(2000) 05 CAL CK 0024

In the Calcutta High Court

Case No : A.O.D. No. 14 of 2000

Mcdowell and Company Limited — APPELLANT

Vs

Kanchan Udyog Limited — RESPONDENT

Date of Decision : 18-05-2000

Acts Referred:
Contract Act, 1872 — Section 73

Citation : 104 CWN 623

Hon'ble Judges : V.K. Gupta, J;Malay Kumar Basu, J

Bench : Division Bench

Advocate : H.K. Mitra, Ratnanko Banerjee, R.R. Sen and T. Aich, for the Appellant;B.K. Bachawat, D. Surana, S. Khaitan and S. Bose, for the Respondent

Final Decision : Allowed

Judgement

V.K. Gupta , J.—In this appeal filed by the Appellant McDowell & Company Ltd.. the judgment and decree dated 2nd December, 1999 passed by the learned Single Judge of this Court in Suit No. 839 of 1990 is under challenge. Vide the said judgment the learned Trial Court decreed the Suit of the Plaintiff/Respondent M/s. Kanchan Udyog Limited to the tune of Rs. 4,24,33.000/- along with interest @ 10% per annum from the date of the institution of the Suit until the payment of the amount. Such decree for the aforesaid amount in favour of the plaintiff was passed after adjusting an amount of Rs. 9.05 lacs awarded in favour of the appellant/ defendant in the aforesaid Suit. Brief facts leading to the filing of the present Appeal are that the respondent which is a Public Limited Company entered into parlays and negotiations with the appellant, a Company belonging to United Breweries Group of Companies, with regard to the setting up of a Bottling Plant in the district of Hooghly in West Bengal for bottling and marketing of three brands of flavoured beverages namely, "Thrill", "Rush" and "Sprint" and the non-flavoured beverage by the name of "McDowell''s Sparkling" Soda. The appellant had been carrying on the business of manufacturing of the aforesaid carbonated beverages, popularly known as soft drinks under the aforesaid four trade marks by or through different franchise holders. The aforesaid parleys and negotiations between the appellant and the respondent revolved around the respondent being granted a franchise by virtue of an agreement by the appellant for the bottling and marketing of the aforesaid four brands of beverages. Perusant to the aforesaid negotions and in implementation of the broad outlines having emerged therefrom, the parties entered into three separate agreements. By the first agreement executed on 11th September 1985, called as the Agreement for Project Engineering Services, the appellant as Consulting Engineering agreed to provide engineering services to the respondent for setting up of a Bottling Plant at Calcutta for bottling of the aforesaid carbonated beverages with the appellant''s brand name. The engineering services to be provided by the appellant under the aforesaid project agreement comprised the following:

(i) Assistance in statutory clearance

(ii) Detailed engineering

(iii) Procurement Assistance

(iv) Erection, supervision and commissioning assistance

(v) Project management

(vi) Recruitment and training

2. It is the respondent''s assertain that the aforesaid Project Agreement in truth and substance was in the nature of a Turnkey Job Agreement whereunder and whereby the appellant had undertaken to erect, supervise and commission the aforesaid Bottling Plant according to its own Technical Documentation".

3. The Project Engineering Services Agreement was followed by the execution of what is referred to as the Bottlers Agreement on 26th October, 1985 between the parties. Vide this agreement the appellant granted to the respondent licence to use the aforesaid four trade marks. The appellant also agreed to pass over to the respondent its technical knowhow and expertise in the manufacture, bottling and marketing of the aforesaid beverages for consideration and on the basis of terms and conditions contained in the aforesaid Bottlers Agreement.

4. As per the averments contained in the plaint, for better implementation of the aforesaid two agreements, on 21st January, 1986 a third Agreement was executed, this time Tripartite, between the appellant, the respondent and one M/ s. K.B Crete whereby the said M/ s. K.B. Crete was appointed as Contractor for the construction of the plant under the supervision and control of the respondent and on terms and conditions contained in the aforesaid Tripartite Agreement. It is the plaintiffs case that the plant went into commercial production on or about 1st January, 1987 and that the total cost incurred by the plaintiff/ respondent for setting up, erection and commissioning of the Plant was to the tune of Rs. 2,52,31.786.02

5. It appears, as we have noticed from the pleadings of the parties, that from

January 1987 uptil about March, 1988 the Plant, the bottling work in the plant and the marketing and sale by the respondent went normally and in ordinary course of business, despite certain hiccups as alleged by the respondent emanating from the respondent''s regular periodical complaints with regard to the alleged failure of the appellant in providing adequate advertising and sale promotion support to the respondent.

6. On 16th March, 1988 the appellant issued a communication addressed to the respondent whereby the Bottlers Agreement executed on 26th October, 1985 was terminated. As per the contents of the said communication the Bottlers Agreement stood terminated with effect from 18th March, 1988 and that such purported termination had been mutually agreed upon by separate correspondence. The respondent undoubtedly strongly contested the alleged termination of the Bottlers Agreement and called it a breach of contract. The respondent also strongly contested the assertion contained in the letter dated 16th March, 1988 that the purported ''termination had been mutually agreed upon between the parties by a separate correspondence. The issuance of the letter dated 16th March, 1988 as followed by three letters, all dated 16th March, 1988 from the appellant to the respondent, accompanied by three proposed agreements. In sum and substance these three letters and the accompanying proposed agreement envisaged that the respondent could enter into a fresh Bottlers Agreement with the appellant for the bottling and sale by the respondent of Appellant''s "McDowell''s Sparkling Soda" only under licence from the appellant, a marketing agreement between the parties for the marketing only of the other three flavoured beverages namely. "Thrill", "Rush" and "Spirint" and lastly a Bottlers Agreement between the respondent and one M/s. Venkateswara Essences and Chemicals Private Limited. No. 3. 1st Main Road, Gandhi Nagar. Bangalore (hereinafter to be referred to as VEC for the sake of brevity). In terms of this proposed Bottlers Agreement between the respondent and VEC the respondent was to bottle the aforesaid three beverages under licence from VEC. Actually by a letter dated 16th March, 1988 the appellant had purported to inform the respondent that it had assigned the trade marks. Thrill. Rush and Sprint to VEC because of such assignment of these trade marks by the appellant to VEC, VEC had become the owner of the said trade marks and the appellant came to be thereafter called as its user and that in future the respondent should place all orders and enquiries for purchase of the essence/concentrate of Thrill, Rush and Sprint from VEC inctead of the appellant. By a letter dated 30th March, 1988 VEC had informed the respondent that as they had become the purported assignees of the aforesaid three trade marks and had commenced the production of the essence/concentrat of these three beverages, the respondent should buy the assence/concentrate from them. On 20th May, 1988, the appellant offered to the respondent with effect from 1st July, 1988 a limited and unquantitled marketing service.

7. The aforesaid developments led the respondent to file the suit against the appellant for damages. In this Suit the Respondent claimed a decree for Rs.

11,21,35,289,02 or, in the alternative an enquiry with damages and a decree for such sum as may be found due, apart from interest and future interest and other incidental or ancillary reliefs. Counter claim was filed by the appellant. As indicated at the very outset, the learned Trial Judge passed a decree for an amount of Rs. 4,24,33,000 with interest @ 10% per annum.

Following Issues were framed in the Suit:

1. What was the agreement between the parties?

2. (a) Did the defendant commit breach of the said agreement?

(b) If so. is the plaintiff entitled to damages and to what extent?

3. (a) What amount, if any, is due from the plaintiff to the defendant under the consultancy agreement?

(b) Is the defendant entitled to royalty @ Re. 1/- per crate on the sale of McDowell''s sparkling soda by the plaintiff?

4. Is the suit barred by waiver, estoppel or acquiescence?

5. To what relief, if any, are the parties entitled.

8. We have heard the detailed argument of the learned Advocate of the parties. We have gone through the evidence and Derused documents produced during the Trial by the parties. At the core of the controversy, at the very centre of the dispute is the very basic question relating to the alleged illegal termination of the Bottlers Agreement dated 26th October, 1985 by the issuance of the termination letter dated 16th March, 1988. This is the very basic question which goes to the very heart of the matter and unless there is a proper resolution of this basic question, unless and until there is a definite finding by the Court about this core issue, proceeding any further with the matter would be an exercise in futility. We have therefore to see and find out whether this basic dispute was at all the subject matter of adjudication by the learned Trial Court and was any issue, properly and appropriately framed by the Trial Court on this question and whether any finding has been returned by the Trial Court in such issue. Very unhappily we have to observe and record that the learned Trial Judge did not frame any issue with regard to the so-called or alleged illegal termination of contract between the parties. Reading of Issues 1 and 2(2), together to our mind, does not suggest to us that the so-called illegality of the termination of the Bottlers Agreement was the subject matter of these two Issues. Termination of the Agreement, legally or illegally, is one thing and committing breach of the same is quite another. Whether the agreement was terminated, whether it was terminated legally or illegally is one question; did the appellant commit any breach of the agreement is quite another, because committing breach of the agreement is different, then, mostly independent of, the termination of the agreement itself. Whatever be the framing of the issues, the only finding that we have on this question by the learned Trial Court is as under:

I am satisfied on the basis of the evidence at the Trial that the assertion that the Bottlers Agreement was terminated by a mutual agreement is untenable and has to discounted. The aforesaid letter of the defendant to my mind was clearly in breach of the said Bottlers Agreement. This was not seriously disputed by the learned Counsel for the defendant.

9. When the learned Trial Judge in the aforesaid finding refers to his satisfaction on the basis of the evidence at the Trial, we despite very careful scanning of the judgment find that no such evidence was referred to at all in the judgment There is not even the remotest reference to any evidence on this question in the judgment. By this we are not saying that no evidence was adduced by the parties during the trial. All that we are saying is that the judgment does not take note of any such evidence on such a vital question, question of such far-reaching importance has been dealt with in such a manner. Even if we ignore that aspect of the matter, what we actually find is that the learned Trial Judge has not returned any finding actually as to whether the termination of the contract was legal or illegal. Merely saying that the letter dated 16th March, 1988 was in breach of the Bottlers Agreement does not amout to a finding that the Bottlers Agreement was actually terminated illegally.

10. After having thus decided the issues 1 and 2(a). the learned Trial Judge went on to decide issue No. 2(b) by vaguely and indirectly deciding, even though not on specific terms that the respondent was entitled to damages and then determining the extent of damages by awarding Rs. 1,60,00,000 and 2,73,58.000 under two distinct heads of claims. The following observations by the learned Trial Judge with regard to the aforesaid issues are apposite:

It emerged in the course of the trial that the carbonated beverages bottled by the plaintiff in collaboration with the defendant did not get off the ground. There was no brand acceptance.

11. At another place the learned single Judge observed as under:

The learned Counsel for the plaintiff was right in his submission that the Court should look to what damages would be awarded to the plaintiff for breach of the said Bottlers Agreement by the defendant by reason of the determination of the same by the defendant by its aforesaid letter and that the controversy that had arisen subsequent to the said date of breach as to whether the plaintiff had performed its part in fulfilling its obligation under the said Bottlers Agreement was irrelevant. He also referred to Section 73 of the Contract Act in support of his submission that damages should be awarded on the basis of what was in the contemplation of the parties when they entered into the said agreement. I also agree with the submission that the plaintiff is entitled to claim damages on account of the cost of the plant that it had incurred as the said plant had become useless for its purpose besides claiming damages for the loss of profit. The principal underlying the award of damages is to compel the party who has broken the contract to pay compensation to the other party so as to place the latter in the position he would have been had the contract been performed by the wrong-doer.

12. The respondent had lodged the following claims under the heads mentioned against each.

Particulars

Head or claim

Amount (Rs.)

a)

Balance unpaid and unadjusted sum Rs. 97.416/- and for wrongful debit Rs. 87/-

97,503.00

b)

Loss of profit for 10 years

2,73,38,000.00

c)

Loss of profit for the optional period of 10 years

5,89,85,000.00

d)

Cost of setting up the plant

2,52,31,786.02

e)

Cost of security and maintenance of the plant

4,83,00.00

13. The learned trial Judge rejected the claims under the heads (a), (c) and (e). He. however awarded claims under heads (b) and (d). In respect to the claim under the head (b) the learned Trial Judge awarded an amount of Rs. 2,72.38.00/- and in respect of claim under head (d) against the claim of Rs. 2.52.31.786.02 awarded an amount of Rs. 1.60.000/-. In respect of the claim under the head (d) the following observations were made to support the awarding of the claim :

In so far as head (b) of its claim is concerned the loss of profit. claimed by the plaintiff is on the basis of the said Webcon report and the report of Dr. R. K. Baisya the then Technical Controller of the defendant which was disclosed by the West Bengal Industrial Development Corporation under subpoena. The said report is exhibit ''W1". Dr. R. K. Baisya was not called by the defendant as its witness as according to it he had left the service. In my judgment the amount claimed under this head was in the contemplation of the parties when they entered into the said Bottlers Agreement. I, therefore, allow the claim of Rs. 2.73.38.000/- under this head.

14. In so far as the claim under the head (d) is concerned, we have also to note the following observations :

The plant was ultimately sold at the instance of the financial institutions to Cadbury-fry at the price of Rs. 1,60.00.000/- which was appropriated by the said financial institutions in protanto satisfaction of their dues. To my mind the plaintiff is entitled to be reimbured the said amount by the defendant on account of cost of the plant under the aforesaid head (d) of its claim.

15. Interestingly, when we turned to the relevant portions of the plaint in support of the respondent''s assertions in respect of its claim under head (b) for Rs. 2,73,38.000/- we found that the respondent had not given any details or break-up of the said claim in the plaint except to say as under in para-65 of the plaint, which we reproduce as hereinbelow:

The plaintiff states that the Defendant by its wrongful and permature termination of the said Bottler''s Agreement as aforesaid, has wrongfully deprived the plaintiff of the chance or opportunity of earning profits that would have otherwise accrued to it from the running of the said plant for the initially fixed period of 10 years and that thereby the plaintiff has suffered loss and damage. The plaintiff reasonably assessed such loss of profit at Rs. 2.73,38.000/-particulars whereof have been duly and correctly set forth and calculated in a schedule annexed herewith and marked "M" as a part of this plaint.

16. When up looked to the schedule marked as Annexure "M" to the plaint we found that it was nothing but a tabulated statement under various heads of items like raw-materials and chemicals, consumables and packaging, utilities, labour and factory provisions and so on and so forth. This tabular statement also contained a column regarding operating profits. We shall make our comments about this later. But what we have to observe right at this stage is that apart from the aforesaid averment contained in para-65 of the plaint, the plaintiff did not plead any material facts nor pleaded or provided any material particulars in respect of its claim for the aforesaid amount of Rs. 2,73,38.000/-. With respect to the other claim, being under the head (d) "cost of setting up of the plant" (Rs. 2,52.31.786.01) necessary averment in support of this claim is contained in para-64 of the plaint which we re-produce as hereunder:

The plaintiff states that the said Bottler''s Agreement was for a fixed period of 10 years and the plaintiff has invested the said sum of Rs. 2.52.31.786.01. On the building and installation of the said plant in the bonafide belief and expectation induced by the Defendant as aforesaid that the plaintiff would make reasonable, anticipated and/or usual profit from the running of the said plant for the said initial fixed period of 10 years together with an optional period of another ten years.

17. It is the admitted case of the plaintiff/respondent that the plant was ultimately sold in the year 1996 for Rs. 1.60.80.000 at the instance of the Financial Institutions by invoking Section 29 of the State Financial Corporation Act 1951. Having invested a sum of Rs. 2.52.31.786.01 in the years 1985-87 and after running the plant almost two years and then having sold it almost 10 years later for Rs. 1.60.00.000, how was the plaintiff/respondent found entitled to a claim of Rs. 1,60,00,000 under the aforesaid head (d) has not either been explained by the plaintiff" in the plaint or in the evidence nor has this claim been supported by the learned Trial Judge by any reasoning or on the basis of any material on record.

18. Rule 2 of Order 6 C.P.C, clearly lays down that ever)'' pleading shall contain statement in a concise form all the material facts on which the party pleading relies for this claim. Rule 4 of the same order stipulates that in all cases in which the party pleading relies on any misrepresentation, fraud, breach of trust, a wilful default or undue influence, and in all other cases in which particulars may be necessary, such particulars shall be stated in the pleadings. For ready reference we reproduce rules 2 and 4 of Order 6 CPC which read thus :

O.V.I.R2

Heading to state material facts and not evidence

"(1) Every pleading shall contain, and contain only a statement in a concise form of the material facts on which the party pleading relief for his claim or defence as the case may be, but not the evidence by which they are to be proved.

(2) Every pleading shall, when necessary, be devided into paragraphs, numbered consecutively, each allegation being, so far as it is convenient, contained in a separate paragraph.

(3) Dates, sums and numbers shall be expressed in a pleading in figures as well as in words.

O.V.I.R.4

Particulars to be given where necessary. In all cases in which the party pleading relies on any misrepresentation, fraud, breach of trust, wilful default, or undue influence, and in all other cases in which particulars may be necessary beyond such as are exemplified in the forms aforesaid, particulars (with dates and items if necessary) shall be stated in the pleading.

19. Undoubtedly in the Suit filed by the plaintiff/respondent it can be said that the plaintiff was complaining either of misrepresentation, or of wilful default or may be even of breach of trust and therefore it was obligatory upon the plaintiff to have pleaded material facts and to have furnished material particulars and also to have given all the detailed breakups and in support of such material facts and material particulars in the plaint. From what we have observed in the earlier

parts of this judgment we noticed that the plaintiff did not chose to either state such material facts or to supply such material particulars. On that basis itself perhaps one can say that the plaintiffs claim was not properly founded.

20. Coming to the evidence part let us try to see and find out as to exactly what is the evidence led by the plaintiff in support of its claim of damages. By saying so however we are not at all suggesting that we are in agreement with the learned Trial Judge that the plaintiff has been able to prove and establish that it was entitled for damages. That is a separate issue altogether. Only for the sake of assumption we want to find out as to whether the plaintiff has led any evidence in support of its claim for damages. Mr. Bachawat learned Senior Advocate appearing for the plaintiff has relied upon three reports produced in the Court and says that this is the entire evidence of the plaintiff as for as the damages are concerned. These reports are :

1) The Report prepared by Dr. Vaidya jointly on behalf of Mc. Dowell and the plaintiff.

2) The report prepared by WEBCON. and

3) The Report prepared by W.B.I.D.C.

21. Mr. Bachawat has frankly submitted that the plaintiffs evidence in support of the claim for damages rests on these three Reports. During the course of his arguments it has clearly come out that apart from these three Reports the plaintiff has not produced any other evidence to prove or establish the damages or the quantum of such damages.

22. Even though all the three aforesaid Reports have been admitted into evidence by being exhibited, it is noteworthy that none of the authors of the said Reports has come in the Witness Box to depose about the contents of the Reports. This is a very important feature of the case because the authors even though have given opinion about the projected profits in the years to come, they have not been examined or cross-examined on the basis of such opinion nor could various questions be put to them about various unforeseen circumstances.

23. Various unforeseen circumstances, various contingencies can arise. Whether the product was acceptable to the public or not. whether new brands would come into the market such as Coca Cola and Pepsi and whether the product of the defendant as bottled and marketed by the plaintiff could withstand the competition from these giants. Even though we may not question the veracity of the three reports yet. can the reports in so far as they relate to the profitability projection be relied upon as a clear indicator of the fact that under all circumstances the plaintiff was to earn profit for the years to come and that there was no chance of his not earning profits or. actually occurring the losses. The business is so uncertain, the conditions so volatile that no one can say with any degree of certainty that the plaintiff was bound to earn profit for the next 10 years or 20 years. In such a vast changing market economy where consumer

goods are undergoing revolutionary concepts, changes improvements, innovations, can it be said about any particular product that it is ''going to stay in the market and the venture is always going to be profitable.

24. That apart, even if one may assume that Dr. Vaidya had associated himself either personally or on behalf of the defendants with regard to the preparation of the Report wherein profitability projection was made, can that be considered as a part of the agreement between the parties, thus having a binding affect. Is it the plaintiffs case that the defendant had promised or assured that the plaintiff would earn profits for the next 10 years? Even if there are averments to that effect in the plaint, does the contemporary record support such averments? Our view is that perhaps it does not. because the plaintiff has merely made such an averment. Support, if at all, could be had from the contents of the two agreements, the Bottlers'' Agreement being more important, pertinent, material and relevant because it is this agreement alone which could or might contain a suggestion that the defendant had extended any promise or given any assurance to the plaintiff that the plaintiff would earn profit at a particular scale in the years to come. But when we minutely looked at these two agreements we find that such a supporting base does not exist in these agreements.

25. The profitability projections in the Reports is also not very relevant and cannot be considered to be of any binding nature because these Reports, as is commonly known, are usually submitted in support of the application for loan enabling the parties to obtain the loans from Financial Institutions. Very bright, rosy and enterprising picture is painted in these Reports so as to attract and receive favourable consideration from the Financial Institutions in the sanction of the loan.

26. While deciding the question of damages, assessment of compensation and the quantum related therewith, we have also to take into account the mitigating factors. Minigation is an important question in a case like this. The appellant''s contention is that the contract was terminated in March, 1988 and that thereafter on the own showing of the plaintiff/ respondent the plant was closed in 1989. Yet the plant was sold only in the year 1996. What did the plaintiff/respondent do to mitigate the losses is the question to be considered.

27. That takes us back to the main question as to whether the plaintiff at all had any right in law to claim compensation from the defendant/ appellant. The plaintiff has alleged that the basis of claiming compensation and damages is the illegal termination of the Contract by the defendant-appellant. The plaintiff has relied upon Clause 26 of the Bottlers'' Agreement to urge that the termination of the Contract could be resorted to only under one of the conditions mentioned in Clause 26 and that in the present case the contract could have been terminated only under sub-clause (ii). Admittedly according to the plaintiff, this is not so in the present case because it is not the defendant''s allegation that the contract is being terminated on that ground. On the other hand, the admitted case of the parties is that the defendant has terminated the contract by sending letter dated

16th March, 1988 in which it has been alleged that the contract will be terminated by mutual agreement. In this letter there is a mention of some correspondence between the parties evidencing such mutual agreement but undoubtedly, as per the plaintiff, no such correspondence exists. What therefore was required to be decided was as to whether the plaintiff and the defendant had, or had not, mutually agreed for the termination of the Contract and if the contract had been terminated by the defendant unilaterally, without the agreement of the plaintiff, does such termination come within the purview of Clause 26 of the agreement and if not. is the termination illegal, whether do hors the Agreement or otherwise.

28. The defendant''s defence was perhaps based on acquiescence on the part of the plaintiff. At the centre of this controversy is the defendant''s offer/suggestion to the plaintiff that since it had transferred the ownership of the trade marks relating to the three brands in favour of V.E.C. even though retaining to itself the right of user of these three trade marks, the plaintiff had acquired in such transfer of ownership of trade marks. The basis of this assertion is reliance upon and reference to an excise regulation whereby retention of the trade marks with the defendant would have, according to the parties or the defendant alone, entailed payment of excise duty whereas its transfer to V.E.C. a Small Scale Unit, would have, again according to them, resulted in exemption from payment of excise duty. Coupled with this assertion is another interesting feature that the plaintiff kept on inter-acting with the defendant even after the termination of the contract. Two letters, one dated 9 May 1988 and the other dated 20 May 1988 are relevant for this purpose. A reading of these two letters, one by the plaintiff and the other by the defendant clearly suggests that even after the receipt of the latter dated 16th March, 1988 terminating the Bottler''s Agreement, both the parties were interacting with each other and going ahead as usual with the sorting out of various problems with regard to the running of the Bottling plant. Even advertisement affairs and sale promotion affairs were being discussed and sorted out.

29. What does the aforesaid fact indicate about the termination of the contract? Was it a mere formality, a mere eye-wash and did the parties not treat it that way? Does it or does it no suggest that the parties did not treat the agreement to have been terminated in any manner and by their conduct did they not continue with the arrangement as existing before?

30. On the basis of what we have discussed in details herein-above, and looking to the aforesaid facts and circumstances, we are compelled to take a view that the plain tiff/defendant did not plead in the plaint material facts nor did it supply material particulars in the plaint so as to make out in relevant details and in proper perspective a case that it was on account of an act of omission or commission on the part of defendant/appellant, or because of some such action its part I the termination of the contract was wrongfully brought about by the defendant/appellant, or that the defendant/appellant committed breach of the

contract, or did some such other act which could be akin, identical or similar to such conduct as between two contracting parties. Similarly we are also convinced that the plaintiff/respondent failed lo either plead material facts or provide material particulars in order to make out, establish and prove that it was entitled to damages on the basis of the aforesaid act or acts of omission or commission on the part of the appellant /defendant committing breach of the contract, bringing about unlawful termination of the contract agreement or committing any other act. identical or similar to that, and the basis of claiming such compensation/damages as also the quantum thereof. We are also of the view that the plaintiff/respondent did not lead sufficient and cogent evidence to prove and establish any of the aforesaid material facts or material particulars. Despite the absence of such pleadings, particulars and the evidence, the learned Trial Judge proceeded to pass judgment and decree in favour of the plaintiff. In our considered view therefore, based on all that we have discussed hereinabove, the Judgment and Decree challenged in this Appeal deserve to be set aside.

31. The setting aside of the Judgment and Decree in every case however does not suggest the automatic dismissal of the suit. In the facts and circumstances of the present case, we feel that not pleading all material facts or not supplying the relevant material particulars or not leading of sufficient and cogent evidence, by themselves do not mean that the suit ought to have been dismissed or that the same should be dismissed in this Appeal by us. The facts and circumstances of the Case warrant, even though we have indicated and pointed out at various places in the course of our Judgment the shortcomings and weaknesses of the plaintiffs case, that the suit should be remanded for fresh trial and that Plaintiff/ respondent be afforded an opportunity of making amends, if so advised. We therefore feel that in a situation like the present one. the consequence of setting aside the Judgment and Decree passed by the learned trial Court on the basis of such deficient material and upon total lack of any reasoning should not be the dismissal of the Suit but its re-trial by remanding it to the Trial Court for fresh consideration, on the basis of the material which may be brought about In the course of the proceedings to be held thus.

32. The Appeal accordingly is allowed. The Judgment and Decree Impugned in the Appeal are set aside. The suit is remanded to the Trial Court for fresh trial in the light of the observations made hereinabove. The parties shall be at liberty to apply for amendment of the pleadings before the learned Trial Court who may dispose of such prayers on their merits and proceed to try the suit accordingly. Before parting we wish to make it absolutely clear that while dealing with and disposing of the Suit on fresh consideration, the learned Trial Judge should not be influenced in any manner whatsoever by any observation made by us in this Judgment or by any finding which we may have inadvertently recorded herein, even though we never intended to do so. All the observations made in this Judgment, as far as our best attempt permitted us to do so. were intended only to highlight the shortcomings and weaknesses in the case of the plaintiff. During the course of making these observations we might have also indicated certain

facts or might have mentioned certain particulars by way of illustrations, only to point out the relative strength or weaknesses of either the plaintiff''s Case or the defendant''s case. None of our observations were intended to be conclusive as far as the final outcome of the Suit is concerned. These observations were made only with a limited object of considering the scope of the present Appeal. Since we are remanding the Suit for fresh consideration and since, in all probabilities the parties may even want to amend their basic pleadings, the Suit has to start all over again, and therefore in the disposal of the Suit all these observations should, even otherwise and in normal circumstances, be considered totally irrelevant. We therefore reiterate that these observations should not be construed as any expression of opinion by us on the merits of the controversy between the parties.

No order as to costs.

Malay Kumar Basu, J.

I agree.