

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
INTERIM APPLICATION NO. 38 OF 2020**

IN

SUIT NO. 4731 OF 1998

Ganesh Benzoplast Ltd.

.. Applicant/Original Defendant

In the matter between :

Fabcon Consultants & Engineers Pvt. Ltd.

.. Plaintiff

Vs.

Ganesh Benzoplast Ltd.

.. Defendant

Mr. Deepak Thakare a/w. Mr. Kuldip T. Pawar for applicant-original defendant.

Ms. Sunanda Kumbhat a/w. Ms. Ankita Manjrekar for plaintiff.

CORAM : N.J. JAMADAR, J.

DATE : 22nd JANUARY 2021

P.C.

1. The defendant has preferred this application to set aside the order dated 26th October 2018, whereby the suit was directed to be transferred to the list of undefended suits on account of the default on the part of the defendant to file the written statement with a prayer for condonation of delay in seeking setting aside of the said order.

2. The substance of the application is that though the suit was instituted by the plaintiff in the year 1998, yet the plaintiff has not prosecuted the suit till the month of November 2014. In the meanwhile, the defendant, against whom the plaintiff had sought a decree in the sum of Rs. 1,10,42,683.42, was declared a sick company and proceedings were initiated before the Board for Industrial and

Financial Reconstruction (BIFR). The proceedings before the BIFR culminated in passing of an order by the Delhi High Court in Writ Petition (C) No. 9320/2015, at the instance of the defendant, and ultimately the Rehabilitation Scheme came to be approved by BIFR on 30th December 2015. In the intervening period, the defendant could not file the written statement on account of certain circumstances which were beyond the control of the defendant. The relevant documents were lost in the floods in the month of July 2005. The learned advocate of the defendant Mr. Jayendra D. Khairnar was suffering from renal ailments and, therefore, the defendant could not file the written statement.

3. The defendant has a strong defence on merit. In fact, the defendant has made an excess payment to the tune of Rs.50,61,133/-. The order transferring the suit to the list of undefended suit would, thus, cause serious prejudice to the defendant. Hence, the said order be set aside and the defendant be granted permission to file written statement by condoning the delay.

4. The application is resisted by the plaintiff by filing an affidavit in reply. The averments in the application are stated to be false and misleading. The plaintiff asserts that there is inordinate delay of about 21 years in filing the written statement as the summons was served

on the defendant on 8th December 1998. The claim of the defendant that there is a delay of only 432 days is thus patently incorrect. The reasons assigned in the application seeking condonation of delay and permission to file the written statement are not genuine and bonafide. There is no explanation much less justifiable one to permit the defendant to file the written statement after lapse of 21 years of the service of the writ of summons. On these, amongst the other grounds, the plaintiff has prayed for rejection of the application.

5. I have heard Shri Thakare, the learned counsel for the applicant-defendant and the Smt. Sundanda Kumbhat, the learned counsel of the plaintiff at some length.

6. The learned counsel for the applicant submitted that the defendant was prevented by a genuine cause from filing the written statement as the defendant-company was declared a sick company and proceedings for its rehabilitation were pending before the BIFR, for has a considerable period. Inviting attention of the court to the order passed by this Court on 17th June 2014, whereby notice was issued to the plaintiff, on the pain of dismissal of the suit for want of prosecution, and the order dated 19th November 2014, whereby after noting the pendency of proceeding before BIFR, the suit was adjourned *sine-die*, it was submitted that the plaintiff was not

prosecuting the suit diligently and the defendant could not have filed the written statement in the intervening period.

7. In opposition to this, the learned counsel for the plaintiff laid emphasis on the fact that the writ of summons was duly served on the defendant on 8th December 1998. However, the defendant has not approached the court with clean hands acknowledging the fact of service of writ of summons. Instead, disingenuous effort is made to demonstrate that the plaintiff was not diligently prosecuting the suit. In any event, the reasons ascribed in the application for condonation of delay and permission to file the written statement are neither genuine nor satisfactory. Therefore, the application be rejected.

8. In order to bolster up this submission, the learned counsel for the plaintiff placed a strong reliance on the judgment of the Supreme Court in the case of *Atcom Technologies Limited Vs. Y.A. Chunawala and Company and Ors.*¹, wherein, in the context of the amended Rule 1 of Order VIII of the Code of Civil Procedure, 1908 ('the Code'), it was enunciated that though the provisions of Rule 1 are procedural in nature and, therefore, handmaid of justice; that would not mean that the defendant has right to take as much time as he wants in filing the written statement, without giving convincing and

1 2018 (6) SCC 639

cogent reasons for delay and the High Court has to condone it mechanically.

9. As indicated above, on 19th November 2014, on the strength of the submission on behalf of the defendant, the suit was adjourned *sine-die*. The order dated 4th December 2015 passed by Delhi High Court in Writ Petition (C) No. 9320/2015 reveals that the Scheme annexed to the report of BIFR was sanctioned. The letter dated 8th January 2016 conveying the approval to the Scheme reveals that reference under section 15(1) of the Sick Industrial Companies (Special Provisions) Act, 1985 (SICA) was made on the basis of an audited balance-sheet for the year ending 31st March 2008 and was registered as Case No. 42 of 2009. The scheme came to be ultimately sanctioned on 8th January 2016.

10. In view of the provisions contained in section 22 of SICA, no suit for the recovery of money against the sick company shall lie or be proceeded with further, except with the consent of the Board or the Appellate Authority. Any decree passed in the face of embargo created by section 22 of SICA for continuation of the proceedings is a nullity. A useful reference in this context can be made to the judgment of Supreme Court in the case of ***Managing Director,***

***Bhoruka Textiles Limited Vs. Kashmiri Rice Industries*².**

11. Thus, from the date of the reference under section 15 of SICA which appears to have been made in the year 2009, till the sanction of the Scheme, in the least, the instant suit could not have been proceeded with. It is true that the defendant has not placed an accurate detail of the commencement and conclusion of the proceedings before the BIFR. However, the fact remains that the proceedings were pending before the BIFR from the year 2009 and the Scheme came to be sanctioned in the year 2016 itself.

12. There is substance in the submission on behalf of the plaintiff that the writ of summons was served on the defendant on 8th December 1998. However, the further submission that the written statement ought to have been filed within the period stipulated by amended Rule 1 of Order VIII of the Code, and upon failure, the defendant has forfeited the right to file the written statement does not merit acceptance. The stipulation of time contained in Rule 1 of Order VIII for filing written statement does not apply with equal rigor to the suits instituted on the Original Side of the Chartered High Court. This position is made clear by the judgment of the Supreme Court in the case of *Iridium India Telecom Ltd. Vs. Motorola INC*³. The suits

2 (2009) 7 SCC 521

3 (2005) 2 SCC 145

before the Chartered High Court are governed by the rules framed under section 129 of the Code.

13. The situation which thus obtains is that in view of the declaration of the defendant as a sick company, there was, in a sense, a moratorium against proceeding with the instant suit. The defendant has ascribed certain reasons for not filing the written statement including the loss of the documents in the floods in the year 2005 and the illness of the learned counsel, who happened to represent the defendant at the relevant time. The reasons cannot be said to be wholly unjustifiable. Indeed, the reasons may not account for each days delay. However, the courts lean in favour of adjudication on merit, after providing an effective opportunity of hearing to the parties, so as to advance the cause of substantive justice. In the totality of the circumstances, in my view, it would be expedient in the interest of justice to provide an opportunity to the defendant to defend the suit by filing written statement. The aspect of delay and inconvenience caused to the plaintiff can be taken care of by imposing costs.

14. Hence, the following order :

O R D E R

- (i) The interim application stands allowed.

(ii) The delay in seeking setting aside the order dated 26th October 2018 stands condoned.

(iii) The order dated 26th October 2018 transferring the suit to the list of undefended suits stands set aside.

(iv) Permission is granted to the defendant to file the written statement in the registry, subject to payment of costs of Rs.20,000/- to the plaintiff, within a period of one week from today.

(v) The interim application stands disposed of.

The suit be listed on 5th February 2021.

Shraddha
K.
Talekar

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[N.J. JAMADAR, J.]