

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.7520 OF 2019

Raj Process Equipments & Systems
Pvt Ltd. And others

Petitioners

versus

Honest Derivatives Pvt Ltd

Respondents

Mr.A.A. Yadkikar advocate for the petitioners.
Mr.S.B.Gorde, advocate for respondent
Mr.V.D.Sapkal advocate appointed as amicus Curie

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CORAM : **RAVINDRA V. GHUGE, J.**

Date: August 1st, 2019

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PER COURT :-

1 By this petition, the petitioners have challenged the Order dated 3.7.2018, passed by the Trial Court, by which Special Civil Suit No. 02/2018 was directed to proceed ex-parte, without the written statement of these petitioners.

2 The issue raised in this petition is, as to “ *whether a suit transferred from the regular Court to the Commercial Court, in view of the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015 [hereinafter referred ,o as 'the Act'], would enable the Commercial Court to set aside the “No WS” Order by condoning delay of 103 days.*”

3 I have heard the learned Advocate for the petitioner-defendants, the respondent and Shri Sapkal learned Advocate appointed

as amicus curie vide Order 15.7.2019.

4 The petitioners submit that, the suit was filed on 22.12.2017. The petitioners received summons on 16.2.2018. On different occasions, they sought time to file a written statement. 120 Days from the date of appearance expired on 16.6.2018. The “No WS” Order was passed on 3.7.2018, after 17 days had lapsed, beyond 120 days.

5 The suit was transferred to the Commercial Court under the Act on 11.8.2018 and was re-numbered as Commercial Civil Suit No. 09/2019. An application for recalling the “No WS” Order was filed at Exh. 5 on 27.8.2018 after 72 days and Exh. 7 was filed on the same day, seeking permission to file the written statement. By the impugned Order dated 11.4.2019, Exhs. 5 and 7 as well as Exh. 9 filed by defendant Nos. 3 and 4, were rejected on the ground that, the Commercial Court did not have the jurisdiction to enlarge the time beyond 120 days from the date of service of summons so as to enable the petitioners to file their written statement.

6 The learned Advocate for the petitioners has relied upon the following Judgments :

(A) Reliance General Insurance Company Limited versus Colonial Life Insurance Company (Trinidad) Limited and others , (MANU/MH//1125/2019),

(B) Mira Gehani and ors. Versus Axis Bank Limited and others, (MANU/MH/0317/2019).

7 The learned Advocate for the respondent has relied upon the Judgment delivered by the Honourable Apex Court in the matter of ***SCG Contracts India Pvt Ltd versus K.S.Chamankar Infrastructure Pvt. Ltd. And others*** (2019SCC On line SC 226)

8 The learned amicus curiae has drawn my attention to Sections 15, 16 and clauses 4A, D(i) and (iv), clause 7 under Order XI, clause 3, 6(B and R) under Order 15 A of the schedule which is prescribed under Section 16, by way of amendments to the provisions of the Code of Civil Procedure 1908. These provisions read as under :

“15. *Transfer of Pending cases. -*

(1) *All suits and applications, including applications under the Arbitration and Conciliation Act, 1996 (26 of 1996), relating to a commercial dispute of a Specified Value pending in a High Court where a Commercial Division has been constituted, shall be transferred to the Commercial Division.*

(2) *All suits and applications, including applications under the Arbitration and Conciliation Act, 1996 (26 of 1996), relating to a commercial dispute of a Specified Value pending in any Civil Court in any district or area in respect of which a commercial Court has been constituted, shall be transferred to such Commercial Court:*

Provided that, no suit or application where the final Judgment has been reserved by the Court prior to the constitution of the Commercial Division or the Commercial Court shall be transferred either under sub-section (1) or Sub-section (2).

(3) *Where any suit or application, including an application under the Arbitration & Conciliation Act, 1996 (26 of 1996) relating to a Commercial Dispute of specified value shall stand transferred to the Commercial Division or Commercial Court under sub-section (1) or Sub-section (2), the provisions of this Act shall apply to those procedures that were not complete at the time of transfer.*

(4) *The Commercial Division or Commercial Court, as the case may be, may hold case management hearings in respect of such transferred suit or application in order to prescribe new time lines or issued such further directions as may be necessary for a speedy and efficacious disposal of such suit or application, in accordance with Order XIV-A of the Code of Civil Procedure, 1908 (5 of 1908):*

Provided that the proviso to sub-rule (1) of rule 1 of Order V of the Code of Civil Procedure, 1908 (5 of 1908) shall not apply to such transferred suit or application and the Court may, in its discretion, prescribe a new time-period within which the written statement shall be filed.

(5) *In the event that such suit or application is not transferred in the manner specified in sub-section (1), sub-section (2) or sub-section (3), the Commercial Appellate Division of the High Court may, on the application of any of the parties to the suit, withdraw such suit or application from the Court before which it is pending and transfer the same for trial or disposal to the Commercial Division or Commercial Court, as the case may be, having territorial jurisdiction over such suit, and such order of transfer shall be final and binding.*

16. *Amendments to the Code of Civil Procedure, 1908 in its application to commercial disputes. -*

(1) *The provisions of the Code of Civil Procedure, 1908 (5 of 1908) shall, in their application to any suit in respect of a commercial dispute of a Specified Value, stand amended in the manner as specified in the Schedule.*

(2) *The Commercial Division and Commercial Court shall follow the provisions of the Code of Civil Procedure, 1908 (5 of 1908), as amended by this Act, in the trial of a suit in respect of a Commercial Dispute of a Specified Value.*

(3) *Where any provisions of any rule of the jurisdictional High Court or any amendment to the Code of Civil Procedure, 1908 (5 of*

1908), by the State Government is in conflict with the provisions of the Code of Civil Procedure, 1908 (5 of 1908), as amended by this Act, the provisions of the the Code of Civil Procedure as amended by this Act shall prevail.

Clause 4-A:

4. Amendment of First Schedule. - In the First Schedule to the Code, -

(A) In the order V, in rule 1, in sub-rule (1) for the second proviso, the following proviso shall be substituted, namely:-

“Provided further that where the defendants fails to file the written statement within the said period of thirty days, he shall be allowed to file the written statement on such other days, as may be specified by the court, for reasons to be recorded in writing and on payment of such costs as the court deems fit, but which shall not be later than one hundred twenty days from the date of service of summons and on expiry of one hundred twenty days from the date of service of summons, the defendant shall forfeit the right to file the written statement and the court shall not allow the written statement to be taken on record.

(D) In Order VIII, -

(i) in Rule 1, for the proviso, the following proviso shall be substituted, namely: -

“Provided that where the defendant fails to file the written statement within the said period of thirty days, he shall be allowed to file the written statement on such other day, as may be specified by the court, for reasons to be recorded in writing and on payment of such costs as the court deems fit, but which shall not be later than one hundred twenty days from the date of service of summons and on expiry of one hundred twenty days from the date of service of summons, the defendant shall forfeit the right to file the written statement and the court shall not allow the written statement to be taken on record.”;

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(iv) in Rule 10, after the first proviso, the following proviso shall be inserted, namely:-

“Provided further that no court shall make an order to extend the time provided under Rule 1 of this Order for filing of the written statement.”;

Clause 7.

7. Certain provisions of the Code of Civil Procedure, 1908 not to apply. - For avoidance of doubt, it is hereby clarified that Order XIII, Rule 1, Order VII, Rule 14 and Order VIII, Rule 1-A of the Code of Civil Procedure, 1908 (5 of 1908) shall not apply to suits or applications before the Commercial Divisions of High Court or Commercial Courts.”.

Clause 3, 6 (b & r) under clause 15-A

3. Time limit for the completion of a trial.- In fixing dates or setting time-limits for the purposes of Rule 2 of this Order, the court shall ensure that the arguments are closed not later than six months from the date of first case management hearing.

6. Powers of the Court in a Case Management Hearing.- (1) In any Case Management Hearing held under this Order, the court shall have the power to -

(a)

(b) direct parties to file compilations of documents or pleadings relevant and necessary for framing issues;

(c) to (q)

(r) issue directions or pass any order for the purpose of managing the case and furthering the overriding objective of ensuring the efficient disposal of the suit.”

(Emphasis supplied)

after transfer of the suit to the Commercial Court, the provisions of the Commercial Court's Act would apply to those stages and procedures, that were not complete at the time of the transfer. Under Section 15(4), the concerned Commercial Court is permitted to hold case management hearings in respect of the transfer of suit or apply / prescribe new time lines or issue such further directions, as may be necessary, for the speedy and efficacious disposal of such suit. He then indicates from Section 16(1) that the provisions of the C.P.C. as applicable to a suit in respect of a Commercial Dispute, would stand amended in the manner, as specified in the schedule.

10 He then submits that clause 4(A) permits the forfeiture of the right of the defendant to file a written statement and the Court shall not allow the written statement to be taken on record after 120 days from the date of the service of the summons. He further submits that, the proviso would clearly indicate that if a defendant fails to file a written statement within the period of 30 days, he still can be allowed to file such written statement, on any such date as may be specified by the Court subject to reasons to be recorded in writing. However, the limit would be of 120 days and there can be no extension of time.

11 He then refers to clause 4(D) and the proviso below Order 8 and submits that there can be no extension of time beyond 120 days. He, therefore, submits that by the said amendment to Order 5 Rule 1 and Order 8 Rule 1, the Court can not grant a single day of extension of time beyond 120 days as is prescribed by the C.P.C. under the said provisions.

12 He has then drawn my attention to clause 7 below Order 11 under a schedule by which, it has been provided that Order 13 Rule 1, Order 7 Rule 14 and Order 8 Rule 1-A would not apply to suits or applications before the Commercial Courts.

13 The learned Advocate for the petitioner places reliance upon case management hearing, which is prescribed under Order 15-A in the schedule below Section 16. He specifically points out clause 6(1)(b) to canvass that, the Court, in spite of resorting to case management study, can direct the parties to file compilation of documents or pleadings relevant and necessary for framing issues. By referring to clause 6(r) he submits that, the Court can issue directions or pass any Order for the purpose of managing the case and for furthering the overriding objective of ensuring the efficient disposal of the suit. As such, if the petitioners have not filed a written statement, the Commercial Court is duty bound to permit such defendants to file compilation of documents and pleadings and by passing such an Order, the Commercial Court can further the overriding objective of ensuring efficient disposal of the suit.

14 Learned Advocate for the respondent submits, by placing reliance on the Judgment delivered in SCG Contracts (Supra), that no Commercial Court can extend the period beyond 120 days for filing a written statement. Once, a “No WS” Order has been passed and the petitioners have approached the Commercial Court with an application for setting aside “No WS” Order, after 191 days from the date of appearance

and that too, with a “No WS” Order passed before the transfer of the suit in the Commercial Court, there is no provision in law empowering the Commercial Court to condone the delay of 71 days and set aside the Order of “No WS” passed by the Court before transfer.

15 I find that, Section 15 (3) reproduced above would clearly indicate that the Commercial Court takes over the commercial suit after transfer and proceeds thereafter under the scheme of the Act. The very purpose and object of establishing the Commercial Courts, was to ensure that, the delay is eliminated and a speedy trial is achieved. There is no provision permitting the Commercial Court to move backwards and revert to an earlier stage for overcoming a legal impediment and then again leap forward. If the Commercial Court is to go backwards to set aside the “No WS” Order and then move forward by taking such a WS on record, it would defeat the very purpose for which the Act was introduced.

16 Paragraph Nos.2 7 and 11 to 22 of the SCG Contracts case supra, read as under:-

“ 2. In the present case, a Suit was filed on 10.03.2017 claiming a sum of Rs. 6,94,63,114/-. The Defendant No. 1 was served with the summons in the Suit on 14.07.2017. 120 days from this date takes us to 11.11.2017, by which date no written statement had been filed. Meanwhile, however, an Order VII Rule 11 application was filed. This application was taken up and rejected by the first impugned order dated 05.12.2017. After rejecting the Order VII Rule 11 application, the learned Single Judge recorded that none appeared for the plaintiff inspite of advance copy stated to have

been given. He also records that the counsel for the defendant No. 1 now states that seven days time be granted to file a written statement. Para 14 of the aforesaid order then reads as follows:

“14. Subject to the defendant No. 1 paying costs of Rs. 25,000/- to the counsel for the plaintiff on or before 15th December, 2017, the time for filing the written statement is extended till 15th December, 2017. If either of the conditions is not complied with, the right of the defendant No. 1 to file written statement shall stand closed without any further order.”

3. In obedience to this order, a written statement was filed on 15.12.2017 by the defendant No. 1. By a belated application dated 06.08.2018, it was averred that the recent changes that have been made in the Code of Civil Procedure were not adhered to as a result of which the written statement which had yet to be taken on record could not so to be taken on record in view of the fact that 120 days had elapsed from the date of service of summons of this Suit.

4. On 24.09.2018, another learned Single Judge took up this application and held that the 05.12.2017 order being final, even though the provisions of law may provide otherwise, the defendant No. 1's written statement which was filed on 15.12.2017 should be taken on record. The petitioner has filed a Special Leave Petition against the aforesaid two orders.

5. Learned counsel appearing on behalf of the petitioner has taken us through the recent amendments made in the Code of Civil Procedure and argued, laying great emphasis on *State of Bihar v. Bihar Rajya Bhumi Vikas Bank Samiti*, (2018) 9 SCC 472 as well as *Canara Bank v. N.G. Subbaraya Setty* AIR 2018 SC 3395 for the proposition that the amendments so made now provide for the consequence of non-filing of written statement, and as this is so, the provisions of Order VIII Rules 1 and 10 can no longer be said to be directory but can only be said to be mandatory. In this view

of the matter, since a statutory prohibition now exists, the doctrine of res judicata cannot be availed.

6. As against this, learned counsel appearing on behalf of the respondents has argued, basing himself on the decisions in Bhanu Kumar Jain v. Archana Kumar, (2005) 1 SCC 787 and Shaikh Salim Haji Abdul Khayumsab v. Kumar, (2006) 1 SCC 46 that the vital difference between res judicata in a subsequent suit and res judicata in two different stages of the same proceeding must be kept in view. He stated that as the 05.12.2017 order had attained finality and could only now be challenged after the decree in the Suit is passed, clearly, the order of 24.09.2018 is correct. He also stated that by now the order dated 05.12.2017 had been acted upon and a wrongful act of the Court therefore, cannot prejudice him. He also argued citing the judgment of R.K. Roja v. U.S. Rayudu, (2016) 14 SCC 275 that as an Order VII Rule 11 application had been filed and that had to be answered before trial of the Suit could commence, it was clear that a written statement could not be filed. He then relied upon Section 151 of the Code of Civil Procedure which preserves the inherent power of the court, more particularly, that of a Court of record - the High Court, and can be invoked in cases like the present where grossly unjust consequences would otherwise ensue.

7. Having heard learned counsel for both parties, it is important to first set out the statutory provisions.

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11. A perusal of these provisions would show that ordinarily a written statement is to be filed within a period of 30 days. However, grace period of a further 90 days is granted which the Court may employ for reasons to be recorded in writing and payment of such costs as it deems fit to allow such written statement to come on record. What is of great importance is the

fact that beyond 120 days from the date of service of summons, the defendant shall forfeit the right to file the written statement and the Court shall not allow the written statement to be taken on record. This is further buttressed by the proviso in Order VIII Rule 10 also adding that the Court has no further power to extend the time beyond this period of 120 days.

12. In *Bihar Rajya Bhumi Vikas Bank Samiti (supra)*, a question was raised as to whether Section 34(5) of the Arbitration and Conciliation Act, 1996, inserted by Amending Act 3 of 2016 is mandatory or directory. In para 11 of the said judgment, this Court referred to *Kailash v. Nanhku*, (2005) 4 SCC 480 referring to the text of Order 8 Rule 1 as it stood pre the amendment made by the Commercial Courts Act. It also referred to the *Salem Advocate Bar Association v. Union of India*, (2005) 6 SCC 344, which, like the *Kailash* judgment, held that the mere expression “shall” in Order 8 Rule 1 would not make the provision mandatory. This Court then went on to discuss in para 17 *State v. N.S. Gnaneswaran*, (2013) 3 SCC 594 in which Section 154(2) of the Code of Criminal Procedure was held to be directory inasmuch as no consequence was provided if the Section was breached. In para 22 by way of contrast to Section 34, Section 29-A of the Arbitration Act was set out. This Court then noted in para 23 as under:

“23. It will be seen from this provision that, unlike Sections 34(5) and (6), if an award is made beyond the stipulated or extended period contained in the section, the consequence of the mandate of the arbitrator being terminated is expressly provided. This provision is in stark contrast to Sections 34(5) and (6) where, as has been stated hereinabove, if the period for deciding the application under Section 34 has elapsed, no consequence is provided. This is one more indicator that the same Amendment Act, when it provided time periods in different situations, did so intending different consequences.”

13. Several High Court judgments on the amended Order VIII Rule 1 have now held that given the consequence of non-filing of

written statement, the amended provisions of the CPC will have to be held to be mandatory. [See Oku Tech Private Limited v. Sangeet Agarwal by a learned Single Judge of the Delhi High Court dated 11.08.2016 in CS (OS) No. 3390/2015 as followed by several other judgments including a judgment of the Delhi High Court in Maja Cosmetics v. Oasis Commercial Pvt. Ltd. 2018 SCC OnLine Del 6698.

14. We are of the view that the view taken by the Delhi High Court in these judgments is correct in view of the fact that the consequence of forfeiting a right to file the written statement; non-extension of any further time; and the fact that the Court shall not allow the written statement to be taken on record all points to the fact that the earlier law on Order VIII Rule 1 on the filing of written statement under Order VIII Rule 1 has now been set at naught.

15. However, learned counsel appearing for the respondents relied strongly upon the judgment in Bhanu Kumar Jain (supra) and Shaikh Salim Haji Abdul Khayumsab (supra) and, in particular, paras 22 and 27 of the first judgment and paras 4 & 19 of the second judgment.

16. We are of the view that since both these judgments dealt with the pre-amendment position, they would not be of any direct reliance insofar as the facts of the present case is concerned.

17. Learned counsel appearing for the respondents also relied upon R.K. Roja v. U.S. Rayudu (supra) for the proposition that the defendant is entitled to file an application for rejection of plaint under Order VII Rule 11 before filing his written statement. We are of the view that this judgment cannot be read in the manner sought for by the learned counsel appearing on behalf of the respondents. Order VII Rule 11 proceedings are independent of the filing of a written statement once a suit has been filed. In fact, para 6 of that judgment records “However, we may hasten to add that the liberty to file an application for rejection under Order 7 Rule 11 CPC

cannot be made as a ruse for retrieving the lost opportunity to file the written statement”.

18. *Learned counsel appearing for the respondents then argued that it cannot be assumed that the learned Single Judge did not know about these amendments when he passed the first impugned order dated 05.12.2017. We do not wish to enter upon this speculative arena. He then argued that since this judgment permitted him to file the written statement beyond 120 days, it was an act of the Court which should prejudice no man. This doctrine cannot be used when the res is not yet judicata. The 05.12.2017 order is res sub judice inasmuch as its correctness has been challenged before us.*

19. *Learned counsel for the respondents then strongly relied upon the inherent powers of the Court to state that, in any case, a procedural provision such as contained in the amendment, which may lead to unjust consequences can always, in the facts of a given case, be ignored where such unjust consequences follow, as in the facts of the present case. We are again of the view that this argument has also no legs to stand on, given the judgment of this Court in *Manohar Lal Chopra v. Rai Bahadur Rao Raja Seth Hiralal*, [1962] Suppl 1 SCR 450. In this judgment, the Court held:*

“The suit at Indore which had been instituted later, could be stayed in view of s.10 of the Code. The provisions of that section are clear, definite and mandatory. A Court in which a subsequent suit has been filed is prohibited from proceeding with the trial of that suit in certain specified circumstances. When there is a special provision in the Code of Civil Procedure for dealing with the contingencies of two such suits being instituted, recourse to the inherent powers under s.151 is not justified...”

20. *Clearly, the clear, definite and mandatory provisions of Order V read with Order VIII Rule 1 and 10 cannot be circumvented by recourse to the inherent power under Section 151 to do the opposite of what is stated therein.*

21. Clearly, therefore, the 05.12.2017 order which applies in the face of the amendments made to the Civil Procedure Code cannot be sustained. When we come to the second order dated 24.09.2019, the only reason for this order is that 05.12.2017 has attained finality.

22. Factually speaking, this is not correct as a Special Leave Petition from the said order has been filed. Even otherwise, this Court in *Canara Bank v. N.G. Subbaraya Setty* (supra) has held (page 3414):

“(ii) An issue of law which arises between the same parties in a subsequent suit or proceeding is not *res judicata* if, by an erroneous decision given on a statutory prohibition in the former suit or proceeding, the statutory prohibition is not given effect to. This is despite the fact that the matter in issue between the parties may be the same as that directly and substantially in issue in the previous suit or proceeding. This is for the reason that in such cases, the rights of the parties are not the only matter for consideration (as is the case of an erroneous interpretation of a statute inter parties), as the public policy contained in the statutory prohibition cannot be set at naught. This is for the same reason as that contained in matters which pertain to issues of law that raise jurisdictional questions. We have seen how, in *Natraj Studios, ((1981) 1 SCC 523 : AIR 1981 SC 537)* (supra), it is the public policy of the statutory prohibition contained in Section 28 of the Bombay Rent Act that has to be given effect to. Likewise, the public policy contained in other statutory prohibitions, which need not necessarily go to jurisdiction of a Court, must equally be given effect to, as otherwise special principles of law are fastened upon parties when special considerations relating to public policy mandate that this cannot be done.”

(Emphasis supplied)

is as to whether there is any provision under the Act, enabling the commercial Court after a transfer of the suit, to revert back to an earlier stage and then again come back to the stage at which the suit was transferred to the Commercial Court. He submits that, the various provisions reproduced above would indicate that, the commercial suits can be transferred to such Court from the regular Court at any stage, save and except such a suit, which is reserved for final judgment prior to the constitution of the Commercial Court or prior to the transfer of the suit to the Commercial Court. The Commercial Court would apply such procedures and would undertake those stages in the suit, which were not reached by the Trial Court before the transfer of such suit to the Commercial Court.

18 The answer to this issue would be found in the judgment delivered by this Court in a case of ***Reliance General Insurance*** supra. A similar issue was taken-up by the said Court for decision with the only difference, which is destructive to this case, being that in the reliance case, a no WS order was not passed and in the case in hand, such an order has been passed, before transfer.

19 Paragraph No.1, 3, 4, 8 to 11, 17 to 20 read as under:-

“ 1. The question of law being decided by this order is: whether the mandatory timeline of 120 days for filing a written statement in a Commercial Suit is applicable to suits which were filed prior to the enactment of the Commercial Courts Act, 2015 ("Commercial Courts Act") and have subsequently been 'transferred' as

Commercial Suits to be heard by a Commercial Division of this Court?

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3. *In the present Suit, being one such 'transferred suit', Defendant No. 1 has not to filed its written statement within the prescribed period of 120 days as mandated under the provisions of the CPC as amended by the Commercial Courts Act. The Apex Court, in its decision in M/s. SCG Contracts India Pvt. Ltd. Vs. K.S. Chamankar Infrastructure Pvt. Ltd. & Ors. [MANU/SC/0227/2019MANU/SC/0227/2019] and this Court, in its decision in Axis Bank Limited vs. Mira Gehani & Ors. [2019 SCC OnLine Bom 358] have held that in Commercial Suits, a written statement by the Defendant cannot be taken on record after the expiry of 120 days from the date of service of the Writ of Summons. However, neither of these two decisions have dealt with the question of law as has been framed in paragraph 1 above. Therefore, this Court, in its decision rendered in Axis Bank Limited vs. Mira Gehani & Ors. (cited supra) has clarified as follows:*

"114. It is clarified that in so far as the question of applicability of the Commercial Courts Act on Suits transferred from noncommercial Suits to Commercial Suits by the office of this Court is concerned (as has arisen in Commercial Suit No. 29 of 2013 and Commercial IP Suit No. 418 of 2016), a separate Order will be passed."

4. It is therefore clarified that the present Order is restricted only to answering the question of law recorded in paragraph no. 1 above. Necessary orders will therefore have to be passed on each application seeking condonation of delay at the time of hearing such applications on their own merits.

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8. *I have considered the aforesaid arguments canvassed by the Plaintiff and Defendants. I have also considered the various decisions of the Apex Court, this Court and the Delhi High Court as cited by them. However, prior to dealing with their respective arguments, it would be necessary even at the cost of repetition to once again set-out the subject provision viz. Section 15 of the Commercial Courts Act:*

"15. Transfer of pending cases.-

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10. *In view of the clear language of the said provision, I do not agree with the Plaintiff's argument that Section 15 (4) of the Commercial Courts Act would come into play only if Writ of Summons' are issued under Order V Rule 1. I do not see any such distinction carved out in Section 15 of the Commercial Courts Act. For the same reason, I also cannot accept the argument that even if the provision of Section 15 (4) of the Commercial Courts Act is to apply, it does not suspend the operation of the mandatory timeline of 120 days. I also do not find any merit in the argument that the proviso to Section 15 (4) does not exclude the proviso to Order VIII Rule 1 and therefore, the period of 120 days continues to apply. There can be no doubt, and even the Ld. Counsel for the Plaintiff did not argue otherwise, that the period of 120 days mentioned in Order V Rule 1 of the CPC is the same as mentioned in Order VIII Rule 1 of the CPC. Therefore, if the proviso to Section 15 (4) of the Commercial Courts Act excludes the time period as mentioned in Order V Rule 1 of the CPC, it for all purposes has excluded the applicability of the 120 days time period for filing written statements in respect of transferred suits. The interpretation contended by the Ld. Counsel for the Plaintiff, in my opinion, would render Section 15 (4) otiose. Had the*

legislature intended for the 120 days period to apply to transferred suits (by either referring to the proviso to Order V Rule 1 and/or the proviso to Order VIII Rule 1 and/or the proviso to Order VIII Rule 10) there would have been no requirement of carving out this very exception under Section 15 (4). Whilst I agree that the primary aim and object of the Commercial Courts Act is to provide for speedy disposal of high value commercial disputes in order to reduce the pendency of cases, if the submission of the Plaintiff is accepted, it would negate the very intent behind the legislature's introduction of Section 15 (4) of the Commercial Courts Act. In the event the Plaintiff's interpretation is accepted, it would render Section 15 (4) nugatory and otiose. In any event, the Plaintiff itself seems unsure as to whether the period of 120 days is to be calculated from the date of the constitution of this Commercial Division or from the 21st September, 2017 Order or from the date on which service of Writ of Summons was waived.

11. In my view, Section 15 (4) is a provision specifically introduced by the legislature in its wisdom whilst drafting the Commercial Courts Act. I am therefore, inclined to harmoniously construe Section 15 (4) of the Commercial Courts Act with the other provisions introduced by the Commercial Courts Act including the amendments introduced to Order V and Order VIII. Harmoniously construed, Section 15 (4) vests the Commercial Division/Commercial Court with the necessary jurisdiction to hold Case Management Hearings to prescribe new timelines or issue further directions including prescribing a new time period within which a written statement shall be filed.

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17. A close reading of the aforesaid decision reflects that whilst it is true that the Delhi High Court refused to take on record the

written statement by exercising any jurisdiction under Section 15 (4) of the Commercial Courts Act, I do not agree that the Delhi High Court has in fact held that a Court cannot, in any given case, exercise such jurisdiction whilst adjudicating upon a transferred suit. I am of the opinion that the Delhi High Court rendered its decision as aforesaid given the facts and circumstances of that particular case. The said decision cannot, in my view, lay down the law to suggest that this Court cannot hold Case Management Hearings in respect of transferred suits or applications in order to prescribe new timelines or issue such further directions as may be necessary including prescribing a new time period within which a written statement can be filed.

18. In so far as the decisions rendered in M/s. SCG Contracts India Pvt. Ltd. vs. K.S. Chamankar Infrastructure Pvt. Ltd. & Ors. (cited supra) and Axis Bank Limited vs. Mira Gehani & Ors. (cited supra) are concerned, as has been stated above, the said decisions have not considered the question of law being decided herein and therefore, any reliance thereon is misplaced.

19. In my view, Section 15 (4) and the proviso thereto applies squarely to suits which were filed prior to the enactment of the Commercial Courts Act but have been subsequently 'transferred' as Commercial Suits to be heard by a Commercial Division of this Court.

20. I therefore hold that the mandatory timeline of 120 days for filing a written statement in a Commercial Suit is not applicable to suits which were filed prior to the enactment of the Commercial Courts Act, 2015 and subsequently 'transferred' as Commercial Suits to be heard by a Commercial Division of this Court. I further hold that a Commercial Division or Commercial Court, as the case may be, may hold Case Management Hearings in respect of such transferred suits under the newly introduced Order XV-A of the CPC to prescribe new timelines or issue further directions

including prescribing a new time period within which a written statement shall be filed. The jurisdiction to exercise such discretion is expressly found in Section 15 (4) of the Commercial Courts Act and the proviso thereto.

Reliance General Insurance Company Ltd. vs. Colonial Life Insurance Company (Trinidad) Limited and Ors. (24.05.2019 - BOMHC) : MANU/MH/1125/2019. ”

20 Shri Sapkal, therefore, submits that, it has been specifically laid down in Reliance General Insurance Company Ltd. supra that, if a defendant is permitted to file a written statement, after transfer to a Commercial Court, at any time, it would virtually amount to entertaining a commercial suit as like a non-commercial suit. He points out from paragraph No.19 that, this Court concluded that, Section 15 (4) and the proviso thereto apply squarely to the suits, which were filed prior to the introduction of the commercial Courts and which have been subsequently transferred to the Commercial Courts.

21 I find from the conclusions drawn by this Court in Reliance General Insurance Company Ltd. supra that, it has been settled that, the mandatory time-line of 120 days for filing a written statement in a commercial suit would not be applicable to a suit, which is subsequently transferred to the Commercial Court. Though this observation would not apply to the case in hand, since the suit was transferred to the Commercial Court, after a no WS order was already passed and 71 days had lapsed, yet, I find that, clause (iv) introducing a proviso to Rule 10 under Order VIII, reproduced above, would mandate that, “ *provided further that no Court shall make an*

order to extend the time provided under Rule 1 of this Order for filing of the written statement. ”So also, clause (4) provided an amendment to the first Schedule to the Code.

22 Under Order V Rule 1 (1) a second proviso was introduced by which a defendant, who failed to file the written statement within the maximum period of 120 days from the date of service of summons, such defendant would forfeit the right to file the written statement and the Court shall not allow the written statement to be taken on record. Similarly, under the said Clause (iv) (D), a proviso was substituted to the existing proviso under Order VIII Rule 1, wherein, it is reiterated that, such defendant, who has not filed the written statement, within 120 days from the service of summons, would forfeit his right to file a written statement and the Court shall not allow a written statement to be taken on record.

23 On the one hand, the above referred provisions were not cited before this Court in the ***Reliance General*** case, which was decided on 24.5.2019. So also, on the other hand, the Honourable Apex Court holds in paragraph 20 in the SCG Contracts case *supra* that, the mandatory provisions of Order V read with Order VIII Rule 1 and 10 cannot be circumvented by recourse to the inherent powers under Section 151 to do the opposite of what is prescribed therein.

24 Unlike in ***Reliance General*** *Supra*, in the instant case, the petitioners had not even filed an application before the trial Court praying for setting aside the “no written statement” order, before the suit was

transferred. Had such an application been pending and then the suit was transferred to the Commercial Court, the said Court would have proceeded from the stage, at which it received the Suit by way of a transfer and since the application seeking recalling of “no WS” order would be pending, the Commercial Court could have passed an order deciding the fate of such application. Had this been the situation, the view taken by this Court in *Reliance General supra* would have been applicable and the Commercial Court could have then passed an order keeping in view the law laid down by the Honourable Apex Court in *SCG supra*.

25 In the instant case, the Commercial Court received the Suit by transfer at a stage when it was required to frame the issues and resort to time management hearings. In this backdrop, Section 15 (3) read with the second proviso introduced below Order VIII Rule 10 under the Schedule to the Commercial Court's Act would be applicable and this proviso was not cited before this Court in *Reliance General supra*.

26 The learned Judge, who decided *Reliance General* case *supra*, has dealt with the *Meera Gehani* case (*supra*), as well and has observed in paragraph 85 that, “*I am unable to agree with the submissions that, the provisions of order VIII rule 1 subsequent to its amendment by the Commercial Courts Act, are still discretionary, for the reasons set out herein above, I am of the considered opinion that the newly introduced provisions are indeed mandatory in nature and cannot be extended. In this respect, I am bound by the decision of the Apex Court in M/s SCG Contracts (supra).* ”

27 In paragraph No.86, it is held by the said Court that, *“However, I must clarify that order 8, rules 9 and 10 would continue to be discretionary powers in non commercial suits to condone the delay in filing of a belated written statement as the provisions introduced by the commercial Courts Act will not apply to non-commercial suits ”.*

28 The petitioner has relied upon this observations, which in my view is misplaced. As noted above, if the suit in which the petitioners are the defendants, had continued before the non-commercial court, the petitioners could have been rescued in the face of their failure to file a written statement. Even as long as the suit was before a non commercial Court, an application for setting aside no WS order, could have been entertained. Neither was such application filed, nor were the defendants within the 120 days prescribed by the commercial Courts Act. The stage, at which, this suit reached the commercial Court, would not vest jurisdiction in the Commercial Court, so as to enable the Commercial Court to set aside the 'no WS' order as if a non-commercial Court is dealing with a non-commercial Suit.

29 In Mira Gehani, in paragraph No.89, this Court has concluded that the Apex Court in catena of decisions has held that, considerations of equity cannot be ground/reason/justification not to follow the law, as is laid down by the legislature. In paragraph 91, this Court then concluded that, the aforesaid judgments merely indicate that, no matter, how harsh the result, if a statute stipulates that, an act must be performed within a

certain period of time, and provides for no exceptions, then the Courts must not allow such an act to be performed after the expiry of the time mandated by the statute directly or indirectly.

30 In paragraph 100, this Court held in Meera Gehani that, there may be instances wherein the plaintiff is ready and willing for a belated written statement to be taken on record subject to payment of costs. However, it is important to note that, parties cannot, by consent, vest the Court with discretion/jurisdiction/powers which it otherwise is barred from exercising under the statute. Jurisdiction can be vested only by the statute and not by the consent or acquiescence or waiver where none such jurisdiction is conferred and nor can such a jurisdiction be ousted in this way.

31 In the backdrop of the law, as is settled, if the contentions of the petitioners is accepted, that even if the suit has been transferred, after the “no WS” order is passed and when no application is pending, would not preclude the Commercial Court to set aside the “no WS” order and permit filing of the written statement, this would completely nullify the intent and object of the legislature in introducing the commercial Courts Act. The Commercial Court would then be bestowed with the status of a “non commercial Court”, which is impermissible in law.

32 In view of the above, this Petition, being devoid of merit, is therefore, dismissed.

33 On the issue of the fees to be offered to the learned amicus curie,

Shri Sapkal graciously submits that, he has assisted the Court considering the issue involved and he, therefore, prays that, no order on his fees be passed by this Court.

(RAVINDRA V. GHUGE, J)

vbd