

**(2007) 06 BOM CK 0038**

**In the Bombay High Court**

**Case No :** Appeal Lodging No. 1067 of 2006 in Suit No. 2635 of 1985

Union of India (UOI)

APPELLANT

Vs

Godrej Industries Ltd.

RESPONDENT

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**Date of Decision :** 29-06-2007

**Acts Referred:**

Bombay High Court (Original Side) Rules, 1980 — Rule 74, 89, 91  
Civil Procedure Code, 1908 (CPC) — Order 8 Rule 1, Order 8 Rule 10, Order 8 Rule 5, 2(9)

**Citation :** (2008) 3 BomCR 827 : (2007) 5 MhLj 50

**Hon'ble Judges :** R.M. Savant, J;F.I. Rebello, J

**Bench :** Division Bench

**Advocate :** N.I. Sethna and A.M. Sethna, S.D. Bhosale and S.I. Shah, for the Appellant; D.R. Zaiwala and P.S. Colabawala, Mulla and instructed by Mulla and C.B. and Caroe, for the Respondent

**Final Decision :** Allowed

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## **Judgement**

F.I. Rebello, J.—With the consent of the parties, the appeal is taken up for hearing and heard forthwith.

2. A learned Judge of this Court on 22nd July, 2005 was pleased to pass a judgment against the appellants and in favour of the respondents under Order 8, Rule 10 of the Code of Civil Procedure. A few facts may be set out which will be necessary for the purpose of considering the appeal. It was the case of the Respondents that the appellants under the provisions of the Imports and Exports (Control) Act, 1947 (hereinafter referred to as the Act) and the Exports (Control) Order 1977 (hereinafter referred to as the Order) granted cash compensatory support to exporters for exporting certain items. One of such item was of De-oiled Rice Bran which the Respondents exported between the period 1st April, 1977 till 31st March, 1978. The exports were subject to certain terms and conditions. The respondents contend that the appellants informed the S.E.A. and through it, its members which included the respondent that Cash Compensatory

Support Scheme would continue for a period of 3 years ending on 31st March, 1982. The respondents therefore, undertook the programme of long term exports of De-oiled Rice Bran. They invested in additional equipments apart from other expenses. The appellants had promised that the Cash Compensatory Support Scheme on exports of De-oiled Rice Bran would continue without any reservation for the period from 1st April, 1979 to 31st March, 1982. However by subsequent letter dated 2nd April, 1979 purported to reserve a right to review the scheme of cash assistance unconditionally sanctioned by the said letter dated 10th January, 1979 and to reduce or withdraw the same at any time. The cash compensatory support was abruptly discontinued with effect from 1st April, 1981 without assigning any reason. The respondents exported between the period from 1st April, 1981 to 31st March, 1982. As they were not paid cash compensatory support for the loss the suit was filed for damages amounting to Rs. 22,07,034/-along with interest at the rate of 21% per annum.

2-A. On summons being served the matter appeared on board on 15th October, 1986 under the caption "called for directions". An order came to be passed on 15th October, 1986 which is reproduced hereinbelow:

Suit transferred to the list of Long Causes. Written Statement taken on file/to be filed within 8 weeks from today. Affidavit of document within 2 weeks thereafter. Inspection forthwith thereafter.

The matter thereafter never came up on board and for the first time it appeared on 22nd July, 2005. On that day appearance was put up on behalf of the appellants. Their Counsel sought time to file written statement. The same was not granted and the suit came to be decreed under the provisions of Order 8, Rule 10 of the Code of Civil Procedure.

3. At the hearing of this appeal on behalf of the appellants their learned Counsel firstly contends as under:

(i) That the judgment passed is not a judgment as defined u/s 2(9) of the CPC and that being the case, on that count alone the judgment decree are liable to be set aside.

(ii) In the alternative it is submitted that the suit was filed under the provisions of the CPC before its amendment. An order was passed to file written statement within eight weeks. The same order then provided that after that the matter be listed for filing affidavit of documents and thereafter for inspection. It is, therefore, submitted that even if the provisions of Order 8, Rule 1 or Order 8, Rule 10 are considered that stage was already over and no judgment could have been passed under Order 8, Rule 10, as under that Rule judgment can be passed after the Court has granted additional time to file written statement under Order 8, Rule 1 as it then stood. No summons as required was served on the appellants in terms of Order 8, Rule 1 as now substituted.

(iii) Apart from that the suit being a suit for damages the suit ought not to have

been decreed under Order 8, Rule 10 of the Code of Civil Procedure. Further interest if and at all could have been granted from the date of the judgment and not the suit as the amount of damages would be crystallised only on the date of the judgment.

The learned Counsel has placed reliance on some judgments.

4. On behalf of the respondents, learned Counsel submits that it was within the jurisdiction of the learned Judge to have passed the judgment and in these circumstances it cannot be said that the judgment and decree passed are illegal or without jurisdiction. Reliance is placed on the judgment of the learned Division Bench of this Court in *Shriram Surajmal v. Shriram Jhunjhunwalla* AIR 1936 Bom. 385. One of the issues there was whether even if written statement was filed and if the plea is not specifically denied, was it open to the Court in the absence of any defence to decree a suit under Order 8 Rule 5 of the Civil Procedure Code. Similarly, reliance is placed on the judgment of a learned single Judge of the Karnataka High Court in *Sakina Bee v. Mohamed Ameer Saheb and Ors.* AIR 1976 Kar 226, which has followed the view taken by the learned Division Bench of this Court in *Shriram Surajmal* (supra). We make it clear at the outset that the issues which were involved in those appeals do not arise in this appeal, as such we are not called upon to decide those issues considering the law as it stands. We, however, make it clear that the view taken there, whether it correctly reflects the present position is not being answered. Next reliance was placed on the judgment in *Vimalkumar Nathmal Goenka Vs. Vinod Kumar Nathmal Goenka and Others*, . In that case the learned single Judge was pleased to hold that it was open to a Court to take on record the written statement even after the stage where evidence has been recorded. We are not concerned with the issue in the case. Reliance was also placed on the judgment in *Om Prakash Gupta v. Union of India and Anr.* AIR 2000 SC 3585. In that case though repeated time was granted to file written statement, written statement was not filed, still time was granted. On the facts of the said case the Supreme Court held that time ought not to have been granted. The issue does not arise in this case as we are concerned with a first appearance when the matter appeared on the board after its previous adjournment for the first time after 19 years. Reliance was also placed on the judgment in *Smt. Kamlesh Kohli and Another Vs. Escotrac Finance and Investment Ltd. and Others*, . It is sought to be pointed out that the decree can be passed against the defendants who have not filed written statement. There can be no contest on that count. The question is whether on the facts of this case, the Court could have passed judgment under Order 8, Rule 10 of the Civil Procedure Code.

5. To contend that the judgment passed is not a judgment within the meaning of Section 2(9) of the CPC learned Counsel relies on an unreported of this Court in Appeal No. 97 of 2003 and other matters decided on 13th June, 2007 in the case of the Principal Collector of Customs and Anr. v. Capital Colour Lab. Pvt. Ltd. and Anr. In our opinion the issue is no longer res integra being covered by the

judgment of the Supreme Court in Balraj Taneja and Another Vs. Sunil Madan and Another, . In that case the Supreme Court was considering the very issue which has been urged on behalf of the appellants. For that purpose we may gainfully refer to the following observations of the Supreme Court:

Whether it is a case which is contested by the defendants by filing a written statement, or a case which proceeds ex-parte and is ultimately decided as an ex-parte case, or is a case in which the written statement is not filed and the case is decided under Order 8, Rule 10, the Court has to write a judgment which must be in conformity with the provisions of the Code or at least set out the reasoning by which the controversy is resolved.

We may now gainfully reproduce the judgment of this Court which reads as under:

1. Heard learned Counsel for the parties. Suit is for recovery of money. Learned Counsel for the defendant prays for time to file written statement. Written statement has not been filed for 20 years and no cause is shown for non-filing of the written statement. Hence, request is rejected.

2. As the defendants have not filed written statement, suit of the plaintiff is decreed under Order 8, Rule 10 of the CPC in terms of prayer Clauses (a) and (b) with the modification that interest would be payable at 9% p.a. from the date of the suit till payment.

If the test as laid down by the Supreme Court in Balraj Taneja (supra) are considered, in our opinion the judgment is not a judgment within the meaning of Section 2(9) of the Code of Civil Procedure. The judgment in appeal on this count alone has to be set aside.

It may be pointed out that it was also contended before the Supreme Court in Balraj Taneja (supra) that the judgment was passed in proceedings under the Original Jurisdiction of the Delhi High Court, as in the instant case. That contention was also rejected and while rejecting the contention the Court observed as under:

The whole process of reasoning has to be set out for deciding the case one way or the other.

6. Another aspect of the matter is that the suit was not for recovery of money, but a suit for damages. Ordinarily in a suit for damages the plaintiffs must prove damages by leading proper evidence unless there was documentary evidence before the Court. In the instant case the amount claimed was by way of damages for a period when the policy was no longer in force. In the absence of proving damages it is not open for a Court to treat the suit as if it is a suit for recovery of liquidated sum of money and decree the same without the plaintiff proving the damages. The judgment suffers from infirmity on this count also. The judgment to the extent that it has decreed a suit for damages without evidence is liable to be set aside.

7. We may now consider the second contention whether it was open to the learned Judge to have passed a judgment for failure to file written statement under Order VIII, Rule 10 of Civil Procedure Code. We have reproduced the contents of the judgment. Even if we consider that the provisions of Order 8, Rule 10 as it now stands would apply, that stage would reach if the written statement had to be filed within 30 days from the date of service of summons on the defendant. This would contemplate that in the summons served the defendant must be called upon to file the written statement within 30 days. This procedure in the instant case could not be followed as the suit was filed earlier. On first appearance, the learned Judge granted eight weeks time to file written statement. Rules have been framed by this Court on its Original Side. We may refer to Rule 74 in Chapter VI and Rules 89 and 91 of Chapter VII which are reproduced hereinbelow:

74. In suits other than Matrimonial suits and Summary suits the Writ of Summons shall require the defendant to file an appearance in person or a vakalatnama and a Written-Statement of defence within twelve weeks from the service of the summons upon him and to serve a copy of the Written-Statement on the plaintiff or his Advocate on record.

89. In default of filing appearance or vakalatnama and written statement, suit may be set down on board as undefended. If the defendant commits default in filling his appearance in person or a vakalatnama and Written Statement as provided in Rule 74, the Judge in Chambers may, when the suit appears on board for directions, direct that the suit be set down on board for disposal as an undefended suit on the same day or on such other day as he may deem fit.

91. In default of written statement defendant may appear with the leave of the Court or the Judge in Chambers.

If in a suit where there are more defendants than one, any defendant shall have failed to file his Written Statement if such be called for, within the time fixed in the Writ of Summons, or any time extended by order, and the suit has not been set down as undefended as against him, such defendant shall not be allowed to appear and defend at the trial except with the leave of the Court or the Judge in Chambers upon such terms as to the filing of his Written Statement, giving discovery, and the payment of costs of adjournment, as a condition precedent to leave to defend, or otherwise, as the Court or Judge may order or upon such other terms, if any, as the Judge may think proper.

In the instant case this procedure was not followed at all. No order was passed to treat the suit as an undefended suit. The Supreme Court in *Iridium India Telecom Ltd. Vs. Motorola Inc.*, has held that the Rule framed by this Court are saved and the time fixed under Order 8 Rule 1 will not apply to suits filed on the Original Side of this Court. The procedure, therefore, prescribed, having not been followed, the judgment is liable to be set aside.

8. Apart from that the order of this Court dated 15th October, 1986 gave time of

eight weeks for filing written statement after that affidavit of documents had to be filed within two weeks thereafter and inspection of documents was to be taken forthwith thereafter which is a stage set out in Order 11 of Civil Procedure Code. That stage is at or before settling of the issues in terms of the law as it now stands. In other words the suit had reached a stage much beyond the provisions of Order VIII, Rule 10 of Civil Procedure Code. Order VIII, Rule 10 as it now stands sets out that the Court may decree the suit or pass such other order. The Court did not decree the suit or pass any conditional order to decree the suit on 15th October, 1986, but proceeded beyond that stage. The learned Judge had not granted any additional time to the defendants, appellants herein, to file their written statement but instead had proceeded further in the matter which was within the Court's jurisdiction. Once that was the case the suit had to be proceeded as a regular suit though may be without a written statement of the defendants unless they applied in terms of Rule 91 of O.S. Rules. It must be borne in mind that the suit being for damages the Court whilst passing the order on 15th October, 1986 for discovery must have obviously been conscious of that fact. It is, therefore, not open to the Court after the Judge had exercised his discretion to direct filing of affidavit of documents and discretion to have passed a judgment under Order 8, Rule 10. We are, therefore, of the considered opinion that the appeal on this count also has to be allowed.

9. For all the aforesaid reasons we allow the appeal and set aside the judgment and decree. The matter is remanded back to the learned Single Judge who is seized of the matter. The appellants are granted twelve weeks time to file written statement from today.

10. Considering the facts, in our opinion, and the order passed whilst considering the application for condonation of delay, this would be a fit case to award costs in favour of the Respondents. Hence costs quantified at Rs. 15,000/- (Rupees Fifteen Thousand Only) to be paid on or before filing of the written statement.

11. Learned Counsel for the Respondents seeks stay of the judgment. In our opinion no case made out for stay. Hence application for stay rejected.