

\$~12

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
Date of Decision: 14th July, 2021

+ **FAO (COMM) 110/2021 & CM No.5882/2020**

SUNIL SAHOO Appellant
Through **Mr. Parikshit Mahipal, Adv.**

versus

ANOOP KUMAR JAIN Respondent
Through **None**

CORAM:

HON'BLE MR. JUSTICE MANMOHAN

HON'BLE MR. JUSTICE NAVIN CHAWLA

NAVIN CHAWLA, J. (Oral)

1. The hearing has been conducted through video conferencing.
2. This appeal has been filed challenging the order dated 30.01.2020 passed by the learned District Judge-Commercial Court-05 (Central) in Suit, being CS (Comm) No.152/2020, **Anoop Kumar Jain v. Sunil Sahoo**, holding that as the appellant herein (defendant in the Suit) has not filed the written statement till the date of the order, his right to file the written statement stands closed and his defence struck off.
3. The respondent had filed the above Suit under the Commercial Courts Act, 2015 (hereinafter referred to as the 'Act'), on which the learned Trial Court issued summons to the appellant vide order dated 23.09.2019. Admittedly, the summons was served on the appellant on 20.10.2019. As the appellant, in spite of service of summons, did not

file his written statement, the learned Trial Court by way of the Impugned Order was pleased to close the right of the appellant to file the written statement.

4. The appellant claims that on the next date of hearing, that is, 04.02.2020, the appellant was represented by a Legal Aid counsel who verbally requested the learned Trial Court to give one more opportunity to file the written statement, however, this request was not acceded to by the learned Trial Court. It may be noted that the copy of the order dated 04.02.2020 has not been placed by the appellant on record in this appeal.

5. The learned counsel for the appellant submits that the learned Trial Court has erred in law in closing the right of the appellant to file his written statement prior to the expiry of 120 days from the date of the receipt of summons by the appellant. He submits that in terms of the Act, a period of 30 days is granted to the defendant to file the written statement. This period can be extended upto 120 days on the given facts and circumstances and, therefore, the right to file the written statement cannot be forfeited before the expiry of 120 days from the date of receipt of summons by the defendant/appellant herein.

6. We have considered the arguments made by the learned counsel for the appellant, however, find no merit in the same.

7. As noted hereinabove and admittedly, the suit is in relation to a commercial dispute governed by the provisions of the Commercial Courts Act. Order V, Rule 1, sub-rule (1) of the Code of Civil Procedure, 1908 (hereinafter referred to as “the Code”) provides that

where a suit has been duly instituted, the summons may be issued to the defendant to appear and answer the claim and to file the written statement of his defence, if any, within 30 days from the date of service of summons on that defendant. The second Proviso to Order V, Rule 1, sub-rule (1), as applicable to commercial disputes of a specified value, reads as under:

“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 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.”

(Emphasis supplied)

8. Order VIII Rule 1 of the Code re-emphasizes that the defendant shall, within 30 days from the date of service of summons on him, present a written statement of his defence. Proviso to Order VIII Rule 1 of the Act, as applicable to commercial disputes, reads as under:

“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.”

(Emphasis supplied)

9. Order VIII Rule 10 of the Code along with Proviso thereto, as applicable to commercial disputes under the Act, reads as under:

10. Procedure when party fails to present written statement called for by Court.—Where any party from whom a written statement is required under rule 1 or rule 9 fails to present the same within the time permitted or fixed by the Court, as the case may be, the Court shall pronounce judgment against him, or make such order in relation to the suit as it thinks fit and on the pronouncement of such judgment a decree shall be drawn up:]
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.”

10. A conjoint reading of the above provisions would clearly show that the written statement is to be filed by the defendant within 30 days of service of summons on him. This period may, however, be extended by the Court ‘for reasons to be recorded in writing and on payment of such costs as the Court deems fit’. The maximum period of such extension shall, however, not be later than 120 days from the date of service of summons on the defendant, whereafter the defendant shall forfeit the right to file the written statement. Therefore, the extension of period to file the written statement beyond the 30-day period also cannot be granted as a matter of routine or on mere asking.

The defendant cannot claim an extension of time to file the written statement as a matter of course or without showing a justifiable cause for not being able to file the written statement within 30 days of the receipt of summons of the suit, as prescribed under Order V Rule 1, sub-rule (1) and Order VIII Rule 1 of the Code. The Court can grant the extension of time beyond 30 days only for the reasons to be recorded in writing. Beyond 120 days from the service of summons, even this discretionary power of the Court is taken away.

11. In **SCG Contracts (India) Pvt. Ltd. v. K.S. Chamankar Infrastructure Pvt. Ltd. & Ors.** (2019) 12 SCC 210, the Supreme Court while considering the effect of the above provisions of the Act has held as under:

“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.”

12. In *Kailash v. Nankhu & Ors.*, (2005) 4 SCC 480, the Supreme Court while holding the provisions of Order VIII Rule 1 applicable to ordinary civil suits as directory in character and not mandatory, had held that it is only in exceptional situations that the Court may extend the time for filing the written statement though the period of 30 days and 90 days (as applicable to ordinary suits) has expired; the judge trying the case must handle the prayer for adjournment with firmness and the defendant seeking extension of time beyond the limit laid down by the provision may not ordinarily be shown indulgence; ordinarily, the time schedule prescribed by Order VIII Rule 1 has to be honoured; the defendant should be vigilant and file the written statement on the appointed date of hearing without waiting for the arrival of the date appointed in the summons for his appearance in the Court; the extension of time sought for by the defendant from the Court, whether within 30 days or 90 days, as the case may be, should not be granted just as a matter of routine and merely for the asking, but only by way of an exception and for reasons assigned by the defendant and also recorded in writing by the Court to its satisfaction. The reasons must be beyond the control of the defendant and such extension must be required in the interest of justice; and grave injustice would be required to be shown to occasion if the time was not extended.

13. In view of the above, the submission of the appellant that the learned Trial Court cannot close the right of the defendant to file the written statement before the expiry of 120 days of receipt of summons by such defendant, cannot be accepted.

14. In the present case, admittedly, the 30-day period from the date of receipt of summons by the appellant had expired; the appellant did not file any application before the learned Trial Court seeking extension of time for filing the written statement, much less show any cause for seeking such extension or for the inability to file the written statement within the prescribed time. The learned Trial Court was, therefore, correct in closing the right of the appellant to file the written statement by the Impugned Order.

15. Though, the order dated 04.02.2020 is not on record, admittedly, even on that date, no formal application was filed by the appellant before the learned Trial Court seeking extension of time to place the written statement on record. It is not even shown that as on that date, the appellant was carrying his written statement to be filed before the learned Trial Court. In fact, the order dated 04.02.2020 is not even in challenge before this Court.

16. We must also note that the Suit was originally filed under Order XXXVII of the Code but, by the impugned order, was treated as an ordinary Commercial Suit for the reason that the summons were not issued in the form prescribed. The appellant therefore, already gained an advantage because of fault of the court.

17. Further, though reason for the delay in filing the written statement seems to have not been stated before the learned Trial Court, in the appeal before us, the appellant has pleaded that he had engaged a counsel and paid him the fee, however, the counsel did not prepare the written statement nor appeared on 30.01.2020, when the impugned order was passed. However, in the appeal the name of the counsel or

whether any complaint has been made by the appellant against such counsel, has not been disclosed. The said excuse therefore, does not inspire any confidence.

18. For the reasons recorded hereinabove, we find no merit in the present appeal and the same is dismissed with no orders as to cost.

NAVIN CHAWLA, J

MANMOHAN, J

JULY 14, 2021/Arya/A.

