

Sharayu Khot.

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

COMMERCIAL NOTICE OF MOTION NO. 691 OF 2017
IN
COMMERCIAL SUIT NO. 122 OF 2016

New Consolidated Construction Company
Limited

...Applicant/Org.
Defendant

In the matter of

M/s. SAS Infra Projects (India) Pvt.Ltd.

...Plaintiff

Versus

New Consolidated Construction Co.Ltd.

...Defendant

Mr. Sanskar Marathe for the Applicant/Defendant.

Mr. Prasad Shenoy and Mr. Pankaj Uttaradhi i/by Ms. Sabeena Mahadik for the Plaintiff.

CORAM : R.I. CHAGLA J

DATE : 09 November 2022

ORDER :

1. Heard learned Counsel for the parties.
2. By this Notice of Motion, the Applicant is seeking setting aside/recall of the order dated 24th February 2017 passed by the

Prothonotary & Senior Master and for condonation of delay of 201 days in filing the Written Statement to the present Suit.

3. The Applicant has stated that the Suit had been originally filed as regular Suit for recovery of Rs. 13 Crores and odd amount along with 24% interest per annum thereon against the Defendant. There were objections which were to be removed in the Suit and by order dated 24th August 2016, this Court had directed the Plaintiff to remove the office objections raised by the office on or before 31st August 2016 failing which the Suit shall stand dismissed without further reference to this Court. Thereafter, office objections were removed and the Suit was numbered. Writ of summons were issued around December 2016 and Defendant filed Vakalatnama through Advocate in January 2016.

4. In January 2016, the matter had appeared as Commercial Suit No. 122 of 2016 and on that date, the Prothonotary & Senior Master had directed the Defendant to file Written Statement on or before 24th February 2017 failing which the Suit against the Defendant will be transferred to the list of undefended Suits. Thereafter, the Prothonotary & Senior Master on 24th February 2017

had noted the prior order dated 24th January 2017 and had recorded that in view of the Defendant not complying with the directions to file Written Statement within the stipulated time, the Suit against the Defendant is transferred to the list of undefended Suits. On that occasion also, it is clearly mentioned that the Suit is a Commercial Suit No. 122 of 2016.

5. Learned Counsel appearing for the Applicant / Original Defendant has submitted that there was delay in filing the Written Statement and an extension has been prayed for in paragraphs 6 and 7 of the Affidavit in Support of the Notice of Motion. He has submitted that the original Suit had been filed as a regular Suit and not as a Commercial Suit and was thereafter, converted in the Commercial Suit. He has submitted that the Defendant had taken time to locate concerned officers as mentioned in paragraph 6 of the Affidavit in Support of the Notice of Motion, as the instructions were required to be taken from the concerned officers working on the project and for countering the averments made in the Plaint. Due to this and the intervening monsoon season, there was delay in filing the Written Statement and accordingly, the present Application has been taken out for condonation of delay.

6. Learned Counsel appearing for the Plaintiff has vehemently opposed any relief in the Interim Application being granted. He has submitted that it is irrelevant that the present Commercial Suit had been originally filed as a regular Suit. He has submitted that from the orders of the Prothonotary & Senior Master dated 24th January 2017 and 24th February 2017, it was apparent that the Suit was shown as Commercial Suit No. 122 of 2016 and that the Defendant was directed to file Written Statement within the stipulated time, which he was unable to do so.

7. The Plaintiff has relied upon the decision of the Supreme Court in **SCG Contracts (India) Private Limited Vs. K.S. Chamankar Infrastructure Private Limited & Ors.**¹, wherein the Supreme Court has held that the Written Statement is required to be filed in the Commercial Suit within the mandatory period of 30 days from the date of service of summons on the Defendant and on failure to file Written Statement, grace period of further 90 days is granted under Code of Civil Procedure, 1908, for which the Court may allow for reasons be recorded in writing and on payment of costs by the Defendant, as the Courts deem fit but on expiry of 120 days from the

¹ (2019) 12 SCC 210

date of service of summons on the Defendant, the Defendant shall forfeit the right to file the written statement and the “Courts must” not allow the written statement to be taken on record. He has submitted that the delay is beyond 120 days as can be seen from the prayers in the Notice of Motion, where the delay of 201 days has been sought to be condoned by the Defendant. Accordingly, he has submitted that the relief sought for cannot be granted, in view of the aforementioned decision of the Supreme Court as well as provisions of Code of Civil Procedure, 1908 for filing of the Commercial Suits.

8. Learned Counsel appearing for the Plaintiff further submits that when the order was passed by this Court on 24th August 2016 and the Plaintiff was directed to remove office objections raised by the office on or before 31st August 2016, though the Suit was shown as regular Suit, after removal of office objections, the Suit was converted into the Commercial Suit and numbered accordingly. He has submitted that the writ of summons was also served upon the Defendant around December 2016 in the above Commercial Suit. Accordingly, there is no merit in the submission of the learned Counsel for the Defendant that merely because the Suit was originally filed as regular Suit, the filing of Written Statement within

120 days is inapplicable.

9. Having considered the submissions, in my view, there is much merit in the submissions of the learned Counsel for the Plaintiff. This particularly, considering that the Suit is a Commercial Suit. The initially filed regular Suit was converted into the Commercial Suit pursuant to the order dated 24th August 2016 passed by this Court for removal of office objections, I find no merit in the contention on behalf of the Defendant that merely because originally the Suit was filed as regular Suit, mandatory period of 30 days and thereafter, grace period of further 90 days under Code of Civil Procedure, 1908 to file the Written Statement, as permitted by this Court, will not apply. It is to be noted that the writ of summons, which was issued around December 2016 and served on the Defendant was also subsequent to the Suit being converted into the Commercial Suit.

10. The decision of the Supreme Court in **SCG Contracts (India) Private Limited** (supra) relied upon on behalf of the Plaintiff makes it clear that the Written Statement is to be filed within the mandatory period of 30 days from the date of service of summons

on the Defendant. Upon failure to file the Written Statement, a grace period of further 90 days is granted under Code of Civil Procedure, 1908 to file the Written Statement which the Court may allow for reasons to be recorded in writing and on payment of costs by the Defendant, as the Courts may deem fit. However, on expiry of 120 days from the date of service of summons on the Defendant, the Defendant shall forfeit the right to file the written statement and the Court must not allow the written statement to be taken on record. Thus, it is clearly held by the Supreme Court in the aforementioned decision as well as the provisions of the Code of Civil Procedure, 1908, namely amendments made under Order VIII Rules 1 and 10 and Order V Rule 1(1) by Act 4 of 2016 for suits relating to commercial disputes by specified value that delay beyond 120 days in filing the Written Statement cannot be condoned and must not be allowed to be filed.

11. Accordingly, I find that in view of the Suit being Commercial Suit as also reflecting in the orders dated 24th January 2017 and subsequent order dated 24th February 2017 of the Prothonotary & Senior Master of this Court, which orders has been sought to be set aside, there is no merit in the submissions on behalf

of the Applicant and relief sought for is accordingly, rejected.

12. The Commercial Suit shall remain transferred to the list of undefended Suits, as was directed by the Prothonotary & Senior Master vide order dated 24th February 2017.

13. Notice of Motion is accordingly, disposed of.

14. There shall be no order as to costs.

[R.I. CHAGLA J.]