

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

% **Pronounced on: 27th September, 2021**

+ **CM (M) 335/2021 & CM APPL. 14646/2021 (of petitioner u/S 151 CPC for stay)**

SUPERIOR AIRCON PVT. LTD.Petitioner

Through: Ms. Amrita Sarkar, Advocate.

Versus

NATIONAL BUILDING CONSTRUCTION CORPORATIONRespondent

Through: Mr. Kartik Nagarkatti, Advocate.

CORAM:

HON'BLE MS. JUSTICE ASHA MENON

J U D G M E N T

1. The petition has been filed under Article 227 of the Constitution of India against the order dated 22nd May, 2019 and the order dated 16th January, 2021 passed by the learned Commercial Court, South-East District, Saket.

2. The grievance of the petitioner is that the respondent though had been served with the summons in the suit on 16th July, 2019, failed to file the written statement within thirty days of the receipt of the summons, which fact was recorded by the learned Commercial Court in its order dated 12th September, 2018. A written statement was filed on 15th November, 2018, which was the 120th day from the date of receipt of the summons.

3. According to Ms. Amrita Sarkar, learned counsel for the petitioner this filing was incomplete filing since without the leave of the Court, a delayed written statement could not be filed and the respondent had not filed such an application for condonation of delay, while filing the written statement. The application for condonation of delay was filed only on 31st January, 2019. Learned counsel submits that the learned Trial Court on 22nd May, 2019 allowed the application for condonation of delay as a “*procedural omission*” but imposed costs of Rs.9,000/-. Subsequently, on 11th September, 2020, the petitioner sought striking off the written statement on the ground that the same had been filed beyond the mandate of law as prescribed under the Commercial Courts Act, 2015.

4. Relying on the judgment of the Supreme Court in ***SCG Contracts (India) Pvt. Ltd. Vs. K.S. Chamankar Infrastructure Pvt. Ltd.*** (2019) 12 SCC 210 and the judgment dated 15th January, 2020 of a Co-ordinate Bench of this Court in CS(COMM) 140/2019 titled ***Friends Motel Vs. Shreeved Consultancy LLP***, it was submitted that in the absence of an application seeking condonation of delay, the written statement could not be taken on record, particularly after a lapse of 120 days from the date of receipt of summons. It was further submitted that questions relating to the jurisdiction of the Court remain open and a jurisdiction cannot be conferred by parties through their consent. It was also submitted that such a decision of a Court without powers/jurisdiction, could not be said to be final. Thus, the learned counsel submitted that the initial order dated 22nd May, 2019 being erroneous though complied with, would not act as *res judicata*. It was submitted that therefore, when an application under Order VIII Rule 1 of

the Code of Civil Procedure, 1908 (CPC) was moved by the petitioner for striking off the written statement from the record, the learned Commercial Court ought to have allowed that application instead of holding that when the delay had been condoned vide order dated 22nd May, 2019, the question of delay could not be re-agitated by means of the application under Order VIII Rule 1 CPC. What was an erroneous decision, according to the learned counsel could not prevail and the learned Commercial Court, in the light of the cited case law, particularly ***Friends Motel*** supra, ought to have taken off the written statement from the record.

5. Mr. Kartik Nagarkatti, learned counsel for the respondent submitted that the judgment of this Court in ***Friends Motel*** (supra) was not applicable, as in that case no application had been filed at all, whereas in the instant case, it was on the permission granted by the Joint Registrar of this Court that the application was filed, seeking condonation of delay. Thereafter, the suit was transferred to the Commercial Division in South-East, Saket. It was submitted that the order dated 22nd May, 2019 was never challenged and thus there was acquiescence and the learned Commercial Court had rightly applied the principles of *res judicata*. It was also submitted that the Supreme Court in ***SCG Contracts (India) Pvt. Ltd.*** (supra) did not hold that an application for condonation must be filed along with the written statement and therefore, once the Joint Registrar had allowed the respondent to place the application on record and it was rightly allowed vide order dated 22nd May, 2019, there was no error in the orders of the learned Commercial Court dated 16th January, 2021 and the

application of the petitioner under Order VIII Rule 1 CPC to strike off the written statement from the record, was rightly dismissed.

6. While it is true that the Co-Ordinate Bench of this Court has in *Friends Motel* (supra) held that in the absence of an application seeking condonation of delay, the written statement could not be taken on record, after the lapse of thirty days from the date of service and held by the Supreme Court in *SCG Contracts (India) Pvt. Ltd.* (supra) that in any case the court could condone the delay in filing the written statement only upto a further period of ninety days on sufficient cause being shown regarding exceptional circumstances, there are certain distinguishing facts in the present case. The order condoning the delay in filing the written statement was passed on 22nd May, 2019. The fact that the application had been filed after a delay of seventy days of filing the written statement was also noticed by the learned Commercial Court. Yet it choose to observe that since it was only procedural, it condoned the delay, subject to payment of costs of Rs.9,000/- to be paid to the petitioner. The written statement which was already filed was taken on record and time was given to the petitioner to file a replication.

7. It is not denied that the costs were received by the petitioner and the replication was also filed. The petitioner did not challenge this decision till the application under Order VIII Rule 1 CPC was filed on 11th September, 2020. Though an explanation of the Covid-19 pandemic has been offered, this explanation is not a credible explanation for not challenging the order dated 22nd May, 2019, since the pandemic and lockdown happened in March, 2020. Till then the petitioner seems to have been satisfied with the decision of the learned Trial Court dated 22nd

May, 2019. A subsequent decision of this Court prompted the filing of the application under Order VIII Rule 1 CPC in September, 2020.

8. In its order dated 16th January, 2021, the learned Commercial Court has observed all these facts to conclude that the question of delay could not be re-agitated by means of the application under Order VIII Rule 1 CPC. This Court finds no error in this conclusion of the learned Commercial Court.

9. The learned counsel for the petitioner has sought to point out an error in the order dated 22nd May, 2019 on the basis of a subsequent decision of this Court dated 15th January, 2020. Clearly, a subsequent decision on a point of law cannot have the consequence of unsettling a decision which has been rendered by a Competent Court prior to the said decision.

10. The petition lacks merit and is accordingly dismissed along with the pending application.

11. The judgment be uploaded on the website forthwith.

(ASHA MENON)
JUDGE

SEPTEMBER 27, 2021

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