

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

% **Reserved on: 16th July, 2021**

Pronounced on: 17th August, 2021

+ CM (M) 346/2020, CM APPL.10013/2020 (by the petitioner u/S 151 CPC for stay)

M/S OK PLAY INDIA PVT LTD Petitioner

Through: Mr. Anirudh Wadhwa and Mr.
Vipul Kumar, Advocates

versus

M/S A P DISTRIBUTORS & ANR Respondents

Through: None

CORAM:
HON'BLE MS. JUSTICE ASHA MENON

J U D G M E N T

[VIA VIDEO CONFERENCING]

1. This petition under Article 227 of the Constitution of India has been filed by the plaintiff before the learned Commercial Court, being aggrieved with its order dated 26th November, 2019, whereby it had rejected the objections raised by the petitioner/plaintiff against the belated filing of the written statement by the respondents/defendants, allowing an application filed for condonation of delay much after the period of limitation.

2. The petitioner/plaintiff had filed the suit bearing number CS (COMM) 81/2018, for the recovery of a sum of Rs.7,68,000/-. Summons were duly served on the respondent on 23rd January, 2019.
3. Mr. Anirudh Wadhwa, learned counsel for the petitioner/plaintiff submitted that the written statement had to be filed by 22nd February, 2019. However, the written statement was filed on 26th February 2019, with a delay of four days and that too, without the affidavit of admission and denial of documents, as mandated by the Delhi High Court (Original Side) Rules 2018. Neither was the written statement accompanied with any application seeking condonation of delay.
4. Learned counsel further submitted that, on 20th May 2019, the affidavit of admission and denial was filed i.e., after 118 days of the service of summons, and once again, no application for condonation of delay accompanied the filing of the said affidavit.
5. The learned Commercial Court heard the objections raised by the petitioner/plaintiff on 31st October 2019 and reserved the matter for orders for pronouncement at 4 PM that day. However, at 4 PM itself, the learned Court accepted an application filed by the respondents/defendants under Section 151 C.P.C., for condonation of the delay in filing the written statement and re-fixed the matter for orders on 26th November 2019.
6. This, according to the learned counsel for the petitioner/plaintiff, has greatly prejudiced it as the time lines in a commercial suit were strict and the petitioner/Plaintiff was entitled to a decree as the written statement and affidavit had been filed belatedly and without applications for condonation of delay. The application for condonation of delay could

not have been filed and taken on record on 30th October, 2020, after the expiry of 120 days from the date of service, beyond which period, the Court had no powers to condone delay in filing the written statement. Learned counsel argued that no application for condonation of delay could have been received once the matter was fixed for orders. Reliance has been placed on the judgment of this Court in ***Friends Motel Pvt. Ltd. Through its director Mr. Arun Dwivedi Vs. Shreeved Consultancy LLP & ors.*** (judgment dated 15th January, 2020 in CS (COMM) 140/2019) and the judgment of the Supreme Court in ***SCG contracts India Private Limited Vs. K.S. Chamankar Infrastructure Private Limited and Others***, 2019 (12) SCC 210.

7. Despite service, none had appeared to argue on behalf of the respondents/defendants.

8. The learned Commercial Court, in the impugned orders had noted the objections raised by the petitioner/plaintiff. It records an explanation offered in the application for condonation of delay, that the written statement was delayed on account of the time taken for procuring the original documents. But what prevailed upon the learned Commercial Court was the fact that though the application for condonation of delay was filed only on 31st October, 2020, the written statement and the affidavit had been filed well within the period of 120 days, the period up to which time the court had powers to condone the delay. It was also of the opinion that as the application for condonation of delay had brought out cogent reasons to explain the delay, therefore, a hyper technical view was not called for.

9. Amendments were carried out to the Civil Procedure Code through Section 16 of the Commercial Courts Act, 2015. The Supreme Court in its decision in *SCG contracts case (supra)* has held that these timelines are to be mandatorily adhered to. It held that the Commercial Court dealing with a commercial suit had no discretion to condone delay and could not allow the written statement to be taken on record beyond the mandatory period provided under Order VIII Rule 1 CPC. It was observed :

“8. xxxxxx

A perusal of these provisions would show that ordinarily a written statement is to be filed within a period of 30 days. However, grace period of a further 90 days is granted which the Court may employ for reasons to be recorded in writing and payment of such costs as it deems fit to allow such written statement to come on record. What is of great importance is the fact that beyond 120 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. This is further buttressed by the proviso in Order 8 Rule 10 also adding that the court has no further power to extend the time beyond this period of 120 days.

(emphasis added)

9. The learned Commercial Court seems to have used its inherent powers to condone delay, on an application under Section 151 C.P.C. that was filed beyond 120 days, as it was filed only at 4 pm on 31st October, 2019, as a sequel to the arguments raised before the learned Commercial Court in regard to the delay in filing the written statements and affidavit. The Supreme Court in *SG contracts (Supra)* rejected such an argument before it, that the court could exercise its inherent powers to condone delay, when the consequences of a procedural provision, such as the

amended Order VIII Rule 1 CPC, were “unjust”. The Supreme Court also frowned upon the exercise of inherent powers which could have the result of circumventing definite and mandatory provisions of Order V and Order VIII Rules 1 & 10 C.P.C.

10. Now, the question is whether a condonation application had to be filed and that too within 120 days, along with the written statement or whether the court without any application before it, could condone the delay and receive the written statement, subject to recording of its reasons and imposition of costs. This Court is of the view that since it is not for the court to furnish reasons for condoning the delay in filing the written statement, it is necessary that the defendant, when filing a belated written statement, also submits to the court an explanation for the delay, by moving an application in this regard. A written application supported by an affidavit is a must for seeking condonation of delay.

11. Since the written statement has to be filed within 120 days from the date of service of summons, and a filing beyond 30 days of service of summons is a delayed filing of the written statement, it is crystal clear that the application accompanying the belated filing of the written statement must necessarily have to be filed within the same time period, that is, 120 days. There is nothing in Order VIII C.P.C. to suggest otherwise.

12. A Coordinate Bench of this Court in *Friends Motel (Supra)* was dealing with a case with similar facts. There too, the written statement was filed with an affidavit of admission and denial on the 117th day on receipt of summons, without an application seeking condonation of delay. An application for condonation of delay was claimed to have been filed

on 28th August, 2019 i.e., after another 19 days. It was held that the necessary application seeking condonation of delay in filing the written statement having not been filed within the period of 120 days, there was no proper application filed before the court for condonation of delay and the written statement was not allowed to be taken on record.

10. To sum up, when a written statement is filed after 30 days of service of summons but before the expiry of further 90 days, the filing of the written statement must be accompanied with a written application setting out the reasons for the delay to allow the court to consider the reasons so given, to condone delay and receive the belated written statement giving reasons for granting such leave and enabling the court to impose appropriate costs. No application can be filed, seeking condonation of delay in filing the written statement after 120 days have elapsed from the date of service of summons.

11. In the instant case, the written statement, without the affidavit, was filed on 26th February 2019. The affidavit was filed on 20th May 2019, 117 days after service. But no application seeking condonation of delay was filed either on 26th February or on 20th May 2020. The petitioner/plaintiff raised objections to the receiving of the belated written statement and affidavit, even without a condonation application. The orders were to be pronounced at 4 pm but could not be pronounced due to administrative issues as recorded by the learned Commercial Court. Till that time, the learned Commercial Court clearly could not have condoned the delay without such application. Probably faced with an inevitable situation, the respondent/defendant came up with the application seeking condonation of delay on 31st October, 2019, that is after about 282 days,

could have considered the reasons given by the defendants for filing written statement and affidavit belatedly.

12. The learned Commercial Court erred in observing that the written statement and affidavit had been filed before the expiry of the 120 days' time that is available to the court to allow the filing of the written statement and use its inherent powers under Section 151 C.P.C. and to set at naught the mandatory provisions for filing of the written statement within 30 days or within the further period of 90 days allowed under Order VIII Rule 1 C.P.C., accompanied with an application seeking condonation of delay.

13. The impugned order is liable to be and is set aside. It is held that the respondents/defendants have forfeited their right to file the written statement. The same is directed to be taken off the record. The parties are directed to appear before the learned Commercial Court on 1st September, 2021 for the learned Commercial Court to consider the course it wishes to take under Order VIII Rule 10 C.P.C.

14. The petition alongwith pending application is accordingly disposed of.

15. Copy of this order be sent to the learned Commercial Court.

16. The judgment be uploaded on the website forthwith.

(ASHA MENON)
JUDGE

AUGUST 17, 2021/ak

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