

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

**NOTICE OF MOTION NO. 1910 OF 2019
IN
COMMERCIAL SUIT NO. 39 OF 2012**

- | | | | |
|----|--|---|---------------------------------------|
| 1. | One Square Investments Limited
(Formerly known as Capri UK Investments Ltd.)
Having registered office address at 1 Battersea Square, London SW11, 3RZ, United Kingdom |] | |
| 2. | Mr. Narinder Dhandsa
Residing at D102, Montevetro, 100 Battersea, Church Road, Battersea, London SW-11 3 YL United Kingdom. |] | |
| 3. | Mr. Rajindar Dhandsa
Residing at E 132, Montevetro, 100 Battersea Church Road, Battersea, London SW11 3 YL United Kingdom |] | |
| 4. | Mr. Surinder Dhandsa
Residing at A 55, Albion Riverside, Hester Road, Battersea, London SW11 4YL, United Kingdom |] | |
| 5. | Mr. John Caird
Having his place of work at 1 Battersea Square, London SW11 3 YL, United Kingdom |] | Applicants/
Original
Defendants |

IN THE MATTER BETWEEN :

- | | | | |
|----|--|---|--|
| 1. | Remedial Resolutions Advisors Private Limited
(Formerly known as Stressed Asset Management Advisors and Settlement Company Pvt. Ltd.)
Having its registered office at A-47, Lower Ground Floor, Hauz khas, New Delhi, 110016. |] | |
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|----|--|---|------------|
| 2. | Remedial Capital LLC, |] | |
| | Having registered office at “Corporation |] | |
| | Service Company” 2711 Centerville Road, |] | |
| | Suite 400, New Wilmington , DE 19808, |] | |
| | USA. |] | |
| | |] | |
| 3. | Mr.Deepak Kulkarni, |] | |
| | Having his place of business at 55, Temple |] | |
| | Place, 2 nd Floor, Boston MA 02111, USA |] | |
| | Versus |] | |
| 1. | Capri UK Investments Limited |] | |
| | Having registered office address at 1 |] | |
| | Battersea Square, London SW11, 3RZ, United |] | |
| | Kingdom |] | |
| | |] | |
| 2. | Mr. Narinder Dhandsa |] | |
| | Residing at D102, Montevetro, 100 Battersea, |] | |
| | Church Road, Battersea, London SW-11 3 YL |] | |
| | United Kingdom. |] | |
| | |] | |
| 3. | Mr.Rajindar Dhandsa |] | |
| | Residing at E 132, Montevtro, 100 Battersea |] | |
| | Church Road, Battersea, London SW11 3 YL |] | |
| | United Kingdom |] | |
| | |] | |
| 4. | Mr.Surinder Dhandsa |] | |
| | Residing at A 55, Albion Riverside, Hester |] | |
| | Road, |] | |
| | Battersea, London SW11 4YL, United |] | |
| | Kingdom |] | |
| | |] | |
| 5. | Mr.John Caird |] | |
| | Having his place of work at 1 Battersea |] | |
| | Square, |] | |
| | London SW11 3 YL, United Kingdom |] | |
| | |] | Defendants |

Mr. Virag Tulzapurkar, Senior Advocate, a/w Mr. Sameer Pandit, Ms. Sarrah Khambati, i/b. Wadia Ghandy & Co., for plaintiffs.

Mr. Janak Dwarkadas, Senior Advocate, a/w Mr. Sharan Jagtiani, Senior Advocate, Ms.Tammana Naik, Mr Abhineet Sharma, i/b.

Voxlaw Advocates And Solicitors, for applicants/original defendants.

CORAM: N. J. JAMADAR, J.
RESERVED ON : 12th DECEMBER 2019
PRONOUNCED ON : 6th MARCH 2020

JUDGMENT :

1. This notice of motion is taken out by the defendants seeking, *inter-alia*, condonation of delay of 286 days in filing the present application to recall and set aside the ex-parte decree passed by this Court on 29th August 2018, recall and set aside the aforesaid decree, set aside the order dated 21st March 2017 passed by the Prothonotary and Senior Master transferring the commercial suit to the list of undefended suits and also to grant four weeks time to the applicants/defendants to file written statement and contest the suit.

2. This notice of motion arises in the backdrop of the following facts :

(a) The respondents-plaintiffs had instituted the suit principally to compel the defendants to perform the obligation under the Commitment Agreement. In sum and substance, the case of the plaintiffs was that the plaintiff No.1 is a Private Limited Company incorporated under the provisions of the Companies

Act, 1956. The plaintiff No.2 is a company incorporated under the laws of the State of Delaware, USA. The plaintiff No.3 is Promoter Director of the plaintiff No.2 and the Director and Executive Chairman of plaintiff No.1. The defendant No.1 is an investment company incorporated in England. The defendant No.2, though a former Director, is in control of defendant No.1. The defendant Nos.3 and 4 are the investors nominated by defendant No.1, whereas defendant No.5 is a Director of defendant No.1.

(b) The defendant No.1 acting through defendant No.5, had executed a Commitment Agreement, dated 23rd December 2009 in favour of plaintiff No.2 whereunder, the defendant No.1 had agreed to invest a sum of US\$ 10 million (equivalent to Rs.55,58,00,000/-) in the business of plaintiff No.1-company to fund the acquisition of the portfolios of non-performing assets from financial institutions, to be warehoused with a non-banking finance company

under the name and style of *Shaha Finlease Private Limited*. In part performance of the Commitment Agreement, the defendants invested a sum of US\$ 3.7 million in plaintiff No.1-Company on 9th February 2010. Thereafter, the defendants in utter disregard to the Commitment Agreement, sought to unilaterally vary the key terms of the agreement.

(c) The defendants refused to advance any further funds until the defendant No.1's nominee was allotted 50% shares of the plaintiff No.1-company, in complete variance with the terms of the agreement. The defendants continued to raise unjust and unlawful demands for infusing further funds contrary to the Commitment Agreement. Ultimately, vide communication dated 29th November 2010, the plaintiffs called upon the defendants to invest the balance sum of US\$ 6.1 million in discharge of their obligation under the Commitment Agreement. The defendants, however, failed to remit the due amount to the plaintiff No.1-company. The breach on the part

of the defendants to perform their obligation under the Commitment Agreement had a cascading effect on the plaintiff No.1. It failed to acquire HSBC Portfolio. Resultantly, the plaintiffs suffered substantial loss including loss of profit and equity to the tune of approximately US\$ 242.02 million.

(d) Hence, the plaintiffs were constrained to institute the suit, *inter-alia*, for the following reliefs :-

(a) this Hon'ble Court be pleased to declare that the Commitment Agreement (Exhibit E hereto) constitutes a valid, binding and enforceable contract between the plaintiffs and defendants and the defendants are bound and liable to discharge their obligations thereunder;

(b) this Hon'ble Court be pleased to order and direct the Defendants to perform their outstanding obligations under the Commitment Agreement and pay to plaintiff No.1 company a sum of US\$ 6.1 million [equivalent to Rs.33,90,38,000/-] as subscription amount for 130,318 fully and compulsorily convertible debentures in plaintiff No.1 company to be allotted to defendant No.1's nominee(s) upon payment of the above-mentioned amount.

(c) this Hon'ble Court be pleased and direct the defendants to pay to plaintiff No.1 company a sum of Rs.9,69,75,79,242.61 [Rupees Nine hundred sixty nine crores seventy five lakhs seventy nine thousand two hundred and forty two and paise sixty one only] as compensation for losses suffered by plaintiff No.1 company on account of the defendants' failure to invest the

amount of US\$ 6.1 million [equivalent to Rs.33,90,38,000/-] in accordance with the Commitment Agreement.

(d) In the alternative to prayers (b) and (c) above, this Hon'ble Court be pleased to order and direct the defendants to pay to plaintiff No.1 company a sum of Rs.13,54,92,73,242.61 (Rupees one thousand three hundred fifty four crores ninety two lakhs seventy three thousand two hundred forty two only and paise sixty one only) as damages for losses suffered by plaintiff No.1 company on account of the defendants' breach of the Commitment Agreement.

....

(g) for costs."

(e) The plaintiffs took out a notice of motion (Lodg.) No.2401 of 2012 for ad-interim reliefs. By an order dated 22nd August 2012, this Court restrained the defendant Nos.2, 3 and 4 from operating accounts at Sr.Nos.4, 5 and 6 at Exhibit 'QQ' to the plaint. The defendants entered appearance through M/s.Dhruve Liladhar and Company, Advocates. Eventually, by an order dated 14th March 2014, the notice of motion came to be dismissed.

(f) The suit was placed for directions before the Prothonotary and Senior Master on 20th February 2017. The Prothonotary and Senior Master noted

that the suit pertained to a commercial dispute of the specified value and thus directed the office to convert the suit as a commercial suit. The defendants were directed to file written statement on or before 21st March 2017, failing which the suit would be transferred to the list of undefended suits. By a subsequent order dated 21st March 2017, noting that the defendants failed to file the written statement, within the stipulated period, the suit came to be transferred to the list of undefended suits.

(g) On 13th December 2017, an affidavit in lieu of examination in chief of Mr. Deepak Shivrao Kulkarni (PW-1) came to be tendered. The Court recorded the further evidence of Deepak Shivrao Kulkarni (PW-1). Thereafter, the suit was listed before the Court on multiple occasions. Ultimately by the order dated 29th August 2018, this Court, after noting that the defendants had not filed written statement despite appearance and the affidavit of evidence was filed in

support of the claim, which the plaintiffs restricted to prayer clauses (a) and (b), was persuaded to decree the suit in terms of prayer clauses (a), (b) and (g), extracted above.

3. The defendants have thus taken out this notice of motion purportedly under the provisions of Order IX Rule 13 read with section 151 of the Code of Civil Procedure, 1908 ('the Code'). The defendants claimed that they were unaware of the listing of the suit before the Prothonotary and Senior Master and the Court, on various dates, and passing of the ex-parte decree. The defendants learnt about the decree when the plaintiffs Advocates 'Bird and Bird' addressed a communication on 2nd July 2019 in the form of an 'Execution Letter' along with a copy of the order dated 29th August 2018. Thereupon, the defendants claimed to have gathered the requisite information.

4. The defendants assert that the decree deserves to be set aside as it has been passed in breach of mandatory procedural rules. Firstly, as the suit came to be converted into a commercial suit in accordance with the provisions contained in section 15(4) of the Commercial Courts Act, 2015 ('the Commercial Courts Act'), the Prothonotary and Senior Master could not have passed the direction for filing the

written statement and the consequent order to transmit the suit to the list of undefended suits. This order dated 21st March 2017 passed by the Prothonotary and Senior Master was without jurisdiction and vitiated subsequent proceedings taken out in the suit including the decree, which is sought to be set aside and recalled. Secondly, the Court could not have passed a decree without adhering to the prescription contained under Rule 90 of the High Court (Original Side) Rules, 1980 ('Original Side Rules'), which empowers the Court to pass a judgment for want of written statement only when an application to that effect is made by a notice of motion; the service of which is proved by an affidavit. Since the plaintiffs have not taken out the notice of motion, there was a serious defect in procedure. Lastly, the defendants contend that the defendants were otherwise also prevented by a sufficient cause from appearing before the Court as they were totally unaware of the suit being listed before the Prothonotary and Senior Master and the Court.

5. The defendants claim that the various proceedings, to which they were parties, were being looked after by a number of advocates. Thus, the defendants had decided to entrust all the matters in various courts and tribunals, to which the defendants were parties, to one

advocate. The defendants had, therefore, instructed M/s.Dhruve Liladhar and Company, Advocates to return the papers and proceedings of this suit. M/s.Dhruve Liladhar and Company had returned all those matters, pertaining to the defendants in which they were briefed, in the month of June 2016. Thus, M/s. Dhruve Liladhar and Company stopped attending to the proceedings of the defendants. However, the defendants failed to entrust the papers and proceedings of the instant suit to the new advocate. Resultantly, none could appear for the defendants before the Court. This, being an inadvertent and bonafide lapse on the part of the defendants, constitutes a sufficient cause for setting aside the ex-parte decree, assert the defendants. Thus, this notice of motion for the aforesaid reliefs.

6. The plaintiffs have resisted the prayers in the notice of motion by filing an affidavit in reply. The plaintiffs averred that the defendants are guilty of suppression of material facts which disentitles them from seeking any relief. It is asserted that the application is misconceived as the decree cannot be said to be passed ex-parte. The defendants did appear in the suit but failed to file the written statement. The judgment was thus passed on account of the failure of the defendants to file the written statement under the provisions of

Order VIII Rule 10 of the Code, and such a decree cannot be set aside by resorting to the provisions contained in Order IX Rule 13 of the Code. The notice of motion is stated to be hopelessly barred by limitation. It is indubitable that the defendants were served and entered appearance in the suit. No case of non-service of the summons can possibly be urged by the defendants. The defendants have not ascribed any cause much less sufficient for not taking out the notice of motion within the stipulated period of limitation and thus, on this count also, the notice of motion deserves to be dismissed.

7. The reasons sought to be assigned by the defendants of change in the Advocates and the consequent non-appearance before the Court are stated to be unworthy of credence. The plaintiffs averred that the defendants had full knowledge of the proceedings in the suit and had consciously chosen to abandon the contest. The defendants were, in any event, grossly negligent, dishonest and indifferent towards the process of the Court and there was lack of diligence on the part of the defendants. No sufficient cause or any other justifiable ground is made out to set aside the decree and permit the defendants to contest the suit by filing the written statement. On these, amongst other

grounds, the plaintiffs have resisted the prayers.

8. An affidavit in rejoinder is filed on behalf of the defendants to deal with the assertions of the plaintiffs on facts and law as well.

9. In the backdrop of the aforesaid pleadings, I have heard Mr. Janak Dwarkadas, the learned Senior Counsel for the applicants/original defendants and Mr. Virag Tulzapurkar, the learned Senior Counsel for the plaintiffs at a considerable length.

10. Mr. Dwarkadas, the learned Senior Counsel advanced a three-pronged submission. Firstly, that the decree is required to be set aside on the ground of defect in procedure. The non-compliance of the requirements of taking out notice of motion as envisaged by Rule 90 of the Original Side Rules which, according to Mr. Dwarkadas is peremptory, the decree becomes legally unsustainable. Secondly, with the enactment of the Commercial Courts Act and the indisputable position that the suit was governed by the provisions therein, the direction for filing written statement by the Prothonotary and Senior Master, and transferring the suit to the list of undefended suits was equally infirm, urged Mr. Dwarkadas. Thirdly, laying emphasis upon the nature of the suit and the order passed by this Court in notice of

motion (Lodg.) No.2401 of 2012, wherein it was categorically recorded that the plaintiffs had failed to make out a *prima-facie* case, Mr. Dwarkadas would urge that the cause of non-appearance on the date of hearing before the Court, cannot be said to be unreasonable or malafide. At any rate, according to Mr.Dwarkadas, the non-appearance was not deliberate and intentional. In view of the settled legal position that the term ‘sufficient cause’ ought to receive liberal construction, on facts as well the defendants can be said to have made out a case for setting aside the decree.

11. Mr.Tulzapurkar endeavoured to demonstrate that the application for setting aside the decree purportedly under Order IX Rule 13 of the Code is not at all tenable. It was urged with tenacity that the defendants are under an incorrect impression that the decree was passed ex-parte. It does not matter that this Court has also observed in the order dated 29th August 2018 that the suit is taken up for ex-parte decree since the defendants had appeared in the suit and failed to file the written statement and judgment was passed by invoking the provisions contained in Order VIII Rule 10. In such a scenario, the recourse to the provisions contained in Order IX Rule 19 is legally impermissible. Mr.Tulzapurkar further urged that the ground of non-

conformity with Rule 90 of the Original Side Rules is also of no avail to the defendants. Mr. Tulzapurkar stoutly submitted that the general proposition that the term ‘sufficient cause’ ought to receive liberal construction, cannot be stretched to a situation where no cause worth the name is assigned. It is incumbent upon the party seeking to set aside the decree to satisfy the court that he was prevented by a cause beyond his control from appearing before the Court.

12. To bolster up the submission that an application under Order IX Rule 13 is not tenable where a decree is passed under Order VIII, Rule 10, the learned Senior Counsel placed a strong reliance upon a Division Bench judgment of this Court in the case ***Dhanwantraï R. Joshi & Ors. Vs. Satish J. Dave & Ors.***¹. In the said case, after advertng to the provisions contained in Order VIII and Order IX of the Code and the previous pronouncements, this Court held that Order VIII Rule 5 or Rule 10 and Order IX operate in different fields. Thus, an application under Order IX Rule 13 is not maintainable when the Court has passed a decree under Order VIII Rule 5 or Rule 10 of the Code. There is no provision in Order VIII for setting aside a decree passed under Rule 5 or Rule 10 thereof for non-filing of written statement. The only remedy in such cases is to file an appeal against

1 1998(3) Mh.L.J. 924

the said decree.

13. Mr.Tulzapurkar would urge that the defendants instead of challenging the instant decree have filed this notice of motion on purpose. If the defendants challenge the decree by preferring an appeal, the execution and operation of the decree would not be stayed unless the defendants deposit the decretal amount or part thereof, as may be directed by the appellate court. To avoid the said payment, the defendants have approached this Court by taking out an unsustainable notice of motion, canvassed Mr.Tulzapurkar.

14. To buttress the submission that an ex-parte decree cannot be set aside without the defendants making out a sufficient cause, the learned Senior Counsel placed a strong reliance on a judgment of the Supreme Court of *Parimal Vs. Veena alias Bharti* ², wherein the Supreme Court expounded the import of the term ‘sufficient cause’ in the context of the provisions contained in Order IX Rule 13. Special emphasis was laid on the observations in paragraphs 13 to 16, which read as under :

"13 Sufficient Cause" is an expression which has been used in large number of Statutes. The meaning of the word "sufficient" is "adequate" or "enough", in as much as may be necessary to answer the purpose

2 (2011) 3 SCC 545

intended. Therefore, word "sufficient" embraces no more than that which provides a platitude which when the act done suffices to accomplish the purpose intended in the facts and circumstances existing in a case and duly examined from the view point of a reasonable standard of a cautious man. In this context, "sufficient cause" means that party had not acted in a negligent manner or there was a want of bona fide on its part in view of the facts and circumstances of a case or the party cannot be alleged to have been "not acting diligently" or "remaining inactive". However, the facts and circumstances of each case must afford sufficient ground to enable the Court concerned to exercise discretion for the reason that whenever the court exercises discretion, it has to be exercised judiciously. (Vide: [Ramlal & Ors. v. Rewa Coalfields Ltd.](#), AIR 1962 SC 361; [Sarpanch, Lonand Grampanchayat v. Ramgiri Gosavi & Anr.](#), AIR 1968 SC 222; [Surinder Singh Sibia v. Vijay Kumar Sood](#), AIR 1992 SC 1540; and [Oriental Aroma Chemical Industries Limited v. Gujarat Industrial Development Corporation & Another](#), (2010) 5 SCC 459).

14. *[In Arjun Singh v. Mohindra Kumar & Ors.](#), AIR 1964 SC 993, this Court observed that every good cause is a sufficient cause and must offer an explanation for non-appearance. The only difference between a "good cause" and "sufficient cause" is that the requirement of a good cause is complied with on a lesser degree of proof than that of a "sufficient cause". (See also: [Brij Indar Singh v. Lala Kanshi Ram & Ors.](#), AIR 1917 P.C. 156; [Manindra Land and Building Corporation Ltd. v. Bhutnath Banerjee & Ors.](#), AIR 1964 SC 1336; and [Mata Din v. A. Narayanan](#), AIR 1970 SC 1953).*

15 While deciding whether there is a sufficient cause or not, the court must bear in mind the object of doing substantial justice to all the parties concerned and that the technicalities of the law should not prevent the court from doing substantial justice and doing away the illegality perpetuated on the basis of the judgment impugned before it. (Vide: [State of Bihar](#)

& Ors. v. Kameshwar Prasad Singh & Anr., AIR 2000 SC 2306; Madanlal v. Shyamlal, AIR 2002 SC 100; Davinder Pal Sehgal & Anr. v. M/s. Partap Steel Rolling Mills (P) Ltd. & Ors., AIR 2002 SC 451; Ram Nath Sao alias Ram Nath Sao & Ors. v. Gobardhan Sao & Ors., AIR 2002 SC 1201; Kaushalya Devi v. Prem Chand & Anr. (2005) 10 SCC 127; Srei International Finance Ltd., v. Fair growth Financial Services Ltd. & Anr., (2005) 13 SCC 95; and Reena Sadh v. Anjana Enterprises, AIR 2008 SC 2054).

16 *In order to determine the application under Order IX, Rule 13 CPC, the test has to be applied is whether the defendant honestly and sincerely intended to remain present when the suit was called on for hearing and did his best to do so. Sufficient cause is thus the cause for which the defendant could not be blamed for his absence. Therefore, the applicant must approach the court with a reasonable defence. Sufficient cause is a question of fact and the court has to exercise its discretion in the varied and special circumstances in the case at hand. There cannot be a strait-jacket formula of universal application.*

15. Mr. Dwarkadas strenuously urged that the aforesaid submissions do not deal with the fundamental challenge to the decree that it was passed in flagrant violation of the governing provisions. The learned Senior Counsel submitted that once a defendant tenders appearance, he cannot be condemned for non-filing of the written statement for all intent and purpose. A defendant who does not file a written statement, does not forego the right to participate in the trial. Thus, the object of the provisions contained in Rule 90 of the Original Side Rules is to address such situation. The service of notice of motion on

the defendants provides such an opportunity to the defendants to participate in the suit despite failure to file the written statement.

16. To draw home this point, the learned Senior Counsel placed reliance on the judgment of the Supreme court in the case of ***Modula India Vs. Kamakshya Singh Deo***³, wherein the Supreme Court considered the question of nature and scope of the rights available to the defendant whose defence has been struck off to participate in the trial. The Supreme Court held that the defendant, subject to the exercise of an appropriate discretion by the Court on the facts of a particular case, would generally be entitled to (a) cross-examine the plaintiff's witnesses, and (b) address argument on the basis of the plaintiff's case.

17. In the process of arriving at the aforesaid conclusion, the Supreme Court also considered the provisions of Order VIII, Rule 5 and 10 of the Code. The Court, *inter-alia*, observed as under :

“23.....Though the present language of rule 10 says that the court "shall" pronounce judgment against him, it is obvious from the language of the rule that there is still an option with the court either to pronounce judgment on the basis of the plaint against the defendant or to make such other appropriate order as the court may think fit. Therefore, there

3 (1988) 4 SCC 619

is nothing in these rules, which makes it mandatory for the court to pass a decree in favour of the plaintiff straightaway because a written statement has not been filed. Reference was made before us to sub-rule 1 of rule 5. This sub-rule, however, has application only in a case where a pleading is filed but does not contain a specific or implicit denial of the averments contained in the plaint or other document to which it is a reply. Rule 5(1) cannot be made use of to sustain the contention that where there is no written statement the court is bound to accept the statements contained in the plaint and pass a decree straightaway. These provisions of the Code of Civil Procedure, far from supporting the contentions of the plaintiff that a decree on the basis of the plaint should follow a failure to file the written statement. rather indicate a contrary position, namely, that even in such cases, it is a matter for the court to exercise a discretion as to the manner in which the further proceedings should take place. We, therefore, do not think that the terms of Order VIII in any way conflict with the conclusion reached by us.”

(emphasis supplied)

18. As a vigorous challenge to the sustainability of the decree was mounted on the applicability and non-compliance of Rule 90 of the OS Rules, it would be necessary to extract the same :

“Rule 90 : Judgment for want of written statement. Application for judgment for want of Written Statement shall be made by Notice of Motion, but no such Notice of Motion shall be issued before the date on which the Writ of Summons is returnable. On the filing of an affidavit of service of the Notice of Motion, the suit shall be set down on

the daily board for the purpose of such application.”

19. The learned Senior Counsel for the defendants, in the light of the aforesaid provision, submitted that there is a catena of judgments of this Court which have taken the view that the provisions of Rule 90 are mandatory. It is not open to this Court to pass a decree by resorting to the provisions contained in Order VIII of the Code where the suit is listed before the Court for passing judgment without written statement. A very strong reliance was placed on a recent judgment of a learned Single Judge of this Court in the case of ***Madhu Sushil Gupta Vs. V.R. Pictures & Others***⁴. In the said case, an identical question arose for consideration. The learned Single Judge noted the jurisprudential history to Rule 90 of the Original Side Rules emerging through the judgments of this Court in the case of ***Nikita Trading v Nirlon Synthetics Fibres & Chemicals Ltd & Ors.***⁵, and ***Tardeo Properties Pvt. Ltd. vs. Bank of Baroda***⁶ and the judgment of the Supreme Court in the case of ***Iridium India Telecom Ltd. vs. Motorola Inc.***⁷. The learned Single Judge observed that “*read together, these three decisions tell us in the most unequivocal terms that on the*

4 2018 (3) Mh.L.J. 287

5 Order dated 29th April 2008 I Appeal No. 1136 of 2002

6 2007(5) BCR 557

7 (2005) 2 SCC 145

Original Side of this Court, given the extant Rules, a Court cannot exercise jurisdiction under Order VIII of the Code to pass an ex-parte decree. That can only be done on a Notice of Motion filed under Rule 90 of the Original Side Rules, and not otherwise”.

20. The learned Judge went on to observe as under :-

“12.If the only way in which to pass an ex parte decree is on a Notice of Motion filed under Rule 90, then it is self-evident that there must be first a Notice of Motion seeking such an order and not one that can be filed later. What the three judgments referred to earlier tell us is that Rule 90 is exclusionary: it eliminates the applicability of the CPC altogether in the matter of passing ex parte decrees. An ex parte decree passed on the Original Side of the Bombay High Court without a Motion under Rule 90, i.e., passed under the provisions of the CPC, is entirely a nullity. It cannot be sustained. It lacks the underlying the remit; that remit demands the filing of a Motion. Without that Motion under Rule 90, no ex parte decree is possible. I do not myself believe Rule 90 is at all any longer a salutary provision or that it should be continued for a minute longer, but that is wholly irrelevant. So long as that provision remains, this result must follow.”

21. The aforesaid judgment, after noticing the governing precedents holds in no uncertain terms that in the absence of a notice of motion having been taken out which Rule 90 mandates, no decree under the provisions of Order VIII of the Code can be passed. Such a decree is entirely a nullity and cannot be sustained.

22. It is imperative to note that the ex-parte decree, which was set aside in *Madhu* (Supra), was passed on 7th March 2014. This Court is, however, confronted with a situation which arises in the commercial suits governed by the provisions of the Commercial Courts Act. Can the aforesaid pronouncement and the rulings referred to therein apply with equal force to commercial suits filed on the commercial division of the High Court for the trial of which, provisions have been made under section 16 of the Act? Section 16 of the Act reads as under :

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 provision 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, as amended by this Act, the provisions of the Code of Civil Procedure as amended by this Act shall prevail.”

23. On a plain reading of the aforesaid provisions it becomes evident that that sub-section (1) amends the provisions of the Code in

the manner specified in the Schedule, in their application to any suit in respect of a commercial dispute. Sub-section (2) enjoins the Commercial Division and Commercial Court to follow the provisions of the Code of Civil Procedure, 1908, as amended by this Act, in the trial of a suit in respect of a commercial dispute. Sub-section (3) is of material significance. It provides that where any provision of any Rule of the jurisdictional High Court or any amendment to the Code of Civil Procedure, 1908, by the State Government is in conflict with the provisions of the Code of Civil Procedure, 1908, as amended by the said Act, the provisions of the Code of Civil Procedure as amended by the said Act shall prevail. Sub-section (3), thus, gives an overriding effect to the provisions of the Code, as amended by the said Act, in the trial of the commercial suits.

24. I am conscious of the fact that in the case of *Iridium India Telecom Ltd.* (Supra) the Supreme Court has, after elaborately considering the statutory scheme of the Code and the chronological perspective of the legislative enactments, held that the Legislature had made a distinction between the proceedings in other civil courts and the proceedings on the Original Side of the Chartered High Courts. This distinction was made for good historical reasons and it had

continued unabated, through the consolidating Acts, and continued unaffected even through the last amendment of the Code in the year 2002. In the face of this body of evidence, it is difficult to accede to the contention of the appellant that the force of the non obstante clause is merely declaratory and not intended to operate as a declared exception to the general body of the Civil Procedure Code.

25. The Supreme Court, thus held that the time limit prescribed in Order VIII, Rule 1 for filing written statement, is not applicable to the suits on the Original Side of the Chartered High Courts, which continued to be governed by the High Court (Original Side) Rules.

26. The aforesaid pronouncement of the Supreme Court, in my considered view, is required to be understood in the backdrop of the fact that the Commercial Courts Act, 2015 introduces a substantially different procedure with the object of expeditious resolution of the commercial disputes. The Parliament was aware of Rule making power of High Court, including the Chartered High Courts, and the existence of the Rules which contained provisions which were at variance with the provisions of the Code as well as the Code as amended by the Commercial Courts Act, 2015. Thus, it was specifically provided that any provision of any Rule of the jurisdictional High Court which is in

conflict with the provisions of the Code of Civil Procedure, 1908, as amended by the Commercial Courts Act, 2015 shall yield to the amended provisions of the Code.

27. A useful reference, in this context, can be made to a recent judgment of the Supreme Court in the case of *SGC Contracts (India) Private Limited Vs. K.S. Chamankar Infrastructure Private Limited & Ors.*⁸, wherein the Supreme Court, after considering the provisions of Order V, Rule 1 and Order VIII Rules 1 and 10, of the Code, as amended by the Commercial Courts Act, which prescribe the time limit for filing a written statement, held that :

“(11) 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.”

28. The written statement in a commercial suit is required to be filed within a period of 120 days and in view of proviso to Rule 10 of Order VIII, the Court has no power to extend the time beyond the said period of 120 days. Thus, the provisions of Order VIII Rule 10 as

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amended by the Commercial Courts Act, 2015 were held to be mandatory.

29. On the aforesaid touchstone, reverting to the controversy at hand, if it is held that the provisions of the Original Side Rules still prevail over the provisions of the Code, as amended by the Commercial Courts Act, 2015, the object of expeditious disposal of the commercial causes suits, for which a special machinery and procedure is enshrined by the Commercial Courts Act would be defeated. Thus, in my view, the interdict contained in Rule 90 of the Original Side Rules may not apply with equal force to the suit in respect of a commercial dispute filed on the Commercial Division of the High Court.

30. The second submission on behalf of the defendants regarding the competence of the Prothonotary and Senior Master to direct the filing of the written statement within the stipulated period, and transfer the suit to the list of the undefended suits, in the event of default, also revolves around the applicability of the provisions of the Commercial Courts Act, 2015. Section 15 of the Commercial Courts Act mandates transfer of pending suits and applications relating to a commercial

dispute of a specified value pending in the High Court to the Commercial Division. The only exception carved out is in respect of the suit or application where the final judgment has been reserved by the Court prior to the constitution of the Commercial Division. Sub-section (3) provides that where any suit or application shall stand transferred to the Commercial Division, the provisions of the said Act, shall apply to those procedures that were not complied at the time of transfer.

31. Stress was laid on behalf of the defendants on the provisions of sub-section (4) of section 15, which reads as under :

“15. Transfer of pending cases.

..

(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 issue such further directions as may be necessary for a speedy and efficacious disposal of such suit or application in accordance “with Order XIV-A” (w.e.f. 3-5-2018) .

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.”

32. The learned Senior Counsel for the defendants urged with a degree of vehemence that in view of the Proviso to sub-section (4),

extracted above, only the Court was competent to prescribe a new time period within which the written statement shall be filed. In the face of aforesaid provision, according to the learned Senior Counsel, the Prothonotary and Senior Master could not have stipulated the time for filing the written statement by the order dated 20th February 2017. Nor the suit could have been transferred to the list of undefended suits, in consequence of default in filing the written statement.

33. To appreciate the challenge in a correct perspective, it may be apposite to reproduce the order passed by the Prothonotary and Senior Master, on 20th February 2017:

“Ms. Sarrah Khambati I/b. Wadia Ghandy & Co., Advocate for the Plaintiff. The Registry informed that upon perusal of prayers in the aforesaid Suit, it appears that aforesaid Suit pertains to Commercial Dispute valued for the purpose of court fees and jurisdiction of more than Rs.1354.92 crore, which is also confirmed by Advocate for Plaintiff. In view thereof, Office to convert aforesaid Suit as Commercial Suit and update CMIS programme accordingly.”

Defendants to file written statement on or before 21st March, 2017, failing Suit against Defendants will be transferred to the list of Undefended Suits.”

(emphasis supplied)

34. Evidently, the aforesaid order came to be passed after the Commercial Courts Act, 2015 came into force and a Commercial

Division came to established in the High court. The Prothonotary and Senior Master noted in the order that the suit pertains to a commercial dispute of the specified value. A direction was given to convert the suit as a commercial suit and update CMIS Programme accordingly. Yet, the Prothonotary and Senior Master, proceeded to issue direction for filing written statement by the defendants on or before 21st March 2017 on the pain of transfer of the suit to the list of undefended suits in the event of default. In view of the provisions contained in sub-sections (3) and (4) of the Commercial Courts Act, once the suit stood statutorily transferred to the Commercial Division, after establishment thereof, all the provisions of the Act became applicable to those proceedings that were not complete at the time of transfer. The prescription of a fresh time-period for filing the written statement was to be made by the Court as envisaged by the Proviso to sub-section (4). The Prothonotary and Senior Master having passed direction for transfer of the suit to the Commercial Division, albeit in the nature of the conversion of the suit to a Commercial Suit, could not have legitimately prescribed a time limit for filing the written statement.

35. The reliance placed by the learned Senior Counsel on an order

passed by a learned Single Judge of this Court in the case of *Reliance General Insurance Company Limited Vs. Colonial Life Insurance Company (Trinidad) Limited*⁹, wherein this Court held that the mandatory time line 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 have been subsequently ‘transferred’ as Commercial Suits to be heard by a Commercial Division of this Court and that 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, appears to be well founded.

36. I am thus persuaded to hold that the order of the Prothonotary and Senior Master fixing a time line for filing the written statement, especially after passing a direction to convert the suit to a commercial suit, was not competent. The order passed by the Prothonotary and Senior Master on 21st March 2017 transferring the suit to the list of undefended suits is therefore without legal sanction. Post transfer to a Commercial Division, by the force of the provisions of Section 15(3),

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the jurisdiction to prescribe the time limit for filing the written statement under section 15(4) ought to have been exercised by the Commercial Court and not by the Prothonotary and Senior Master. The necessary corollary of the aforesaid conclusion is that the very substratum of the ex-parte order passed by this Court, namely non-filing of the written statement within the stipulated period, gets dismantled. Resultantly, the ex-parte decree becomes unsustainable.

37. This leads me to the consideration of the justifiability of the cause sought to be ascribed by the defendants for non-appearance on the day, the decree came to be passed. Mr.Tulzapurkar would submit that the reason of the defendants having missed to entrust the papers and proceedings of the instant suit to a new advocate, after those papers and proceedings were returned by M/s. Dhruve Liladhar and Company, does not satisfy the test of ‘sufficient cause’ enunciated in the case of *Parimal* (Supra). It was submitted that there is no material on record on the aspect of the return of papers and proceedings by M/s. Dhruve Liladhar and Company and their subsequent non-appearance in the instant suit. This fact could have been adequately proved by the defendants by placing reliable material, urged Mr.Tulzapurkar.

38. Mr.Dwarkadas countered by inviting the attention of the Court to the fact after the matter came to be transferred to the list of undefended suits and listed before the Court in that category, the plaintiffs mentioned the matter on a couple of occasions and filed an affidavit of evidence. Neither the notice of mentioning of the matter was given to M/s. Dhruve Liladhar and Company nor the copy of the affidavit of evidence was served on the advocate for the defendants. Had notice been given or affidavit of evidence been served on the advocate for the defendants, the defendants would have got an opportunity to appear before the Court.

39. In the light of the aforesaid view, which this Court is persuaded to take, and the nature of instant proceedings, it is not strictly warranted to delve deep into the controversy on facts. However, it is pertinent to note that the averments in paragraph 15 in the affidavit in support of the notice of motion, which incorporate the aforesaid grievance of non-service of notice of mentioning and affidavit of evidence, have been merely denied in paragraph 9.16 of the affidavit in reply.

40. It is well neigh settled that the term ‘sufficient cause’, whenever

used by the legislature to relieve a party of the consequence of default or inadvertence ordinarily receives a liberal construction. The Courts lean in favour of a liberal construction for the purpose of advancing the cause of substantive justice. The law favours determination of a *lis*, on merits, after providing an effective opportunity to the parties. This overriding objective warrants a liberal consideration of the cause assigned by a party where a delay or inaction is sought to be condoned. The term ‘sufficient cause’ in a broader sense, implies that there was no negligence, malafide or deliberate inaction, on the part of the party seeking the relief.

41. Viewed through the aforesaid prism, in the facts of the case, the reason assigned by the defendants cannot be said to be wholly unreasonable or inconceivable. The defendants claim that they became aware of the ex-parte decree only upon being served with the execution letter dated 2nd July 2019 could not be shown to be incorrect. There is no material to indicate that at an earlier point of time the defendants had the opportunity to know about the passing of the ex-parte decree. Thus, I am persuaded to hold that the defendants have made out a case for condonation of delay in seeking setting aside of the ex-parte decree. The cause ascribed by the defendants, in

the totality of the facts and circumstances of the case, appears justifiable.

42. Since this Court is of the considered view that the Prothonotary and Senior Master could not have prescribed the time limit for filing the written statement and passed an order transferring the suit to the list of undefended suits, upon failure of the defendants to file the written statement within the stipulated period, having noted that the suit was required to be dealt with as a commercial suit, governed by the provisions of Commercial Courts Act, 2015, the defendants deserve an opportunity to file written statement within the period to be prescribed by the Commercial Court under section 15(4) of the Commercial Courts Act, 2015.

43. The conspectus of the aforesaid consideration is that the notice of motion deserves to be allowed.

44. At this juncture, it is necessary to note that the learned Senior Counsel for the plaintiffs, in the alternative, urged that the defendants be put to terms in the nature of deposit of specified amount to protect the interest of the plaintiffs, in the event the ex-parte decree is set aside, in terms of the provisions contained in Rule 13 of Order

IX. As the principal reason for the setting aside the decree is the procedural defect touching upon the jurisdiction of the Court to pass ex-parte decree, in my view, it would not be justifiable to direct the defendants to deposit or secure the amount. Hence, the following order :

O R D E R

The Notice of Motion stands allowed in the following terms :

(a) Delay in taking out the notice of motion stands condoned

(b) The ex-parte decree dated 29th August 2018 passed by this Court stands set aside.

(c) The Commercial Suit No. 39 of 2012 stands restored to file.

(d) The order passed by the Prothonotary and Senior Master on 21st March 2017 transferring the suit to the list of undefended suits also stands set aside.

(e) The defendants shall file written statement within a period of four weeks from the date of this order.

- (f) The notice of motion stands disposed of.
- (g) The suit be listed for directions after five weeks.

[N.J. JAMADAR J.]

1 At this stage, the learned counsel for the plaintiffs seeks stay to the execution and operation of the order passed by this Court. The learned counsel for the defendants-applicants opposes the prayer.

2 Since the execution of the decree came to be stayed by this Court by order dated 14th October 2019 in terms of prayer clause (e) of the notice of motion, the interest of the defendants-applicants would be adequately protected if the order, passed by this Court, is stayed with a view to provide an opportunity to the plaintiffs to assail the legality, propriety and correctness of this order and at the same time continue the stay to the execution of the decree passed by this Court on 29th August 2018.

Hence, to advance the cause of justice, I am persuaded to stay the operation of this order for a period of four weeks.

However, the interim order passed by this Court staying execution, implementation and operation of the decree, dated 29th August 2018 in terms of prayer clause (e) of the notice of motion, would continue to operate during the said period.

[N.J. JAMADAR J.]