
(2007) 12 DEL CK 0215

In the Delhi High Court

Case No : CM No. 4155/07 in Regular First Appeal No. 176/07 and Regular First Appeal No. 176/07

Guru Nanak Mechanical Works and Others

APPELLANT

Vs

Shri. R.K. Dutta

RESPONDENT

Date of Decision : 20-12-2007

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 8 Rule 1, Order 8 Rule 10

Citation : (2008) 147 DLT 19 : (2008) 100 DRJ 611

Hon'ble Judges : Sudershan Kumar Misra, J; Manmohan Sarin, J

Bench : Division Bench

Advocate : Purshottam Singh, for the Appellant; S.K. Garg, for the Respondent

Final Decision : Allowed

Judgement

Manmohan Sarin, J.—Appellant has preferred this Regular First Appeal against the order dated 9.12.2006 passed by the Mr. D.C. Anand, Additional District Judge, Delhi by which the suit filed by the respondent was decreed under the provisions of Order 8 Rule 10 CPC on the failure of the appellant to file the written statement. Learned judge proceeded on the ground that no written statement can be placed on record after 90 days of service of summons on the defendant. In the present case defendant/appellant was served on 6.5.2006. Permission of the court was taken while filing the written statement on 25.8.2006 which is the mandate of law in case the written statement is to be taken on record on record beyond the period of 90 days.

2. As a short question is involved, with the consent of parties the appeal is taken up for disposal. Brief Facts of the case are:

i) Appellant had quoted for the supply of a High Speed Power Press Line of 150 ton capacity along with a Grippen Feeder and Combined Decoiler cum straightener, a price of Rs. 8,40,000/-. The supply was to be made within 8-9 weeks from the date of the order. Advance payment of Rs. 1,50,000/- was made

by the respondent. In between, there was increase in the price of steel and revised quotation with in increase in the price of machine by 25% i.e., to Rs. 10,00,000/- (Rs. Ten Lacs) was submitted. Respondent accepted the revised price and remitted further advance. A total sum of Rs. 2,50,000/- (Rs. Two Lac Fifty Thousand) was paid by the respondent to the appellant as advance. Respondent also remitted a sum of Rs. 1,12,000/- for purchase of 30 HP Eddy Current Drive motor instead of Seimens Electric Motor.

(ii) Appellant on account of financial difficulties being faced required further advance to complete the manufacture and deliver the machine. Respondent thereupon paid a further sum of Rs. 2,00,000/- vide Pay Order No. 800138 dated 4.10.2004 Appellant had assured that the machine would be ready for trial and testing by 15.10.2004 and finally delivery would be given by 20.12.2004 A penalty of Rs. 15,000/- per day was agreed for delay in delivery. This penalty was to be increased to Rs. 20,000/- if the delivery was delayed beyond 25.10.2004.

iii) Appellant could not deliver the machine until 18.2.2005. A further sum of Rs. 2,50,000/- and another sum of Rs. 1,00,000/- was paid by the respondent to the appellant vide Pay orders Nos. 812561 dated 29.1.2005 and 813038 dated 17.2.2005 respectively. The machine was delivered on 18.2.2005.

iv) Respondent has filed a suit, claiming damages of Rs. 15 lacs together with pendente lite and future interest @ 18% per annum. The plaintiff averred in the plaint that it was entitled to claim Rs. 30,57,000/- out of which Rs. 23,75,000/- is claimed on account of the penalty and the rest on account of non-supply of the items, as averred in para 30 of the plaint. However, plaintiff confined his claimed to Rs. 15,00,000/- (Rs. Fifteen Lacs) together with pendente lite and future interest @ 18% per annum from the date of filing of the suit.

3. We may note some of the relevant dates. The appellant was duly served with summons on 6.5.2006 and appeared in Court on 18.5.2006. The case was adjourned to 21.7.2006 since the presiding officer was on leave. On 21.7.2006, the appellant sought time to file written statement. The case was adjourned to 25.8.2006. Appellant was granted time to file written statement within the 90 day period from the date of service i.e. up to 5.8.2006. The next date given for admission/denial of documents was 25.8.2006. The appellant tendered the written statement on the date when he appeared on 25.8.2006 but without any application seeking condensation of delay in filing of the written statement.

4. Learned Additional District Judge adjourned the matter for further proceedings to 8.9.2006 when an application under Order 8 Rule 10 CPC was also moved by the respondent culminating in passing of the order dated 9.12.2006 decreeing the suit under Order 8 Rule 10 CPC.

5. Learned Counsel for the respondent at this stage submitted that not only was the machine defective, their essential accessories and parts, which were required to be supplied as per the original contract were also not supplied.

Learned Counsel for the appellant submitted that this is a case where the appellant has suffered on account of casual approach and neglect of the counsel. It submitted that the appellant was always prepared with the case, ready and willing to file written statement but was not advised by his counsel with regard requirement of filing written statement within the stipulated time and consequences of non filing thereof. Learned Counsel for respondent refuted the same by urging that the appellant /defendant's partner had appeared on 21.7.2006 and was thus aware of the requirement of filing the written statement within 90 days. Besides ignorance of law was no ground.

Learned Counsel for the respondent objected to the same and submitted that the defendant himself had appeared at the threshold and was, Therefore, required to file the written statement and ignorance of law cannot be urged at this stage.

6. We have considered the matter. There is a delay of 22 days and the appellant has tendered a plausible Explanation for the same. Even if the appellant became aware of the direction to file written statement within 90 days from service on 21.7.2006, it does not negate the plea that he was not advised by the counsel about the consequences emanating. The appellant tendered the written statement on 25.8.2006 unsupported by an application. This tends to support the appellant's argument that the counsel had adopted a casual approach. Appellant has tendered a plausible Explanation for delay in filing of the written statement, which deserves to be accepted. Reference may be invited to the judgment of the Supreme Court in Salem Advocate Bar Association, Tamil Nadu Vs. Union of India (UOI), , wherein the Court held that the provisions of Order VIII Rule 1 CPC, providing for upper limit of 90 days to file written statement is directory and that the order extending time beyond that cannot be made in routine. Time can be extended only in exceptionally hard cases. Reference is also invited to the decision of this Court in Smt. Prem Lata and Others Vs. Shri Rajender Soni, with regard to extension of time beyond 90 days period.

7. Leaving that apart and considering the nature of the relief sought and the transaction involved, in our view this is a case where the respondent should have been called upon to prove the loss and damages suffered and sustained by it rather than proceeding to decree the suit under Order 8 Rule 10 CPC. The court is vested with this discretion even on account of the failure of the party to file the written statement. Reference may be made to Balraj Taneja v. Sunil Madan AIR (1999) (SC) 381 wherein the Supreme Court observed:

The court has not to act blindly upon the admission of a fact made by the defendant in his written statement nor the court should proceed to pass judgment blindly merely because a written statement has not been filed by the defendant traversing the facts set out by the 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 the judgment against the defendant it must see to it that even if the facts set out in the plaint are treated to have been admitted, a

judgment could possibly be passed in favor of the plaintiff without requiring him to prove any fact mentioned in the plaint. It is a matter of courts satisfaction and, Therefore, only on being satisfied that there is no fact which need proved on account of deemed admission, the court can conveniently pass a judgment against the defendant who has not filed the written statement.

In Syed Ismail and Anr. v. Smt. Shamshia Begum and Anr. AIR 2000 KAN 34 it was held:

The impugned order does not disclose the nature of pleading placed by the plaintiff and whether there is prima facie material to grant a decree in his favor. A judgment in favor of plaintiff is not automatic. The Court has to consider the case of the plaintiff and grant a decree in his favor. The learned trial Judge has not referred to the pleadings of the plaintiff and the documents produced by him to substantiate even a prima facie case for grant of a decree in his favor. Therefore the judgment and decree in favor of the plaintiff is not automatic on failure of the opposite party to put his defense. The Court can grant a judgment in favor of the party only upon consideration of the case of the plaintiff including appreciation of pleadings and evidence. Similar view was taken in Alson Motors v. Sh. Rajesh Kumar AIR 1993 J and K 12.

It was further observed that mere statement that the suit of the plaintiff is decreed under Order 8 Rule 10 cannot be sustained.

In Indradhanush T.V. Pvt. Ltd. v. National Film Development Corporation 2006 (III) AD (Delhi) 104 it was observed "on failure to file written statement under this provision, the court has been given the discretion either to pronounce judgment against the defendant or make such other order in relation to suit as it thinks fit. In the context of the provision, despite use of the word "shall", the court has been given the discretion to pronounce or not to pronounce the judgment against the defendant even if written statement is not filed and instead pass such other order as it may think fit in relation to the suit.

In view of the aforesaid judicial pronouncements, we are of the view that in the present case, the appellant deserves to be permitted to contest the suit on merits and the delay of 20 days in filing of the written statement beyond the 90 days period deserves to be condoned in this case. We also notice that plaintiff has averred in the plaint that even though he is entitled to Rs. 30,57,700/- (Rs. Thirty Lacs Fifty Seven Thousand Seven Hundred) he is only making a claim for Rs. 15,00,000/- (Rs. Fifteen Lacs). The said claim in the plaint is not based on any admitted amount. A substantial portion of the claim in the plaint is attributable to the penalty claimed. respondent in the circumstances, has also not averred that the penalty as stipulated was preestimate of damages which the party had incurred. We are of the view that the quantum of loss and damages incurred by the respondent requires to be proved by evidence. Respondent would also have to prove having suffered the damages and loss as claimed. We accordingly, condone the delay in the filing of written statement and set aside the

impugned order directing the written statement to be taken on record, subject to costs of Rs. 15,000/-. Rs. 7,500/- to be paid to the respondent and Rs. 7,500/- to be paid to the Delhi High Court Legal Services Committee.

At this stage, learned Counsel for the respondent prays that the direction be given for expediting the trial as the decree suit has been set aside and the respondent is being required to prove his case on merits. The trial of the suit is expedited. The Trial Court shall endeavor to conclude trial within six months from today.

Appeal stands allowed in the above terms.