

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

**INTERIM APPLICATION NO. 1 OF 2019
IN
COMMERCIAL IP SUIT NO. 1112 OF 2018**

Flipkart India Pvt.Ltd.	...Applicant/Defendant No.1
in	
Metro Shoes Ltd	...Plaintiff
vs.	
Flipkart India Pvt.Ltd & Anr.	...Defendants

**AND
INTERIM APPLICATION NO. 2 OF 2019
IN
COMMERCIAL IP SUIT NO. 1112 OF 2018**

Tech-Connect Retail Pvt.Ltd.	...Applicant/Defendant No.2
in	
Metro Shoes Ltd	...Plaintiff
vs.	
Flipkart India Pvt.Ltd & Anr.	...Defendants

Mr.Amit Jamsandekar with Mr.Jay Vora and Mr.Vignesh Kamat i/b.
Mr.Piyush N. Shah for Plaintiff.

Mr.Venkatesh Dhond, Senior Advocate with Mr.Rohan Kadam, Mr.Sanjay Kadam, Ms.Apeksha Sharma and Ms.Sanjeel Kadam i/b. Kadam & Co. for Defendant No.1/Applicant in IA 1/2019.

Mr.Ashish Kamat with Mr.Shrinivas Bobde, Mr.Mohanish Chaudhari and Ms.Sayalee Rajpurkar i/b. Mr.Mohanish Chaudhari for Defendant No.2/Applicant in IA 2/2019.

CORAM : S.C. GUPTE, J.

DATE : 26 MAY 2020

JUDGMENT :

These Interim Applications, taken out in a Commercial Suit by original Defendants, seek condonation of delay of 410 days in filing of written statements. Alternatively, they apply for leave to treat the affidavits in reply filed earlier by the Defendants in a notice of motion taken out in the suit (Notice of Motion No.2430 of 2018) as written statements of the Defendants.

2 The suit has been filed as a commercial IP suit for preventing acts of infringement, passing off and unfair trade practice. The Plaintiff is a registered proprietor of various trademarks having the word “METRO” as their intrinsic part (“METRO marks”). The Plaintiff *inter alia* seeks a perpetual injunction restraining the Defendants from using the METRO marks or marks deceptively similar to them or having the word ‘METRO’ as their part. The writ of summons was duly served on the Defendants in October 2018. The Applicant/Defendants’ case in these applications is that though their written statements were ready, the same could not be filed due to drastic and far-reaching policy changes of the Union Government which had an overarching effect on the Defendants’ business strategy and activities and since their whole legal team was pre-occupied with this development. The Defendants claim that they were, in any event, contesting the Plaintiff’s application for temporary injunction (Notice of Motion No.2430 of 2018) in terms of the perpetual injunction sought in the commercial suit *inter alia* by filing affidavits in reply. It is submitted that, in the premises, either this Court may take their written statements on record by condoning the delay or allow them to treat their replies to the motion as their respective written statements.

3 After the Supreme Court judgment in **SCG Contracts India Pvt.Ltd. vs. K.S. Chamankar Infrastructure Pvt.Ltd.**¹, the argument that delay in filing written statement, for good reasons, can be condoned, is no more available to a defendant. The Supreme Court, in that case, construed the three crucial amendments to the Code of Civil Procedure brought in its wake by the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015 (“Commercial Courts Act”), namely, (i) substitution of the second proviso to sub-rule (1) of Rule 1 of Order V, (ii) addition of a new proviso in Rule 1 of Order VIII and (iii) insertion of a proviso in Rule 10 of Order VIII. The effect of these amendments, as explained by the Supreme Court, is that ordinarily a written statement is required to be filed within 30 days of service of writ of summons; a grace period of a further 90 days may, however, be allowed by the court for reasons to be recorded in writing and for costs as may be deemed fit; after expiry of this aggregate period of 120 days, the defendant forfeits his right to file a written statement; and no court can allow such written statement to be taken on record. No court, in other words, has power to extend the time for filing of a written statement beyond 120 days in all. The Supreme Court, in clearest of words, emphasized this by stating that these clear, definite and mandatory provisions cannot be circumvented by recourse to inherent powers under Section 151 of the Code of Civil Procedure. The first prayer of the Applicant/Defendants for taking their written statement on record by condoning the admitted delay of 410 days, thus, deserves to be rejected outright.

4 That brings us to the alternative prayer for allowing the

1 2019 SCC OnLine SC 226

Defendants to treat their replies to the interim application of the Plaintiff (Notice of Motion No.2430 of 2018) as their written statements. Mr.Dhond, learned Senior Counsel for Applicant/Defendant No.1, and Mr.Kamat, learned Counsel for Applicant/Defendant No.2, submit that their clients have extensively dealt with the Plaintiff's case in the plaint in their replies to the notice of motion. Learned Counsel submit that after all, though matters of form (for a written statement) may have been separately prescribed in the Code, in substance, the idea of a written statement is to enter into a contest, disclose the defence, and invite the court to adjudicate upon the dispute. Learned Counsel submit that there can be no objection in principle to allow a defendant to treat his reply to the plaintiff's interlocutory application as the former's written statement. Learned Counsel submit that courts have done so earlier. Learned Counsel rely on judgments of this Court in **Kuldeep Umraosingh Ostwal vs. Chandrakant N. Patel**² and **B. Jayantilal vs. Municipal Corporation of Greater Bombay**³ in support of their case.

5 There can indeed be no objection, at least on principle, to allow a party to treat its reply filed earlier in any miscellaneous proceeding in the suit as its written statement. And there is also authority for the proposition. In **Kuldeep Umraosingh Ostwal** (supra), our Court has done so. It was, however, not in dispute in that case that the reply (to the application for temporary injunction) was filed well within 90 days from the date of service of writ of summons; and it was in the form of a pleading, which was duly verified in accordance with Rule 15 of Order VI of the Code. The court noted the practice consistently followed in civil courts in various districts of our State of filing of exhaustive replies to

2 2010(2) Mh.L.J.689

3 MANU/MH/1770/2011

applications for temporary injunction, which themselves, when filed with the plaint, were usually a replica of the plaint or a mere adoption of the statements in the plaint, and later, adopting such replies as written statements by filing of a pursis to that effect. Even in **B. Jayantilal** (supra), the same learned Single Judge has held that there was no prohibition against adopting an affidavit in reply to a notice of motion as a written statement. It may, thus, be held, even on authority, that it is perfectly legitimate for a party to apply to the court, and for the court to permit the party, to treat a reply to a miscellaneous proceeding in the suit as a written statement. The question, however, is, whether, in the face of the Commercial Courts Act and its clear, definite and mandatory provisions, as noted above, this can be done after expiry of the statutory period of 120 days. Mr.Dhond and Mr.Kamat would submit that it could well be done so long as the reply itself was filed within this statutory period. Learned Counsel reply on the judgment of **Kuldeep Umraosingh Ostwal** (supra) in support.

6 No doubt, in **Kuldeep Umraosingh Ostwal**, our Court did say so. It did allow the reply to be treated as a written statement on the ground that the reply itself was filed within the applicable period of 90 days, though the pursis was filed after expiry of that period. But then, the applicable law then was the unamended provisions of Order 8 Rules 1 and 10. The Civil Procedure Code, as it then stood, did not have the amended provisions of (i) second proviso to Order V Rule 1(1), (ii) new proviso to Order VIII Rule 1 and (iii) new proviso to Order VIII Rule 10, so far as these relate to commercial suits. Our court, as indeed several other High Courts in India, had held the unamended provisions of Order VIII Rules 1 and 10 as not mandatory. In exceptional and extraordinary circumstances,

the Courts were held to have a discretion to permit the defendant to file a written statement beyond the period of 90 days. (See the judgment of **Chintaman Sukhdeo Kaklij vs. Shivaji Bhausahab Gadhe**⁴.) The learned Judge, who decided **Kuldeep Umraosingh Ostwal**, himself observed that whether or not it was necessary to explain the delay in filing the pursis would depend on the facts and circumstances of each case. In a given case, as the learned Judge noted, if a defendant chose to file such pursis after commencement of recording of evidence, an explanation for such delay would have to be given; the court might not mechanically accept a pursis filed belatedly; it would reject such pursis if it was not found to be bona fide.

7 I am afraid, these observations have no application in a commercial suit, where the defendant seeks to file a pursis or an application beyond the statutory period of 120 days available for filing of a written statement for treating any affidavit filed earlier as his written statement. As we have noted above, under the Commercial Courts Act, failure to file a written statement within this statutory period would have a salutary effect of the defendant forfeiting his right to file a written statement, there being no power in the court to allow him to do so. In the present case, for instance, at the expiry of 120 days from the service of writ of summons, the Defendants have already forfeited, as a matter of law, their right to file a written statement. Is that forfeiture to be now nullified or their right to file a written statement revived after, at their own sweet will, they, at a later date chosen by them, apply for treating their reply to the interim application as their written statement? What about the accrued right of the Plaintiff to proceed with the suit without a written statement?

4 2004(4) Mh.L.J.739

8 There is no answer to these extremely pertinent questions. The accrued right of the Plaintiff, after all, is a substantive right and not just a procedural right. As the Supreme Court has held in **Bharat Barrel and Drum Mfg.Co.Ltd. vs. The Employees State Insurance Corporation**⁵, the object of every statute or provision of limitation, amended Order V Rule 1 and Order VIII Rules 1 and 10 undoubtedly being such statutes or provisions so far as a written statement in a commercial suit is concerned, is to compel a person to exercise his right (or defence) of action within a specified time and where such statute or provision extinguishes any right (and the above provisions unquestionably do so), it affects substantive rights; it cannot be treated merely as a matter of procedure.

9 Even otherwise, on a purposive interpretation of Order V Rule 1 and Order VIII Rules 1 and 10, it is clear that there is no scope for allowing a pursis or praecipe or application to be filed after expiry of the statutory period of 120 days for treating an affidavit or pleading filed earlier in the course of a commercial suit as a written statement. The amended provisions are designed to introduce a statutory prohibition for filing of a written statement beyond the prescribed period, so that trials of commercial suits are not delayed. Strict timelines are even otherwise provided at every important stage of the trial, so that commercial disputes are expeditiously disposed of in the interest of commerce and industry. In this scheme of things, it would be an anomaly to allow a written statement to be introduced at any time in the trial by defeating the statutory prohibition.

5 1971(2) SCC 860

10 There is, thus, no merit in the Interim Applications. Interim Application Nos.1 of 2019 and 2 of 2019 are, accordingly, dismissed. Costs to be costs in the cause.

(S.C. GUPTE, J.)

Sanskruti
A. Thakur

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