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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **FAO(OS) (COMM) 53/2021, C.M. Appl. No. 11459/2021**

MUKUL TANEJA

..... Appellant

Through: **Mr.Dinesh Monga and Ms. Monika
Shahi, Advocates**

versus

METRO LIFESTYLES INDIA PVT LTD

..... Respondent

Through: **Mr. Ajay Pal Singh, Advocate**

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Date of Decision: 25th March, 2021

CORAM:

HON'BLE MR. JUSTICE MANMOHAN

HON'BLE MS. JUSTICE ASHA MENON

J U D G M E N T

MANMOHAN, J (Oral):

1. Present appeal has been filed challenging the order dated 20th January 2020 passed by learned Single Judge in CS(COMM) 261/2017 whereby appellant's application being IA No. 18393/2019 for extension of time to bring the written statement on record was dismissed. Appellant also prays that the aforesaid application be allowed and his written statement be taken on record.
2. On 20th January, 2020, the learned Single Judge while dismissing the appellant's application for enlargement of time had observed as under:-

“I.A. 18393/2019 (enlargement of time to file W.S. by D-2)”

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13. In the present application, the plea of the defendant No.2 is that subsequent to the order dated 2nd May, 2019 the counsel for the applicant/ defendant No.2 developed some serious ailments and left for heavenly abode on 4th July, 2019 and this fact was brought to the notice of the Court on 18th July, 2019. Thereafter the defendant No.2 engaged another counsel to pursue the present suit. The defendant No.2 claims that to the other counsel all inputs were given and the amount of ₹40,0000/- was also given to the said counsel as cost. The said counsel filed the written statement on behalf of defendant No.2 on 27th August, 2019 vide diary No. 871663/2019 and the same is reflected in the status of the case. However, the written statement was not on record and thus this fact was noted by this Court vide order dated 28th August, 2019. Unfortunately, wife of the second counsel was detected with cancer and the second counsel for the defendant No.2 had to go abroad for his wife's treatment and thus could not take steps to remove objections in the written statement bringing the same on record. Finally, with the help of one another counsel defendant No.2 again filed the written statement on 4th December, 2019 vide diary No. 1501756/2019, however when the matter was listed on 5th December, 2019 the written statement was still not on record and was lying in objections and thus the opportunity of the defendant No.2 to file written statement as well as affidavit of admission/ denial was closed.

14. Defendant No.2 claims that his written statement had been filed much earlier i.e. on 27th August, 2019 and thus it ought to be taken on record and the defendant No.2 cannot be penalized due to exigencies i.e. first counsel having passed away and second counsel's wife falling seriously ill.

15. As noted above, while setting aside the order dated 25th April, 2018, proceeding the defendant No.2 ex-parte on 2nd May, 2019 this Court granted 30 days time to the defendant No.2 to file the written statement subject to payment of cost of ₹40,000/- . Admittedly, as per the application the cost of ₹40,000/- was not given to the first counsel but to the second counsel who was

engaged in August, 2019. Further, it is the case of the defendant No.2 himself that he had filed an application for waiver of the cost, however till date the said application has not seen the light and is not on record. The first counsel for the defendant No.2 passed away on 4th July, 2019 whereas 30 days period for filing the written statement with defendant No.2 was over on 1st June, 2019. There is no explanation whatsoever as to why the written statement was not filed on or before 1st June, 2019. Orally, defendant No.2 argues that his mother passed away on 2nd June, 2018.”

3. Learned counsel for the appellant states that the learned Single Judge failed to appreciate that non-removal of objections in respect to the written statement of the Appellant was beyond the control of the Appellant. He emphasizes that unfortunate incidents happened to the previous two counsel for the appellant, namely, that first counsel for the appellant died on 4th July 2019 and the second counsel's wife was diagnosed with cancer. He, therefore, prays that the time for filing the written statement be extended.

4. In support of his submission, learned counsel for the appellant relies upon the judgement of the Supreme Court in ***Desh Raj vs. Balkishan (D) Through Proposed LR Ms. Rohini, (2020) 2 SCC 708***, wherein it has been held as under:-

“21. Having held so, there could be no escape but to dismiss this appeal. However, taking a lenient view given the unique circumstances of the case, and without laying down the discretion being exercised hereinafter, as a precedent, we direct that the written statement filed by the appellant on 02.11.2017 (as claimed), be taken on record with a copy to counsel for the respondent within one week from today and further subject to payment of costs of Rs. 25,000/ to the respondent.”

5. Having heard learned counsel for the appellant and having perused the paper book, this Court finds that vide order dated 16th March, 2018 the learned Joint Registrar noted that defendants had been served with summons on 13th March, 2018 and the written statement had not been filed within the prescribed time. On 25th April, 2018, the Court proceeded the defendants *ex-parte* and directed the plaintiff to lead its *ex-parte* evidence. The appellant/defendant no.2 entered appearance for the first time on 24th January, 2019. Thereafter, the learned Single Judge vide order dated 2nd May, 2019 held that there was no clear service. Accordingly, the *ex-parte* proceedings were set aside subject to payment of cost of Rs.40,000/-. The written statement was to be filed within thirty days i.e. by 02nd June, 2019.

6. However, the appellant/defendant no.2 neither paid costs nor filed the written statement within the prescribed time. Instead, he filed an application for extension of time on 16th December, 2019. In the said application, it was averred that the first counsel for the appellant died on 4th July 2019 and the second counsel's wife was diagnosed with cancer.

7. The Legislature has prescribed a period of 30 days' for filing of written statement in Commercial Suits. For rare and compelling reasons, the time period for filing a written statement can be extended to maximum 120 days. In fact, the Supreme Court in *SCG Contract (India) Pvt. Ltd. vs. K.S. Chamankar Infrastructure Pvt. Ltd., (2019) 12 SCC 210*, has upheld the view of a learned Single Judge of this Court in *OKU Tech Pvt. Ltd. vs. Sangeet Aggarwal & Ors., 2016 SCC OnLine Del 6601* that in the event the defendant fails to file the written statement within 120 days from the date of service of summons, no further time can be granted. The relevant portion of the Supreme Court Judgment is reproduced as under:-

“8. 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 5 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 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 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 8 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 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.”

This was re-emphasised by re-inserting yet another proviso in Order 8 Rule 10 CPC, which reads as under:

“10. 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 the 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 8 Rule 10 also adding that the court has no further power to extend the time beyond this period of 120 days.

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10. Several High Court judgments on the amended Order 8 Rule 1 have now held that given the consequence of non-filing of written statement, the amended provisions of the CPC will have to be held to be mandatory. See Oku Tech (P) Ltd. v. Sangeet Agarwal [Oku Tech (P) Ltd. v. Sangeet Agarwal, 2016 SCC OnLine Del 6601] by a learned Single Judge of the Delhi High Court dated 11-8-2016 in CS (OS) No. 3390 of 2015 as followed by several other judgments including a judgment of the Delhi High Court in Maja Cosmetics v. Oasis Commercial (P) Ltd. [Maja Cosmetics v. Oasis Commercial (P) Ltd.

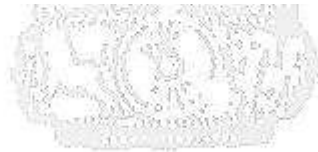
11. We are of the view that the view taken by the Delhi High Court in these judgments is correct in view of the fact that the consequence of forfeiting a right to file the written statement; non-extension of any further time; and the fact that the Court shall not allow the written statement to be taken on record all points to the fact that the earlier law on Order 8 Rule 1 on the filing of written statement under Order 8 Rule 1 has now been set at naught.”

8. In the present case, the suit filed by the respondent is a Commercial Suit and admittedly the written statement had not been filed along with the costs

either within the stipulated time period of 30 days' or within the extended period of 120 days'. It is pertinent to mention that the first counsel for the appellant expired after 30 days' period for filing the written statement had lapsed.

9. The judgment in *Desh Raj vs. Balkishan (D)* (supra) is inapplicable to the facts of the present case inasmuch as the said judgment pertains to an ordinary Civil Suit and not a Commercial Suit. Further, the Supreme Court in the said case extended the time to file the written statement on the peculiar facts of that case and clarified that the said judgment shall not be treated as a precedent. Consequently, the judgment in *Desh Raj vs. Balkishan (D)* (supra) does not constitute a precedent in support of the submission advanced by the learned counsel for appellant.

10. Accordingly, the impugned order is in conformity with law and suffers from no infirmity. Consequently, the present appeal along with pending application being bereft of merit is dismissed.



MANMOHAN, J



ASHA MENON, J

MARCH 25, 2021
Pkb/KA