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

% *Date of Decision: May 11, 2017*

+ **CM(M) 496/2017**

M/S SYNERGY TELECOMMUNICATIONS & ORS Petitioners

Through: Mr.Rajshekhar Rao & Mr.Amit
A.Pai, Advocates

versus

M/S ASIAN COLOUR COATED ISPAT LIMITED Respondent

Through: Mr.Ajit Tewari, Advocate

AND

+ **CM(M) 498/2017**

M/S SYNERGY THRISLINGTON & ORS Petitioners

Through: Mr.Rajshekhar Rao & Mr.Amit
A.Pai, Advocates

versus

M/S ASIAN COLOUR COATED ISPAT LIMITED Respondent

Through: Mr.Ajit Tewari, Advocate

CORAM:
HON'BLE MS. JUSTICE PRATIBHA RANI

JUDGMENT (Oral)

CM(M) 496/2017 & CM(M) 498/2017

1. The petitioners have invoked the jurisdiction of this Court under Article 227 of the Constitution of India with the prayer for setting aside the order dated 3rd February 2017 whereby the opportunity to file the written statement has been declined as well the order dated 4th July, 2016 striking off their defence. The prayer of the petitioners is that in view of the circumstances in which the written statement could not be filed within the stipulated time, one opportunity may be given to the petitioners/defendants

to file the written statement.

2. On behalf of the petitioners, it has been contended that the delay in filing the written statement was due to the following reasons:-

(i) The previous counsel engaged by the petitioners did not prepare the written statement on time.

(ii) Thereafter, the petitioners/defendants engaged another counsel who appeared before learned trial Court on 4th July, 2016 but despite request for one more opportunity, the right of the defendants to file the written statement was closed.

(iii) The partnership firm of petitioner No.1 company consists of Sh.Harpal Singh, petitioner no.2 herein and his wife, Rachna Singh, petitioner no.3 herein. The husband is the managing partner who had been travelling in India and abroad in connection with the business which also caused delay in filing the written statement.

(iv) The concerned official of the petitioners'/defendants' firm who was handling the matter relating to the respondent/plaintiff company left the job and since the dispute pertained to the transaction for the period 2010 to 2014 relating to supply of goods by the respondent/plaintiff company, the time consumed in collecting relevant information from the record also contributed to delay.

3. Learned counsel for the respondent has strongly opposed these petitions taking the following pleas:-

(i) It is not the case of the petitioners that since the date of service till defence was struck off or the application was filed seeking condonation of delay in filing the written statement, the managing partner was out of India.

(ii) Inconsistent pleas were taken in the application which have been noted by the learned trial Court while passing the impugned order thereby

declining the permission to the petitioners to file the written statement.

(iii) Though blame has been put on previous counsel for delay in filing the written statement but no complaint was made to the Bar Council against the said counsel.

4. Perusal of the record shows that two Civil Suits bearing No.87/2016 and 88/2016 were filed on 3rd February, 2016 by the respondent/plaintiff M/s Asian Colour Coated Ispat Limited seeking recovery of amount of ₹ 98,23,357/- and ₹39,72,117/- respectively along with pendent lite and future interest.

5. After the service of summons for settlement of issues in March, 2016 (date of service not mentioned), Mr.Ashok Bannidini, Advocate appeared on behalf of the petitioners/defendants and filed memo of appearance. He also sought time to file vakalatnama and written statement. The matter was adjourned to 4th July, 2016 for filing the replication and in the meantime direction to the petitioners/defendants to file the written statement within 30 days.

6. On 4th July 2016, Mr.Amit Pai, Advocate appeared on behalf of the petitioners/defendants and sought further time to file the written statement. On that date Mr.Amit Pai, Advocate submitted that the petitioners/defendants were travelling in different parts of the country for their business purpose hence written statement could not be prepared. This was not considered sufficient by the learned trial Court to grant further adjournment and defence was struck off.

7. Thereafter, case was adjourned to 19th September, 2016 for plaintiff's evidence. In the meantime, three applications under Section 151 CPC were filed by the petitioners/defendants for recalling the order dated 4th July, 2016 incorporating the reasons due to which petitioner was not able to file the

written statement within the stipulated time. Prayer was made for grant of another opportunity to file the written statement in both the civil suits.

8. The learned trial Court dismissed all the three applications under Section 151 CPC filed by the petitioners/defendants. The impugned order reads as under:-

“CS No.56069-16 & 56348-16

Ms.Asian Vs. Synergy

03.02.2017

Present: Sh.Ashish Tiwari and Sh.Ankit Gupta, Counsels for the plaintiff.

Sh.Amit Pai and Sh.Rahat Bansal, Counsels for the defendant.

Today case is fixed for arguments on the 3 pending applications moved by the defendant U/S. 151 CPC for recalling of the order dated 04th July, 2016 denying the defendant for filing the WS as well as application U/S.151 CPC seeking exemption and condonation of delay in filing the application in time as well as application U/S.151 CPC for condonation of delay for recalling the order dated 04th July. Reply to the applications already filed by the plaintiff. Arguments heard at length. The ground taken in all the three application is that one of the partner was travelling in different parts of the country and the official of the defendant has left the services who was dealing with the matter, therefore, the WS could not be prepared by the defendant in time. The defendant

prayed for lenient view and seeking the filing of WS, subject to cost. In my considered opinion, as the defendant has taken contradictory stand in his arguments, no ground for recalling of order is made out. All the 3 applications are without merit. Same are dismissed.

Be put up on 04th May, 2017 for plaintiff evidence.

*Sd/-
ADJ-02 & Waqf Tribunal/NDD
PHC/ND/03.02.2017”*

9. During the course of hearing, learned counsel for the petitioners submitted that the petitioners have no intention to delay the trial in any manner whatsoever. The factors causing delay in filing the written statement were not correctly appreciated. The copy of the passport has been placed on record as directed by this Court and the reasons explained cannot be termed as contradictory in nature so as to deny the opportunity to the petitioners to contest the case on merits. It has also been contended that in case the respondent/plaintiff succeeds, petitioners would get the interest for this period as well and no prejudice shall be caused to the respondent/plaintiff if an opportunity is given to the petitioners to contest on merits by condoning the delay in filing the written statement.

10. Learned counsel for the respondent/plaintiff has drawn the attention of this Court to the conclusions which can be derived from the passport as per which the petitioner No.2 had remained abroad only for a period of 15 days and his travel within India was also for a period of 15 days. It has been contended that the period of 30 days on different dates in itself is no ground to condone the delay hence the petitions may be dismissed.

11. Perusal of the record shows that after service of summons, on the very first date i.e. 8th April, 2016, Mr.Ashok Bannidini, learned counsel for the

petitioners/defendants appeared before the Court and sought time to file vakalatnama and written statement, which was allowed. But on 4th July, 2016 Mr.Amit Pai, Advocate appeared on behalf of the petitioners/defendants thereby indicating that the counsel was changed by the defendants. Although on 4th July, 2016, Mr.Amit Pai, Advocate did not mention that the previous counsel has been changed because of his inability to prepare the written statement but that in itself cannot be termed to be taking contradictory plea which has been taken while filing the application under Section 151 CPC.

12. Change of a counsel within a short span of less than three months for the purpose of filing the written statement suggests that the petitioners/defendants were vigilant.

13. No doubt on 4th July, 2016 when the defence was struck off, period of 90 days from the date of service had already lapsed. But after the appearance of the new counsel on 8th April, 2016 i.e. on the second date of hearing before the learned trial Court, the newly engaged counsel sought adjournment without putting blame on the previous counsel. However, when the opportunity was declined and applications under Section 151 CPC have been filed for seeking further opportunity to file the written statement, all the reasons responsible for not being able to file the written statement were incorporated.

14. Learned trial Court has dismissed the application under Section 151 CPC solely on the ground that the defendant has taken the contradictory stand hence no ground for recalling the order is made out. The stands are not contradictory but various reasons contributing delay in filing the written statement were mentioned.

15. The narration of the aforesaid facts shows that the petitioner/defendant tried to avoid the inordinate delay in filing the written statement by engaging

another counsel and thereafter filing various applications under Section 151 CPC to seek an opportunity to file the written statement.

16. The provisions of Order VIII Rule 1 CPC as amended by the amending Act of 1999 and 2002 have been held to be directory and not mandatory as held by the Hon'ble Supreme Court in Kailash Vs.Nanhku & Ors., 2005 (4) SCC 480. The Code of Civil Procedure is a procedural code for the conduct of the suit and the same has been held to be a handmaid of justice. One of the first judgments on this aspect holding the provision of Order 8 Rule 1 to be directory was the case of Kailash Vs. Nankhu (Supra). The ratio of the decision in the case of Kailash (supra) has also thereafter been repeatedly followed by the Supreme Court in various other judgments including Rani Kusum (Smt.) Vs. Kanchan Devi (Smt.) and others (2005) 6 SCC 705, Mr. Shaikh Salim Haji Abdul Khayumsab Vs. Mr. Kumar & Ors. 2006 (1) SCC 46 and R.N.Jadi & Brothers & Ors. Vs. Subhashchandra 2007 (6) SCC 420. Of course, the provision of Order 8 Rule 1 is not to be so liberally interpreted so as to allow gross delays and negligence on the part of the defendant in filing the written statement.

17. A reference to the aforesaid facts shows that the present was not a case of a gross and abnormal delay on the part of the petitioner/defendant in filing the written statement.

18. No doubt the provision of Order VIII Rule 1 CPC is not to be liberally interpreted so as to allow gross delay and negligence on the part of the defendant in filing the written statement. Therefore, the facts of each case need to be examined to ascertain whether there is gross delay or negligence on the part of the defendant in filing the written statement within the stipulated time. I have already noted the proceedings dated 8th April, 2016 and 4th July, 2016 when after granting time to the petitioners/defendants to

file the written statement, the defence was struck off on 4th July, 2016. The applications under Section 151 CPC giving detailed reasons for not being able to file the written statement and the factors contributing delay were treated by the learned trial Court to be contradictory though the same could have been termed as additional reasons incorporated in the application to seek permission to file the written statement beyond the prescribed time.

19. Therefore, taking a holistic view of the matter and that Code of Civil Procedure being handmade of justice coupled with the fact that the steps taken by the petitioners/defendants to seek an opportunity to file the written statement though beyond 90 days and the delay is explained, an opportunity is given to the petitioners/defendants to file the written statement and the respondent/plaintiff is compensated by awarding costs.

20. It can also be inferred from the record that parties also spent some time in making an effort through mediation process. The written statement has already been filed though not taken on record by the learned trial Court. Thus, the petitioner is allowed to place on record the written statement subject to cost of ₹25,000/- in each case (total costs ₹50,000/-).

21. Both the petitions stand disposed of in above terms.

CM No.16921/2017 in CM(M)496/2017

CM No.16926/2017 in CM(M)498/2017

Dismissed as infructuous.

PRATIBHA RANI, J.

MAY 11, 2017

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