C.R.No.3255 of 2011

Adil Textile Mills etc. **Sui Gas**

22.12.2011 **Nemo for the petitioners.**
Mr. Bilal Kashmiri, Advocate for the respondents.

The case has been called. Although nobody is present on behalf of the petitioners but the learned counsel for the respondent has commenced his arguments with an emphasis for dismissal of the Civil Revision on merits. I accordingly proceed to hear the arguments and decide the Civil Revision.

2. Briefly stating the facts of the case are that a suit for the recovery of Rs.5,126,395/-has been instituted by the respondent / Sui Gas company against the petitioners with a mark up @ 2%. The respondent/plaintiff company entered into a contract for supply of sui gas for the industrial use of the defendants. It is alleged that a wilful default has been committed by the petitioners/defendants for a sum of Rs.5,126,395/-towards the gas consumption as a result of which the sui gas connection of the petitioners/defendants was disconnected on 17.10.2007. The amount claimed by the respondent was demanded through a gas bill sent to the petitioners on 27.6.2008 payable until 02.7.2008. On the failure of the petitioners to pay the sui gas bill a suit was accordingly instituted by the respondent against the petitioners on 19.10.2010 before the Civil Judge Lahore.

3. The learned counsel for the respondent has placed on record a copy of the order sheet showing that the petitioners/defendants were allowed numerous opportunities

to submit written statement and on their failure the learned Civil Judge Lahore vide order dated 15.9.2011 closed the right of the petitioners to submit the written reply. The order dated 15.9.2011 has been assailed by the petitioners through the instant Civil Revision.

4. The learned counsel for the respondent has contended after relying upon the judgment reported as ***MUHAMMAD FAYYAZ BUTT VS. METROPOLITAN CORPORATION LIMITED THROUHG ADMINISTRATOR, LAHORE (1997 CLC 55)*** that the provisions of Order VIII Rule 10 of CPC were rightly invoked by the learned trial court in view of the conduct of the petitioners and therefore the right to submit the written statement of the petitioners has been correctly closed through the impugned order dated 15.9.2011 by the learned Civil Judge Lahore.

5. I have considered the arguments of the learned counsel for the respondent.

6. The perusal of the order sheet reflects that the petitioners/defendants submitted a memo of appearance on 09.4.2011 and Power of Attorney was submitted on 09.5.2011. The case was adjourned for reply to 30.5.2011. The learned Civil Judge Lahore then adjourned the case on request for reply to 18.6.2011. The case then was transferred to another court for 09.7.2011. The transferee court also adjourned the case on request for reply to 26.7.2011. For the first time the learned Civil Judge Lahore noted a request on behalf of the petitioners/defendants in the order dated 26.7.2011 for submission of written statement and the case was adjourned to 15.9.2011 on which date the learned Civil Judge Lahore closed the right of the petitioners to submit written reply as noted in the order dated 15.9.2011.

7. The provisions of Order VIII Rule 10 of CPC are only to be applied with penal consequences if the learned Civil Judge Lahore/trial court has specifically called upon the defendant of a suit to submit the written statement. In none of the order sheets from 4.4.2011 till 26.7.2011 the learned Civil Judge Lahore "required the petitioners/defendants to submit the written statement". The honourable Supreme Court of Pakistan in the well-known judgments reported as ***SARDAR SAKHAWATUDDIN AND 3 OTHERS VS. MUHAMMAD IQBAL AND 4 OTHERS (1987 SCMR 1365)*** and ***THE SECRETARY, BOARD OF REVENUE, PUNJAB LAHORE AND ANOTHER VS. KHALID AHMAD KHAN (1991 SCMR 2527)*** has laid down the law that right to submit written statement can only be closed by the learned Civil Courts by invoking provisions of Order VIII Rule 10 of CPC if there is an order passed "requiring" the defendant to submit the written statement and that in routine manner, if adjournments are granted by the learned Civil Courts for submission of written statement then the penal provisions under Order VIII Rule 10 of CPC would not apply. The honourable Full Bench in the judgment reported as **(1987 SCMR 1365)** at page Nos.1370 and 1371 discussed the provisions of Order VIII Rules 1, 9 and 10 in the following manner:-

> *"It is clear from the combined reading of Rules 1 and 9 that amongst others three types of written statements can be filed by a defendant.*
> *(1) As a right without any formal permission of the Court. (Rule 1).*
> *(2) When it is so required by the Court to file a written statement (Rule 1 and 9).*
> *(3) When under some circumstances it is by the leave of the Court. (Rule 9)*
>
> *It is obvious from Rule 10 that no adverse results under these rules are to follow on failure to file written statement in cases mentioned in items Nos. 1 and 3 above. But penal consequences of "pronouncement of judgment against" him when the defendant fails to file written statement when "so required" - - as is indicated in item No.2 above, would follow.*

As it is a penal provision it will have to be strictly construed. Hence wherever a reasonable doubt arises regarding its interpretation or implementation, it shall have to be resolved in favour of the victim of its application. Otherwise too, its requirements would have to be established like those of Order XVII, Rule 3 which is similarly penal in nature. See Industrial Sales and Service, Karachi and another v. Archifar Opal Laboratories Ltd., Karachi PLD 1969 Kar.418.

Rule 10 is in two parts. No doubt under the first part a judgment can be pronounced against the defendant, but it will be pronounced only if it can be so done under the law. For example, if the suit is for enforcing a contract or obtaining any other relief which is prohibited by law expressly or impliedly, the judgment could not be pronounced. Similarly no decree could be passed if there is no cause of action shown in the plaint or the material placed before the Court or relied upon by the plaintiff even if not in the form of evidence will make it a case of no evidence (if the trial is taken to its logical ends). Hence, in all such cases and other similar cases it will be impermissible for the Court to proceed under the first alternative. The proper course then would be to proceed under the second alternative. It will be in rare cases, when, on account of the material placed on record that it would not only be legal but also just and fair, on the merits of the case, that judgment is pronounced under the first part. Otherwise, in the cases like the two before us it would not be proper to proceed under the first part. Like Rule 12, Rule 10 also creates a liability and it is not mandatory for the Court to pronounce judgment or strike off the defence. The matter being in the discretion of the Court the penalty should not be imposed without a compelling reason – but as emphasised above that too not without satisfying the conditions as are being discussed e.g., even then it is not mandatory to pronounce judgment without satisfaction of the Court that it is good case on merits for doing so.

There is another very important aspect of the matter. All the three types of written statement mentioned earlier do not entail penal consequences. Therefore, it should always be absolutely clear from the proceedings that the written statement on account of which penalty is sought to be imposed was "required", by the Court. It was neither as of right (Rule 1) nor as result of permission (Rule 9). The use of word "required" is not without significance. It does not permit a routine order without application of mind to the "requirement" and/or the need. Therefore, it is essential that whenever a written statement is to be made subject of the penal rule 10, there should be proof on record that the Court had "required" it by application of mind to the need and that too in a speaking order. Without the same, many innocent parties would be trapped in a technicality without fully realising the implications. In this connection, it is made clear that whenever adjournments are granted for production of a written statement which can be filed as of right under Rule 1 or which is permitted to be filed under Rule 9, that would not satisfy the law regarding the "requirement" of the Court. It is

> *only the written statement which is "required" and that too by "the Court" by a speaking order, which would entail the penal consequences of Rule 10. In these two cases it has been admitted before us that these requirements have not been fulfilled."*

8. The case law relied upon by the learned counsel for the respondent is not strictly applicable to the facts and circumstances of the instant case. However in view of the law pronounced by the honourable Supreme Court of Pakistan I am bound to follow the judgments of the honourable Supreme Court of Pakistan.

9. In view of the above judgments pronounced by the honourable Supreme Court of Pakistan the right of the petitioners to submit written statement in the instant case has not been lawfully closed by the learned Civil Judge Lahore. The perusal of order sheet points out that on 09.5.2011, 30.5.2011 and 09.7.2011 the learned Civil Judge Lahore adjourned the case for submission of reply only. It is only in the order dated 26.7.2011 that the term written statement has been used by the learned Civil Judge Lahore. Even in the order dated 15.9.2011 the term written statement has not been applied by the learned Civil Judge Lahore and the impugned order has been passed closing the right of the petitioner with respect to submission of written reply. The penal provisions of Order VIII Rule 10 of CPC have to be interpreted strictly in order to invoke the same upon the facts and circumstances of a case. A suit for the recovery of a huge amount of Rs.5,126,395/-has been filed by the respondent against the petitioners. The dismissal of the instant Civil Revision even for default would result into grave miscarriage of justice as an order violative of law pronounced by the honourable Supreme Court of Pakistan will be allowed to continue.

10. As this Court is hearing the instant matter as a Court of record and the order sheet of the learned trial court has been produced by the learned counsel for the respondent himself during the arguments today which has been perused with the assistance of the learned counsel for the respondent and it is observed that the order passed by the learned Civil Judge Lahore closing the right of the petitioners to submit the written statement has not been legally passed, therefore, I am inclined to **allow** the instant Civil Revision by setting aside the impugned order dated 15.9.2011. The learned Civil Judge Lahore is directed to allow the petitioners a reasonable opportunity to submit the written statement within a period of one month from the date when this order is produced before the learned Civil Judge Lahore and further to proceed with the trial of the case in accordance with law.

(NASIR SAEED SHEIKH)
JUDGE.

•AMJAD•

APPROVED FOR REPORTING