

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
COMMERCIAL APPEAL NO.543 OF 2019
IN
COMMERCIAL NOTICE OF MOTION NO.561 OF 2018
IN
COMMERCIAL SUIT NO.29 OF 2013

Reliance General Insurance Co. Ltd.Appellant/Original Plaintiff
Vs.
Colonial Life Insurance Company
(Trinidad) Ltd. & Anr.Defendants

Mr. Nitin Thakkar, Senior Advocate a/w. Mr. Anubhav Datta and Ms. Aashna Jain i/by Tuli & Co. for the Appellant.

Mr. Sharan Jagtiani, Senior Advocate a/w. Mr. Priyank Kapadia, Ms. Sonali Mathur and Mr. Parth Jain i/by AZB & Partners for Respondent No.1.

Ms. Suchita Uppal i/by Hariani & Co. for Respondent No.2.

CORAM : S.C. GUPTE AND
SURENDRA P. TAVADE, JJ.

DATE : 28 JANUARY 2021

ORAL JUDGMENT (PER : S. C. GUPTE, J.):

1. This commercial appeal challenges an order passed by a learned Single Judge of this Court on a notice of motion. The question of law decided by the learned Single Judge in the impugned order was : whether the mandatory timeline of 120 days for filing a written statement in a Commercial Suit is applicable to suits which were filed prior to the enactment of the Commercial Courts Act, 2015 and which came to be transferred as commercial suits to be heard by the commercial division of this Court in accordance with the provisions of Section 15 of the Commercial Courts Act.

2. The present suit was filed on 19.03.2013 as an ordinary suit. On 15.04.2013, writ of summons was issued to both defendants, who are Respondents to the present commercial appeal. The writ of summons was

duly served on defendant No.2, but not on defendant No.1. In pursuance of such service, on 19.11.2013, defendant No.2 filed its written statement in the suit. Before the writ of summons could be served on defendant No.1, the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015 ("Commercial Courts Act") came into force on 23.10.2015. In pursuance of that Act, particularly Section 15 thereof, the Prothonotary & Senior Master issued a notification transferring all suits of specified value and answering the description of "commercial dispute" to the commercial division of this Court, to be tried as commercial suits. On 13.08.2016, the present suit was accordingly converted into a commercial suit. At that stage, the advocate of original defendant No.1 entered appearance and waived service of writ of summons. The Prothonotary & Senior Master, by his order dated 13.08.2016, directed defendant No.1 to file its written statement on or before 27.09.2016, failing which the commercial suit was directed to be transferred to the list of undefended suits as against defendant No.1. Defendant No.1 failed to file its written statement by that date and instead sought three extensions. Finally, by order dated 21.09.2017, defendant No.1 was granted four weeks' time to file its written statement. Defendant No.1, however, did not file its written statement within this period. On 19.01.2018, period of 120 days from the date of the original order providing for the last extension of time elapsed without there being any written statement on record. In the premises, on 27.02.2018, defendant No.1 filed the present notice of motion seeking condonation of delay in filing its written statement. The learned Judge, after hearing the parties, passed an order on that notice of motion on 24.05.2019, holding *inter alia* that the mandatory timeline of 120 days for filing of a written statement in a commercial suit was not applicable to suits filed prior to the enactment of the Commercial Courts Act, which were subsequently transferred as commercial suits to be tried by the commercial division of this Court. Though the notice of motion for condonation of delay is still pending before the learned Single Judge, as a matter of law, the point was decided in favour of the

applicant/defendant No.1. Being aggrieved, the present commercial appeal has been filed by the original plaintiff.

3. Mr. Thakkar, learned senior counsel appearing for the appellant/original plaintiff, has taken us through the provisions of the Commercial Courts Act and, in particular, Section 15 thereof and amendments made by that Act to Order V Rule 1, Order VIII Rule 1 and Order VIII Rule 10 of the Code of Civil Procedure, 1908 ("Code") in their application to commercial suits. Learned counsel submits that the provisions of Commercial Courts Act and in particular, the proviso to Sub-section (4) of Section 15 thereof, which makes the amended provisions of sub-rule (1) of Order V of the Code inapplicable to pending suits transferred to the commercial division, applies only to those suits which were not only pending as at the date of the Commercial Courts Act, but where writs of summons had been served on the defendants prior to the enactment of that Act. Learned counsel submits that as far as transferred pending suits, where writs of summons have not been served on the defendants, are concerned, the timeline of 120 days for filing of a written statement and forfeiture of the right to file written statement after expiry of that period very much apply to them. Learned counsel relies on the judgment of the Supreme Court in the case of **SCG Contracts (India) Private Limited Vs. K.S. Chamankar Infrastructure Private Limited & Ors.**¹ and decisions of Delhi High Court in the cases of **AIS Glass Solutions Limited vs. Moser Baer Solar Limited & Ors.**², and **Oku Tech Private Limited vs. Sangeet Agarwal & Ors.**³ and the judgment of a learned Single Judge of our High Court at its Aurangabad Bench in **Raj Process Equipments and Systems Pvt. Ltd. & Ors. vs. Honest Derivatives Pvt. Ltd.**⁴, in support of his submissions.

1 (2019) 12 SCC 210

2 2017 SCC Online Del 11467

3 2016 SCC Online Del 6601

4 2019 SCC Online Bom 12063

4. The Commercial Courts Act provides for adjudication of what are called commercial disputes *inter alia* by establishment of Commercial Courts, Commercial Appellate Courts, Commercial Divisions and Commercial Appellate Divisions to deal with such suits. It makes various procedural provisions for dealing with such suits and appeals from such suits. It *inter alia* makes amendments to the provisions of the Code in their application to such commercial suits. We are concerned here with three such provisions of the Code, which have been amended as a result. These provisions are (i) Order V Rule 1, (ii) Order VIII Rule 1 and (iii) Order VIII Rule 10 of the Code. In Order V Rule 1, for the existing second proviso (which applies to all ordinary suits), the following proviso has been substituted for commercial suits :

“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 deem 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.”

On the other hand, in Order VIII Rule 1, the following proviso has been substituted in place of the original proviso :

“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 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.”

So also, in Order VIII Rule 10, the following proviso has been inserted;

“Provided that no Court shall make an order to extend the time provided under Rule 1 of this Order for filing of the written statement.”

5. The Commercial Courts Act provides for transfer of pending suits in Chapter V of the Commercial Courts Act. Section 15, which is the only section forming part of Chapter V, is quoted below :

“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 issued 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.”

6. As is apparent on the very face of it, Sub-section (4) of Section 15 makes a special provision for timeline of a transferred suit or application. The Commercial Courts Act contains strict timelines for various stages of a commercial suit. Though these timelines are applicable even to transferred commercial suits, atleast to the extent of those proceedings which were not complete at the time of transfer of such suits, just as all provisions of the Commercial Courts Act are meant to apply to those proceedings (Sub-section (3) of Section 15), Sub-section (4) of Section 15 gives power or authority to the Commercial Division or Court, as the case may be, to prescribe new timelines or issue further directions in such transferred suits. The proviso to Sub-section (4) makes the timeline provided in sub-rule (1) of Rule 1 of Order V of the Code for filing of a written statement inapplicable to a transferred commercial suit. As we have noted above, the amended proviso to sub-rule (1) of Rule 1 of Order V provides for initial period of 30 days after service of writ of summons for filing of a written statement, leaving discretion to the Court to extend that time, for reasons to be recorded in writing and on payment of such costs as it deems fit, upto a maximum period of 120 days from the date of service of writ of summons. The proviso goes on to add that on expiry of 120 days, the defendant shall forfeit the right to file a written statement. It further affirms the position in law by providing that no court shall thereafter allow the written statement to be taken on record. As is obvious, this entire proviso has been done away with by virtue of the

proviso to Sub-section (4) of Section 15 of the Commercial Courts Act, which makes it clear that this particular proviso to Sub-rule (1) of Rule 1 of Order V does not apply to any suit or application which is transferred under Section 15 of the Commercial Courts Act to the Commercial Division of this Court.

7. The argument of Mr. Thakkar is twofold. Firstly, learned counsel submits that even if the proviso of Sub-rule (1) of Rule 1 of Order V has been done away with in its application to transferred commercial suits, the other amended provisions, namely, provisos to Order VIII Rule 1 and Order VIII Rule 10 of the Code, are left intact. Learned counsel submits that exclusion of these two provisos from the text of Section 15(4) must be treated as a deliberate act of the legislature and given a meaning accordingly; it is imperative not to treat this exclusion as a lacuna and then cure it by reading these two provisos in Sub-section (4) of Section 15. Learned counsel, secondly, submits that the amended provisions can only be reconciled by interpreting Sub-sections (3) and (4) of Section 15 of the Commercial Courts, Act in the manner suggested by him, that is to say, by holding the proviso to Sub-section (4) of Section 15 to be applicable only to those transferred suits or applications, where writs of summons have already been served prior to the transfer and not to those suits where writs of summons are still to be served as at the date of such transfer.

8. In our opinion, neither of the two submissions has any merit. It is beyond the pail of controversy that Sub-rule (1) of Rule 1 of Order V of the Code, which has been amended in its application to commercial suits, whilst providing for a special timeline for filing of a written statement in commercial suits, makes four important provisions in that behalf. Firstly, it stipulates an initial timeline of 30 days for filing of a written statement. Secondly, it gives power to the Court to extend this timeline upto a period of maximum 120 days from the date of service of summons. Thirdly, it provides for the

defendant's forfeiture of his right to file a written statement at the expiry of this period of 120 days. And fourthly, it prohibits the Court from allowing any written statement to be taken on record thereafter. No doubt, as a result of these pivotal provisions, the Commercial Courts Act introduces amendments even in Order VIII Rule 1 and Order VIII Rule 1 and makes supplementary provisions to the same effect in these latter rules. The proviso introduced in Rule 1 of Order VIII reiterates practically the whole of the proviso to Sub-rule (1) of Rule 1 of Order V. In fact, it is in exactly identical terms, whereas the amended proviso to Rule 10 of Order VIII reiterates the proscription against the Court extending the maximum time provided for filing of a written statement. It is, however, impermissible to hold that though the entire proviso of Sub-rule (1) of Rule 1 of Order V has been made inapplicable to transferred commercial suits, identical provisions contained in Order VIII Rule 1 and the restriction on the Court's power contained in the proviso to Order VIII Rule 10 nevertheless apply to such transferred commercial suits. In the very least, if we were to hold this to be the correct position, Sub-section (4) of section 15 of the Commercial Courts Act would be rendered wholly nugatory, losing all its content and meaning. That, we are afraid, is impermissible whilst construing any statutory enactment.

9. Section 15 of the Commercial Courts Act, which is the lone provision made specially for taking care of transfer of ordinary suits pending before the High Courts to Commercial Divisions and their trial as commercial suits by those Divisions, not only makes the timeline provided under the proviso to Sub-rule (1) of Rule 1 of Order V inapplicable to such transferred suits, it empowers the Court, in its discretion, to prescribe a new timeline within which the written statement can be filed. In its plain meaning, what this proviso does is that it bestows discretion on the Court to provide for extension of time beyond the maximum permissible time limit of 120 days from the date of service of writ of summons. If that is so, there is no way to apply the forfeiture clause to a defendant, who does not file his written

statement within the period of 120 days and who may be given further time by the Court. It would make scarce sense of the Court's power to grant further time, if one were to hold that the Court nevertheless does not have power to grant time by virtue of the provisions of Order VIII Rule 1 or Rule 10. No act of legislature can be read in this fashion.

10. The Supreme Court's judgment in the case of **SCG Contracts (India) Private Limited (supra)** deals with a commercial suit filed after the Commercial Courts Act came into operation. It considers whether the timeline of maximum period of 120 days for filing of a written statement in the suit before it could be extended by the Court. On a combined reading of the three provisions introduced by the Commercial Courts Act, namely, the substituted second proviso in Sub-rule (1) of Rule 1 of Order V, the substituted proviso to Rule 1 of Order VIII and the newly introduced proviso in Rule 10 of Order VIII, it holds that the provision of maximum period of 120 days from the date of service of writ of summons for filing a written statement in a commercial suit is mandatory and not directory. This law has nothing to do with the facts of our case. In our case, what we are concerned with is, whether forfeiture by a defendant of his right to file written statement after this timeline and inability of the Court to extend the timeline, are meant to apply to those suits, which were originally filed as ordinary suits and later on transferred to the commercial division by virtue of Section 15 of the Commercial Courts Act. In so far as such suits are concerned, the strict timeline provided for filing of a written statement, the forfeiture of the defendant's right to file a written statement after such timeline and inability of the Court to extend that timeline, are expressly stated to be not applicable.

11. The judgment of Delhi High Court in **Oku Tech Private Limited (Supra)** also deals with the combined effect of the three amended provisions of the code in their application to commercial suits filed after the commercial Courts Act came into force. It rules on the legislative intent to take away the

discretion of the Court to extend the time for filing of a written statement beyond the maximum period of 120 days. The other judgment of that Court, namely, the case of ***AIS Glass Solutions Limited (Supra)***, reiterates the law stated in ***Oku Tech Private Limited (supra)***.

12. The facts of the case before Aurangabad Bench in ***Raj Process Equipments and Systems Pvt. Ltd. (supra)*** were, as per the Court's own observations, wholly different from the facts of the impugned judgment of the learned Single Judge in our case. The Court in that case did not question the law stated by the learned Single Judge in the impugned judgment, but held that it would not apply to the case in hand, since the suit, which was before the Aurangabad Bench, was transferred to the commercial Court after a "*no written statement*" order was passed. Besides, as observed by that Court, unlike in the case of the impugned judgment, the Petitioners in ***Raj Process Equipments and System Pvt. Ltd.*** had not even filed any application for setting aside the "*no written statement*" order. The statement of the Court in ***Raj Process Equipments and Systems Pvt. Ltd.*** that the provisions of Order VIII Rule 1 and Rule 10 were not noticed in the impugned judgment or other observations made in connection with the provisions of Order VIII Rule 1 or 10, cannot be read to mean a doubt being cast about the correctness of the observations in the judgment impugned in the present commercial appeal. Anyway, the judgment in ***Raj Process Equipments and Systems Pvt. Ltd.*** does not state the law otherwise.

13. The distinction drawn by Mr. Thakkar between those commercial suits which were filed before the commencement of the Commercial Courts Act and where writs of summons were served prior to such commencement and those suits which were filed before the introduction of the Commercial Courts Act, but where writs of summons were not served till the date of commencement of the Commercial Courts Act, has no merit. Chapter V of the Commercial Courts Act, dealing with the subject, is entitled "Transfer of

pending suits”. Sub-section (1) of Section 15 provides for compulsory transfer of all suits and applications including applications under Arbitration and Conciliation Act, 1996, relating to commercial disputes of specified value ***pending*** in a High Court where a Commercial Division has been constituted, to such commercial division. The condition for application of this provision is “pendency” of a suit or application. The provisions which follow [Sub-sections (2) to (5)] deal with such pending suits transferred to the commercial division. There is no scope for distinguishing between these suits on the basis of service or want of service of writ of summons. Sub-sections (2) to (5) of Section 15 apply to all commercial suits irrespective of the date of service of writ of summons.

14. The learned Single Judge has accordingly correctly interpreted the law and come to a correct conclusion that the mandatory timeline of 120 days for filing of a written statement in a commercial suit is not applicable to suits originally filed as ordinary suits, and which have been transferred as commercial suits to be heard by the commercial division of this Court, under Section 15(1) of the Commercial Courts Act.

15. There is, thus, no merit in the appeal. The Commercial Appeal is dismissed. Costs to be costs in the cause.

(SURENDRA P. TAVADE, J)

(S.C. GUPTE, J.)