HIGH COURT OF ANDHRA PRADESH: AMARAVATI

CIVIL REVISION PETITION No. 2755 OF 2019

Between:
M/s. UNITECH – NCC (JV), a Joint Venture of M/s. United Limited,
a Joint Venture of Unitech Limited and
M/s. Nagarjuna Constructions Company Limited,
Having its office at JMD Regent square, Gurgoan-Mehrauli Road,
DLF Phase-II, Gurgaon-122002, and one branch office at 10th floor,
NCC House, Sy.No. 64, Madhapur,
Hyderabad – 500031, Telangana State. … Petitioner

AND

M/s. I.S.N.Raju Infrastructures (P) Limited,
Represented by its Executive Director
Ravi Kumar Raju Dandu and others … Respondents

Date of Order Pronounced : 03-12-2020

SUBMITTED FOR APPROVAL:

THE HON'BLE SRI JUSTICE A.V.SESHA SAI

AND

THE HON'BLE SRI JUSTICE K.SURESH REDDY

1. Whether Reporters of Local newspapers
   May be allowed to see the order? Yes/No

2. Whether the copy of order may
   be marked to Law Reporters/Journals? Yes/No

3. Whether their Lordships wish to see the
   Fair copy of the order? Yes/No

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JUSTICE A.V.SESHA SAI

_____

JUSTICE K.SURESH REDDY

***THE HON'BLE SRI JUSTICE A.V.SESHA SAI**

AND

THE HON'BLE SRI JUSTICE K.SURESH REDDY

+CIVIL REVISION PETITION No. 2755 OF 2019

%Dated: 03-12-2020

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VERSUS

$M/s. I.S.N.Raju Infrastructures (P) Limited,
Represented by its Executive Director
Ravi Kumar Raju Dandu and others … Respondents

!Counsel for the petitioner : Sri Avinash Desai

^Counsel for respondent No. 1 : Sri Srujan Vegi

<GIST :

>HEAD NOTE :

?Cases referred :
1.2006 (4) ALD 42 (D.B.)
2.(2020) 5 SCC 757
3.2006 (4) ALD 296
4.2019 (2) ALT 48
5.2019 SCC OnLine Del 8498
6.CS (COMM)232/2017

THE HON'BLE SRI JUSTICE A.V.SESHA SAI

AND

THE HON'BLE SRI JUSTICE K.SURESH REDDY

CIVIL REVISION PETITION No. 2755 OF 2019

ORDER: (per Honourable Sri Justice A.V.Sesha Sai)

Defendant No. 1 in C.O.S.No. 17 of 2018 on the file of the Court of learned Special Judge for Trial and Disposal of Commercial Disputes, Visakhapatnam, is the petitioner in the present revision, filed under Article 227 of the Constitution of India. In the present revision petition, challenge is to the order dated 22-08-2019 passed by the Special Court in I.A.No. 101 of 2019. By way of the said order, the learned Judge dismissed I.A.No. 101 of 2019, filed by the petitioner herein to set aside the order dated 07-02-2019, setting defendant No. 1 *ex parte*.

2. Respondent No. 1 herein instituted the said C.O.S.No. 17 of 2018 for recovery of a sum of Rs.6,56,64,661/- with subsequent compound interest @ 10.5% *p.a.* on Rs.1,39,20,192/- from the date of filing the suit till realization. In the said suit, summons came to be issued by the Court below and, according to the petitioner, defendant Nos. 1 and 2 received the summons on 24-01-2019, wherein the date of posting of the suit was indicated as 07-02-2019. According to the petitioner, they instructed their counsel at Visakhapatnam to offer to file vakalat and learned counsel by mistake, instead of offering vakalat on behalf of defendant Nos. 1 and 3, offered to file vakalat for defendant No. 2 on 07-02-2019 and the Court below passed an order on the said date, setting defendant No. 1 *ex parte*. Thereafter, the petitioner filed I.A.No. 101 of 2019 on 16-04-2019, praying the Court to set aside the said order so as to enable it to participate in the proceedings. The plaintiff contested the said I.A. by filing counter and the Court below dismissed the said I.A. on the grounds that the written statement was attempted to be filed beyond

120 days and that instead of filing affidavit of the party, affidavit of the Advocate was filed.

3. This revision challenges the validity and legal sustainability of the said order passed by the learned Special Judge, dismissing I.A.No. 101 of 2019.

4. Heard Sri Avinash Desai, learned counsel for the petitioner, and Sri Srujan Vegi, learned counsel for respondent No.1-plaintiff, apart from perusing the entire material available on record.

5. It is contended by learned counsel for the petitioner that the impugned order is highly erroneous and contrary to law besides being opposed to the very spirit and object of the provisions of Order IX Rule 7 of the Code of Civil Procedure (for short, 'C.P.C.'); that in the absence of service of plaint copy along with summons, the limitation for filing written statement ought to have been computed from the date of receipt of plaint and the enclosed documents; that the filing of the affidavit deposed by learned counsel would be sufficient compliance under Rule 54 of Civil Rules of Practice; and that the dismissal of the application on the ground that the supporting affidavit was not deposed by the party is not tenable in the eye of law. To bolster his submissions and contentions, learned counsel for the petitioner places reliance on ***G.Krimana Murthy Vs. Hemalatha Chit Funds Private Limited and others***[1]; and ***New India Assurance Company Limited Vs. Hilli Multipurpose Cold Storage Private Limited***[2].

6. On the contrary, totally supporting the order under challenge, learned counsel for respondent No. 1-plaintiff strenuously contends that there is no error nor there exists any infirmity in the impugned order and, in the absence of the same, the questioned order is not amenable for any judicial review under Article 227 of the Constitution of India; that the limitation for filing written statement begins to run from the date of service of summons as per Order V Rule 1 of C.P.C. and not from any date posterior to the said date, as such, the

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[1] 2006 (4) ALD 42 (D.B.)
[2] (2020) 5 SCC 757

impugned order cannot be faulted; that the dismissal of the application on the ground that the supporting affidavit was not signed by the party also cannot be faulted as the counsel cannot be said to be a person having knowledge of the facts; and that since the petitioner did not file truth statement as per Order VI Rule 15-A read with Appendix to Schedule to the Commercial Courts Act, 2015, the enclosed written statement cannot be taken on record. Learned counsel for respondent No. 1-plaintiff, in support of his submissions and contentions, takes the support of the judgments in ***Lakshmi Trading Company Vs. Dokkoda Satyavani and others***[3]; ***SCG Contracts India Private Limited Vs. K.S.Chamankar Infrastructure Private Limited and others***[4]; ***Uilin Beheer B.V. Vs. Balaji Action Buildwell***[5]; the order of Delhi High Court in ***NBCC (India) Limited Vs. Aircon Engineering Services and others***[6]; and ***New India Assurance Company Limited Vs. Hilli Multipurpose Cold Storage Private Limited*** (2nd *supra*).

7. In the above background, now the issues that arise for consideration of this Court are:

(1) Whether the period of limitation for filing written statement needs to be computed from 24-01-2019 or from 26-04-2019 and whether the finding of the Court below is in accordance with Order V of C.P.C.?

(2) Whether the finding of the Court below with regard to filing of supporting affidavit by the counsel is sustainable and tenable?

(3) Whether the contention of learned counsel for respondent No. 1-plaintiff with regard to non-compliance of the requirement as per Order VI Rule 15-A read with Appendix to Schedule to the Commercial Courts Act, 2015, is fatal?

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[3] 2006 (4) ALD 296
[4] 2019 (2) ALT 48
[5] 2019 SCC OnLine Del 8498
[6] CS (COMM) 232/2017

8. **ISSUE No. 1:**

In order to adjudicate this issue, it would be highly essential and apposite to refer to the provisions of C.P.C. According to Section 27 of C.P.C., summons need to be issued to the defendants to appear and answer the claim. Order V of C.P.C. deals with the procedure for issuance and service of summons on the defendants. Rules 1 and 2 of Order V of C.P.C., which are germane and relevant for the case on hand, read as under:

> ***"Rule 1*** ***When a suit has been duly instituted, a summons may be issued to the defendant to appear and answer the claim and to file the written statement of his defence, if any, within thirty days from the date of service of summons on that defendant."***
>
> ***Provided that no such summons shall be issued when a defendant has appeared at the presentation of plaint and admitted the plaintiff's claim.***
>
> ***Provided further 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 and twenty days from the date of service of summons and on expiry of one hundred and 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.***
>
> ***"Rule 2*** ***Every summon shall be accompanied by a copy of the plaint."***

It is very much evident from a reading of the above provisions of law that Rule 1 of Order V of C.P.C. mandates filing of written statement within 30 days from the date of service of summons on the defendant and the said period is extendable by another 90 days by the Court and the total period is up to 120 days from the date of service of summons. Therefore, after institution of suit, the initial duty of the Court is to issue summons to the defendant and the same is not merely a formality but a highly essential and an important step. Such issuance of summons is intended for the purpose of enabling the defendant to

answer the claim and to file written statement. It is also significant to note that as per Rule 2 of Order V of C.P.C., every summon shall necessarily be accompanied by plaint and the intention of the same is to enable the defendant to answer the claim in the pliant. A combined reading of Rules 1 and 2 of C.P.C., in unequivocal and clear terms, demonstrates that summons intended to be served on defendant shall necessarily be accompanied by a copy of the plaint. Non-compliance of the same would render the service of summons incomplete and cannot be construed as due service of summons. In the instant case, according to the petitioner-defendant No. 1, the petitioner received the summons on 24-01-2019 but not received the plaint along with the summons on the said date. Therefore, having regard to the above provisions of law, the said date cannot be construed as the date from which limitation needs to be reckoned. According to the endorsement made by learned counsel for the petitioner-defendant No.1 before the Special Court, learned counsel received the plaint copy and the documents from the Court on 26-04-2019 only, as such, the limitation needs to be computed from that date only for filing written statement. The contention contra advanced by learned counsel for the plaintiff is liable to be rejected. In the instant case, the petitioner did file I.A. on 16-04-2019. With certain objections, including one stating that I.A. was not accompanied by written statement, I.A. was returned on 29-04-2019 and according to learned counsel for the petitioner, summer vacation, which started immediately thereafter, came to an end by 03-06-2019 and I.A. was resubmitted on 07-06-2019, enclosing written statement and learned counsel for the petitioner-defendant No. 1 in the Court below made the following endorsement while complying with the objections:

> ***"It is humbly submitted that the defendant was served only summons by registered post with acknowledgement due and that only on 26-04-2019 the honourable court was pleased to supply the copy of the plaint and the documents therewith. Therefore written statement could not be filed as there will not be any possibility of the written statement being filed along with the petition for setting***

aside the ex parte order. Furthermore only on 03-06-2019 when the defendants counsel attended before the honourable court to file written statement along with adoption memo (in both the written statement and adoption memo notice was served) along with the memo offering notice in the I.A., it was known that the I.A. was returned with the objection.

Written statement is filed herewith."

Since only on 26-04-2019 the petitioner through its counsel received the plaint from the Court, limitation for filing written statement needs to be counted from the said date only but not from a date anterior to the same and the service of summons without being accompanied by plaint cannot be construed as proper service of summons as per Rules 1 and 2 of Order V of C.P.C. The contention that the petitioner had the knowledge of the suit, as such request should have been made for copy of the plaint, cannot be sustained having regard to the mandatory provisions of Rules 1 and 2 of Order V of C.P.C. Therefore, the finding of the Court below that the written statement was filed beyond 120 days cannot be sustained and this issue is answered in favour of the petitioner and against respondent No. 1-plaintiff.

9. **ISSUE No. 2:**

In order to answer this issue, it would be appropriate to refer to Rule 54 of Civil Rules of Practice which reads as follows:

"54. Contents of:- Except where otherwise provided by these Rules or any law for the time being in force, an Interlocutory Application shall state the provision of law under which it is made and the order prayed for or relief sought in clear and precise terms. The application shall be signed by the applicant or his Advocate, who shall enter the date on which such signature is made. Every application in contravention of this Rule shall be returned for amendment or rejected."

It is very much evident from a reading of the above Rule that either the applicant or his counsel can depose to the affidavit and the only requirement is the person deposing to the affidavit should have knowledge of the facts proposed to be deposed or stated. In fact, in the supporting affidavit, learned

counsel stated that, by mistake, instead of offering to file vakalat for defendant Nos. 1 and 3, he offered for defendant No. 2 which fact cannot be said to be out of the knowledge of learned counsel deposing to the affidavit. In this context, it is appropriate to refer to the judgment of the Division Bench of the composite High Court of Andhra Pradesh in ***G.Krimana Murthy*** (1st *supra*), wherein the Court, at para Nos. 7, 10, 22 and 23, held as under:

> ***"7. It is absolutely clear that there is no postulation anywhere to the effect that the affidavit shall be signed only by the person who made the application, but, on the contrary, Rule 54 of the Civil Rules of Practice envisages that an application can be signed either by the applicant or by the Advocate. When an application is permitted to be signed either by the party himself or by the Advocate by necessary implication, the affidavit, which is filed in support of such an application, can also be signed by the party himself or by the Advocate.***
>
> ***10. Therefore, it can be understood that the 'deponent' may be any person, even other than the Advocate, or the party himself. For e.g., an Advocate's clerk can make statements in the affidavit, provided the source, or ground of information or belief is stated in such application.***
>
> ***22. It is well settled that the procedural laws are handmaid to justice. Technicalities and formalities should not be allowed to defeat the interests and ends of justice. What is required to be done by a Court is to do substantial justice to the parties, that too, on merits, do hors trivial technicalities and formalities.***
>
> ***23. From the above, it is clear that all the interlocutory applications need not necessarily be signed by the party himself or herself and an affidavit can be signed either by the party himself or by an Advocate or anybody, including the clerk of an Advocate, who is conversant with the statement of facts, which are necessary to be furnished for maintaining an interlocutory application."***

Therefore, the judgment of learned single Judge in ***Lakshmi Trading Company*** (3rd *supra*), cited by learned counsel for respondent No. 1-plaintiff, would not render any assistance to the plaintiff. Therefore, the finding that the supporting affidavit shall be signed only by the party for maintaining the

application cannot be sustained in the eye of law. Therefore, this issue is also answered in favour of the petitioner and against respondent No. 1 and this Court is of the considered opinion that the supporting affidavit is in accordance with law.

10. **ISSUE No. 3:**

In order to adjudicate this issue, it is necessary to refer to Order VI Rule 15-A of C.P.C., according to which written statement needs to be accompanied by truth statement as per Appendix to Schedule to the Commercial Courts Act, 2015. In fact, the written statement contains verification statement deposed in the following manner:

> ***"I, the Authorized signatory of the 1st defendant Company do hereby verify and state that what have been stated above are true and correct to the best of my knowledge, belief and information."***

It is settled and well established proposition of law that procedural laws are intended and meant obviously for advancement of justice and the same cannot be used for scuttling the valuable and substantial rights of the parties. In the considered view of this Court, the non-filing of truth statement is a curable defect and it cannot be construed as fatal to the defendant. Therefore, the contention contra advanced by learned counsel for respondent No. 1-plaintiff is neither sustainable nor tenable in the eye of law and is accordingly rejected. Consequently, this issue is also answered in favour of the petitioner herein.

11. It is also significant to note that on the first date of posting, after service of summons, on 07-02-2019, the petitioner was set *ex parte* and this Court finds sufficient force in the submission of learned counsel for the petitioner that another opportunity should have been given to the petitioner as the summons sent to defendant No. 4 returned by the time the petitioner was set *ex parte*.

12. In ***SCG Contracts India Private Limited*** (4th *supra*), the Honourable Supreme Court, at para No. 8, held as under:

> ***"The Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015 came into force on***

23-10-2015 bringing in their wake certain amendments to the Code of Civil Procedure. In Order V, Rule 1, Sub-rule (1) for the second proviso, the following proviso was substituted:

Provided further 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 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 and 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.

Equally, in Order VIII Rule 1, a new proviso was substituted as follows:

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 and 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.

This was re-emphasized by re-inserting yet another proviso in Order VIII Rule 10 of Code of Civil Procedure, which reads as under:

Procedure when party fails to present written statement called for by Court – Where any party from whom a written statement is required under Rule 1 or Rule 9 fails to present the same within the time permitted or fixed by the Court, as the case may be, the Court shall pronounce judgment against him, or make such order in relation to the suit as it thinks fit and on pronouncement of such judgment a decree shall be drawn up.

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.

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."

In the considered opinion of this Court, the principle laid down in the said judgment would not help respondent No. 1-plaintiff in the instant case, as, in the case on hand, copy of the plaint was not sent along with the summons as mandated under Order V of C.P.C.

13. In ***Unilin Beheer B.V.*** (5th supra), the High Court of Delhi, at para Nos. 14 and 31, held as under:

"14. Rules 3 and 4 of Chapter VII titled 'Appearance by Defendant, Written Statement, Set Off, Counter claim and Replication' of the Rules are as under:

3. Affidavit of admission/denial of documents along with written statement –

Along with the written statement, defendant shall also file an affidavit of admission/denial of documents filed by the plaintiff, without which the written statement shall not be taken on record. Along with the written statement, the defendant shall be entitled to file applications for interrogatories for examination of the plaintiff together with proposed interrogatories; application for discovery; and application for inspection of such documents.

[The affidavit referred to in this Rule shall be in accordance with the provisions of Rule 4 of Order XI of the Code, as applicable under the Commercial Courts Act]

4. Extension of time for filing written statement –

If the Court is satisfied that the defendant was prevented by sufficient cause for exceptional and unavoidable reasons in filing the written statement within 30 days, it may extend the time for filing the same by a further period not exceeding 90 days, but not thereafter. For such extension of time, the party in delay shall be burdened with costs as deemed appropriate. The written

statement shall not be taken on record unless such costs have been paid/deposited. In case the defendants fail to file the affidavit of admission/denial of documents filed by the plaintiff, the documents filed by the plaintiff shall be deemed to be admitted. In case, no written statement is filed within the extended time also, the Registrar may pass orders for closing the right to file the written statement."

31. I thus hold, that in the event of the written statement being filed without affidavit of admission/denial of documents, not only shall the written statement be not taken on record but the documents filed by the plaintiff shall also be deemed to be admitted and on the basis of which admission the Court shall be entitled to proceed under Order VIII Rule 10 of the C.P.C."

Having regard to the law laid down in the judgment of Division Bench of the composite High Court in ***G.Krimana Murthy*** (1st *supra*) at para Nos. 22 and 23 that the procedural laws are handmaid to justice and technicalities and formalities should not be allowed to defeat the interests and ends of justice and the Court is required to do substantial justice to the parties, the contention advanced by learned counsel for respondent No. 1-plaintiff, by relying upon the above cited judgment, cannot be upheld by this Court.

14. In ***NBCC (India) Limited*** (6th *supra*), the High Court of Delhi, at para Nos. 4 and 8, held as under:

"Case of the plaintiff is that defendant No. 3 did not object nor asked for the complete paper book when he appeared before the learned Joint Registrar on 24th August, 2017 till 19th September, 2017 thereby spending substantial period of time. Learned counsel for the plaintiff/respondent states that since a valid service of notice has been affected on the defendant No. 3/appellant on 16th June, 2017 and the same would be deemed to be with complete documents as no objection to the same was made and the plaintiff having asked for the documents on 19th September, 2017 complete paper book having been provided on 27th September, 2017 even excluding period of 21 days, the extended period of 120 days for filing the written statement from 17th June, 2017 was over much before 30th January, 2018 and the

written statement was filed more than nearly 100 days over and above 120 days time limit granted.

In this case as per the report of bailiff, the defendant No. 3 has been served on 16th June, 2017. The grievance of the defendant No. 3 with regard to complete paper book not being available was with regard to the second service through speed post and there is no material on record to come to the conclusion that the first service was affected with an incomplete paper book of the suit."

Having regard to the factual variation in the present case, the said judgment also would not render any assistance to the plaintiff.

15. It is also to be noted that the learned counsel for respondent No. 1-plaintiff, by referring to the judgment of the Honourable Apex Court in ***New India Assurance Company Limited*** (2nd *supra*), submits that in the absence of any objection taken on the first date *i.e.* on 07-02-2019, the petitioner herein cannot be permitted to rely upon Order V Rules 1 and 2 of C.P.C. It is the categorical case of the petitioner herein, as deposed by learned counsel in the supporting affidavit, that though defendant Nos. 1 and 2 instructed learned counsel at Visakhapatnam to offer vakalat on behalf of defendant Nos. 1 and 2, learned counsel offered vakalt on behalf of defendant No. 2 and with the result, defendant No. 1 was set *ex parte* and posed the matter on 26-04-2019. Therefore, 07-02-2019, on which date the petitioner was set *ex parte*, cannot be construed as the first date and having regard to the provisions of Order IX Rule 7 of C.P.C. and the above discussion, the valuable right of defendant No. 1 cannot be taken away.

16. For the aforesaid reasons, the civil revision petition is allowed, setting aside the order dated 22-08-2019 in I.A.No. 101 of 2019 in C.O.S.No. 17 of 2018 on the file of the Court below, and consequently, I.A.No. 101 of 2019 is also allowed and the Court below shall take the written statement of the petitioner herein on record and proceed with the matter in accordance with law.

17. Pending miscellaneous applications, if any, shall stand closed in consequence.

A.V.SESHA SAI, J.

Date: 03-12-2020.
Note: L.R. copy to be marked.
B/O
JSK

K.SURESH REDDY, J.

THE HON'BLE SRI JUSTICE A.V.SESHA SAI

AND

THE HON'BLE SRI JUSTICE K.SURESH REDDY

CIVIL REVISION PETITION No. 2755 OF 2019

DATE: 03RD DECEMBER, 2020

JSK