plea of the plaintiff-appellant ought to have recorded reasons even if it were based on ex-parte E evidence that the plaintiff had succeeded in proving the jointness of the suit property on the basis of which a decree of partition could be passed in his favour. [Para 15] [468-C-H; 469-A]

3. The High Court was legally justified in setting F aside the judgement and decree of the trial court and allowing the appeal to the limited extent of remanding the matter to the trial court for a de-novo trial after permitting the defendant-respondent to file the written statement. However, this Court is conscious of the fact that the G Plaintiff/Appellant for no fault on his part has been forced to entangle himself in the appeal before the High Court as Respondent giving rise to an appeal before this Court, although the Defendant/Respondent had leisurely failed to file written statement in spite of numerous H opportunities to file the same and also had failed to cross-

examine the plaintiff witnesses, but once the decree for partition of half share was passed in favour of the Plaintiff/Appellant, the Defendant/Respondent promptly challenged the same by filing an appeal before the High Court. Since the disposal of the suit for partition has now been dragged into a protracted retrial of the suit, it is legally just and appropriate to balance the scales of equity and fairplay by awarding a sum of rupees twenty five thousand by way of a token cost to the Plaintiff/ Appellant to be paid by the Defendant/Respondent expeditiously as the impugned order of the High court directing retrial shall be given effect to only thereafter. [Para 16] [469-B-F]

Case Law Reference

1999 (2) Suppl. SCR 258	**relied on**	**Para 10**
2005 (3) SCR 289	**relied on**	**Para 11**

CIVIL APPEAL JURISDICTION : Civil Appeal No. 3710 of 2012.

From the Judgment & Order dated 05.10.2010 of the High Court of Karnataka at Bangalore in R.F.A. No. 597 of 2004.

R.S. Hegde, Chandra Prakash, Ashwani Garg, P.P. Singh for the Appellant.

T.V. Ratnam for the Respondents.

The Judgment of the Court was delivered by

GYAN SUDHA MISRA, J. 1. The impugned order dated 05.10.2010 passed by the Division Bench of the High Court of Karnataka at Bangalore in R.F.A.No. 597/2004 is under challenge in this appeal after grant of special leave at the instance of the plaintiff-appellant by which the High Court has set aside the judgment and decree of partition passed in favour of the plaintiff-appellant by the Civil Judge (Sr. Divn.)

A Chikmagalur dated 28.01.2004 and the appeal was remanded to the trial court in order to consider the matter afresh. The defendants-respondents herein have also been granted liberty to file written statement and produce the documents within four weeks from the date of the order passed by the High Court and
B the trial court was directed to dispose of the suit on merits in accordance with law within a period of six months. However, the decree of partition which the plaintiff-appellant already got executed in his favour was made subject to the result of retrial of the suit.

C 2. (i) The core question which requires determination in this appeal is whether the High Court exceeded its jurisdiction by directing the trial court for retrial of the suit and permitting the defendants to file written statement and documents without assigning any justifiable and legally sustainable reason
D particularly when the defendants-respondents were admittedly served with the summons and were also duly represented by their advocate in the trial court?

(ii) Further question which is related to the issue is whether
E the defendants-respondents who had chosen not to file written statement in spite of several opportunities granted by the trial court, could be granted fresh opportunity by the High Court to file written statement and order for retrial resulting into delay and prejudice to the plaintiff-appellant from enjoying the fruits
F of the decree in his favour?.

(iii) Yet another important question which arises herein and frequently crops up before the trial court is whether the trial court before whom the defendants failed to file written statement in spite of repeated opportunities could straightway pass a
G decree in favour of the plaintiff without entering into the merits of the plaintiff's case and without directing the plaintiff to lead evidence in support of his case and appreciating any evidence or in spite of the absence of written statement, the trial court ought to try the suit critically appreciating the merits of the
H

plaintiff's case directing the plaintiff to adduce evidence in support of his own case examining the weight of evidence led by the plaintiff? A

3. Before we appreciate the aforesaid questions involved in this appeal, it appears essential to record some of the salient features and facts of the case giving rise to this appeal after grant of leave. B

4. The plaintiff-appellant had filed a suit for partition and separate possession of landed property measuring 13 acres 20 guntas which according to his case was a joint family property wherein the partition had not taken place and as the defendants-respondents had failed to arrange for partition and separate possession of the plaintiff's half share in the schedule property, the plaintiff was compelled to file a suit for partition. It was also averred in the plaint that the defendants-respondents had partitioned the property amongst themselves without giving any share to the plaintiff-appellant. The plaintiff-appellant sent a legal notice dated 24.05.1999 to the defendants-respondents which were duly served on them in response to which the defendants appeared through their advocate and sent a reply on 10.07.1999 denying the claim of the plaintiff. The plaintiff-appellant in view of the reply of the defendants-respondents filed a suit bearing O.S.No.197/2002 before the court of Civil Judge (Sr. Divn.) at Chikmagalur for partition and separate possession. The defendants-respondents in the said suit were served with the notice in response to which Vakalatnama was filed by their advocate. However, in spite of numerous opportunities, no written statement was filed by the defendants-respondents. Since the defendants-respondents failed to file written statement, the trial court directed the plaintiff to lead evidence. The plaintiff filed his evidence by way of affidavit along with certain documents which were marked as Ex.P-1 to P-10. However, the plaintiff was neither cross-examined by the defendants nor the defendants had filed the written statement as already stated hereinbefore. C D E F G H

A 5. Since the defendants neither filed written statement nor cross-examined the plaintiff, the learned Judge vide judgment and order dated 28.01.2004 on the basis of the pleadings and the ex-parte evidence adduced by the plaintiff in support of his case, decreed the suit in favour of the plaintiff-appellant and B was thus held entitled to a decree of partition to the extent of half share in the landed property. The learned trial judge further held that the defendants although were served with the notice and were represented by their counsel, they did not choose to file written statement denying the case of the plaintiff and hence C there was no reason to disbelieve the case of the plaintiff. Accordingly, the suit was decreed directing that the plaintiff-appellant shall be entitled to half share in the property.

6. The defendants-respondents herein thereafter challenged the judgment and decree before the High Court by D filing an appeal bearing RFA No. 597/2004 wherein the plaintiff-appellant herein submitted that the defendants-respondents have not stated any valid or justifiable reason for non-filing of the written statement nor took part in the proceedings before the trial court in spite of service of summons. There was also E no prayer incorporated seeking permission to file the written statement . It was also stated therein that the plaintiff had already got the preliminary decree of partition executed and came in possession of half share of the schedule property.

F 7. The High Court by its interim order dated 30.05.2005 had also refused to grant stay of execution of the decree in favour of the plaintiff-appellant and directed that the trial court may conclude the final decree proceedings. However, it was observed that if the preliminary decree is given effect to and G the property is divided and allotted in the final decree proceedings, the same shall be subject to the result of the appeal. Thereafter during pendency of the appeal before the High Court, the defendant No.1 died whose legal representatives were brought on record.

H 8. The appeal was finally heard by the High Court and the

judgment and order in appeal was delivered on 05.10.2010 by the High Court setting aside the judgment and decree passed by the trial court and the matter was remanded to the trial court for its retrial and consideration of the matter afresh as already stated hereinbefore. The plaintiff-appellant felt aggrieved with the impugned order of the High Court and hence filed the special leave petition before this Court wherein leave was granted and the matter was heard at some length.

9. Learned counsel for the plaintiff-appellant has reiterated the contentions urged before the High Court and submitted that the defendants-respondents ought to be held to have forfeited their rights to file their written statement and adduce evidence as the defendants were duly served with the summons and were also represented by their advocate. In spite of this the defendants chose not to file written statement although several opportunities were granted and they had also not stated any reason for not filing written statement. It was further urged that even in appeal the defendants have not disputed the factum of the suit property being joint family property and, therefore, in absence of any evidence to the contrary, the High Court ought not to have interfered with the judgment and decree passed by the trial court. It was submitted that the defendants had slept over the matter and committed grave latches when they failed to file written statement for which no reason at all has been assigned by the defendants and, therefore, the High Court committed error by granting undue indulgence and permitting the defendants to file written statement and documents when their right to file the same stood forfeited.

10. Contesting the appeal, it was urged on behalf of the defendants-respondents that the suit of the plaintiff-appellant has been decreed only on the basis of the averments in the plaint which was legally impermissible for even if the suit has been decided in the absence of written statement, the trial court ought not to have decreed the suit without cross-examination of the plaintiff's witness and without appreciation of evidence and,

A therefore, it has rightly been set aside by the High Court. Elaborating on this part of his submission, it was contended that the trial court was bound to independently examine the case of the plaintiff and satisfy itself as to the correctness of the plaintiff's claim even in the absence of written statement which B evidently has not been done. In these circumstances, the High Court has rightly exercised its discretion and allowed the defendants-respondents to file their written statement. To reinforce his submission, it was further supplemented that a duty is cast upon the court to examine the plaintiff and satisfy itself C as to the correctness of the averments of the pleadings and the trial court ought not to have adopted the plaint without even cross-examination of the plaintiff. In support of his submission, learned counsel has placed reliance on the ratio of the decision of this Court in *Balraj Taneja And Another. vs. Sunil Madan* D *And Another* reported in (1999) 8 SCC 396 wherein this Court has dealt with a situation which has arisen in the present appeal. In the matter of *Balraj Taneja* (supra), the Court while considering a circumstance wherein written statement was not filed by the defendant, held that the court is duty bound to adjudicate even in the absence of complete pleadings or in the E presence of pleadings of only one party. Learned counsel in this context has specifically placed reliance on the observations of this Court which is of great relevance and value wherein it was held as follows:-

F "As pointed out earlier, the court has not to act blindly upon the admission of a fact made by the defendant in his written statement nor should the court proceed to pass judgment blindly merely because a written statement has not been filed by the defendant traversing the facts set out by the G plaintiff in the plaint filed in the court. In a case, specially where a written statement has not been filed by the defendant, the court should be a little cautious in proceeding under Order 8 Rule 10 CPC. Before passing the judgment against the defendant it must see to it that H even if the facts set out in the plaint are treated to have

been admitted, a judgment could possibly be passed in favour of the plaintiff without requiring him to prove any fact mentioned in the plaint. It is a matter of the court's satisfaction and, therefore, only on being satisfied that there is no fact which need be proved on account of deemed admission, the court can conveniently pass a judgment against the defendant who has not filed the written statement. But if the plaint itself indicates that there are disputed questions of fact involved in the case regarding which two different versions are set out in the plaint itself, it would not be safe for the court to pass a judgment without requiring the plaintiff to prove the facts so as to settle the factual controversy. Such a case would be covered by the expression "the court may, in its discretion, require any such fact to be proved" used in sub-rule (2) of Rule 5 of Order 8, or the expression "may make such order in relation to the suit as it thinks fit" used in Rule 10 of Order 8".

11. Explaining the default on the part of the defendant for not filing written statement it has been stated that late C.C. Chandregowda represented by his Lr. C.C. Harish was suffering from severe illness due to jaundice. This fact was pleaded before the High Court at the stage of appeal and the High Court in the light of the same has rightly remanded the matter to the trial court to re-consider it afresh. Learned counsel for the defendants-respondents also submitted that the remand order of the High Court will not serve the interest of justice if the defendants-respondents are not allowed to place written statement of the defendants-respondents on record and the remand order will not serve any useful purpose if the suit is restored and ordered for retrial without permitting the defendants-respondents to file written statement. Learned counsel has contended that the filing of written statement is governed by procedural law and this Hon'ble Court has held in *Kailash vs. Nanhku And Ors.* reported in (2005) 4 SCC 480, as follows:-

A "The purpose of providing the time schedule for filing the written statement under Order 8 Rule 1 CPC is to expedite and not to scuttle the hearing. The provision spells out a disability on the defendant. It does not impose an embargo on the power of the court to extend the time. Though the B language of the proviso to Rule 1 Order 8 CPC is couched in negative form, it does not specify any penal consequences flowing from the non-compliance. The provision being in the domain of the procedural law, it has to be held directory and not mandatory. The power of the C court to extend time for filing the written statement beyond the time schedule provided by Order 8 Rule 1 CPC is not completely taken away."

12. It was finally submitted that the plaintiff-appellant who claims to be in possession of his share in the plaint schedule D property would not be prejudiced in any manner by the order of remand and hence the High Court was perfectly justified in remanding the matter for its trial by granting permission to the defendants-respondents to file written statement which need not be interfered with by this Court under its extra-ordinary E jurisdiction under Article 136 of the Constitution.

13. In the light of the ratio decidendi of the cases cited hereinabove, when we examined the judgement and order of the trial court granting a decree of partition in favour of the F plaintiff-appellant, we could notice that the plaintiff-appellant has sought to prove his case that the suit property was a joint family property only on the strength of affidavit which he had filed and has failed to lead any oral or documentary evidence to establish that the property was joint in nature. Even if the case of the G plaintiff-appellant was correct, it was of vital importance for the trial court to scrutinize the plaintiff's case by directing him to lead some documentary evidence worthy of credence that the property sought to be partitioned was joint in nature. But the trial court seems to have relied upon the case of the plaintiff merely placing reliance on the affidavit filed by the plaintiff which H

was fit to be tested on at least a shred of some documentary evidence even if it were by way of an ex-parte assertion. Reliance placed on the affidavit in a blindfold manner by the trial court merely on the ground that the defendant had failed to file written statement would amount to punitive treatment of the suit and the resultant decree would amount to decree which would be nothing short of a decree which is penal in nature.

14. We find sufficient assistance from the apt observations of this Court extracted hereinabove which has held that the effect of non-filing of the written statement and proceeding to try the suit is clearly to expedite the disposal of the suit and is not penal in nature wherein the defendant has to be penalised for non filing of the written statement by trying the suit in a mechanical manner by passing a decree. We wish to reiterate that in a case where written statement has not been filed, the Court should be a little more cautious in proceeding under Order 8 Rule 10 CPC and before passing a judgement, it must ensure that even if the facts set out in the plaint are treated to have been admitted, a judgement and decree could not possibly be passed without requiring him to prove the fact pleaded in the plaint. It is only when the Court for recorded reasons is fully satisfied that there is no fact which needs to be proved at the instance of the plaintiff in view of the deemed admission by the defendant, the Court can conveniently pass a judgement and decree against the defendant who has not filed the written statement. But, if the plaint itself indicates that there are disputed questions of fact involved in the case arising from the plaint itself giving rise to two versions, it would not be safe for the Court to record an ex-parte judgement without directing the plaintiff to prove the facts so as to settle the factual controversy. In that event, the ex-parte judgement although may appear to have decided the suit expeditiously, it ultimately gives rise to several layers of appeal after appeal which ultimately compounds the delay in finally disposing of the suit giving rise to multiplicity of proceeding which hardly promotes the cause of speedy trial. However, if the Court is clearly of the view that

A the plaintiff's case even without any evidence is prima facie unimpeachable and the defendant's approach is clearly a dilatory tactic to delay the passing of a decree, it would be justified in appropriate cases to pass even an uncontested decree. What would be the nature of such a case ultimately will B have to be left to the wisdom and just exercise of discretion by the trial court who is seized of the trial of the suit.

15. When we examined the instant matter on the anvil of what has been stated above, we have noticed that the trial court has decreed the suit without assigning any reason how the C plaintiff is entitled for half share in the property. The same is absolutely cryptic in nature wherein the trial court has not critically examined as to how the affidavit filed by the plaintiff in support of his plea of jointness of the family was proved on relying upon Ex.P-1 to P-10 without even discussing the nature D of the document indicating that the suit property was a joint property. Ex.P-1 to P-10 are the preliminary records viz. Atlas, Tipni Book, R.R. Pakka Book, Settlement Akarband, sale deeds etc. The trial court although relied upon these documents, it has not elaborated critically as to why these E documents have been believed without indicating as to how it proves the plea that the property always remained joint in nature and had never been partitioned between the parties. Even if the trial court relied upon these documents to infer that the property was joint in nature, it failed to record any reason as to F whether the property was never partitioned among the coparceners. It is a well acknowledged legal dictum that assertion is no proof and hence, the burden lay on the plaintiff to prove that the property had not been partitioned in the past even if there was no written statement to the contrary or any G evidence of rebuttal. The trial court in our view clearly adopted an erroneous approach by inferring that merely because there was no evidence of denial or rebuttal, the plaintiff's case could be held to have been proved. The trial court, therefore, while accepting the plea of the plaintiff-appellant ought to have H recorded reasons even if it were based on ex-parte evidence

that the plaintiff had succeeded in proving the jointness of the suit property on the basis of which a decree of partition could be passed in his favour.

16. As a consequence of the aforesaid analysis and the reasons recorded hereinabove, we are of the view that the High Court was legally justified in setting aside the judgement and decree of the trial court and allowing the appeal to the limited extent of remanding the matter to the trial court for a de-novo trial after permitting the defendant-respondent to file the written statement. The appeal consequently stands dismissed. However, we are conscious of the fact that the Plaintiff/ Appellant for no fault on his part has been forced to entangle himself in the appeal before the High Court as Respondent giving rise to an appeal before this Court, although the Defendant/Respondent had leisurely failed to file written statement in spite of numerous opportunities to file the same and also had failed to cross-examine the plaintiff witnesses, but once the decree for partition of half share was passed in favour of the Plaintiff/Appellant, the Defendant/Respondent promptly challenged the same by filing an appeal before the High Court. Since the disposal of the suit for partition has now been dragged into a protracted retrial of the suit, we consider it legally just and appropriate to balance the scales of equity and fairplay by awarding a sum of rupees twenty five thousand by way of a token cost to the Plaintiff/Appellant to be paid by the Defendant /Respondent expeditiously as the impugned order of the High court directing retrial shall be given effect to only thereafter.

17. The appeal thus stands dismissed subject to the payment of cost by the Defendant/Respondent to the Plaintiff/ Appellant.

B.B.B. Appeal dismissed.