

P.C. :

. Heard learned Counsel for the parties.

2 This Interim Application, taken out by Defendant No.2 in the present Commercial Suit, seeks to set aside an order directing the suit to proceed against it as an undefended suit and permission to file its written statement.

3 The application is on the footing that Defendant No.2 was not served with the writ of summons and hence, the embargo against filing of a written statement, within the meaning of (i) Rule 1 of Order 8, (ii) second proviso to Rule 1 of Order 5 and (iii) Rule 10 of Order 8 of the Code of Civil Procedure 1908, after expiry of 120 days of service of writ of summons, does not apply. It is submitted that in the facts of the case, Defendant No.2 deserves to be granted time to file its written statement, which, in any event, is ready with its Advocates.

4 The Applicant/Defendant No.2 has taken a categorical stand in the present Interim Application that it has not been served with the writ of summons. It has referred to the Plaintiff's affidavit of service in proof of the latter's case of service of writ of summons on Defendant No.2. The affidavit of service does not indicate that the

packet of service was duly served at the address of Defendant No.2, which is at “Stourport Road, Kidderminster Worcestershire, DY11 7PZ, UK”. All that the affidavit indicates is that the packet of service of addressed to Defendant No.2 reached the main postal location of the area being “DY10”. In the first place, the postal code “DY10” does not relate to the address of Defendant No.2. The postal code of the area of Defendant No.2 is “DY11”. When this was pointed in the Interim Application, the Plaintiff’s response in its reply was that postal code “DY10” was likely to be the sorting address, at which the packet of service was delivered for onward delivery to the noticee’s address. The packet of service being delivered at the sorting address denoted by the area code is a far cry from receipt of service at the actual address of the noticee. The address of the noticee not only has a different area code, namely, in this case, “DY11”, but has an exact location within that area denoted by postal code “7PZ”.

5 Learned Counsel for the Plaintiff/Respondent submits that in any event, the facts, and documents forming part of the record, of the case would indicate that Defendant No.2 was very much aware of the present suit. It is submitted that Defendant No.2 is a parent company of Defendant No.1; the CEO, CFO and General Operation Head of Defendant No.2, respectively, are directors of Defendant No.1. That may be so, but that still does not impute actual knowledge on the part of Defendant No.2, a corporate entity, as a matter of law much less service of writ of summons on it.

6 As this court has categorically held in the cases of **Axis Bank Limited Vs. Mira Gehani**¹ and **LKP Finance Limited Vs. Viren Vinod Ahuja**², the period of 120 days commences only from the date of service of writ of summons and not either from the date the defendant first enters appearance or acquires knowledge of the pendency of the suit.

7 The above narration indicates that the defendant may well be within its right to apply for extension of time for filing of written statement and by that token, to have the order transferring the suit against it to the list of undefended suits set aside. That, however, does not imply that the defendant can do so as of right; it merely means that provisions of Rule 1 of Order 8 or proviso to sub-rule (2) of Rule 1 of Order 5 or proviso to Rule 10 of Order 8 do not come in the way of the defendant seeking such extension of time. In the facts of the case, considering that this suit is a commercial suit and strict time lines and dispatch on the part of parties to it is the order of the day, Defendant No.2 must be saddled with costs of the present application.

8 Accordingly, the Interim Application is allowed in terms of prayer clauses (a) and (b) subject to Defendant No.2 paying costs of quantified at Rs.1,00,000/- (Rs. One Lac Only) to the Plaintiff. The

1 2019 SCC OnLine Bom 358

2 Notice of Motion (L) No.674 of 2018 in Commercial Suit No.156 of 2018, decided on 3 May 2018

costs shall be paid within a period of four weeks from today and shall be condition precedent. Office may, though, take on record written statement of Defendant No.2 within one week from today; that would be subject to payment of costs; the costs, for their part, may come within four weeks.

8 The suit is at the stage of cross examination of the Plaintiff's witness by Defendant No.1. The court is informed that this cross examination has been concluded by Defendant No.1. Learned Counsel for the Applicant/Defendant No.2 seeks leave to cross examine the Plaintiff's witness/es, without first having to submit its evidence. This is a matter of trial. Considering that a fresh written statement is likely to see the light of the day, and there may accordingly be a case even for recasting of issues, interests of justice would be served better if the suit is kept for case management hearing under amended Order 15A of the Code after Defendant No.2 files its written statement and at that stage suitable directions for filing of evidence on behalf of Defendant No.2 and the time and manner of cross examination of the Plaintiff's witness by it are issued by the court after hearing the parties.

9 The Commercial Suit shall accordingly appear on board for a Case Management Hearing on 18 January 2021.

10 In the meantime, the returnable date of the witness summons

for production of documents already issued in the present case, is extended upto the next date, i.e. 18 January 2021.

(S.C. GUPTE, J.)