
(1991) 04 P&H CK 0082

In the Punjab And Haryana At Chandigarh

Case No : Regular First Appeal No. 788 of 1990

Kwality Conduit Pvt. Ltd.

APPELLANT

Vs

B.C.Gupta & Company

RESPONDENT

Date of Decision : 10-04-1991

Acts Referred:

Citation : (1991) ISJ 381 : (1991) PLJ 331 : (1991) 2 PLR 124 : (1991) 2 RRR 557

Hon'ble Judges : V.K Bali, J

Advocate : Vivek Suri, Advocates., Rajiv Kataria, Advocates for appearing Parties

Judgement

V.K. Bali, J.

1. This appeal is preferred by the defendant against the judgment and decree rendered by the trial Court vide which the claim of the plaintiffrespondent to an amount of Rs. 7,75.397.75 was allowed. The judgment and decree basically came into being on account of order dated 7th October, 1989 vide which the trial Court by applying provisions of Order VII rule 10 of the Civil Procedure Code struck off the defence of the appellant. On the same very day i.e. 7th October, 1989, the judgment and decree was passed. Before the contention of the appellant is noticed it shall be useful to give resume of the facts culminating into order dated 7th October, 1989, in consequence of which, as referred to above, the impugned judgment and decree was passed on the same date.

2. The respondent (hereinafter referred to as "the plaintiff") filed suit for the recovery of Rs. 7,75,397.75 as principal and interest on the basis of nonpayment of the goods supplied to the defendant. The suit was filed in the Court of Saul) Judge I Class, Amloh, on 11th May, 1989, and order that came to be passed on the first dale of the institution of the suit, is reproduced :

"Report of the Reader perused. Suit be registered and notice be. issued to the defendant for 24.7.89 on PF, RC documents etc."

On the adjourned date. i.e. 24th July, 1989, when the defendantappellant also

appeared for the first time, the trial Court adjourned the case for filing written statement and the case was then to come up on 5th of August, 1989. It requires to be mentioned here that Central Bank had also filed some objections, copy whereof had been supplied and the same was also to be put up on the date fixed, 5th of August, 1989. It is clear from the interim order dated 5th of August, 1989 that the matter was taken up only with regard to the filing of the reply to the objections filed by the Central Bank and inasmuch as the suit was not filed on the date fixed and the case was adjourned on 16th of August, 1989. Interim order dated 5th of August, 1989, would not reveal anything with regard to the filing or nonfiling of the written statement. On the adjourned date i.e. 16th of August, 1989, the defendant moved an application under Order VI rule 5 read with section 151 of the Code of Civil Procedure. In the aforesaid application prayer was for supplying of better particulars and of the documents that had been relied upon by the plaintiff for filing a meaningful and complete written statement. The trial Court after receipt of the application aforesaid adjourned the case to 21st August, 1989, for filing reply to the application under Order VI Rule 5 of the Code as well as for filing reply to the objections of the Central Bank. It may be noticed here, that there is nothing in the interim order requiring the defendant to file written statement on the adjourned date. The matter again came up on the adjourned date i.e. 21st August, 1989, and the plaintiff filed reply to the application filed by the defendant under Order VI rule 5. The rest of the interim order passed by the learned Sub Judge is rather confusing. It only states that copies of documents relied upon by the plaintiff are already on the record and that said documents were required to be produced by the plaintiff. As referred to above no clarity is forthcoming from the interim order referred to above but be that as it may, the trial Court after observing what has been stated above further directed the defendant to file written statement by 29th August, 1989. When the matter came up for hearing on 29th of August, 1989, the trial Court observed that written statement had not been filed and on the request made for adjournment by the defendant, the case was adjourned to 19th of September, 1989. It is significant to mention here that before adjourning the case to 19th September, 1989, on 29th of August, 1989 itself, it was clearly mentioned in the interim order of the said date that copy of the application under Order VI rule 5 of the Code had been given to the plaintiff and the case is now adjourned to 19th September, 1989, for reply and consideration on application as well as for filing of the written statement. It is thus clear from the aforesaid order that nothing was decided vide interim order dated 21st of August, 1989, with regard to the application of the defendant under Order VI rule 5 of the Code and the same was in fact to come for consideration on 29th of September, 1989.

3. The matter thereafter came up for hearing on the adjourned date on 29th September, 1989, and the reply to the application was filed and the counsel for the plaintiff after filing reply stressed upon that the defendant should file his written statement. On the said request, the trial Court directed the defendant to file written statement on 28th September, 1989. On the adjourned date i.e. 28th

September, 1989, another controversy arose and the interim order of the said date reflects institution of some case by the defendant at Jodhpur. Suffice to mention here that by aforesaid order the defendant was finally directed to file his written statement on 7th October, 1989. It is apparent that in the din that was created on account of the suit filed at Jodhpur and consequence thereof on the present suit, the learned trial Court completely lost sight of the fact that application of the defendant-appellant under Order VI rule 5 of the Code was still pending and had not been disposed of so far.

4. It is thereafter, as indicated above, that on the adjourned date i.e. 7th October, 1989, for nonfiling of the written statement by the defendant, his defence was struck off under the provisions of Order VIII rule 10 of the Code and simultaneously on the same date a decree for recovery of Rs. 7,75,397.75, with costs and interest, was passed. It is after the striking off of the defence of the defendant and passing the decree that the learned trial Court took up the matter with regard to the application filed by the defendant under Order VI rule 5 of the Code and dismissed the same..

5. The facts detailed above would go to show that the learned trial Court struck off the defence of the defendant under Order VIII rule 10 of the Code and passed decree which was prior in point of time than of dismissing the application under Order VI rule 5 of the Code although all these orders were passed on the same date. The twin submission of the learned counsel for the appellant is that the learned trial Court was not justified to strike off the defence by applying stringent and penal provisions of Order VIII rule 10 of the Code before the right of the defendant to get better particulars was either accepted or declined. It is also contended that in any case the facts and circumstances of the case did not warrant such an harsh order by striking out the defence which is normally applied as a measure of last resort.

6. The contention of Mr. Arun Jain, learned counsel for the plaintiff, on the other hand is that the defendant pressed into service all kinds of tactics to delay the proceedings and his conduct warranted resort to provisions of order VIII rule 10 of the Code and that there was no equity in his favour.

7. I have heard the learned counsel for the parties at length and have perused the records which was specially summoned in order to facilitate the hearing and decision of the present case. I am in complete agreement with the contention of Mr. Kataria, learned counsel for the appellant, and I am of the view that facts and circumstances of the present case did not warrant resort to penal provision of Order VIII rule 10 of the Code particularly when the application of the defendant seeking better particulars and all the documents, that were relied upon by the plaintiff had since not been disposed of. The learned trial Court ought to have first disposed of the application seeking better particulars and the documents, and it is thereafter only the defendant could be directed to file written statement. Better particulars are demanded by a party only with a view to meet all the points of the pleadings of the other side. It is only when some difficulty is

experienced in drafting pleadings on account of lack of some pleadings or documents that an application under Order VI rule 5 of the Code is necessitated. I would not comment upon the merits of the application of Order VI rule 5 of the Code but suffice to say that even if the said application was devoid of merit yet the learned trial Court ought to have first dismissed it by confronting the defendant with the situation where he would have had choice but for to file his written statement. As long as the said application was pending the defendant ought to have been under the impression and justifiably so that he call postpone the filing of the written statement. The procedure adopted by the learned trial Court in my considered opinion is not at all justified. Even otherwise it cannot be disputed that provisions of Order VIII rule 10 of the Code are penal in character. The said provision would necessarily result in allowing the claim of the adversary without trial and without semblance of evidence having been brought on record howsoever frivolous as the case may be. While observing so I am by no stretch of imagination trying to comment upon the claim of the plaintiff but all what I am observing is that in a given case even a very feeble and hollow plea can succeed and in fact would necessarily succeed if resort is had to the provision contained Order VIII rule 10 of the Civil Procedure Code. Such a provision would normally apply when the default of the defendant is contumacious. The facts of the present case show that only on the last two successive dates, the defendant was directed to file written statement. I am convinced that for nonfiling of the written statement on the date fixed when his defence was struck off the Court ought to have instead burdened him with costs and that too after deciding his application filed under Order VI rule 5 of the Code. Just in order to satisfy myself with regard to the merits of controversy involved in the case, I have heard counsel for the parties and although I am not commenting anything with regard to the merit of the case, it does not appear to me that the defence is totally frivolous and it is for that reason that all out effort were being made to delay the finalisation of the case. The defendant is placing reliance on an agreement vide which the plaintiff and others had agreed to take over all assets and liabilities of the defendant and in consequence thereof money due towards the defendant was to be given up. The defence is briefly noticed just with a view to show that the defendant did have a plea to raise which required a proper trial and adjudication of the controversy on merits. Looking thus from any angle, the judgment and decree passed by the learned trial Court cannot sustain.

8. In view of what has been stated above the order dated 7th of October, 1989, striking out the defence of the defendant shall be set aside. The judgment and decree passed by the learned trial Court on the same date shall also be set aside and the appeal shall be allowed, and the learned trial Court would start the case from the proceedings which were immediately in offing prior to the impugned orders were passed. This appeal shall be allowed in the manner indicated and the parties shall appear before the trial Court on 24th of May, 1991.

9. Before I part with this judgment, equities will not be squarely met if the parties are not bound down in their conduct at the trial and it is pre eminently a

case, which requires direction to the parties to conclude their evidence as soon as possible. The learned trial Court would grant only four opportunities each to the plaintiff and the defendant. No further adjournment has been given to either of them. However, If the parties to the suit wish to take help of the Court in summoning witnesses, the Court would issue dasti summons as well and but for that it shall be the sole responsibility of the parties to produce entire evidence at their own responsibility. The learned trial Court would conclude the case and give its judgment at the most within a year and preferably within six months.

10. The case requires further direction to the effect that by virtue of interim order passed by the trial Court under Order XXXVIII rules 4 and 5 of the Civil Procedure Code, the factory of the defendant at Jodhpur has been locked as is contended by Mr. Kataria, learned counsel for the defendant, the same shall be opened forthwith. I am of the considered view that in pursuance of Order XXXVIII rule 5 of the Code, no such procedure like locking of the factory premises is warranted under the law. Inasmuch as order dated 7th October, 1989, as also the judgment and decree is being set aside on technical point and the case is being remanded. The defendant shall be entitled to refund of the courtfee that has been affixed on the memorandum of appeal by filing present regular first appeal. The appeal is thus allowed in the manner indicated above. As referred to above. The parties through counsel are directed to appear before the trial Court on 24th of May, 1991.