

GAHC010198522023



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : FAO/61/2023

NORTH CACHAR CEMENTS LIMITED AND ANR.
A COMPANY INCORPORATED UNDER THE PROVISIONS OF THE
COMPANIES ACT, 1956 HAVING ITS OFFICE AND PRINCIPAL PLACE OF
BUSINESS AR 501, AMAZE SHOPPING MALL, A.T. ROAD, GUWAHATI-
781001, REP, BY ITS AUTHORIZED SIGNATORY.

2: ABHISHEK LOHIA
S/O SHRI JUGAL KISHORE LOHIA

R/O HOUSE NO. 70
H.M. DAS ROAD
REHABARI
GUWAHATI. DIRECTOR AND AUTHORIZED SIGNATORY OF PLAINTIFF
NO. 1

VERSUS

INSTAKART SERVICES PRIVATE LIMITED
A COMPANY REGISTERED UNDER THE COMPANIES ACT, 2013 HAVING ITS
REGISTERED OFFICE AT BUILDINGS ALYSSA, BEGONIA AND CLOVER,
EMBASSY TECH VILLAGE, OUTER RING ROAD, DEVARABEESANAHALLI,
BENGALURU- 560103, KARNATAKA. REP. BY ITS AUTHORIZED
SIGNATORY SHRI ABHIJIT BANARJEE AND SHRI ABHIJIT BOSE.

Advocate for the Petitioner : MR. S P ROY

Advocate for the Respondent :

BEFORE
HONOURABLE MR. JUSTICE KALYAN RAI SURANA
HONOURABLE MR. JUSTICE MANISH CHOUDHURY

ORDER

Date : 15.09.2023

(K.R. Surana, J)

Heard Mr. S.P. Roy, learned counsel for the appellants.

2) By filing this appeal under Section 13 of the Commercial Courts Act, 2015, the appellants have assailed the order dated 21.08.2023, passed by the learned Civil Judge, Kamrup, Amingaon in Commercial Suit No. 1/2023.

3) The appellants are the plaintiffs in the said suit. Although there are two defendants in the suit, only the defendant no. 1 has been impleaded as sole respondent.

4) By the order impugned in this appeal, the learned trial Court had allowed the sole respondent herein time till 16.09.2023 to file its written statement. According to the learned counsel for the appellants, the summons of the suit was served on the respondent on 10.03.2023, and therefore, the 120 days available to the respondent to file written statement would expire on 08.07.2023. The learned counsel for the appellants has submitted that summons together with copy of plaint and documents were dispatched by registered post with acknowledgement due and that the postal receipt would disclose that the weight of the postal article was 1059 grams (i.e. 1 kg- 59 grams), which was a conclusive evidence of the fact that copy of plaint and documents were also dispatched with summons.

5) It is submitted that the copy of order dated 11.04.2023, would reveal that on the said date the respondent was served with another copy of

plaint and documents except document no. 31, which was a compact disc. However, on 11.04.2023, the learned trial Court had passed an order to direct the appellants to serve document no. 31 to the respondent and accordingly, the said document no. 31 was served to the respondent on 19.05.2023.

6) It was submitted that in the meanwhile on 20.07.2023, the appellants had filed a petition, numbered as petition no. 3549 dated 20.07.2023 to the effect that if written statement was not filed within 120 days prescribed for filing written statement, it should not be accepted on record. Objection to the said petition was filed on 20.07.2023. Upon hearing the parties, the impugned order had been passed.

7) It has been submitted that by allowing time to the respondent to file written statement by 16.09.2023, it would have the effect of extending the time to file written statement beyond 120 days, thereby violating the mandate of the provisions of Order VIII, Rule 1 of the CPC, as modified by virtue of the provisions of Section 16 of the Commercial Courts Act, 2015.

8) In support of the submissions, the learned counsel for the appellant had referred to the following cases, viz., (1) *M/s. SCG Contracts India Pvt. Ltd. vs. K.S. Chamankar Infrastructure Pvt. Ltd. and Ors.*, (2019) 12 SCC 210, and (2) *Axis Bank Limited and Ors. v. Mira Gehani and Ors.*, Docid# IndLawLib/1417877.

9) Considered the submissions and the materials available on record including the impugned order.

10) At the outset, the Court is inclined to examine whether the instant appeal is maintainable in law. In a quest to find the answer, the provisions of Section 13 of the Commercial Courts Act, 2015 is extracted below:-

13. Appeals from decrees of Commercial Courts and Commercial Divisions-

(1) Any person aggrieved by the judgment or order of a Commercial Court below the level of a District Judge may appeal to the Commercial Appellate Court within a period of sixty days from the date of judgment or order.

(1A) Any person aggrieved by the judgment or order of a Commercial Court at the level of District Judge exercising original civil jurisdiction or, as the case may be, Commercial Division of a High Court may appeal to the Commercial Appellate Division of that High Court within a period of sixty days from the date of the judgment or order:

Provided that an appeal shall lie from such orders passed by a Commercial Division or a Commercial Court that are specifically enumerated under Order XLIII of the Code of Civil Procedure, 1908 (5 of 1908) as amended by this Act and section 37 of the Arbitration and Conciliation Act, 1996 (26 of 1996).]

(2) Notwithstanding anything contained in any other law for the time being in force or Letters Patent of a High Court, no appeal shall lie from any order or decree of a Commercial Division or Commercial Court otherwise than in accordance with the provisions of this Act.

11) If the materials available on record are accepted as its face value, it is made to appear in this appeal that the summons was served on the respondent (i.e. defendant no. 1) on 10.03.2023. It has also been projected that postal envelope through which summons was dispatched was weighing 1059 grams (i.e. 1 kg- 59 grams). The copy of the order dated 11.04.2023, which is annexed to this memo of appeal discloses that on the said date the appellant's side had served a copy of plaint and documents except document no. 31 (i.e. compact disc), but without any demur and without raising any objection that copy of plaint and documents, in complete, were served on the respondent. Nonetheless, on 11.04.2023, the learned trial Court had passed an order, thereby directing the appellants to serve document no. 31 (i.e. compact disc) to the respondent. Consequently, the document no. 31 was served to the respondent on 19.05.2023.

12) Thus, pursuant to the order dated 11.04.2023, passed by the

learned trial Court, the appellants had provided copy of document no. 31 (i.e. compact disc) to the respondent on 19.05.2023.

13) In the considered opinion of the Court, due service of summons contemplates that not only the summons is served in a proper and lawful manner as provided in the Civil Procedure Code read with the relevant provisions in the Civil Court Rules and Orders of the Gauhati High Court, but the complete copy of plaint and complete set of documents accompanying with the plaint must also be served on the defendant(s) in the commercial suit.

14) From the copy of plaint annexed to the memo of appeal, it is observed that 31 documents has been referred and annexed to the plaint. The requirement of the provisions of Order V, Rule 2 of the CPC, it is required that every summon shall be accompanied with the plaint. The said provision contemplates complete plaint and does not envisage incomplete plaint i.e. without all documents annexed to the plaint.

15) The order dated 11.04.2023, passed by the learned trial Court is a testimony of the fact that the appellants had not served the respondent with a copy of plaintiff's document no. 31 (i.e. compact disc), which was admittedly served to the respondent on 19.05.2023. Therefore, in the considered opinion of the Court, the time to file written statement for the respondent herein would commence only on and from 20.05.2023, upto a maximum period of 120 days as envisaged under the provisions of Order VIII, Rule 1 CPC, as amended for cases instituted under Commercial Courts Act, 2015.

16) Therefore, by holding that copy of plaint in full was served to the respondent only on 19.05.2023, the date of 16.09.2023, which has been fixed by the learned trial Court for filing written statement would fall on 119th day

from 16.09.2023, by excluding the said date, being the date when summons on the respondent can be said to be duly served.

17) The mere fact that summons was dispatched in a postal envelope weighing 1059 grams (i.e. 1 kg- 59 grams) alone would not constitute proper service of summons, if it is not accompanied with complete set of plaint and documents annexed/ appended to the plaint. Admittedly, it was only after the learned Trial Court had passed the order dated 11.04.2023 that a copy of plaintiff's document no. 31 (i.e. compact disc), was served to the respondent on 19.05.2023. Thus, the appellants had miserably failed to establish before the learned trial Court that the entire set of documents annexed/ appended to the plaint was served upon the respondent along with the summons.

18) The learned trial Court had placed reliance on the judgment of the learned Single Judge of this Court in the case of *Sreenivas Basudev v. Vineet Kumar Kothari*, AIR 2007 Gau 5: (2006) 3 GLR 230: 2006 (3) GLT 118: (2006) 0 Supreme(Gau) 256, wherein it was observed and held as under:-

18. *Consequently, therefore, mere service of summons on a defendant would not make the period of 90 days, as envisaged under Order VIII, Rule 1, start running. When a period does not begin to run, the question of the period having come to an end does not arise at all. Hence, when the service of summons is not accompanied by a copy of the plaint, the period of 90 days, as contemplated under Order VIII, Rule 1, would not begin to run.*

19. *In the case at hand, notwithstanding the fact that the summons, admittedly, stood delivered to the defendant on 28.4.2003, the fact remains that the summons was not accompanied by a copy of the plaint. The summons cannot, in such a case, be said to have been served on the defendant on 28.4.2003. No wonder, therefore, that on a petition having been filed, in this regard, by the defendant, the learned trial Court had to pass an order, on 9.7.2003, directing the plaintiff to supply, inter alia, copy of the plaint and fixing 30.7.2003 for filing of written statement. A copy of the plaint was accordingly furnished to the defendant, admittedly, on 30.7.2003. Notwithstanding, therefore, the fact that the summons stood delivered on the defendant as early as on 28.4.2003, the time did not start*

running against the defendant until, at least, 30.7.2003, when a copy of the plaint was made available to the defendant. Hence, the observations made by the learned trial Court, in its order, dated 26.9.2005, aforementioned to the effect that the defendant ought to have, on receipt of the summons on 28.4.2003, started drafting and preparing the written statement is ex facie perverse inasmuch as the question of drafting and preparing the written statement did not arise at all until, at least, 30.7.2003.

19) The learned counsel for the appellants has referred to the decision of the Supreme Court of India in the case of *SCG Contracts (India) Private Limited (supra)*. In the said case, the Supreme Court of India, while dealing with a case relating to the filing of written statement in a case under the Commercial Courts Act, 2015, took notice of the amendments brought in the provisions of Order V, Rule 1, Order VIII, Rule 1, and Order VIII, Rule 10 of the CPC with regard to *commercial disputes of specified value* under the Commercial Courts Act, 2015 by way of insertion of the proviso in the said provisions, and it was held to the effect that the clear, definite and mandatory provisions of Order V, Rule 1 read with Order VIII Rules 1 and 10 of the CPC cannot be circumvented by recourse to the inherent power under Section 151 CPC to do the opposite of what is stated therein and accordingly, it was held that there was no scope for enlarging the time for filing of written statement beyond the period of 120 days in commercial suits, as the provision with regard to such suits would be mandatory, and not directory. The said judgment has been affirmed by a Bench of 3-Judges in the case of *Desh Raj v. Balkishan, (2020) 2 SCC 708*.

20) But the question this Court is required to determine in this case in hand is whether the salutary and mandatory provisions of Order VIII, Rule 1 of the CPC can be allowed to become a tool of oppression in the hands of unscrupulous plaintiff(s), who deliberately and consciously do serve the complete set of plaint and documents annexed/ appended to the plaint along

with summons to the defendant(s) and yet expect the defendant(s) to file written statement in 30 days from the date of receipt of summons, extendable to 120 days? And that whether the Court would be powerless if such a recourse is adopted by the plaintiff?

21) To the said query, the answer would obviously be an emphatic 'no'. In the said context, we agree with the observations made by the learned Single Judge of this Court in the case of *Sreenivas Basudev (supra)* to the effect that "*when the service of summons is not accompanied by a copy of the plaint, the period of 90 days, as contemplated under Order VIII, Rule 1, would not begin to run.*" We hasten to add that "plaint" would obviously include "all and/or complete set of documents annexed/ appended to the plaint". We are also inclined to hold that the compact disc (document no. 31) is also a document, but in electronic form. Therefore, the appellants were bound to serve a copy of the same to the respondent.

22) It is not in dispute that in light of the judgment rendered by the Supreme Court of India in the case of *SCG Contracts (India) Private Limited (supra)*, the Courts do not have power under Section 151 CPC to extend the period of 120 maximum days time allowable to the defendant(s) to submit/ file written statement, but the period of such limitation would run only on and from the date when the defendant(s) is served with the complete copy of plaint and documents. In this regard, the learned counsel for the appellants has submitted that the print-out of the compact disc was supplied to the respondent. If that be so, then also once a document in electronic form (compact disc) is filed in Court, it was the duty of the appellants to provide a copy of the same to the defendant(s), unless the learned trial Court had exempted the appellants to serve copy of compact disc to the respondent upon a print-out being provided.

23) Under the unique facts of this case, the Court is of the considered opinion that this is not a case where the appellant can be allowed to get an advantage and/or a premium for not serving the complete set of plaint with documents annexed/ appended to the plaint together with the summons. The provision of Order VIII, Rule 1 of the CPC cannot be read in isolation of the provisions of Order V, Rules 1 and 2 of the CPC so as to mean that even if the provisions of Order V, Rule 2 is not complied with, yet a written statement must mandatorily be filed by the defendant, whether or not the defendant receives the copy of plaint and documents annexed/ appended thereto.

24) In view of the discussions above, the two cases cited by the learned counsel for the appellants does not come to the aid of the appellants in any way.

25) Therefore, the order dated 21.08.2023, impugned in this appeal does not warrant any interference of this Court. The Court is constrained to hold that there is no merit in the instant appeal preferred against the impugned order and this appeal is thus, dismissed *in limine* without issuance of notice on the respondent.

26) Moreover, the learned counsel for the appellant has not been able to show that under the provisions of Order XLIII of the CPC, the order of the trial Court, fixing a date for filing of written statement is appealable.

27) Therefore, the Court is inclined to hold that the impugned order dated 21.08.2023, allowing time to the respondent (defendant no.1) till 16.09.2023 to file written statement is not appealable under the provisions of Section 13 of the Commercial Courts Act, 2015, read with the provisions of Order XLIII of the CPC. Accordingly, this appeal is dismissed.

28) The appellants are left to bear their own cost.

JUDGE

JUDGE

Comparing Assistant