

**2002 S C M R 1954**

**[Supreme Court of Pakistan]**

**Present: Sh. Riaz Ahmed, C.J., Mian Muhammad Ajmal and Muhammad Nawaz Abbasi, JJ**

**WAK ORIENT POWER AND LIGHT LIMITED---Appellant**

**versus**

**WESTINGHOUSE ELECTRIC CORPORATION and others---Respondents**

Civil Appeals Nos.62 and 1235 of 2001, decided on 12th July, 2002.

(On appeal from the judgment of Lahore High Court, Lahore passed in R.F.A. No.302 of 1999 dated 12-10-1999).

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

----O. VIII, Rr. 1 & 10---Written statement, non-filing of---Effect---If the defendant fails to file the written statement on the day fixed by the Court or before the issues are framed, he is not entitled to file the written statement subsequently---Non-filing of the written statement, however, does not amount to the admission of facts contained in the plaint and the Court may proceed against the defendant ex parte, pass the judgment---Court is empowered to strike off the defence of the defendant who despite the direction of the Court in terms of O.VIII, R.1, C.P.C., fails to file written within the specified time but the penal provision of O.VIII, R.10, C.P.C. cannot be invoked in a case in which the defendant was not required by the Court to file the written statement.

**(b) Civil Procedure Code (V of 1908)---**

----O. VIII, R.1---Written statement, filing of beyond given time--Condonation---Principles---"Time given for filing of written statement ordinarily would not exceed 30 days but in exceptional circumstances, in case of failure on the part of defendant to file written statement, trial Court in its discretion may extend the time of 30 days and further the Court in suitable cases can grant more time if it is satisfied that the explanation offered by the defendant for not filing the written statement within the time given was reasonable, it is also within the domain of the Trial Court to condone the default in filing of the written statement of all defendants in a case wherein there are more defendants and the explanation offered by one of the defendants is found satisfactory.

**(c) Civil Procedure Code (V of 1908)---**

----O. VIII, Rr. 1, 10 & O.III, R.1---Written statement, non-filing of, on account of improper service and representation by an unrecognized agent-- Effect---Defendant, who was living abroad, without proper service through the process of the Court, on coming to know about filing of suit against him instructed a counsel to watch his interest and the said counsel without having power of attorney on behalf of the defendant represented him---Such counsel would not be deemed to be the recognized agent of the defendant under O.III, R.1, C.P.C.---Counsel appearing before filing his power of attorney raised the objection relating to the jurisdiction of Court and sought time to seek instructions from his client---Court, in the given circumstances instead of invoking the penal provision of O.VIII, R.10, C.P.C. with a view to provide a fair opportunity to the defendant to defend suit could only proceed further either on their proper service through the process of Court or at least after the submission of

power-of-attorney by the counsel appearing on his behalf as to file the written statement as legally the defendant was neither being represented by a recognized agent nor was yet served, therefore, non compliance of order of filing the written statement would be of no penal consequence as no such order could be passed without proper service---Court, in any case, in such cases, instead of imposing the penalty of striking off defence under O.VIII, R.10, C.P.C. would prefer to condone the delay to avoid any injustice and would be hesitant in exercising the discretionary power under O.VIII, R.10, C.P.C. unless there were compelling reasons and exceptional circumstances---Principles.

#### **(d) Civil Procedure Code (V of 1908)---**

----O. VIII, Rr.1 & 10---Written statement, non-filing of---Striking off defence---Procure---Not necessary that Court after striking off defence of the defendant under O.VIII, R.10, C.P.C. must pass a decree and may proceed against the defendant ex parte as despite failure of defendant to file the written statement, he does not loose the right of participation in the subsequent proceedings and can still defend himself by filing counter -affidavit---Court is therefore not bound to essentially pass a decree under O.VIII, R.10, C.P.C. without recording evidence, in a case in which defendant fails to file written statement.

#### **(e) Civil Procedure Code (V of 1908)---**

----O. VIII, Rr.1 & 10---Arbitration Act (X of 1940), S.34---Written statement, non-tiling of, on account of improper service of defendants who were residing abroad-Effect-Trial Court, without deciding the question of jurisdiction of the Court and disposal of application under S.34, Arbitration Act, 1940 invoked the provision of O. VIII, R.10, C.P.C, and passed decree against the defendants in the suit Validity--Without deciding the question of- Jurisdiction the proceedings in the suit would ultimately prove a futile exercise---Trial Court passed the decree without observing the essential requirement of law and without providing a fair and sufficient opportunity to the defendants to file written statement---Defendants were not negligent in tiling the written statement and put their appearance in the Court for the first titter on the date on which their counsel filed power-of-attorney on their behalf, therefore; non-compliance of the order of trial Court which was passed without their service and through which they were required to file written statement, would have no legal consequences---Principles.

In the present case the trial Court without disposing of the miscellaneous application directed the defendants to file the written statement within 30 days and on the next date while entertaining application under Order VIII, Rule 10, C.P.C. proceeded with the said application despite the fact that by that time, the counsel under oral instructions was appearing on behalf of the defendant, without power of attorney and was not a recognized agent and defendants were also not served in proper manner and thus the trial Court without observing essential requirement of law passed the decree in the suit. Without deciding the question of the jurisdiction of Court and disposal of the application under section 34 of the Arbitration Act 1940, it was not proper for the trial Court to invoke the provisions of Order VIII, Rule 10, C.P.C. and pass the decree in the suit. The order sheet in the suit would show that before the order for filing written statement within 30 days no order requiring the defendants to file written statement was passed, therefore, without providing a fair and sufficient opportunity to the defendants to file the written statement who were residents of a foreign country and were also not properly served, striking off their defence with the observation that their conduct was contumacious, was not justified. The defendants put their appearance in the Court for the first time on the date on which their counsel filed power-of-attorney on their behalf, therefore, the non-compliance of the order which was passed without their service and through which they were required to file written statement, would have no legal consequences.

Regarding the question relating to the jurisdiction of Court without deciding the said question, the proceedings in the suit on merits may ultimately prove a futile exercise.

In the present case the factual position was that the trial Judge without attending the essential question relating to the jurisdiction of the Court and the disposal of an application under section 34 of the Arbitration Act, 1940, required the defendants to file the written statement and on their failure to file the written statement struck off their defence under Order VIII, Rule 10, C.P.C. The Court if comes to the conclusion that it has jurisdiction to proceed in the suit on merits may, upon failure of the defendant to file written statement while invoking the provisions of Order. VIII, Rule 10, C.P.C. pronounce the judgment or proceed for recording the evidence before pronouncement of the judgment and in such situation has wide discretion and powers either to extend further time or strike off the defence of the defendants but such discretion must not be used in an arbitrary or capricious manner rather it should be exercised keeping in view the circumstances under which the defendant failed to file the written statement and also the judicial principles and the spirit of law for adjudication and decision of the matter on merits. In a case in which the defendant is found grossly negligent in his conduct to file the written statement, the Court in its discretion can invoke the penal provisions under Order VIII, Rule 10, C.P.C. but in a case in which it is found that the suit cannot justifiably be decreed in summary manner, the Court, instead of exercising discretion in favour of striking off the defence of defendant under Order VIII, Rule 10, C.P.C., should proceed for recording the evidence of the plaintiff and in a suit for recovery of money and damages without ascertaining the question of damages through evidence, it would not be legal and proper to pass a decree in the discretionary jurisdiction.

#### **(f) Jurisdiction---**

---- Without deciding question of jurisdiction, the proceedings in the suit on merits may ultimately prove a futile exercise.

#### **(g) Civil Procedure Code (V of 1908)---**

----O. VIII, Rr.1 & 10----Written statement, failure to file by defendant-- Striking off defence of defendant by Trial Court---If the statement of facts made in the plaint, and the claim of plaintiff was not satisfactorily established, it was essential for the Trial Court, after striking off defence of defendants, to require the plaintiff to produce evidence in support of his claim before passing the decree and consider the material if any brought on record by the defendant in the subsequent proceeding in his defence.

#### **(h) Civil Procedure Code (V of 1908)---**

----O. VIII, Rr.1 & 10----Written statement, non-filing of---Provisions of O.VIII, R.10, C.P.C. can be invoked in case of gross misconduct of the defendant---Court, in normal cases, while taking into consideration the reasons for non-filing of the written statement should provide further opportunity to the defendant before invoking the penal provisions of law, to meet the ends of justice---If the conduct of the defendant was neither contumacious nor contemptuous it would not be proper, in circumstances, to proceed against the defendant under O.VIII, R.10, C. P. C.

Hakumat Bibi v. Imam Din PLD 1987 SC 22 ref.

Abdul Rahim Kazi; Advocate Supreme Court and M.A. Qureshi, Advocate-on-Record (absent) for Appellants (in C.A. No.62 of 2001).

Fakhr-ud-Din G. Ebrahim, Senior Advocate Supreme Court with Ejaz Ahmed Khan, Advocate-on-Record for Respondents (in C.A. No.62 of 2001).

Fakhr-ud-Din G. Ebrahim, Senior Advocate Supreme Court and Hamid Khan, Advocate Supreme Court with Ejaz Ahmed Khan, Advocate-on-Record for Respondents (in C.A. No. 1235 of 2001).

Abdul Rahim Kazi, Advocate Supreme Court, and M.A. Qarni, Advocate-on-Record (absent) for Appellants (in C. A. No. 1235 of 2001).

Date of hearing: 11th April, 2002.

## **JUDGMENT**

**MUHAMMAD NAWAZ ABBASI, J.**---Civil Appeal No.62 of 2001 filed by Wak Orient Power and Light Limited and Civil Appeal No. 1235 of 2001 filed by Westinghouse Electric Corporation and others being connected and inter-linked are proposed to be disposed of through this common judgment.

The above appeals have been preferred against the judgment 12-10-2000 passed by a Division Bench of Lahore High Court, Lahore, R.F.A. No.302 of 1999 which arose out of a civil suit.

The relevant facts in small compass in the background are that WAK ORIENT, appellant in Civil Appeal No.62 and respondent in appeal (hereinafter to be referred to as 'the appellant'), filed a declaration and permanent injunction with specific performance of contract and recovery of damages in the Civil Court at Lahore against Westinghouse Electric Corporation and others (respondents herein) in relation to a dispute arising out of an implementation agreement of the Government of Pakistan and power purchase agreement entered with Karachi Electricity Supply Corporation (KESC) for establishment of about 400 mega watt to be built near Port Qasim, Karachi. The suit was entrusted to a learned Civil Judge 1st Class, Lahore, who vide order, dated 7th of September, 1998 issued summons for the service of the respondents defendants in the suit for 10-10-1998 and also passed an ad interim order by virtue of which the respondents were restrained from cancelling or reverting of the contract and retreating or withdrawing the pledge already made under the agreement till the next date of hearing. The respondents without proper service, on coming to know about the filing of the suit by the appellant against them instructed Mr. Shahid Ikram Siddiqui, a local Advocate, to watch their interest pending their service and appearance before the Court. The above named Advocate by way of filing a memo. of appearance in the Court on behalf of respondents sought time to seek instructions and file power of attorney. The case was accordingly adjourned to 27-9-1998 to enable the learned counsel to file the power of attorney on behalf of respondents. Meanwhile the appellant through a miscellaneous application sought clarification of the injunctive order issued by the Court on 7-9-1998 and the learned trial Judge while passing another order in the said application directed the respondents not to act in any manner against the interest of the appellant and adjourned this miscellaneous application to be taken up along with the suit on 27-11-1998. The counsel for the respondents on 27-11-1998 sought further time to enable him to seek instructions from his client from abroad, therefore, the Court adjourned the case to 23-12-1998 on which date again on the request of the learned counsel, who appeared on behalf of respondents, the learned trial Judge postponed the further proceedings till 23-1-1999 with direction to the appellant to deposit the court-fee of Rs.15,000 and also file reply to the miscellaneous application for supply of legible copies of documents annexed with the plaint whereas the respondents were directed to file written statement on the next date. The written statement was still not filed, therefore, the appellant on 23-1-1999 made an application under Order VIII, rule 10, C.P.C. and the learned trial Judge directed the learned counsel who, was watching the interest of the respondents without power of attorney for filing the reply to the said application which was filed on 14-4-1999 along with the power of attorney. However, prior to it, he had also filed an application under section

34 of the Arbitration Act, 1940 for stay of the proceedings in the suit on the ground that the dispute was pending in arbitration which was in progress. The application under Order VIII, Rule 10, C.P.C. was adjourned for arguments to 20-4-1999 and then to 6-5-1999 on which date, the learned trial Judge having heard the arguments of learned counsel for the parties reserved -the order for the next day and vide judgment dated 7-7-1999 allowed the application under Order VIII, Rule 10, C.P.C. and decreed the suit of the appellant. The respondents being aggrieved of the judgment and decree in the suit challenged the same in the Lahore High Court, Lahore, through a Regular First Appeal bearing No.302 of 1999 which was accepted through the impugned judgment. The High Court while setting aside the judgment and decree remanded the case to the trial Court for its disposal after obtaining written statement from the respondent. The appellant being aggrieved of the judgment of the High Court has filed this direct appeal (C.A. No.62 of 2001) under Article 185 (2) of the Constitution of Islamic Republic of Pakistan, 1973, whereas the connected Civil Appeal No. 1235 of 2001 was filed by the respondents with the leave of the Court under Article 185(3) of the Constitution of Islamic Republic of Pakistan, 1973. These two appeals against the same judgment are disposed of through this common judgment.

Learned counsel for the-appellant in Civil Appeal No.62 of 2001 contended that the learned Division Bench of the High Court was not correct in holding that pending disposal of application under section 34 of the Arbitration Act, 1940, the non-filing of the written statement would be of no consequence and that in any case there was no direct arbitration agreement in existence between the respondents and the appellant rather it was with a different company being run by the partners of the appellant company, which would have no nexus with the list in the present suit, and therefore, would not provide a valid ground to the respondents for stay of proceedings. The learned counsel argued that the failure of the respondents to fulfil the requirement of filing the written statement within the time given by the Court in terms of Order VIII, Rule I, C.P.C. would essentially attract the provisions of Order VIII, rule 10, C.P.C. However, learned counsel has submitted that. Order VIII, rule 10, C.P.C. would not apply in absence of a specific order for filing the written statement but in a case in which such an order is passed, the defendant on failure to file the written statement as per direction of the Court must face the consequences in the form of penalty provided under Order VIII, rule 10, C.P.C. Learned counsel submitted that the respondents put appearance in the case through their counsel on 7-9-1998 but they did not bother to file the written statement within the time specified under Order VIII, rule 1, C.P.C. and then the Court vide a specific order dated 23-12-1998 directed them to file the written statement within 30 days and adjourned the case to 23-1-1999. In nutshell, learned counsel argued that failure of the respondents to file written statement within the specified time of thirty days would necessarily attract the penal consequence and the learned trial Judge was fully justified in invoking the provisions of Order VIII, rule 10, C.P.C. and decreeing the suit of appellant. The learned counsel while placing reliance on *Hakumat Bibi v. Imam Dm* (PLD 1987 SC 22) has contended that before passing the decree under Order VIII, rule 10. C.P.C. it was not essential for the Court to record the evidence of plaintiff-appellant and that the view taken by the learned Judges in the High Court that after striking off the defence of the respondents, the Court was required to record the evidence of the appellant was not correct.

Learned counsel appearing on behalf of the respondents in the present appeal and for the appellants in the connected appeal on the other hand, argued that in a suit for damages the Court after striking off the defence of respondents was bound to record the evidence to assess the quantum of damages and without undertaking such an exercise of recording the evidence, the decree would be nullity in law as neither any detail of damages was given in the plaint nor any evidence was brought on record in support of claim of damages.

The learned counsel while reverting to the main controversy in issue, submitted that the respondents without submitting to the jurisdiction of the Court in the suit moved an

application, under section 34 of the Arbitration Act, 1940, for stay of proceedings in the suit as the dispute subject-matter of the suit was sub-judiced before the arbitrator. The learned counsel vehemently argued that in any case, the respondents for the first time were required to file written statement vide order dated 23-12-1998 when the applications for stay of the proceedings under section 34 of the Arbitration Act, 1940, was pending and the objection relating to the jurisdiction of the Court raised through a separate application was, also not disposed of, therefore, the striking off defence of the respondents under Order VIII, rule 10, C.P.C. and passing of the decree in the suit for non-compliance of the order of filing the written statement in the given situation, was not legal.

In the nutshell, the learned counsel emphasized that the learned Civil Judge without deciding the question of jurisdiction of the Civil Court at Lahore to entertain the suit and adjudicate the matter, was not justified to invoke the penal provisions of Order VIII, rule of C.P.C. and decreed the suit.

For the purpose of better appreciation of the points raised by the learned counsel for the parties, we deem it proper to examine the provisions of Order VIII, rules 1 and 10, C.P.C. which provide as under:--

"1. Written statement.--The defendant may, and, if so required by the Court, shall, at or before the first hearing or within such time as the Court may permit, present a written statement of his defence:

Provided that the period allowed for filing the written statement shall not ordinarily exceed (thirty) days."

The above rule has been substituted by Lahore High Court Amendment, as under:--

"(1) The defendant may, and, if so required by the Court shall, at or before the first hearing, or within such time as the Court may permit, present a written statement of his defence and with such written statement, or if there is no written statement, at the first hearing shall produce in Court all documents in his possession or power on which he basis his defence or any claim for set-off.

(2) Where he relies on any other documents as evidence in support of his defence or claim for set-off, he shall enter such documents in a list to be added or annexed to the written statement or where there is no written statement, to be presented at the first hearing. If no such list is so annexed or presented, the defendant shall be allowed a further period of ten days to file this list of documents.

(3) A document which ought to be entered in the list referred to in sub- clause (2) but which has not been so entered, shall not, without the leave of the Court, be received in evidence on the defendant's behalf, at hearing of the suit.

(4) Nothing in this rule shall apply to documents produced for cross -examination of plaintiff's witnesses or handed to a witness merely to refresh his memory."

Order VIII, rule 10, C.P.C. provides as under:--

"(1) Procedure when party fails to present written statement called for by Court. Where any party from whom a written statement is so required fails to present the same within the tune fixed by Court, the Court may pronounce judgment against him, or make such order in relation to the suit as it thinks fit."

We have heard the learned counsel for the parties at length and also considered the proposition of law canvassed by them in support of their respective stances.

Order VIII, rule 1, C.P.C. provides that if the defendant fails to file the written statement on the day fixed by the Court or before the issues are framed, he is not entitled to file the written statement subsequently. However, the non-filing of the written statement does not amount to the admission of facts contained in the plaint and the Court may while proceeding against the defendant ex-parte pass the judgment. There is no cavil to the proposition that the Court is empowered to strike off the defence of defendant who despite the direction of the Court in terms of Order VIII, rule 1, C.P.C. fails to file written statement within the specified time but the penal provision of Order VIII, rule 10, C.P.C. cannot be invoked in a case in which the defendant was not required by the Court to file the written statement.

Under Order VIII, rule 1, C.P.C. the time given for filing of written statement ordinarily would not exceed 30 days but in exceptional circumstances in case of failure on the part of defendant to file the written statement, the trial Court in its 'discretion may extend the time for filing the written statement beyond the prescribed time of 30 days and further the Court in suitable cases can grant more time if, it is satisfied that the explanation offered by the defendant for not filing the written statement within the time given was reasonable, it is also within the domain of the trial Court to condone the default of filing of the written statement of all defendants in a case in which there are more defendants and the explanation offered by one of the defendant is found satisfactory. In the case in hand, it is an admitted fact that defendants Nos.3 and 4 were not served till 1st of March, 1999 and fresh summons were issued for their service for 14th of April, 1999. The respondent No. 1 without proper service through the process of the Court, on coming to know about the filing of suit by the appellant instructed a counsel to watch his interest and the said counsel without having power of attorney on behalf of the respondent, represented him, therefore, he would not be deemed to be the recognized agent of said respondent under Order III, rule 1, C.P.C. In any case learned counsel who appeared on behalf of the respondents before filing his power of attorney raised the objection relating to the jurisdiction of Court and sought time to seek instructions from his client who was abroad, therefore, in the given circumstance instead of invoking the penal provision of Order VIII, rule 10, C.P.C. the Court with a view to provide a fair opportunity to the respondents to defend the suit should only proceed further either on their proper service through the process of Court or at least after the submission of power of attorney by the learned counsel appearing on their behalf as without filing power of attorney, he would not be in a position to act as their recognized agent and file the written statement. Legally the respondents were neither being represented by a recognized agent nor were yet served, therefore, non-compliance of order of filing the written statement would be of no penal consequence as no such order could be passed without proper service of the respondents. In any case, the Court in such cases instead of imposing the penalty of striking off the defence under Order VIII, rule 10, C.P.C. would prefer to condone the delay to avoid any injustice and would be hesitant in exercising the discretionary powers under Order VIII, rule 10, C.P.C. unless there are compelling reasons and exceptional circumstance. It is also not necessary that Court after striking off the defence of the defendant under Order VIII, rule 10, C.P.C. must pass a decree and may proceed against the defendant ex parte as despite failure of defendant to file the written statement, he does not lose the right of participation in the subsequent proceedings and can still defend himself by filing the counter -affidavit and thus the Court is not bound to essentially pass a decree under Order VIII, rule 10, C.P.C. without recording evidence in a case in which defendant fails to file the written statement.

The learned trial Judge without disposing of the miscellaneous application directed to the respondents to file the written statement within 30 days vide order dated 23-12-1999 and on the next date i.e. 23-1-1999 while entertaining application under Order VIII, rule 10, C.P.C. proceeded with the said application despite the fact that by that time, the learned counsel under oral instructions was appearing on behalf of the respondent No.1 without power of attorney and was not a recognized agent of respondents and respondents were also not served in proper manner and thus the

learned trial Judge without observing essential requirement of law passed the decree in the suit. We may further observe that without deciding the question of the jurisdiction of Court and disposal of the application under section 34 of the Arbitration Act, 1940, it was not proper for the learned Civil Judge to invoke the provisions of Order VIII, rule 10, C.P.C. and pass the decree in the suit. The perusal of the order sheet in the suit would show that before 23-12-1999 no order requiring the respondents to file written statement was passed, therefore, without providing a fair and sufficient opportunity to the respondents to file the written statement who were residents of a foreign country and were also not properly served, striking off their defence with the observation that their conduct was contumacious, was not justified. The respondents put their appearance in the Court for the first time on the date on which their learned counsel filed power of attorney on their behalf, therefore, the non-compliance of the order dated 23-12-1998 which was passed without their service and through which they were required to file written statement would have no legal consequences.

Regarding the question relating to the jurisdiction of Court suffice to say that without deciding the said question, the proceeding in the suit on merits may ultimately prove a futile exercise.

The factual position is that the learned trial Judge without attending the essential question relating to the jurisdiction of the Court and the disposal of an application under section 34 of the Arbitration Act, 1940, required the defendants to file the written statement and on their failure to file the written statement struck off their defence under Order VIII, Rule 10, C.P.C. There is no cavil to the proposition that the Court if comes to the conclusion that it has jurisdiction to proceed in the suit on merits may, upon failure of the; defendant to file written statement while invoking the provisions of Order VIII, Rule 10, C.P.C. pronounce the judgment or proceed for recording the evidence before pronouncement of the judgment and in such situation has wide discretion and powers either to extend further time or strike off the defence of the defendants but such discretion must not be used in an arbitrary or capricious manner rather it should be exercised keeping in view the circumstances under which the defendant failed to file the written statement and also the judicial principles and the spirit of law for adjudication and decision of the matter on merits. In a case in which the defendant is found grossly negligent in his conduct to file the written statement, the Court in its discretion can invoke the penal provisions under Order VIII, Rule 10, C.P.C. but in a case in which it is found that the suit cannot justifiably be decreed in summary manner, the Court, instead of exercising discretion in favour of striking off the defence of defendant under Order VIII, Rule 10, C.P.C., should proceed for recording the evidence of the plaintiff and in a suit for recovery of money and damages without ascertaining the question of damages through evidence it would not be legal and proper to pass a decree in the discretionary jurisdiction.

In a case in which from the statement of facts made 'in the plaint, the claim of the plaintiff is not satisfactorily established, it is essential for the trial Court after striking off defence of defendant to require the plaintiff to produce evidence in support of his claim before passing the decree and consider the material if any brought on record by the defendant in the subsequent proceeding in his defence, We having gone through the judgment of this Court in *Hakumat B1bi v, Imam Din* (PLD 1957 SC 22) find that the ratio of the said judgments is that in case of gross misconduct of the defendant, the penal provision, of Order VIII, rule 10, C.P.C. can be invoked but in the normal cases the Court while taking into consideration the reasons for non-filing of the written statement should provide further opportunity to the defendant before invoking the penal provisions of law to meet the ends of justice. The conduct of the respondents in the present case was neither contumacious nor contemptuous and the facts and circumstances of the cases cited by the learned counsel for the appellant being entirely different to that of the present case it would not be proper to proceed against the respondents under Order VIII, rule 10, C.P.C. on the strength of said judgments.



In the light of foregoing discussion, we are of the view that in the circumstances of the present case, the invocation of penal provision of Order VIII, rule 10, C.P.C. was not justified and accordingly, we dismiss Civil Appeal No.62 of 2001. The impugned judgment of the High Court is upheld. The respondents shall file their written statement within the time to be given to them by the trial Court and the learned trial Judge in the light of objection relating to the jurisdiction of the Court shall decide the same as a preliminary issue and if comes to the conclusion that Civil Court at Lahore has the jurisdiction to adjudicate the matter, shall not proceed further without deciding the applications under section 34 of the Arbitration Act, 1940. The respondents, however, shall furnish equivalent Bank Guarantee .to the satisfaction of the learned trial Judge for satisfaction of the decree, if ultimately passed against them. Civil Appeal No .1235 of 2001 also stands disposed of accordingly. There shall be no order as to, costs.

M.B.A./W-33/S

**Appeal dismissed.**

