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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 15.11.2021

CORAM :

THE HON'BLE MR.SANJIB BANERJEE, CHIEF JUSTICE
AND
THE HON'BLE MR.JUSTICE P.D.AUDIKESSAVALU

O.S.A. No.210 of 2021
and
C.M.P. No.8588 of 2021

1.Mr.Ashwin Kakumanu

2.Ms.Sujini Kakumanu

...Appellants

rep. By Power agent Mr.Ashwin Kakumanu
(cause title accepted vide Court order
dated 31.03.2021 made in CMP No.6009 &
6006 of 2021 in OSA Sr.7034 of 2021)

Vs

1.Canback Factors Ltd.,
A subsidiary of Canara Bank
and a public limited company within the
meaning of Companies Act, 1956,
having its Registered Office
at No. 67/1, Kanakapura Main Road,
V.V.Puram, Basavanagudi,
Bangalore - 560 004
and
having a Branch at Chennai,
No. 770-A, Anna Salai,
Spencer Towers Annexe,
Chennai - 600 002.

2.The Official Liquidator,
High Court of Andhra Pradesh,
5-4-400, 2nd Floor, East Wing,
Gagan Vihar, Nampally,
Hyderabad - 500 001.

3.Ms.K.S.Geetha

4.Dr.T.Pavithra



5.M/s. Hotel Temple View Pvt. Ltd.
(Pioneer Group of Companies),
Administrative Office,
132/33, Nelson Manickam Road,
Chennai - 600 029.

6.Mr.Sharat Kakumanu

7.Ms.K.Beena

8.M/s.Mahindra & Mahindra Ltd.,
Tractors Division,
Akruthi Road,
Khandiville East,
Mumbai - 400 001.

9.Andhra Bank (Mowbrays Road Branch),
265, TTK Salai,
Alwarpet,
Chennai - 600 018.

10.State Bank of India,
Settipalli Branch,
Thirupathi,
Andhra Pradesh - 517 506.

.. Respondents

Prayer: Appeal under Order XXXVI Rule 1 of the Original Side Rules read with Clause 15 of the Letters Patent to set aside the order dated 25.02.2020 made in C.S. No. 334 of 2014 and to allow the above appeal.

For the Appellants : Mr. Anand Sashidharan

For the Respondent 1 : Mr. M.Balachander

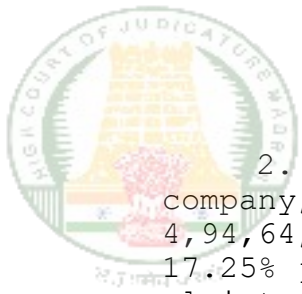
For the Respondents 2, 6 to 10 : No appearance

For the Respondents 3 to 5 : Not ready in notice

ORDER

(Order of the Court was made by P.D.AUDIKESSAVALU, J.)

This intra court appeal invoking Clause 15 of the Letters Patent has been preferred by the Seventh and Eighth Defendants in C.S. No. 334 of 2014 on the file of the Original Side of the Court aggrieved by the order dated 25.02.2020 passed in that suit. The parties are hereinafter referred to as per their description in that suit for the sake of convenience.



2. The Plaintiff, which is an non-banking financial company, had laid the suit for recovery of a sum of Rs. 4,94,64,951/- from the Defendants with discount charges at 17.25% per annum compounded with monthly rests from the date of plaint till its realization. The summons issued through Court to the Seventh and Eighth Defendants had been returned unserved on 13.06.2014 with the endorsement of bailiff as 'went to abroad'. The Plaintiff thereafter sent private summons by registered post to the Seventh and Eighth Defendants which were returned with the endorsement as 'unclaimed' as per the affidavits of service dated 31.10.2014 and 04.10.2016 filed in that regard. An application in A. No. 6920 of 2016 was thereafter made by the Plaintiff for substituted service which was ordered by the Learned Master on 09.01.2017 and paper publication was made on 20.01.2017 in the Tamil Daily 'Malai Murasu', which was recorded in the order dated 13.02.2017. It is noticed from the records that the Seventh and Eighth Defendants had entered appearance in the suit through their Counsel, who has filed vakalat on 26.07.2019. After the filing of the suit, the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015 (hereinafter referred to as 'the Commercial Courts Act' for short), came into force and by notification, the Commercial Division has been constituted in this Court with effect from 29.11.2017. In furtherance thereto, the present suit was classified as 'commercial dispute' and in the proceedings dated 25.02.2020, it was observed that whether it was a regular suit or a commercial dispute, the time prescribed under the statute to file written statement had expired long back. The Trial Court took notice of the fact that the recording of evidence of the Plaintiff Witness 1 (P.W.1) had commenced before the Learned Additional Master-I and his examination-in-chief was over and the same was pending for cross-examination and further examination of Plaintiff Witnesses and directions were issued for examining them on 11.03.2020 and completion of the cross-examination on or before 25.03.2020 and to list the matter before the Court on 30.03.2020.

3. The Seventh and Eighth Defendants claim to have applied for a certified copy of the said order on 25.02.2020 vide C.A. No. 2476 of 2020, but the same had not been made ready by the Registry. In such circumstances, the Seventh and Eighth Defendants presented this appeal on 22.01.2021 against the order dated 25.02.2020 passed in that suit along with an application in C.M.P. No. 7430 of 2021 to dispense with the production of the original certified copy by accepting its copy which had been downloaded from the official website of this Court which has been ordered on 29.04.2021.

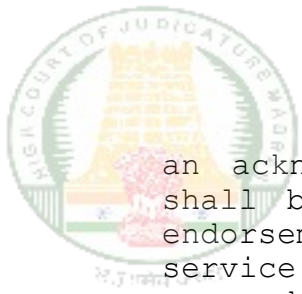
4. The grievance sought to be ventilated by the Seventh and Eighth Defendants in this appeal is that the Trial Court



ought not to have held that the filing of their Written Statement had been forfeited in the absence of proper service of summons on them in the suit which had been presented on 28.04.2014 prior to the commencement of the Commercial Courts Act. The Plaintiff resists the appeal by pointing out that inasmuch as the Learned Master on the Original Side of this Court has recorded the completion of service of summons on the Seventh and Eighth Defendants on 13.02.2017, it is not open to them to assert that the time line for filing the Written Statements cannot be applied in this case. It is emphasized that since P.W.1 has been cross examined by Learned Counsel for the Seventh and Eighth Defendants, this appeal cannot be prosecuted by those Defendants.

5. Having regard to the rival submissions made by Learned Counsel for both sides, the pivotal question that arises for consideration is whether the Seventh and Eighth Defendants have forfeited their right to file Written Statement in the suit in terms of the substituted proviso to Rule 1 of Order VIII of the Code of Civil Procedure, 1908, as amended by the Commercial Courts Act?

6. The Learned Judge in the order under appeal has taken the view that inasmuch as the suit is a 'commercial dispute', the bar under substituted proviso to Rule 1 of Order VIII of the Code of Civil Procedure, 1908, as amended by the Commercial Courts Act, would operate and the Seventh and Eighth Defendants cannot be permitted to file Written Statement and in any event, they have not filed their Written Statement within the time limit stipulated for regular suit. Before proceeding further to examine the correctness of the such conclusion arrived, it would be necessary to first ascertain as to whether there has been proper service of summons on the Seventh and Eighth Defendants which would have the effect of forfeiting their right to file Written Statement after the lapse of the maximum period of 120 days from the date of service of summons on them. As already noticed, the summons had been attempted to be served only once through Court on the Seventh and Eighth Defendants, which was returned unserved on 13.06.2014 with the endorsement of the bailiff as 'went to abroad'. There is nothing on record to show that any further steps had been taken to issue fresh summons to the Seventh and Eighth Defendants through Court thereafter. The Plaintiff has filed affidavits of service dated 31.10.2014 and 04.10.2016 along with returned postal covers showing that the private summons sent to the Seventh and Eighth Defendants by registered post have been returned unserved with the postal endorsement 'unclaimed' on both occasions. It must, at once, be pointed out here that Rule 8 of Order IV of the Madras High Court Original Side Rules provides that the Plaintiff may privately serve summons to the Defendants by registered post and



an acknowledgment purporting to be signed by such Defendants shall be treated as sufficient proof of such summons, but an endorsement of its 'refusal' shall not be deemed to be due service. Learned Counsel for the Plaintiff endeavoured to persuade that the postal endorsement of 'unclaimed' would have to be construed as due service and ought not to be discarded as its 'refusal'. However, it is not possible to accept such contention inasmuch as the postal endorsement of 'unclaimed' is in effect nothing but 'refusal' to receive the same, which cannot be due service in terms of the quoted rule. The service of summons has been recorded to have been completed on the Seventh and Eighth Defendants on 13.02.2017 after effecting substituted service by way of paper publication in Tamil Daily 'Malai Murasu' in the issue dated 20.01.2017 in furtherance to the order dated 09.01.2017 passed in A. No. 6920 of 2016 by the Learned Master. Inasmuch as that substituted service has not been preceded by sufficient attempts to serve summons through Court, it ought not to have been accepted as proper service on the Seventh and Eighth Defendants. The consequential reckoning of the lapse of the maximum period of 120 days from 13.02.2017 cannot in such circumstances be of any avail to deprive the Seventh and Eighth Defendants of their vested right to file Written Statement after due service of summons in the suit. It is true that even before the commencement of the Commercial Courts Act and the notification dated 29.11.2017 constituting the Commercial Division in this Court, no Defendant can claim any unfettered right to file Written Statement after the prescribed maximum period of six weeks from the date of service of summons under Rule 5 of Order IV of the Madras High Court Original Side Rules and any delay thereafter would have to be condoned by the Court on satisfactory explanation in that regard. However, as the suit in the instant case has been filed on 28.04.2014 prior to that date, the absolute bar to receive any Written Statement of a Defendant after the expiry of the maximum period of 120 days, inserted by the substituted proviso to Rule 1 of Order VIII of the Code of Civil Procedure, 1908, as amended by the Commercial Courts Act, does not get attracted and this Court is empowered to receive the Written Statement if sufficient cause for the delay is shown. This view taken is fortified by the decision of the Division Bench of this Court in *Rubinetterie Bresciane Bonomi Spa -vs- Lehy Instrumentation & Values Pvt. Ltd.* [(2019) 4 CTC 188].

7. Learned Counsel for the Plaintiff strenuously contended that P.W.1 has been cross-examined by Learned Counsel for the Seventh and Eighth Defendants, which must lead to the inference that those Defendants cannot now be permitted to file their Written Statement. At this juncture, it requires to be noticed from the materials borne out of the record that such cross-examination has taken place only after impugned order dated



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25.02.2020 had been passed and though the Seventh and Eighth Defendants had immediately applied for its certified copy, the Registry had not supplied the same. That apart, it is also brought to notice that the Plaintiff had been making periodical amendments to the plaint, but the amended copy of the plaint had not been furnished to Learned Counsel for the Seventh and Eighth Defendants, who had entered appearance on 26.07.2019, till the passing of the impugned order on 25.02.2020 in the suit. It is evident from the proceedings in the suit that by a subsequent order dated 15.04.2021, the Plaintiff was permitted to make further amendments in the plaint and the Court had specifically directed the amended copy of the plaint to be filed by 26.04.2021 and has observed that the Defendants have right to file Additional Written Statement, if so advised. It is informed that the Seventh Defendant has then filed the Written Statement vide Diary No. 14582 on 18.06.2021, which has been adopted by the Eighth Defendant by a memo dated 16.06.2021 and is now available on record.

8. In the backdrop of the aforesaid fact situation coupled with the legal position noticed supra, the Seventh and Eighth Defendants cannot be held to have forfeited their right to file Written Statement in the suit in terms of the substituted proviso to Rule 1 of Order VIII of the Code of Civil Procedure, 1908, as amended by the Commercial Courts Act. Moreover, the Plaintiff has not shown any real prejudice caused by permitting the Seventh and Eighth Defendants to contest the matter by filing their Written Statement at this point of time. However, inasmuch as the Seventh and Eighth Defendants had evaded to receive the private summons sent through registered post, it would be appropriate that they should be mulcted with costs for contributing to the delay for the progress of the suit, which is a 'commercial dispute', and they shall pay the sum of Rs. 25,000/- by way of Demand Draft in favour of the Plaintiff under written acknowledgment by 22.11.2021 towards the same.

9. The result of the foregoing discussion is that the appeal in O.S.A. No. 210 of 2021 is disposed on the following terms:-

- (i) The order dated 25.02.2020 in C.S. No. 334 of 2014 to the extent that it forfeits the right of the Seventh and Eighth Defendants to file Written Statement in the suit is set aside.
- (ii) The Written Statement vide Diary No. 14582 presented by the Seventh Defendant on 18.06.2021 in C.S. No. 334 of 2014, which has been adopted by the Eighth Defendant by a memo dated 16.06.2021, is taken on file.
- (iii) Since P.W.1 has been examined-in-chief and partly cross-examined by Learned Counsel for the Seventh and Eighth Defendants, such evidence shall continue to remain on



record, and the Plaintiff may file additional proof affidavit, if required, by 30.11.2021 after furnishing its copy to Learned Counsel for the Seventh and Eighth Defendants.

- (iv) The suit shall be listed before the Learned Additional Master-I on 08.12.2021 when P.W.1 shall appear for continuation of cross-examination by Learned Counsel for the Seventh and Eighth Defendants without fail. The submission of Learned Counsel for the Seventh and Eighth Defendants that he would not repeat the same questions already put to the said witness and for which answers have been already elicited, is placed on record. Further proceedings in the suit including examination of other witnesses of the Plaintiff and the Seventh and Eighth Defendants shall take place following the prescribed procedure in accordance with law.
- (v) Apart from the sum of Rs. 25,000/- required to be paid by the Seventh and Eighth Defendants to the Plaintiff by 22.11.2021 towards costs for not receiving the private summons sent through registered post, the parties shall bear their respective costs in this appeal.
- (vi) Consequently, C.M.P. No. 8588 of 2021 is closed.

Sd/-
Assistant Registrar (CS-VI)

//True Copy//

Sub Assistant Registrar

vjt

To:

1.The Official Liquidator,
High Court of Andhra Pradesh,
5-4-400, 2nd Floor, East Wing,
Gagan Vihar, Nampally,
Hyderabad - 500 001.

2.The Sub Assistant Registrar,
Original Side,
Madras High Court,
Chennai - 600 104.
(for listing the suit before AM-I on 08/12/2021)

+1cc to Mr.M.Balachander, Advocate, S.R.No.58677

O.S.A. No. 210 of 2021

PPA (CO)
RVM(19/11/2021)