

2000 C L C 1955.

[Peshawar]

**Before Mian Shakirullah Jan
and Talat Qayum Qureshi, JJ**

**Messrs FRIENDS VEGETABLE GHEE MILLS
(PRIVATE) LIMITED---Appellant**

versus

**PRIVATIZATION COMMISSION, MINISTRY
OF FINANCE, GOVERNMENT OF PAKISTAN
through Chairman and 2 others---Respondents**

First Appeal from Order No. 1 of 1998, decided on 6th April, 2000.

(a) Civil Procedure Code (V of 1908)-

---S. 114, O.VIII, R.10, O.XVII, R.3 & O.XLVII, R.1---Non-filing of written statement--Striking off defence of defendants---Review---Defendants having failed to file written statement as per direction of Trial Court, defence of defendants was struck off by Trial Court under OXVII, R.3, C.P.C.--Validity---Non-filing of written statement at the most would attract provisions of O.VIII, R.10, C.P.C. and not O.XVII, R.3, C.P.C. which was for the non-production of evidence---None of said provisions contained striking off defence which completely disentitled defendants to participate in subsequent proceedings---Defendants having offered sufficient reasons for non-filing of written statement as per direction of Court, Trial Court rightly set aside order of striking off defence of defendants accepting their review application holding that case should have been decided on merits instead of technicalities especially when huge amount was involved in case.

Qamrul Islam v. Institute of Chartered Accountants of Pakistan 1999 MLD 1805; Riaz Qasim v. Messrs A.M.A. (Pvt.) 1999 CLC 445; United Bank Ltd. Canadian Apparel Company Ltd. PLD 1995 Kar. 577; Lal Shah v. Muhammad Ishaq PLD 1977 Lah. 1058; Dost Muhammad and another v. Rais Satik and another PLD 1962 (W.P.) Quetta 82; 1997 MLD 2348; 1999 CLC 1856; PLD 1987 SC 22 and PLD 1997 Lah. 722 ref.

(b) Administration of justice-

Courts always lean in favour of adjudication on merits rather than stifling proceedings on technicalities.

PLD 1997 Lah. 722 ref.

Malik Fazal Hussain for Appellant. Khalid-ur-Rehman Qureshi for Respondents.

Date of hearing: 4th April, 2000..

JUDGMENT

MIAN SHAKIRULLAH JAN, J.--- Friends Vegetable Ghee Mills (Private) Limited, a limited company has instituted a suit with a prayer that the plaintiffs are the lawful purchaser of the Project formerly known as Haripur Vegetable Oil Processing Industries under the agreement, dated 30-6-1992 and that they have discharged all their lawful obligations under the said Contract. A prayer for mandatory injunction was also made to be granted directing the defendants to transfer the land of the aforesaid project in favour of the plaintiffs, and further prayer was made for the grant of decree for the recovery of Rs.3,20,81,234 for damages on account of breach of contract committed by the. defendants and pecuniary losses (Rs.1,72,03,398.37 as mentioned in para.24 of the plaint) suffered by the plaintiffs, against the defendant i.e. (1) Privatization Commission, and Ghee Corporation of Pakistan and the Central Government. Alongwith the suit an application for temporary injunction was also filed with a prayer that the defendant be restrained from interfering with the possession of the plaintiffs and also be restrained from demanding/recovering or enforcing any claim for instalments by way of balance towards the bid price, long term loan to the defendants or current account liability.

2. In pursuance of the process issued by the Court representative of the defendants attended the Court on the very next date of hearing. However, the case was adjourned for about 3 dates due to the absence of the Presiding Officer and when the case was taken up by him on 26-10-1993, the defendants submitted application for referring the matter to the Arbitration as per clauses in the agreement executed between the parties and also another application for staying the proceedings in the Court was submitted.

3. On 19-12-1993 the application for referring the matter to the Arbitration was dismissed alongwith the stay application and the defendants were asked to file the written statement. The case was adjourned for some dates at the behest of the defendants on the ground of preparation of appeal, its (appeal) filing in the High Court and obtaining a stay order from the High Court, and ultimately after imposition of fine of Rs.100 and Rs.300 on the defendants their defence was struck off under Order 17, Rule 3, C.P.C. for non-filing of the written statement on 26-3-1994 with a next date on 5-4-1994 with the direction that the list of the witnesses and diet money be deposited within 7 days. However, the defendants succeeded in getting a stay order from the High Court on 31-3-1994 as the order-sheet of the case dated 30-4-1994 reveals, and thus the proceedings were stayed. It is on 30-7-1996 (as the order-sheet shows) that on the production of the certified copy of the order of the High Court on behalf of the plaintiff that the proceedings again be taken up then a notice to the defendants with a further direction that they should file the written statement on 19-8-1996 and due to the non-service of the notice on the defendants it was again fixed,for 14-9-1996 for the written statement with a similar order-sheet on the same date (for filing of the written statement).

4. On 8-10-1996 defendant No.3 filed the written statement while defendant No. 1 sought adjournment and it was on 29-10-1996 that defendant No: 1 also filed the written statement and the case was fixed for written reply (Jawabul Jawab). Due to the absence of the Presiding Officer on account of election duties the case was adjourned for some dates and on 29-7-1997 the plaintiff filed an application for dismissal of the written statement of the defendants. After the fixation of the case for replication and arguments on the said

application, the defendants submitted an application on 28-2-1998 for reviewing of the order of the Court, dated 26-3-1994. After calling of the replication from the plaintiff and hearing the learned counsel for the parties this review petition was accepted on 15-4-1998 on payment of cost of Rs.25,000 and it is this order, which has been challenged through the instant appeal.

5. The learned counsel for the appellant has made three-fold submissions:

(i) The competency of the review petition as there existed no ground for review of the order as it does not fall within the ambit of section 114 and Order 47 of the C.P.C.

(ii) That the review petition was time-barred. In this respect reliance was placed on Qamrul Islam v. Institute of Chartered Accountants of Pakistan 1999 MLD 1805, Riaz Qasim v. Messrs A.M.A. (Pvt.) 1999 CLC 445, United Bank Ltd. Canadian Apparel Company Ltd. PLD 1995 Kar. 577, Lal Shah v. Muhammad Ishaq PLD 1977 Lah. 1058, Dost Muhammad and another v. Rais Satik and another PLD 1962 (W.P.) Quetta 82 citation "H".

(iii) His third submission was that in case of non-filing of the written statement when the case was fixed for filing of the same, then the lower Court was justified to pass the order of striking off defence and in this respect reliance was placed on 1997 MLD 2348, 1999 CLC 1856, PLD 1987 SC 22 and PLD 1997 Lah. 722.

6. By looking at the application for review of the order it shows that the review of the order was sought, inter alia, on the grounds:

(i) that the defendants as per directions of the Court, after passing of the order under review, filed the written statement and the Court has also called for the reply (Jawabul Jawab) to the written statement from the plaintiff and (ii) that the non-filing of the written statement does not attract the provisions of Order 17, Rule 3, C.P.C. and much less the order of the striking off defence.

7. The Court while accepting the review application has observed that now it has become a routine that in cases of the Government some lapses do take place, however, in view of the general trend of the Court that matter should be decided on merits, another opportunity be given to the defendants.

8. The order, against which the review was sought, reflects that it was due to the non-submission of the written statement but that (non-submission of W.S.) was also due to valid reasons i.e.-the attempt of the defendants for referring the matter to the Arbitration, the preparation and pendency of the appeal in the High Court and the learned trial Court still insisting upon the filing of the written statement and ultimately passed the order under review. After a few days of passing of the order under review the defendants succeeded in getting a stay order from the High Court. The record of the trial Court also contained an application submitted on behalf of the defendants for the request of extension of time for filing of the written statement on the ground that the main file containing the facts and circumstances leading to the Privatisation maintained in the office of defendant No. 1 (under the custody of the Federal Investigation Agency). Their this conduct was not a contumacious and also not a wilful default, but having good reasons behind it and in which eventuality such an order ought not to have been passed.

9. The non-filing of the written statement at the most attracts the provisions of Order 8, Rule 10 and not Order 17, Rule 3, C.P.C., which is for the non-production of the evidence and moreover none of these provisions contained the striking off defence which completely disentitled the defendants to participate in the subsequent proceedings. As already observed that after passing of the order under review and when the High Court permitted the proceedings to continue, the Court again asked the defendants to file the written statement and which they did accordingly, in pursuance of the order of the Court and in which view of the matter the earlier order required to be reviewed.

10. The second contention of the learned counsel for the petitioner with regard to the limitation it is correct that the application was filed after the period of limitation but in the circumstances of the case when they were asked to file the written statement and which was done accordingly and it was after the submission of application of the petitioner/plaintiff for the "dismissal" of the written statement compelled the defendants to file application for review of the order and which delay is not so fatal to completely knock out the defendants and the trial Court while accepting the application of review amounts to the condonation of delay. The reasons given by the learned trial Court for accepting of the review petition are to decide the case on merits instead of technicalities is in line and in consonance with the judgments of the superior Courts and in this respect reference may be given to Noorul Amin and another v. Muhammad Hashim and 27 others 1992 SCMR 1744, wherein it is observed at the end of page 1745 that:--

"It is also well-accepted principle of law that Courts always lean in ~8 favour of adjudication on merit rather than stifling proceedings on technicalities. "

11. The case in hand requires adjudication on merits as the plaintiff petitioner has claimed a huge amount runs in crores of Rupees against the Privatization Commission and with a further prayer that they be absolved of the obligation which they incurred towards the Privatization Commission (defendants) and particularly when the defendants was burdened with a heavy cost of Rs.25,000 for their act of not filing the written statement in time. The authorities referred to by the learned counsel for the plaintiff/petitioner are quite distinguishable with different facts and are not applicable strictly to the facts of the present case as discussed above. Consequently, in view of what has discussed above, this appeal is dismissed with no order as to costs.

H.B.T./88/P Appeal dismissed