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

Date of Decision: 15.10.2020

\+   **FAO(OS)(COMM) 126/2020**

ALKA TRADERS & ORS.   ...Appellants
Through: Mr. Rajat Sharma, Advocate.

versus

COSCO INDIA LTD. & ORS.   ...Respondents
Through: None.

CORAM:
HON'BLE MR. JUSTICE MANMOHAN
HON'BLE MR. JUSTICE SANJEEV NARULA

SANJEEV NARULA, J. (Oral):

C.M.No.26147/2020 (Exemption)

1. Allowed, subject to all just exceptions.

C.M.No.26148/2020 (delay in filing)

2. In view of averments made in the application, the delay of 155 days in filing the present appeal is condoned.

3. Accordingly, the application stands disposed of.

FAO(OS)(COMM) 126/2020 & C.M.No.26146/2020 (stay)

4. The Appellants have filed the present intra-court appeal under Section 13(1) of the Commercial Courts Act, 2015 (hereinafter referred to as "the Act") challenging the legality and validity of the order dated 13th February,

2020 passed by the learned Single Judge in CS(OS) (COMM) No.35/2018 whereby their application under Order IX Rule 7 of the Code of Civil Procedure, 1908 ("CPC") stands dismissed.

5. Briefly stated, on 21st December, 2017, the Respondent herein-Cosco India Ltd. filed a commercial suit seeking permanent injunction restraining the Appellants from infringing trademark, copyright, passing off, rendition of accounts of profits, delivery up and damages to the tune of Rs.1,10,01,400/-. Appellants are arrayed as Defendants No. 2 to 7 in the said suit which is still pending before the learned Single Judge of this Court.

6. We are not concerned with the averments made in the suit and the counter allegations made by the Appellants, as the scope of the present appeal lies in a narrow compass where we have to only examine the correctness of the impugned order. The undisputed facts are that on service of summons in the suit, the Appellants were required to file written statement along with affidavit within the statutory period of 30 days as prescribed under law. The Appellants failed to do so and filed I.A.No.5801/2018 under Order VIII Rule 1 of the CPC seeking condonation of delay in filing the written statement. The said application was listed before the learned Joint Registrar (Judicial) of this Court. Vide order dated 10th July, 2019, the said application was allowed and the written statement was taken on record, subject to payment of costs of Rs.10,000/-. Out of the total costs imposed, Rs. 5,000/- was to be paid to the counsel for the Plaintiff and the remaining amount was directed to be deposited with www.bharatkeveer.com. The Court further directed the Appellants to file statement of truth in support of the written statement along

with affidavit of admission/denial of documents as per the Act, within two weeks from the date of the order.

7. On 27th August, 2019, when the matter was again listed before the learned Joint Registrar (Judicial), the counsel for the Respondent apprised the court that costs had not been paid/deposited till date and accordingly, a request was made that the written statement be taken off the record. The Court was also apprised that the Appellants had neither filed the statement of truth in support of the written statement nor an affidavit for admission/denial of documents as per the Act. The Court recorded the submissions, but since there was no appearance on behalf of the appellant despite the matter being passed over, it was directed that the matter be listed before the learned Single Judge.

8. On 21st October, 2019, when the matter was listed before the learned Single Judge, again there was no appearance on behalf of the Appellants. Furthermore, the order directing the payment of costs as a condition for taking the written statement on record had also not been complied with. In this view of the matter, the learned Single Judge directed that the written statement would be deemed to be not on record, and further the Appellants were proceeded against *ex-parte*. Moreover, on the basis of the pleadings of the Plaintiff and the documents filed therewith, the learned Single Judge held that there was no need to relegate the Plaintiff to *ex-parte* evidence against the Appellants. In these circumstances, the learned Single Judge proceeded to examine the question of framing the issues, if any, *qua* Defendant No.1. Further, on consideration of the submissions of the Plaintiff and Defendant

No.1, the learned Single Judge directed that suit be listed along with CS(COMM) 265/2019.

9. Thereafter, the Appellants filed an application I.A.No.17937/2019 under Order IX Rule 7 of the CPC seeking setting aside of the order dated 21st October, 2019. In the said application, a prayer was made to *'set aside its ex-parte order dated 21st October, 2019 against defendants No.2 to 7 and allow to place the written statement on record in the interest of justice'.* The said application was decided by the learned Single Judge vide impugned order dated 13th February, 2020, relevant portion whereof is reproduced herein below:

> *"I.A. 17397/2019 (u/O IX R 7 CPC by D-2 to 7)*
> 1. *By this application defendant No.2 to 7 seek recall of the order dated 8th January, 2020 whereby this Court noted that the written statement of defendant No.2 to 7 along with the statement of truth in support of written statement and fresh affidavit of admission/denial was to be filed within two weeks on 10th July, 2019 subject to payment of cost of ₹10,000/-. However, neither cost was paid nor the statement of truth in support of written statement nor affidavit of admission/denial was filed.*
> 2. *Considering that by this application the facts on which written statement and affidavit of admission/denial of defendant No.2 to 7 could not be taken on record is no disputed and the cost had not been deposited till 8th January, 2020 when this Court passed the order, this Court finds no ground to recall the order dated 8th January, 2020.*
> 3. *Application is dismissed."*

10. We have heard the Learned counsel for the Appellants at length. He submits that the written statement was filed on 10th April, 2019, after a delay

of 23 days from the statutory limit, however the learned Joint Registrar (Judicial) permitted the same to be taken on record subject to payment of costs. He further submits that as directed by the court, cost of Rs.5,000/- has already been paid and deposited with '*bharat ke veer'*. However, as the predecessor counsel failed to pass on proper instructions, the Appellants, were oblivious of the costs imposed. In these circumstances, the remaining amount of Rs.5,000/- could not be paid. The same was then brought to the notice of Court on 5th November, 2019, but since the case got transferred, Appellants' counsel could not appear and pay the same to the counsel for the Respondent. Learned counsel submitted that all these facts were brought to the notice of the learned Single Judge in I.A.No.17937/2019, however the Court failed to take the same into consideration. The Appellants should not be made to suffer on account of the fault of the predecessor counsel, and grave prejudice would be caused to them in case the impugned order is not set aside. He further argued that the partial payment of costs, deposited with '*bharat ke veer'* and the undertaking of the Appellants to deposit the remaining amount with the Respondent, has erroneously not been taken into account by the learned Single Judge.

11. We have perused the record and given due consideration to the submissions advanced by the learned counsel for the Appellants. The present appeal is grossly misconceived. The order impugned in the present appeal, *prima facie* decides the application under Order IX Rule 7 of the CPC, however the nature of relief sought in the said application as well as in the present appeal is beyond the scope of the said provision. Let us elucidate this aspect. The order dated 21st October, 2019 has several implications *qua* the

Appellants. Firstly, it directs that the written statement filed by the Appellants be taken off the record. Secondly, the Appellants have been proceeded against *ex-parte* and thirdly, the learned Single Judge has proceeded to consider the question of framing the issues *qua* only Defendant No.1, being of the opinion that there was no need to relegate the Plaintiff to *ex-parte* evidence against the Appellants. The Appellants by way of application I.A.No.17937/2019, approached the learned Single Judge and invoked Order IX Rule 7 seeking setting aside of the *ex-parte* order. However, in this application, as noted above, a prayer was also made to allow the written statement to be taken on record. This prayer made in the application under Order IX Rule 7 of the CPC was thus beyond the scope of the provision invoked. However, it is settled law that merely because a wrong provision was mentioned or the correct provision was not invoked by the Appellants, would not by itself be a ground to hold that the application was not maintainable. Nevertheless, the fact remains that in the afore-noted application the substantial prayer was for seeking permission to place a written statement on record, which relief in effect amounted to review of the earlier order dated 21st October, 2019, passed under Order VIII Rule 1 &10 of the CPC whereby the written statement was directed to be taken off the record. The order rejecting the aforesaid application has now merged into the substantive order dated 21st October, 2019. Thus, it emerges that the order dated 21st October, 2019 and the one impugned in the present appeal dated 13th February, 2020 are orders passed under Order VIII Rule 1 &10 and Order IX Rule 7 of the CPC. Neither of these provisions are enumerated under Order XLIII of the CPC and are thus, excluded from the scope of appeals provided for in the proviso to Section 13(1) of the Act. The scope of intra-court appeals under Section 13(1) of the Act has been elaborated upon by a Division Bench of this Court in ***HPL (India) Limited and Ors. v. QRG Enterprises and Ors.***[1] which was followed subsequently by Division Benches in ***Samsung Leasing Ltd. and Ors. v. Samsung Electronics Co. Ltd. and Ors.***[2] and ***Swaraj Industrial and Domestic Appliances (P) Ltd. and Ors. v. Societe Des Produits Nestle S.A. and Ors.***[3]. The Appellants have not been able to cross the barrier of maintainability as the same is governed by Section 13(1) of the Act. Para 30 of ***HPL (India) supra*** clearly states that, "*In other words, only an order specified under Order XLIII Rule 1 would be appealable and, read with the provisions of Section 104, no other order would be an appealable order under the CPC. In this backdrop, the proviso to Section 13(1) makes it abundantly clear that an appeal shall lie from such orders passed by a Commercial Division or a Commercial Court that are 'specifically enumerated' under Order XLIII of the CPC, as amended by the said Act and Section 37 of the Arbitration and Conciliation Act, 1996. Clearly, in our view, this restricts the appealable orders to only those orders which are specifically enumerated in Order XLIII.*" Thus, the present appeal is not maintainable and liable to be dismissed on this ground alone.

12. Be that as it may, we have also examined the merits of the case. The Court has rejected the application since it was found that there was no cogent or convincing reason for the lapse on the part of the Appellants. We have perused the application. It assigns no good cause for the previous non-

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[1] 238 (2017) DLT 123
[2] 242 (2017) DLT 608
[3] 2018 (73) PTC 110 (Del)

appearances of the Appellants before the learned Joint Registrar (Judicial) on 27th August, 2019 and then again before the Court on 21st October, 2019. Since the explanation offered by the Appellants is not convincing, we find nothing wrong with the approach taken by the learned Single Judge in dismissing the application. It is no doubt well settled law that the expression "sufficient cause" or the one used in Order IX Rule 7 of the CPC as "good cause" has to receive liberal interpretation so as to advance substantial justice, however at the same time this Court cannot ignore an act of negligence and inaction on behalf of a party. Judicial review has to be exercised with circumspection and not for vague and fanciful reasons. In the present case, the Appellants have not been able to demonstrate that they acted with due diligence. Initially, the Appellants chose to stay away from the proceedings before the learned Joint Registrar (Judicial) on 27th August, 2019 and then again before the Court on 21st October, 2019. Furthermore, although the Appellants have paid Rs.5,000/- to the institution as directed by the Court, the remaining amount is still unpaid. There is no convincing explanation for this non-compliance. The only explanation offered is that the counsel who was earlier appearing for the Appellants did not give proper and correct information to the Appellants. To our mind this is completely vague and exhibits negligence on the part of the Appellants. The Appellants have not placed any communication on record issued by their counsel to the Respondent or to their counsel which could demonstrate that an effort was made by the Appellants to deposit the remaining cost. The Appellants have chosen to blame the counsel. This allegation remains unsubstantiated in absence of any formal complaint made by the Appellants against the counsel with the concerned Bar Council. The Appellants also never approached this

Court to seek any further directions in this regard. The application vaguely mentioned that the amount was brought before the Court, but the case got transferred.

13. We are also of the view that the request of the Appellants cannot be allowed, having regard to the fact that the suit deals with a commercial dispute, which is governed by the Act. If the prayer is allowed, and the Appellants are permitted to file a written statement at this stage, it would grossly delay the proceedings in the suit that have advanced substantially. The various provisions of the Act have been designed to ensure speedy resolution of high value commercial disputes. It is no longer *res integra* that the time period for filing the written statement for commercial suits is mandatory as per the judgment of the learned Single Judge of this Court in ***Oku Tech Private Limited v. Sangeet Agarwal and Others***[4] which has been cited with approval by the Hon'ble Supreme Court in ***M/s SCG Contracts (India) Pvt. Ltd. v. K.S. Chamankar Infrastructure Private Limited and Others***[5]. The intention of the legislature while drafting the Commercial Courts Act, 2015 was to lay down the procedure which would exponentially expedite the disposal of a commercial suit. Thus, timelines in commercial suits, should be considered sacrosanct and mandatory and must be given due weightage. Despite opportunity granted, Appellants have chosen not to bring the written statement on record. There is no just or plausible reason for us to exercise our jurisdiction under Section 13(1) of the Act. Thus, keeping in view the objects and purpose of the establishment of the Commercial Courts Act and the fast track procedure provided under the Act, there is no reason

[4] 2016 SCCOnline Del 6601
[5] (2019) 12 SCC 210

for us to countenance the casual and the lackadaisical approach exhibited by the Appellants.

14. Thus, the present Appeal and the application are dismissed on the ground of maintainability and also because it is completely devoid of merits. No costs.

SANJEEV NARULA, J

MANMOHAN, J

OCTOBER 15, 2020
v