

IN THE HIGH COURT AT CALCUTTA
CIVIL REVISIONAL JURISDICTION
APPELLATE SIDE

Present:
Hon'ble Justice Shampa Sarkar

C.O. No. 1470 of 2020

Sayan Sarker
v.
Austin Distribution Private limited

For the petitioner : Mr. Lokenath Chatterjee,
Mr. Sukanta Ghosh.

For the opposite party : Mr. Zeeshan Haque,
Ms. Payal Saha.

Heard on : 08.12.2020

Judgment on : 21.01.2021

Shampa Sarkar, J.:-

This application has been filed under Article 227 of the Constitution of India, challenging the order dated February 18, 2020 passed by the learned Judge, Commercial Court at Alipore , in Money Suit No. 39 of 2019. The petitioner is the defendant in Money Suit No. 39 of 2019. By the order impugned, the learned Court did not accept the written statement filed by the defendant. The learned Court fixed the suit for hearing as an undefended suit.

2. The case of the petitioner/defendant is that the opposite party filed a money suit in the Court of the learned Civil Judge (Senior Division), 4th Court at Alipore on April 17, 2018. It was registered as Money Suit No. 166 of 2018. The defendant received the summons on May 16, 2018. July 13, 2018, was fixed for appearance of the defendant. On July 13, 2018, the

defendant prayed for time to file the written statement. The learned Civil Judge (Senior Division) at Alipore, by order No.2 dated July 13, 2018, allowed such prayer of the defendant and fixed October 4, 2018 for filing the written statement. On October 4, 2018, the defendant filed the written statement, which was recorded by the learned Civil Judge in the order sheet. The learned Court fixed December 20, 2018 for acceptance of the written statement and thereafter March 19, 2019 and April 17, 2019 were fixed for acceptance of the written statement. The matter could not be taken up on the dates fixed due to resolutions of the local bar. On April 17, 2019 also, the matter could not be taken up due to a resolution of the local bar and September 20, 2019 was fixed for acceptance of the written statement. On September 20, 2019, the learned Civil Judge (Senior Division), 4th Court at Alipore, while considering the application for acceptance of the written statement came to the conclusion that the suit was in the nature of a commercial suit. Accordingly, the records were directed to be transmitted to the Commercial Court for trial and disposal. The said suit was then registered as Money Suit No. 39 of 2019 and the same appeared before the learned Judge, Commercial Court at Alipore. February 18, 2020 was fixed for passing orders with regard to the acceptance of the written statement. The learned Commercial Judge upon considering the amended provisions of the Code of Civil Procedure came to the conclusion that the written statement ought to have been filed within 120 days from the date of receipt of summons. As the same was filed after 141 days from the date of receipt of summons, the written statement could not be accepted beyond a period of 120 days as per the mandatory provisions of the Code of Civil Procedure.

According to the learned Judge Commercial Court, the present suit involved a dispute covered by the definition of a 'commercial dispute' under Section 2(1)(c) of the Commercial Courts Act, 2015 (hereinafter referred to as the said Act). Upon consideration of the decision of the Hon'ble Apex Court in the matter of **SCG Contracts India Pvt. Ltd. v. K.S. Chamankar Infrastructure Pvt. Ltd. and ors. AIR 2019 SC 2691**, the said court came to the conclusion that the Commercial Courts Act, 2015 came into effect on and from October 23, 2015 and the Commercial Court started functioning at Alipore on and from July 5, 2019 and as such the defendant was under an obligation to follow the time prescribed for filing the written statement under the amended provisions of Order V Rule 1 (proviso), Order VIII Rule 1 and Order VIII Rule 10 of the Code of Civil Procedure as applicable to commercial suits. The learned Court below placed reliance on another decision of the Calcutta High Court in the matter of **RDB Textile v. Union of India & ors.** passed in connection with CS 214 of 2016.

3. It was urged by the learned Advocate for the petitioner, that the suit was filed as a money suit under the provisions of the Code of Civil Procedure. The Commercial Court at Alipore started functioning on and from July 5, 2019. Prior to July 5, 2019, there was no Commercial Court in Alipore and the Civil Judge (Senior Division) was the court having jurisdiction to hear the suit. Accordingly, the defendant could not be denied his right to file the written statement and contest the suit as there was no laches, negligence or delay on the part of the defendant in filing the written statement. He submitted that the records would reveal that the learned Civil

Judge had fixed several dates for acceptance of the written statement but the matter could not be taken up due to resolutions of the local bar. He urged that a litigant could not suffer for the fault of the Court. He urged that if the proceedings before the learned Civil Judge, Senior Division had taken place on the dates fixed, the written statement would have been accepted much before the Commercial Court had started functioning in Alipore. That the written statement was filed on the first date fixed by the learned Court. Resolutions of the local bar prevented the learned Court from passing orders with regard to acceptance of the same. He next urged that until the Commercial Court at Alipore was inaugurated on July 5, 2019, the suit was proceeding as a regular money suit and the amended provisions of the Code of Civil Procedure relating to commercial suits would not have any application, even if, the said Act had been notified. If it was to be accepted that the suit filed by the opposite party was a commercial suit and the amended provisions of the Code of Civil Procedure with regard to filing of the written statement i.e. within 120 days and not thereafter, was mandatory, then on the same analogy, the plaint ought to have been filed as per the rules and the format as prescribed in the schedule to the said Act and the Rules regarding truth affidavit and other formalities applicable to verification and affidavits in case of commercial suits. That not having been done by the plaintiff, the said suit could not be entertained at all as the plaint was defective. He submitted that the amended provisions of the CPC would not be applicable with regard to the mandate of filing the written statement within 120 days from the date of receipt of summons and the provisions in case of regular suits would be applicable. Filing of the written statement

within 120 days and as per the amended provisions of the Code of Civil Procedure in such a suit was a directory provision and not a mandatory one.

4. Mr. Chatterjee submitted that the suit was transferred under the provisions of Section 15 of the said Act to the Commercial Court at Alipore after the same was established and had become operational. According to him, the learned Commercial Judge should have held a case management hearing in respect of the said suit and ought to have prescribed new time lines or issued further directions as may be necessary for speedy and efficacious disposal of such suit including filing of written statement. Such procedure as prescribed under Section 15(4) had not been followed by the learned Commercial Judge and the impugned order was liable to be set aside on this ground alone. He relied on the following decisions, namely, **Raj Television Network Ltd. v. Sony Music Entertainment India Pvt. Ltd.** reported in **2018 (3) CTC 256**, **Colonial Life Insurance Company (Trinidad) Ltd. & anr. v. Reliance General Insurance Company Ltd.** passed in **Commercial Suit No.29 of 2013** and **A.R. Antulay v. R.S. Nayak and ors.**, reported in **AIR 1988 SC 1531**.

5. Mr. Chatterjee concluded his arguments by distinguishing the decision of the Hon'ble Apex Court in SCG Contracts (supra) on the ground that the judgment was distinguishable on facts. The suit in this case, was filed as a regular money suit as there was no Commercial Court functioning in the district of South 24-parganas and thus, the suit was not, in effect, a commercial suit as defined under the said Act at the time of its institution, unlike the suit which was dealt with in the said judgment.

6. Mr. Haque, learned Advocate appearing on behalf of the plaintiff/opposite party submitted that the dispute involved was in connection with a commercial transaction and as such even if the suit was filed before the learned Civil Judge (Senior Division), the same was a commercial suit for all purposes. According to him, the said Act received the assent of the President on December 31, 2015 and was notified in the official gazette on January 1, 2016. Thus, any suit filed after January 1, 2016, which involved a commercial dispute as defined under Section 2(1)(c) of the said Act, would be a commercial suit and the second proviso to Order V Rule 1 as amended for commercial suits as also the amended provisions of Order VIII Rule 1 and Order VIII rule 10 would be applicable. The decision of SCG Contracts would be squarely applicable in this case and even the court did not have the authority to accept the written statement beyond the period of 120 days. He submitted that the suit was essentially a commercial suit although, being prosecuted in a different forum in the absence of a forum and as such, the transmission of the records of the said suit to the Commercial Court after the Commercial Court started functioning, in effect, was not a transfer of a pending suit. According to him the provisions of Section 15(4) of the said Act would not be applicable. He urged that once the defendant was aware of the notification by which the said Act had come into force, the question of filing the written statement after 120 days did not arise and the defendant should have been diligent enough to file the written statement within 120 days. He distinguished the decisions relied upon by Mr. Chatterjee on the ground that both the Madras High Court and the Bombay High Court, dealt with suits which had been filed before the said

Act had come into force. He urged that no discrimination could be permitted between fresh commercial suits and suits involving commercial disputes which were sent to the Commercial Court. If such discrimination was permitted the same would lead to complete divide and distinction between fresh commercial suits and transferred commercial suits and the parties in the transferred suits would be unable to avail of the benefits of the newly inserted mandatory provisions of the said Act. According to him, Section 15(4) of the said Act should be read down and interpreted in a manner that would not negate the purpose of the said Act. He relied on the following decisions, namely, (i) **Dilip Choudhury v. Pratishruti Projects Limited and ors.** passed in **C.S. 23 of 2015**, (ii) **Gulf DTH FZ LCC v. Dishtv India Limited and ors.** passed in **CS (OS) 3355 of 2015**, (iii) **SCG Contracts India Pvt. Ltd. v. K.S. Chamankar Infrastructure Pvt. Ltd.** reported in **AIR 2019 SC 2691**, (iv) **Citicrop International Limited v. Gtl Infrastructure Limited** passed in **CS 159 of 2017** and (v) **OKU Tech Private Limited v. Sangeet Agarwal and ors.** passed in **CS (OS) 3390 of 2015**.

7. Heard the parties. Admittedly, the suit was instituted before the learned Civil Judge (Senior Division) at Alipore as a regular money suit sometime in July, 2018 and the said suit was registered as Money Suit No. 166 of 2018. The prayers in the said suit were as follows:

“The plaintiff therefore prays for the following reliefs:

a) A decree declaring that the defendant has wrongfully abandoned the project site of the plaintiff;

b) A decree of Rs 3 crores on account of loss and damages suffered by the plaintiff;

c) Costs

d) Receiver

e) Injunction

f) Such other relief and/or reliefs as this Learned Court may deem fit and proper”

8. The dispute arose out of an abandoned project for construction of a commercial building in which the services of the defendant had been allegedly hired by the plaintiff as a project management consultant. The suit was filed within the jurisdiction of Alipore Court as per the provisions the Code of Civil Procedure. It is a matter of record that the summon was received by the defendant/petitioner on May 16, 2018. July 13, 2018 was fixed for appearance of the defendant. The defendant appeared on July 13, 2018 and prayed for time to file the written statement. The learned Civil Court fixed October 4, 2018 for filing the written statement. On October 4, 2018 the written statement was filed as would be available from the order sheet. Thereafter, on three occasions namely December 20, 2018, March 19, 2019 and April 17, 2019, the learned court could not take up the matter due to the resolutions of the local bar and as such a formal order of acceptance of the written statement was not passed. On September 20, 2019 while considering the acceptance of the written statement, the learned Civil Judge found that the suit involved a dispute which was valued at Rs. 3 crores and the same should be tried as a commercial suit. The suit was transferred to the learned Judge, Commercial Court at Alipore and was renumbered/registered as Money Suit No. 39 of 2019. By an order dated November 19, 2019, the learned Judge Commercial Court recorded that

although the defendant had filed the written statement on October 4, 2018, no prayer had been made for acceptance of the written statement. The learned Commercial Judge fixed November 28, 2019 for steps to be taken by the defendant. The defendant filed an application for acceptance of the written statement. An opportunity was given to the plaintiff to file a written objection. Upon contested hearing, the impugned order was passed and the learned Commercial Judge rejected the application relying on the decision of the Hon'ble Apex Court in the matter of SCG Contract (supra) and the decision of a Division Bench of this Court, in the matter of RDB Textile limited v. Union of India and ors. (supra). The suit was directed to continue as an undefended suit.

9. It is a matter of record that the Commercial Court in Alipore was established and started operating on and from July 5, 2019. Even if the dispute was a commercial dispute, the said suit could not have proceeded as a commercial suit to which the rigors of the said Act would be applicable, in the absence of a Court in place. The Commercial Courts Act was enacted on December 31, 2015 and was notified in the official gazette extraordinary on January 1, 2016. This was an act to provide for the Constitution of Commercial Courts, Commercial Appellate Courts, Commercial Division and Commercial Appellate Division in the High Courts for adjudicating commercial disputes of specified value and matters connected thereof or incidental thereto. A Commercial Court is constituted under Sub-Section 1 of Section 3 of the said Act. Section 3 of the said Act provides that the State Government, may after consultation with the concerned High Court, by

notification, constitute such number of Commercial Courts at district level, as it may deem necessary for the purpose of exercising the jurisdiction and powers conferred on those Courts under this Act. The State Government shall, after consultation, with the concerned High Court, specify by notification the local limits of the area to which the jurisdiction of a Commercial Court shall extend and may, from time to time, increase, reduce or alter such limits. The State Government also with the concurrence of the Chief Justice of the High Court, may appoint one or more persons having experience in dealing with commercial disputes to be the Judge or Judges, of a Commercial court either at the level of District Judge or a court below the level of a District Judge.

10. In the order impugned, the learned Court below had categorically recorded that July 5, 2019 was the date when the Commercial Court of Alipore started functioning for hearing commercial suits in the district of South 24-pargans. Thus, the learned Civil Judge (Senior Division) at Alipore could not be treated as a Commercial Court as per the definition of a Commercial Court in the said Act. Even after coming into force of the said Act, no court was designated to hear commercial suits until a Commercial Court was established and had become operational and Judges in terms of Section 3(3) were appointed as Commercial Judge. Thus the Civil Judge (Senior Division) at Alipore could not be treated as a Commercial Court when the suit was filed, and the rigors of the Commercial Courts Act, 2015 would not be applicable.

11. As the suit was filed as a regular money suit after the enactment

of the said Act but, before the establishment of the Commercial Court and subsequently transferred to the Commercial Court of South 24 Paraganas at Alipore after the same became operational, the suit should be treated as a transferred suit and the provisions of Section 15 of the said Act would apply. For convenience Section 15 of the said Act is quoted below:-

"15. Transfer of pending cases.--(1) *All suits and applications, including applications under the Arbitration and Conciliation Act, 1996 (26 of 1996), relating to a commercial dispute of a Specified Value pending in a High Court where a Commercial Division has been constituted, shall be transferred to the Commercial Division.*

(2) *All suits and applications, including applications under the Arbitration and Conciliation Act, 1996 (26 of 1996), relating to a commercial dispute of a Specified Value pending in any civil court in any district or area in respect of which a Commercial Court has been constituted, shall be transferred to such Commercial Court:*

Provided that no suit or application where the final judgment has been reserved by the Court prior to the constitution of the Commercial Division or the Commercial Court shall be transferred either under sub-section (1) or sub-section (2).

(3) *Where any suit or application, including an application under the Arbitration and Conciliation Act, 1996 (26 of 1996), relating to a commercial dispute of Specified Value shall stand transferred to the Commercial Division or Commercial Court under sub-section (1) or sub-section (2), the provisions of this Act shall apply to those procedures that were not complete at the time of transfer.*

(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 XV-A] of the Code of Civil Procedure, 1908 (5 of 1908):*

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.

(5) *In the event that such suit or application is not transferred in the manner specified in sub-section (1), sub-section (2) or sub-section*

(3), the Commercial Appellate Division of the High Court may, on the application of any of the parties to the suit, withdraw such suit or application from the court before which it is pending and transfer the same for trial or disposal to the Commercial Division or Commercial Court, as the case may be, having territorial jurisdiction over such suit, and such order of transfer shall be final and binding."

12. Sub-section 3 of Section 15 provides that when a suit was transferred to the Commercial Division or the Commercial Court under Sub-section 1 or Sub-section (2) of Section 15, provisions of the said Act would apply to those procedures that were not complete at the time of transfer. Sub-section 4 of Section 15 provides that the Commercial Court of the Commercial Division may hold case management hearing in respect of such transferred suit or application in order to prescribe new time lines and issue such further direction as may be necessary for a speedy and efficacious disposal of such suit or application in accordance with order XV-A of the Code of Civil Procedure. The proviso to the said sub-section states that the proviso to Sub Rule 1 of Rule 1 of Order V of the Code of Civil Procedure 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. A conjoint reading of Sub-sections 1, 2, 3 and 4 as also the proviso to sub-section (4) of Section 15 clearly indicates that the legislature intended to make a separate provision with regard to transferred suits. The proviso to Sub-section 4 of Section 15 grants the discretion to the court to prescribe a new time period within which the written statement should be filed. It further provides that the proviso to Sub-Rule 1 of Rule 1 of Order V of the Code of Civil Procedure would not be applicable. Order V

reads as follows:-

“1.Summons. - [(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 same on such other days as may be specified by the court, for reasons to be recorded in writing, but which shall not be later than ninety days from the date of service of summons.] (2) A defendant to whom a summons has been issued under sub-rule (1) may appear:-

(a) in person, or

(b) by a pleader duly instructed and able to answer all material questions relating to the suit, or

(c) by a pleader accompanied by some person able to answer all such questions.

(3) Every such summons shall be signed by the Judge or such officer as he appoints and shall be sealed with the seal of the Court."

13. After the amendment of the Code of Civil Procedure as per Section 16 of Act 4 of 2016 in respect of commercial dispute, the second proviso was substituted by the following proviso.:-

“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 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.”

14. Therefore, in the case in hand, the mandatory provision of filing the written statement within 120 days from the receipt of summons in case

of a commercial suit will not be applicable in case of a transferred suit, like the present one. It is also a matter of record that the defendant filed the written statement on the date fixed by the learned Civil Judge. On four occasions, dates were fixed for acceptance of the written statement but the business of the learned Civil Court did not permit passing of an order of acceptance of the written statement. Thus, the litigant cannot suffer for the inability of the court to hold the proceedings on those days. An act of court should prejudice no one. Thereafter, the suit was transferred to the Commercial Court after Commercial Court at Alipore became operational, the learned Judge Commercial Court instead of holding the case management hearing under Sub-section 4 of Section 15, erroneously rejected the written statement and held that the suit would continue as an undefended suit. The learned Commercial Court failed to appreciate the proviso to Sub-section 4 of Section 15 and refused to accept the written statement which was filed after 141 days, by placing reliance on the decisions of **SCG Construction (supra)** and **New India Assurance Company Vs. HILLI** reported in **2015 (16) SCC 22**. It is relevant to mention that in neither of these decisions the provisions of Section 15 of the said Act had fallen for consideration. The cases relied on did not consider transferred suits. The order impugned suffers from error apparent on the face of record.

15. However, when the proviso to Sub-rule 1 of Rule 1 of Order V with regard to filing of the written statement has not been made applicable in case of transferred suits, the learned Judge had the discretionary power to accept the written statement which was filed after 141 days from the receipt of summons. The High Court of Madras in the decision of **Raj**

Television Network (supra) also interpreted the proviso to Sub-section 4 of Section 15 in the same manner. The delay was around 21 days. The written statement was filed on the date first fixed by the learned Civil Judge.

16. It is also a fact, that the Commercial Court at South 24 Paraganas, to which the suit was transferred, became functional on and from July 5, 2019. Prior to the said date, suits involving commercial disputes were tried as regular suits before the court having territorial and pecuniary jurisdiction. The arguments of the opposite party that every suit filed after the enactment of the said Act should be treated as a Commercial suit and the provisions of the said Act would be applicable, cannot be accepted in the facts of this case. If such a proposition is accepted, then the plaint itself suffers from defects and cannot be entertained in the proceedings before the Commercial Court, inasmuch as, the said plaint has not been supported by an affidavit in the form and manner as prescribed under Order VI Rule 15-A of the Code of Civil Procedure.

17. In **Dilip Choudhury (supra)** a learned Judge of this court held as follows:-

“28. Section 16 of the Act of 2015 requires the Commercial Division to follow the provisions of the Code of Civil Procedure, 1908 as amended by the Act of 2015 in the trial of a suit in respect a commercial dispute of a specified value. However, the proviso to Sub Section (4) of Section 15 prescribes that, the proviso to sub-rule (1) of Rule 1 of Order V of the Code of Civil Procedure, 1908 shall not apply to the transferred suit. Since, the proviso to sub-rule (1) of Rule 1 of Order V of the Code of Civil Procedure, 1908 does not apply to a transferred suit, and the Court retains the discretion to prescribe a new time period within which the written statement can be filed, the application for extension of time to file written statement filed by the defendant no. 2 requires consideration. All and every application for extension of time to file written statement cannot be allowed. The time to file written statement can be allowed on judicial recognized

principles one of which is that, the defendant adequately explains as to, the delay in not filing the written statement within the time stipulated.

29. *In the facts of the present case, the defendant no. 2 seeks to explain non filing of the written statement from the date of expiry of the time period to file written statement as prescribed by the writ of summons till the date of making the application for extension of time to file written statement, on the ground of various proceedings that the parties had in the suit. The defendant no. 2 acknowledges that he received the writ of summons on April 2, 2015. The defendant no.2 entered appearance on March 11, 2015. Two applications for dismissal of the suit were taken out by the defendant nos. 3 and 4. In one of such application for dismissal of the suit, an order dated June 7, 2016 was passed directing the department not to transfer the suit to the list of undefended suits during the pendency of the application for dismissal. The application of the plaintiff for decree on judgement on admission filed on January 13, 2016 was allowed on July 26, 2016. The judgement and decree dated July 26, 2016 was set aside by the Appeal Court on August 22, 2017. The defendant no. 2 has sought to explain the non-filing of the written statement not only on the pendency of the applications as noted above but also on the fact that the defendant no. 2 was embroiled in criminal cases and was detained in judicial custody for a given period of time. The defendant no. 2 who is a medical practitioner and was employed with a college of medicine, lost his employment with the college by reason of such criminal litigation. Consequently, the defendant no. 2 has claimed that he was mentally depressed and unemployed for about a year till January 2018. Thereafter, the defendant no. 2 started his own practice. Subsequently, after the application of the defendant no. 3 and 4 to file written statement were allowed the defendant no. 2 filed the present application on June 25, 2019. The Court is informed that the written statement on behalf of the defendant no. 2 is ready.*

30. *In view of the position is law as noted above and the conduct of the defendant no. 2 as explained in its application for extension to time to file written statement, in my considered opinion, the defendant no. 2 is entitled to one opportunity to file written statement in the suit. The defendant no. 2 will file written statement within seven days from date."*

18. In **Gulf DTH (Supra)** the Delhi High Court observed that the normal time period for filing the written statement was 30 days and only upon filing an application before the court furnishing valid reason could the Commercial Court extend the time for filing the written statement beyond 30 days. The said judgment is not applicable in the facts of this case,

inasmuch as, the instant suit was filed as a regular money suit. The suit was transferred to the Commercial Division after the written statement had already been filed before the learned Civil Court on the date fixed by the learned Civil Court prior to such transfer and only a formal acceptance was pending.

19. The decision of **S.C.G Construction Contracts India Pvt. Ltd.** (**supra**) does not apply as the suit in respect of which the judgment was rendered was not a transferred suit and the provisions of Section 15 was not taken into consideration at all.

20. In **OKU Tech Pvt. Ltd.** (**supra**), the amended second proviso to Order V Rule 1 was taken into consideration while deciding an application for condonation of delay in filing the written statement. The learned Court placed reliance on Order VIII Rule 10 and second amended proviso to Order V Rule 1 Sub-rule 1 applicable to Commercial suits but, in the said case too, the provisions of Section 15 were not taken into consideration as the suit was filed 4 days after the creation of the Commercial Division. It was decided that provisions of Order VIII Rule 1 and Order VIII Rule 10 insofar as their applicability to commercial suits were mandatory and not directory. There is no quarrel with the proposition laid down in the above judgments but, the distinguishing factor in this case is that the suit was not initially filed as a commercial suit. The Commercial Court became functional one year after the suit was filed. The said Act is an Act to provide for constitution of Commercial Courts, Commercial Appellate Courts, Commercial Division and Commercial Appellate Division in the High Court for adjudicating commercial disputes of specified value and for matters connected therewith.

Thus, until a Commercial Court was constituted and became operational, in case of suits filed before another Civil Judge, the amended provisions of the Code of Civil Procedure relating to the mandate of filing the written statement within 120 days would not be applicable. In case of transfer of a pending case to the Commercial Court after constitution of the Commercial Court, the proviso to Section 15(4) of the said Act would be applicable. The learned Judge failed to exercise his discretion by taking into account the proviso to Section 15(4). In any event, the mandatory provisions for filing the written statement within 120 days did not apply in this case at the time of its institution and the learned court had the discretion to accept the written statement which was already on record.

21. The order impugned is set aside and quashed. The learned Commercial Court is directed to accept the written statement filed by the defendant/petitioner and proceed with the suit in accordance with law, after holding a case management hearing and by prescribing time lines for compliances by the parties.

22. The application is allowed, there will be no order as to costs.

Urgent photostat Certified Copy of this judgment, if applied for, be given to the parties, on priority basis.

(Shampa Sarkar, J.)