



\$~1

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

%

Decision delivered on: 25.07.2024+ **RFA(COMM) 277/2024****ABDUL MIR KHALICK****.....APPELLANT**Through: Mr Kumar Sanu Choudhary and Mr
Abhishek Kumar Singh, Advs.

versus

ORIFLAME INDIA PVT. LTD.**.....RESPONDENT**

Through: Mr Mahesh B. Chhibber, Adv.

CORAM:**HON'BLE MR. JUSTICE RAJIV SHAKDHER****HON'BLE MR. JUSTICE AMIT BANSAL****[Physical Hearing/Hybrid Hearing (as per request)]****RAJIV SHAKDHER, J. (ORAL):**

1. This matter had been listed before us on 22.07.2024. In the first instance, on 22.07.2024, upon hearing learned counsel for the parties, we had etched out the broad contours of the case at hand. For convenience, the relevant parts of the order dated 22.07.2024 are set forth hereafter:

"1. This appeal is directed against the judgment and decree dated 08.04.2024 passed by Mr Sandeep Yadav, learned District Judge (Commercial Court)-03 (South), Delhi.

2. Via the impugned judgment, the learned District Judge has decreed the suit in favour of the respondent/plaintiff for Rs.11,70,132/- along with interest at the rate of 9% per annum from 01.09.2016 till realization.

3. The impugned judgment and decree came to be passed as the appellant/defendant had not filed its written statement in time. The learned District Judge has decreed the suit taking into account, inter alia, the provisions of Order VIII Rule 10 of The Code of Civil Procedure, 1908 [hereinafter referred to as CPC]. Notably, there is no discussion on the merits of the assertions made by the respondent/plaintiff in the suit action.

4. Prima facie, according to us, if not in detail, there should have been, in the very least, a brief discussion qua the assertions made in the suit action, the relief sought and the evidence placed on record.

5. The respondent/plaintiff via the suit action sought to recover Rs.18,19,555/- along with interest at the rate of 9% per annum from



01.09.2016 till realization.

6. As noted above, the trial court, in our view, should have, at the bare minimum, adverted to the nature of the claim and why the sum decree ought to be granted to the respondent/plaintiff.

7. Interestingly, interest has been granted, as alluded to above, from 01.09.2016. There is no discussion as to why the pre-suit interest is granted to the respondent/plaintiff.

8. Since learned counsel for the respondent/plaintiff seeks time to examine the legal position, list the matter on 25.07.2024.”

2. As would be evident, the appeal was stood over for learned counsel for the respondent/plaintiff to examine the legal position.

3. Learned counsel for the respondent/plaintiff says that since the written statement accompanied by an affidavit concerning admission/denial of documents was not filed in time, the case set up by the respondent/plaintiff was admitted and therefore, the impugned judgment needs no interference.

4. In support of his submission, learned counsel for the respondent/plaintiff relies on the judgment rendered by this court in **Unilin Beheer B.V. v. Balaji Action Buildwell**, 2019:DHC:2640.

5. On the other hand, learned counsel for the appellant/defendant says that there should be, if not in detail, some discussion as to the tenability of the claim set up by the respondent/plaintiff in the suit action.

6. Having heard learned counsel for the parties, we tend to agree with the submission advanced on behalf of the appellant/defendant.

7. A plain reading of provisions of Order VIII Rule 10 of the Code of Civil Procedure, 1908 [in short, “CPC”], shows that if the defendant fails to present the written statement in the prescribed time, as permitted in the provisions of the Code or the time fixed by the court, the court has the discretion to pronounce judgment against such defendant and make such order in relation to the suit action as it thinks fit. The provision goes on to



state that if a judgment is pronounced, the decree will be drawn up in consonance with the said judgment.

8. Clearly, the operative words in the provision are “may” and not “shall”. The court has the discretion as to whether or not it should straightaway pronounce judgment in the matter. This view also finds support in the observations made in the judgment rendered by the Supreme Court in *Asma Lateef & Anr. v. Shabbir Ahmad & Ors.*, 2024 INSC-36. The relevant observations of the judgment are extracted hereafter:

“16. At this stage, we consider it apposite to take a quick look at *Balraj Taneja* (supra) to examine the scope of Rule 10 of Order VIII. Therein, this Court ruled that a court is not supposed to pass a mechanical judgment invoking Rule 10 of Order VIII, CPC merely on the basis of the plaint, upon the failure of a defendant to file a written statement. The relevant paragraphs of the judgment are reproduced below for convenience:

“29. As pointed out earlier, the court has not to act blindly upon the admission of a fact made by the defendant in his written statement nor should the court 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 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 favour of the plaintiff without requiring him to prove any fact mentioned in the plaint. It is a matter of the court's satisfaction and, therefore, only on being satisfied that there is no fact which need be proved on account of deemed admission, the court can conveniently pass a judgment against the defendant who has not filed the written statement. But if the plaint itself indicates that there are disputed questions of fact involved in the case regarding which two different versions are set out in the plaint itself, it would not be safe for the court to pass a judgment without requiring the plaintiff to prove the facts so as to settle the factual controversy. Such a case would be covered by the expression ‘the court may, in its discretion, require any such fact to be proved’ used in sub-rule (2) of Rule 5 of Order 8, or the expression ‘may make such order in relation to the suit as it thinks fit’ used in Rule 10 of Order 8.”

No doubt this decision was rendered considering that the verb used in the provision is ‘may’, but nothing substantial turns on it.

17. What emerges from a reading of *Balraj Taneja* (supra), with which we wholeheartedly concur, is that only on being satisfied that there is no fact which need to be proved on account of deemed admission, could the



court pass a judgment against the defendant who has not filed the written statement; but if the plaint itself suggests involvement of disputed questions of fact, it would not be safe for the court to pass a judgment without requiring the plaintiff to prove the facts. Balraj Taneja (supra) also lays down the law that provision of Rule 10 of Order VIII, CPC is by no means mandatory in the sense that a court has no alternative but to pass a judgment in favour of the plaintiff, if the defendant fails or neglects to file his written statement.

18. If indeed, in a given case, the defendant defaults in filing written statement and the first alternative were the only course to be adopted, it would tantamount to a plaintiff being altogether relieved of its obligation to prove his case to the satisfaction of the court. Generally, in order to be entitled to a judgment in his favour, what is required of a plaintiff is to prove his pleaded case by adducing evidence. Rule 10, in fact, has to be read together with Rule 5 of Order VIII and the position seems to be clear that a trial court, at its discretion, may require any fact, treated as admitted, to be so proved otherwise than by such admission. Similar is the position with section 58 of the Indian Evidence Act, 1872. It must be remembered that a plaint in a suit is not akin to a writ petition where not only the facts are to be pleaded but also the evidence in support of the pleaded facts is to be annexed, whereafter, upon exchange of affidavits, such petition can be decided on affidavit evidence. Since facts are required to be pleaded in a plaint and not the evidence, which can be adduced in course of examination of witnesses, mere failure or neglect of a defendant to file a written statement controverting the pleaded facts in the plaint, in all cases, may not entitle him to a judgment in his favour unless by adducing evidence he proves his case/claim.”

[Emphasis is ours]

9. The aforementioned observations of the Supreme Court in the *Asma Lateef* case, which are extracted hereinabove, would show that the Court has distinguished between a writ action and a suit action. It has been highlighted that in a suit action, only the facts are to be pleaded, unlike a writ action where not only the facts are to be pleaded but also evidence in respect of the same is to be adverted to by the petitioner.

10. In a nutshell, the Supreme Court, as alluded to above, emphasized that the expression “may” given in Order VIII Rule 10 of the CPC of the Code



would have to be given due weight.

11. Concededly, in this case, the trial court has not at all adverted to the respondent's/plaintiff's case. The surest sign of this approach is the grant of pre-suit interest by the trial court in favour of the respondent/plaintiff. Pre-suit interest was granted with effect from 01.09.2016. There is no discussion or even a suggestion as to why, firstly, pre-suit interest has been granted, and secondly, why must it commence from 01.09.2016. Pre-suit interest, as is well established, can only be based on a contract, custom and usage, or a statute. The relevant observations made in that behalf by the Privy Council, in ***Bengal Nagpur Railway Company v. Ruttanji Ramji***, 1937 SCC OnLine PC 94, are set forth hereafter:

*“The crucial question, however, is whether the Court has authority to allow interest for the period prior to the institution of the suit; and the solution of this question depends, not upon the Civil Procedure Code, but upon substantive law. Now, interest for the period prior to the date of the suit may be awarded, if there is an agreement for the payment of interest at a fixed rate, or it is payable by the usage of trade having the force of law, or under the provision of any substantive law entitling the plaintiff to recover interest, as for instance, under S. 80 of the Negotiable Instruments Act, 1881, the Court may award interest at the rate of 6 per cent, per annum, when no rate of interest is specified in the promissory note or bill of exchange. There is in the present case neither usage nor any contract express or implied to justify the award of interest. Nor is interest payable by virtue of any provision of the law governing the case. Under the Interest Act XXXII of 1839, the Court may allow interest to the plaintiff, if the amount claimed is a sum certain which is payable at a certain time by virtue of a written instrument. But it is conceded that the amount claimed in this case was not a sum certain. The Interest Act, however, contains a proviso that “interest shall be payable in all cases in which it is now payable by law.” This proviso applies to cases in which the Court of Equity exercises jurisdiction to allow interest. As observed by Lord Tomlin in *Maine and New Brunswick Electrical Power Company, Limited v. Hart* [1929 A.C. 631.] , “In order to invoke a rule of equity it is necessary in the first instance to establish the existence of a state of circumstances which attracts the equitable jurisdiction, as, for example, the non-performance of a contract of which equity can give specific performance.” The present case does not, however, attract the equitable jurisdiction of the Court and*



cannot come within the purview of the proviso.”¹

12. Having perused the aforesaid judgment, in our view, the trial court should have, if not in great detail, at least briefly adverted to the respondent’s/plaintiff’s case and then proceed to pass judgment in the matter.

13. Thus, for the foregoing reasons, we are inclined to allow the appeal.

14. It is ordered accordingly.

15. The impugned judgment is set aside.

16. The trial court will take next steps in the matter from the stage the trial is presently positioned, *albeit*, as per law.

17. The parties and their counsel will appear before the concerned court on 12.08.2024.

18. Parties will act based on a digitally signed copy of the order.

RAJIV SHAKDHER, J

AMIT BANSAL, J

JULY 25, 2024/aj

¹ Also See *Union of India v. Watkins Mayor & Co.*, 1965 SCC OnLine SC 242; *Union of India v. West Punjab Factories Ltd.*, 1965 SCC OnLine SC 68; *Central Coop. Bank Ltd. v. S. Kamalaveni Sundaram*, (2011) 1 SCC 790.