

IN THE HIGH COURT OF BOMBAY AT GOA
WRIT PETITION NO.305 OF 2019

Vedanta Limited
A Company registered under
the Companies Act, 1956
and having its registered
office at 1st floor, C wing,
Unit 103, Corporate Avenue
Atul Projects, Chakala,
Andheri (East), Mumbai
400 093, Rep by POA
Nabul Kishore Sharma
AGM-Legal vide POA
dated 1.4.18
Also at: Bhurkahamunda
PO-Sripura Dist,
Jharsuguda – 768202.

... Petitioner
(Original Defendant)

V e r s u s

Global Energy Pvt. Ltd.,
A Company registered under
the Companies Act, 1956
and having its registered
office at 207, Gera Imperium,
II Patto Plaza, Panjim, Goa
403 001.

... Respondent
(Original Plaintiff)

Shri S. S. Kantak, Senior Advocate with Mr. Jonathan Delduque Costa, Mr. Preetam Talaulikar, Ms. Aleesha Reis Dos Falcao and Mr. Tarshish Leo Pereira, Advocates for the Petitioner.

Mr. Neelesh A. Takkekar, Advocate for the Respondent.

Coram :- C. V. BHADANG, J.
Reserved for Judgment on : 24th July, 2019
Judgment Pronounced on : 26th July, 2019.

JUDGMENT

1. Rule made returnable forthwith. The learned Counsel for the respondent, waives service. Heard finally by consent of parties.

2. The challenge in this petition is to the order dated 27.03.2018 and 15.01.2019 passed by the Commercial Court at Panaji in Special Civil Suit (Commercial) No.84 of 2017. By the order dated 27.03.2018, an application (exhibit -12) filed by the petitioner for time to file written statement has been dismissed while by the subsequent order dated 15.01.2019, an application, exhibit D-13, for recall of the earlier order dated 27.03.2018 has been dismissed. The net result is that the petitioner has been precluded from filing written statement in the suit.

3. The brief facts are that the respondent has filed the said suit against the petitioner for specific performance of an agreement dated 18.12.2013 and for damages, etc. That suit was filed before the learned Senior Civil Judge at Panaji, Goa, and was registered as Special Civil Suit No.28/2016/A. It may be mentioned that although The Commercial Courts Act, 2015 (Act of 2015, for short), had come into force on 23.10.2015,

the Commercial Courts were constituted at Panaji only on 03.11.2016. Thus, Special Civil Suit No.28/2016/A was filed on 25.07.2016 i.e. after the coming into force of the Act, however, prior to the constitution of the Commercial Courts.

4. Somewhere in June 2017, the aforesaid suit was transferred to the Commercial Court and was registered as Special Civil suit (Commercial) No.84 of 2017. Prior to its transfer, the petitioner before the Civil Court had sought time to file written statement on 22.02.2017, 05.04.2017 and 20.06.2017. According to the petitioner, the duly affirmed written statement of the petitioner was dispatched from the office of the petitioner at Jharsuguda (Orissa) on 18.07.2017. However, on 19.07.2017, the Advocate for the petitioner was informed that the suit has been transferred to the Commercial Court.

5. According to the petitioner, it was learnt that the Commercial Court had taken up the suit on 1st March 2018 and the Advocate for the petitioner appeared and sought time to file the written statement. Ultimately, on 27.03.2018, the application, exhibit D-12, came to be filed seeking ten days time to file the written statement along with appropriate

application for condonation of delay and for asking for grant of “final opportunity” in the interest of justice.

6. The application was opposed on behalf of the respondent, inter alia, on the ground that a maximum period of 120 days which can be granted as per the amended provisions of the Act has already expired and that the application was not supported with any affidavit and, therefore, it be dismissed.

7. The learned Trial Court passed the following order on 27.03.2018, below application Exhibit D-12 :

“The defendant had put in an appearance when the matter was pending before the Civil Court. The matter was transferred to this Court in June 2017, and as the defendant had not put in an appearance in this Court, fresh summons were issued. It is seen that even before the Civil Court no written statement was filed. Once the matter was transferred to this Court, a duty was cast on the defendant to appear in this Court and not wait for fresh summons. As such, no sufficient grounds have been made out for the delay in filing a W.S. Hence this application is dismissed.”

8. In application, exhibit D-13, filed on 26.04.2018, which was signed and affirmed by the Advocate, it was contended that the petitioner has acted diligently and it should not be prejudiced on account of developments in the interregnum, which were not within the control of the petitioner. It was contended that there was no order closing the right of the petitioner to file the written statement passed in Special Civil Suit No.28/2016/A (i.e. prior to the transfer of the suit to the Commercial Court). In the application, the petitioner tried to set out the circumstances which led to the petitioner being unable to file the written statement in the suit.

9. The application was opposed on behalf of the respondent, inter alia, on the ground that the application does not set out the provisions under which it is filed.

10. The learned Trial Court by the impugned Order dated 15.01.2019 has dismissed the application on the ground that there is no error arising from any accidental slip or omission and a clerical or arithmetical mistake while passing the order dated 27.03.2018. In that view of the matter, the Commercial Court dismissed the application, exhibit D-13.

11. I have heard Mr. S. S. Kantak, the learned Senior Counsel for the petitioner and Mr. Takkekar, the learned Counsel for the respondent. With the assistance of the learned Counsel for the parties, I have gone through the record.

12. It is submitted by Mr. Kantak, the learned Senior Counsel for the petitioner, that at the time when the suit was transferred to the Commercial Court, an application for time to file the written statement was pending before the Senior Civil Judge at Panaji and, therefore, the impugned order dated 27.03.2018 could not have been passed without taking the said application into consideration. It is contended that on 19.7.2017, the written statement of the petitioner was affirmed and was ready to be filed and thus the petitioner had no reason not to file the same and it was only on account of the transfer of the suit to the Commercial Court that the petitioner was prevented/precluded from filing the written statement on 19.07.2017. It is submitted that the Commercial Court was in error in holding that there was a duty cast on the petitioner to appear in the Commercial suit without waiting for a fresh notice. It is submitted that the Commercial Court failed to see that the defendant is required to respond to a suit only upon "receipt of writ of summons". It

is submitted that in the absence of any order foreclosing the right of the petitioner to file the written statement in the original suit prior to its transfer to the Commercial Court, the right of the petitioner to file the written statement continued. On behalf of the petitioner, reliance is placed on the decision of this Court in the case of **Reliance General Insurance Company Ltd. vs. Colonial Life Insurance Company (Trinidad) Limited & Ors., MANU/MH/1125/2019**. It is submitted that the mandatory timeline of 120 days for filing the written statement is not applicable to suits which are transferred to the Commercial Court under Section 15 of the Act of 2015 as would be evident from the fact that the proviso to sub-section (4) of Section 15 of the Act of 2015 enables the Commercial Court in its discretion to prescribe a new time period within which the written statement will be filed.

13. Mr. Takkekar, the learned Counsel for the respondent, has supported the impugned order. It is submitted that there is gross delay and laches on the part of the petitioner in filing the written statement both prior and after the transfer of the suit to the Commercial Court. It is submitted that on its own saying, the written statement was ready and affirmed on 18.07.2017 and thus nothing prevented the petitioner from filing the same before the Commercial Court immediately after

the transfer of the suit. It is submitted that the petitioner is taking undue advantage of the fact that in the interregnum the suit was transferred to the Commercial Court. It is submitted that the Commercial Court is justified in observing that the petitioner was not entitled to wait for a fresh notice. The learned Counsel has referred to the application, exhibit 12, in order to submit that it is filed in a casual manner without making out any case for extension of time. The learned Counsel has then referred to exhibit 13 in order to submit that the grounds which are tried to made out for such extension are not at all justified. The learned Counsel has placed reliance on sub-section (3) of Section 15 of the Act of 2015 in order to submit that after the transfer of the suit to the Commercial Court, the provisions of the Act of 2015 shall apply to "those procedures that were not completed at the time of transfer." He submits that the decision in the case of **Reliance General Insurance Company Ltd.** (supra) is distinguishable, inasmuch as the suit in that case was filed prior to the coming into force of the said Act of 2015 unlike in the present case, where the suit is filed after the Act of 2015 came into force. In the submission of the learned Counsel for the respondent, once the Act of 2015 had come into force, any suit which is otherwise triable by Commercial Court (although the Commercial Courts have not been constituted) would be

governed by the provisions of the Act of 2015. The learned Counsel has placed reliance on the decision of the Hon'ble Supreme Court in the case of **SCG Contracts India Pvt. Ltd. vs. K. S. Chamankar Infrastructure Pvt. Ltd. & Ors. MANU/SC/0227/2019** in order to submit that the period of 120 days is mandatory, after which the defendant forfeits his right to file the written statement.

14. Mr. Kantak, the learned Senior Counsel for the petitioner, in his rejoinder submitted that the provisions of the Act of 2015 cannot be made applicable to the ordinary Civil Court where the suit was initially filed.

15. I have given my anxious consideration to the rival circumstances and the submissions made.

16. The material facts in this case are matters of record. The petitioner appeared in the original suit on 22.02.2017 and sought time which was granted till 05.04.2017 on which date again time was sought and the suit was adjourned to 20.06.2017. On that day, there was yet another request for grant of time to file the written statement and the suit was adjourned for say of the respondent-plaintiff on the said application seeking time and it was adjourned to 19.07.2017.

A copy of the written statement placed on record in this petition shows that it is signed and sworn on 18.07.2017. According to the petitioner, it was dispatched from the head office of the petitioner from Jharsuguda, Orissa, and thus in the normal course of events the written statement could have been filed on 19.06.2017 by which time the Court of the Senior Civil Judge had not passed any order to proceed with the suit without the written statement of the petitioner. In fact, the application seeking time which was filed on 20.06.2017 was adjourned to 19.07.2017 for say of the respondent/plaintiff. The learned Trial Court has noticed that the suit was transferred to the Commercial Court somewhere in June 2017 and thus it appears probable that on 19.07.2017, the petitioner having informed about the said transfer was unable to file the written statement which was otherwise ready. According to the petitioner thereafter the Counsel of the petitioner at Mumbai were monitoring the further progress in the matter on the website of the District Court and it was learnt that the suit after transfer from the Commercial Court was fixed on 01.03.2018 when an Advocate appeared and sought time to file Wakalatnama and the written statement. According to the petitioner, this was not the same Advocate who had earlier appeared. In fact, in the original suit,

Advocate Jonathan Costa was appearing on behalf of the petitioner.

17. Be that as it may, from this point of time, there appears to be a certain amount of lapse on the part of the petitioner in not filing the written statement promptly which was otherwise ready on 18.07.2017. However, the record discloses that the Commercial Court in its discretion had issued a fresh summons which was served on the petitioner on 28.02.2018 and on the very next date, some other Advocate appeared in the suit on 01.03.2018 seeking time. On 27.03.2018, the application, exhibit 12, was filed again seeking time to file the written statement which was rejected by the Trial Court. One of the grounds made out in the application, exhibit 12, was that the winding up petition between the same parties was recently disposed off at the principal seat. The learned Counsel for the respondent pointed out that the winding up petition was disposed off much prior to the filing of the application, exhibit 12. I have already noticed that from the time when the petitioner put in appearance through some other Advocate in the suit on 01.03.2018, there is a certain amount of lapse on the part of the petitioner in not filing the written statement which was otherwise sworn on 18.07.2017. The question is whether in the circumstances the petitioner can be allowed to

file the written statement particularly in the context of the provisions of the Act of 2015 and if so, on what conditions?

18. There cannot be any manner of dispute with the proposition and as has been held by the Hon'ble Supreme Court in the case of **SCG Contracts India Pvt. Ltd.** (supra) that the period of 120 days is mandatory and on the expiry of the said period, the defendant forfeits his right to file the written statement. However, the decision in the case of **SCG Contracts India Pvt. Ltd.** (supra) will be distinguishable on facts, inasmuch as the suit in the said case was filed after the commencement of the Act and the constitution of the Commercial Courts. In other words, the suit in the first instance was itself filed before the Commercial Court unlike in the present case where the Civil Suit was filed before the ordinary Civil Court on 25.07.2016 as by that time, the Commercial Courts were not constituted and which were constituted only on 03.11.2016.

19. In the case of **Reliance General Insurance Company Ltd.** (supra), the question was whether the mandatory timeline of 120 days in filing a written statement in the Commercial suit is applicable to suits which were filed prior to the enactment of the Act of 2015 and which suit has

subsequently been transferred as a Commercial Suit. This Court found that the mandatory timeline of 120 days will not apply in such a case. The learned Counsel for the respondent has made an attempt to distinguish the decision in the case of **Reliance General Insurance Company Ltd.** (supra) on the ground that the suit in that case was filed prior to the commencement of the Act of 2015 unlike in the present case where the suit was filed subsequent to the commencement of the Act of 2015.

20. In my considered view, this will not be decisive of the matter in view of the specific phraseology used in Section 15(2) of the Act of 2015 which to the extent relevant, reads thus :

"15. Transfer of pending cases.- (1) ...

(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 and 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 timelines or issued such further directions as may be necessary for a speedy and efficacious disposal of such suit or application in accordance [with Order XV-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.”

It can thus be seen that sub-section (2) of Section 15 contemplates transfer of the pending suits or applications on

the constitution of the Commercial Court. This is obvious on account of the fact that merely because the Act of 2015 has come into force, a party would not be in a position to file a suit before the Commercial Court unless and until the Commercial Courts are constituted. It can thus be seen that the transfer envisaged under Section 15 of the Act is a transfer after the constitution of the Commercial Court or a Commercial division as the case may be. It is not possible to accept that where the suit which is otherwise triable before the Commercial Court is pending before an ordinary Civil Court (prior to its transfer to the Civil Court) would also be governed by the provisions of the Act of 2015.

21. It would now be necessary to make a reference to the proviso to sub-section (4) of Section 15 of the Act of 2015 which in no uncertain terms states that the proviso to sub-rule (1) of Rule 1 of Order V of Civil Procedure Code, shall not apply to a transferred suit and the Court in such a case of a transferred suit may in its discretion prescribe a new timeline within which the written statement would be filed.

22. The proviso to sub-section (4) of Section 15 of the Act of 2015, is an enabling provision which empowers the Court to prescribe a new time period in which the written statement

would be filed in a suit which is transferred either under Section 15(1) or 15(2) of the Act of 2015. It would be significant to note that the proviso to sub-rule (1) of Rule 1 of Order V of CPC will apply with all its rigour to a suit which is filed before the Commercial Court and in such a case, the law provides a drastic and serious consequence of the defendant failing to file the written statement within a period of 120 days from the service of summons.

The proviso to sub-Section (4) of Section 15 of the Act of 2015, makes an attempt to balance the conflicting considerations of the expeditious disposal of a commercial suit and the interest of the defendant in a suit which prior to its transfer was not governed by the rigours of sub-rule (1) of Rule 1 of Order V of CPC. This balancing Act is by enabling the Court in an appropriate case to prescribe a new time period within which the written statement can be allowed to be filed in a suit which is transferred under Section 15(1) or 15(2) of the Act of 2015.

23. The reliance placed by the learned Counsel for the respondent on sub-rule (3) of Section 15 of the Act of 2015, in my considered view, is misplaced. All that sub-section (3) of Section 15 of the Act of 2015 says is that after the transfer of

the suit, the provisions of the Act of 2015 shall apply to “those procedures that were not complete at the time of transfer.”

24. In my considered view, sub-section (3) of Section 15 of the Act of 2015 has to be read along with sub-section (4) and the proviso appended thereto. Sub-Section (3) of Section 15 of the Act of 2015 cannot be read in isolation. Although sub-section (3) of Section 15 of the Act of 2015 speaks of “those procedures that were not complete”, the proviso to sub-section (4) of Section 15 of the Act of 2015 specifically refers to the time period within which the written statement can be allowed to be filed.

25. Coming back to the present case, the Commercial Court in its discretion had issued a fresh summons which was served on the petitioner on 28.02.2018 and the application, exhibit D-12, was filed within a month thereof. Even by the time the application, exhibit 13, was filed, on 26.04.2018, the period of 120 days had not lapsed. Considering the overall circumstances, in my view, the petitioner ought to have been allowed to place the written statement on record albeit subject to costs.

26. In the result, the petition is allowed. The impugned order dated 27.03.2018, (below exhibit – 12) and 15.01.2019 (below exhibit – 13) are hereby set aside. The Trial Court shall accept the written statements filed by the petitioner on record subject to the petitioner depositing costs of Rs.50,000/- payable to the respondent within two weeks from today. The deposit/payment of costs is condition precedent for accepting the written statement.

27. Rule is made absolute in the aforesaid terms with no order as to costs.

C. V. BHADANG, J.

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