

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

% *Date of decision: 23rd November, 2022.*

+ **CS(COMM) 14/2020 & I.A. 12304/2021(u/S 151 of CPC)**

TPS INFRASTRUCTURE LIMITED Plaintiff
Through: Mr.Vikas Mishra, Advocate.

versus

RANCHI MSW PVT LIMITED & ANR. Defendants
Through: Ms.Ritwika Nanda and Ms.Akshita
Salamapuria, Advocates for D-1.

CORAM:
HON'BLE MR. JUSTICE AMIT BANSAL

JUDGMENT

AMIT BANSAL, J. (Oral)

I.A. 4616/2021 (O-VIII R-1 of CPC)

1. The present application has been filed on behalf of the defendant no.1 under Order VIII Rule 1 of the Code of Civil Procedure, 1908 (CPC) seeking condonation of delay in filing written statement. Notice in this application was issued on 26th March, 2021. Reply has been filed on behalf of the plaintiff opposing the present application.

2. The relevant facts for deciding the present application are set out hereunder:

2.1 On 10th February, 2020, summons in the suit were served on the defendant no.1.

2.2 On 11th March, 2020, the 30 days period prescribed for filing of

written statement expired.

- 2.3 On 9th June, 2020, the condonable period for filing written statement in terms of second proviso to Order VIII Rule 1 of the CPC expired.
- 2.4 On 17th October, 2020, the written statement was filed on behalf of the defendant no.1 along with affidavit of admission/denial of documents.
- 2.5 On 18nd March, 2021, the present application was filed seeking condonation of delay in filing written statement.
3. Counsel for the defendant no.1 relies upon various orders passed by the Supreme Court in Suo Motu Writ Petition (C) No.3/2020 to submit that the period from 15th March, 2020 till 28th February, 2022 is to be excluded for the purposes of calculating limitation. The defendant no.1 bona fide believed that the summons of the suit were served on the defendant no.1 on 20th February, 2020 and therefore, the period of thirty days would have expired on 20th March, 2020, when the operation of the order passed by the Supreme Court in the aforesaid writ petition came into effect. It was only on 10th February, 2021 when the defendant no.1 inspected the records of the present suit, it came to its knowledge that as per the records of the suit, the summons were served on the defendant no.1 on 10th February, 2020.
4. On merits, the counsel for the defendant no.1 submits that on account of onset of COVID-19 Pandemic, there were restrictions on movement in the NCR of Delhi that restricted its office functioning. Therefore, it was difficult for the defendant no.1 to meet its counsels and have the written statement prepared.
5. Per contra, the counsel for the plaintiff submits that no explanation has been given on behalf of the defendant no.1 for not filing written

statement within the thirty days period that expired on 10th March, 2020. He further submits that even though the written statement was filed on behalf of the defendant no.1 on 17th October, 2020, the present application has been filed only on 18th March, 2021 and therefore, the written statement cannot be permitted to be taken on record in view of the judgment passed by this Court in **OK Play India Pvt. Ltd. v. A.P. Distributors**, 2021 SCC OnLine Delhi 4043.

6. I have heard the counsels for the parties and considered the rival contentions.

7. In the first order passed by the Supreme Court on 23rd March, 2020 in Suo Motu Writ Petition (C) No.3/2020, reported as **Cognizance for Extension of Limitation, In Re**, (2020) 19 SCC 10, it was held that the period of limitation in all proceedings, irrespective of the limitation prescribed under the general law or special law, whether condonable or not, shall stand extended w.e.f. 15th March, 2020 till further orders. The relevant observations are set out below:

“2. To obviate such difficulties and to ensure that lawyers/litigants do not have to come physically to file such proceedings in respective courts/tribunals across the country including this Court, it is hereby ordered that a period of limitation in all such proceedings, irrespective of the limitation prescribed under the general law or special laws whether condonable or not shall stand extended w.e.f. 15-3-2020 till further order(s) to be passed by this Court in present proceedings.”

8. In the subsequent order passed in the said writ petition on 8th March, 2021, reported as **Cognizance for Extension of Limitation, In Re Suo Motu**, (2021) 5 SCC 452, it was held that the period of limitation w.e.f. from 15th March, 2020 till 14th March, 2021 shall stand excluded for calculating

limitation period including the period for which the court can condone the delay. The relevant observations are set out below:

“2.3 The period from 15-3-2020 till 14-3-2021 shall also stand excluded in computing the periods prescribed under Sections 23(4) and 29-A of the Arbitration and Conciliation Act, 1996, Section 12-A of the Commercial Courts Act, 2015 and provisos (b) and (c) of Section 138 of the Negotiable Instruments Act, 1881 and any other laws, which prescribe period(s) of limitation for instituting proceedings, outer limits (within which the court or tribunal can condone delay) and termination of proceedings.”

9. The aforesaid observations were reiterated in the order passed in the said writ petition on 23rd September, 2021, reported as ***In Re: Cognizance for Extension of Limitation***, 2021 SCC OnLine SC 947. The relevant observations are set out below:

“8. ...
III. The period from 15.03.2020 till 02.10.2021 shall also stand excluded in computing the periods prescribed under Sections 23(4) and 29A of the Arbitration and Conciliation Act, 1996, Section 12A of the Commercial Courts Act, 2015 and provisos (b) and (c) of Section 138 of the Negotiable Instruments Act, 1881 and any other laws, which prescribe period(s) of limitation for instituting proceedings, outer limits (within which the court or tribunal can condone delay) and termination of proceedings.”

10. Finally, the aforesaid writ petition was disposed of by the Supreme Court vide order dated 10th January, 2022 and same observations were reiterated that the period from 15th March, 2020 till 28th February, 2022 shall stand excluded for computing the period of limitation and this shall also include the period within which the court can condone delay. The relevant observation of the Supreme Court are set out below:

“5.4 It is further clarified that the period from 15.03.2020 till 28.02.2022 shall also stand excluded in computing the periods prescribed under Sections 23(4) and 29A of the Arbitration and Conciliation Act, 1996, Section 12A of the Commercial Courts Act, 2015 and provisos (b) and (c) of Section 138 of the Negotiable Instruments Act, 1881 and any other laws, which prescribe period(s) of limitation for instituting proceedings, outer limits (within which the court or tribunal can condone delay) and termination of proceedings.”

11. In the order dated 9th May, 2022 passed in SLP(C) 2522/2022 titled ***Babasaheb Raosaheb Kabarne v. Pyrotek India Private Limited***, it was observed by the Supreme Court that the aforesaid orders passed by the Supreme Court in Suo Motu Writ Petition (C) No.3/2020 shall also be applicable to the limitation period prescribed under the Commercial Courts Act, 2015 for filing written statement in a commercial suit. Accordingly, the period from 15th March, 2020 till 28th February, 2022 had to be excluded for computing the period of limitation for filing written statement. Since the 120 days condonable period for filing written statement expired on 9th May, 2020 in the case before the Supreme Court, the written statement was permitted to be taken on record.

12. The judgment in ***Babasaheb Raosaheb*** (supra) was followed by a Coordinate Bench of this court in ***Relaxo Footwears Limited v. XS Brands Consultancy Private Limited.***, 2022 SCC Online Del 2456, wherein it was observed that since the condonable period under Order VIII Rule 1 of the CPC expired post 15th March, 2020, the defendants were entitled to the benefit of the orders passed by the Supreme Court in Suo Motu Writ Petition (C) No.3/2020. Written statement filed on 19th October, 2020 was permitted to be taken on record.

13. With regard to the sufficiency of reasons given by the defendant no.1 for condonation of delay, the Division Bench of this Court in its judgment dated 9th February, 2021 in FAO(OS)60/2020 titled **Vinod Kumar Kad v. Girish Kumar Kad** has noted that the prevalence of the COVID-19 Pandemic itself was a sufficient ground for the defendant not being able to prepare and file its written statement. The relevant observations of the Division Bench are set out below:

“8. We are also unable to agree with the learned counsel for the appellant that merely because online filing was permitted by this Court with effect from 08.05.2020—or even from 22.04.2020, COVID-19 pandemic stopped hampering regular filings. We cannot lose sight of the fact that in most cases, when it comes down to filing written statements, the defendant often has to visit his counsel personally at his office to give appropriate instructions for preparation thereof.; unfortunately, this has not been possible for many litigants in the last one year owing to lockdown as well as the social distancing practices imposed on account of the pandemic. We, therefore, see no reason to disregard the respondent’s version that the written statement could not be filed within the time granted by the Court, since the respondents could not visit the office of their counsel, especially between March-July 2020, when the pandemic had just set in....”

14. The same view was taken by a Coordinate Bench of this Court in **Eli Lilly and Company and Anr. v. Natco Pharma Limited and Anr.**, 2021 SCC OnLine Del 3284.

15. The counsel for the plaintiff has placed reliance on the judgment of the Coordinate Bench of this Court in **OK Play India** (supra) to contend that the date of filing of written statement will be counted from the date of filing of the application for condonation of delay in filing written statement. The aforesaid judgment was set aside by the Supreme Court vide order dated 12th

September, 2022 in SLP(C) Nos. 9733-9734/2022 titled ***A.P. Distributors O.K. Play India Pvt. Ltd.*** The relevant observations of the Supreme Court are set out below:

“21. ...

“Having heard learned counsel for the respective parties and in the facts and circumstances of the case and considering the fact that the written statement was filed on the 34th day of the service of notice of summons, however, the application for condonation of delay was filed which was beyond the period of 120 days, the High Court has taken too technical view in setting aside the order passed by the learned Commercial Court directing to accept the written statement filed on behalf of the appellants/defendants. The High Court was not justified in setting aside the order passed by the learned Trial court directing to take the written statement on record.

16. Relying on the aforesaid observations of the Supreme Court, I had condoned the delay in filing of written statement, subject to payments of costs, in ***Phillips 66 Company v. Raaj Unocal Lubricants Limited***, 2022 SCC OnLine Del 3268.

17. In view of the legal position discussed above, the period from 15th March, 2020 till 28th February, 2022 has to be excluded in the present case for the purpose of calculating period of limitation for filing written statement. Therefore, the delay in filing written statement beyond the thirty days period would only be four days. Sufficient reasons have been given by the defendant no.1 for condonation of the aforesaid delay in filing written statement.

18. Accordingly, the present application is allowed and the delay in filing written statement is condoned, subject to payment of costs of Rs.25,000/- by the defendant no.1 to the plaintiff within two weeks from today.

I.A. 11782/2020 (of the defendant no.1 under S.8 of Arbitration & Conciliation Act)

19. The present application has been filed on behalf of the defendant no.1 under Section 8 of the Arbitration and Conciliation Act, 1996 (A&C Act) seeking a reference of the disputes raised by the plaintiff in the present suit to arbitration.

20. Notice in this application was issued on 10th December, 2020 and reply has been filed on behalf of the plaintiff in opposition to the present application.

21. Counsel for the defendant no.1 has made the following submissions:

- I. The relationship between the plaintiff and the defendant no.1 is governed by the Purchase Order dated 20th September, 2016 placed by the defendant no.1 on the plaintiff, which was later revised on 3rd November, 2016 and both of which contained an arbitration clause.
- II. It is in terms of the aforesaid Purchase Orders, proforma invoices were issued by the plaintiff on defendant no.1 and the said invoices specifically referred to the Purchase Orders placed by the defendant no.1 on the plaintiff.
- III. The amount of Rs.2,51,13,295/- claimed in the plaint is only against defendant no.1 and arises out of the proforma invoices raised pursuant to the aforesaid Purchase Orders. A reference in this regard is made to paragraphs 8 and 16 of the plaint.
- IV. The prayers in the plaint have been cleverly drafted so as to make a reference to the Delivery Order issued by defendant no.2 on the plaintiff. There was no contractual relationship between

the plaintiff and the defendant no.2. Reference in this regard is made to the email dated 27th August, 2019 sent by the plaintiff to the defendant no.2. Reliance is placed on the judgment in *M/S Damco India Pvt. Ltd. v. M/S Samtel Glass Limited & Ors.*, 2013 SCC OnLine Del 446.

V. Even after the issuance of the Delivery Order, the parties in their various correspondence exchanged amongst themselves continued to make reference to the terms of the Purchase Orders.

22. Per contra, the counsel for the plaintiff has made the following submissions:

I. The prayer in the suit is with regard to specific performance of obligations under the Delivery Order dated 25th April, 2017 and the aforesaid Delivery Order does not contain any arbitration clause. Therefore, the present application under Section 8 of A & C Act is not maintainable.

II. The defendant no.2 is a necessary party for the adjudication of the dispute between the parties and since the defendant no.2 is not bound by the arbitration clause contained in the Purchase Orders, the parties cannot be referred for arbitration. Reliance is placed on the judgment in *Yogi Agarwal v. Inspiration Clothes & U And Ors.* 2009 1 SCC 372.

23. I have heard the counsels for the parties.

24. At the outset, a reference may be made to the arbitration clause contained in the revised Purchase Order issued by the defendant no.1 on the plaintiff on 3rd November, 2016, which is set out hereunder:

“12. Arbitration: All disputes and differences arising between the

parties hereto, including any disputes or difference in regard to the interpretation of any provision or term or the meaning thereof, or in regard to any claim of on party against the other or in regard and for obligations of any party or parties hereto under this Agreement or otherwise, however, shall be referred to a common Arbitrator if agreed upon by all or otherwise to two or more Arbitrators, one to be appointed by each party to the dispute or difference and such Arbitration shall be governed by the provisions of the Arbitration Act, for the time being in force. The venue will be Mumbai.”

25. Now, a reference may also be made to the prayers made in the plaint:

“(a) pass a decree of mandatory injunction directing the Defendant No. 1 to perform its obligations under the Delivery Orders dated 25.04.2017 by taking supply of the Twenty Four (24) Portable Compactors after releasing payment of Rs. 2,51,13,295/- (Rupees Two Crores Fifty One Lacs Thirteen Thousand Two Hundred and Ninety Five Only) in favour of the Plaintiff Company;

(b) award interest to the Plaintiff Company on non -payment of the aforesaid amount of Rs 2,51,13,295/- (Rupees Two Crores Fifty One Lacs Thirteen Thousand Two Hundred and Ninety Five Only) @ 24% p.a from 06.04.2017 till the date of the payment;”

26. A perusal of the prayer clause set out above would show that essentially the present suit has been filed by the plaintiff seeking recovery of Rs.2,51,13,295/-, though the relief is couched in the form of a mandatory injunction. Clearly, the supply of 24 compactors by the plaintiff and their acceptance by the defendant no.1 would be consequent to the plaintiff receiving the aforesaid amount from the defendant no.1. Therefore, in essence, the relief claimed in the present suit is that of recovery by the plaintiff from the defendant no.1. This is also clear from prayer (b) in the present suit, where the plaintiff has claimed interest on the aforesaid amount of Rs.2,51,13,295/-.

27. Next, a reference may be made to the relevant portion of paragraph 16 of the plaint:

“16. ...The accumulative margin money to be paid by the Defendant No. 1 was for a sum of Rs 2,51,13,295/(Rupees two Crores Fifty One Lacs Thirteen Thousand Two Hundred and Ninety Five Only) (in short referred to as "Margin Money") of which Margin Money in the sum of Rs 1,81,41,975/- (Rupees One Crore Eighty Only Lacs Forty One Thousand Nine Hundred and Seventy Five Only) was payable towards Compactors that were yet to be delivered and Margin Money in the sum of Rs 6,971,320 (Rupees Sixty Nine Lacs Seventy One Thousand Three Hundred and Twenty Only) was payable towards Compactors already delivered and Invoices raised and pending. The Margin Money represented 30% of the cost of the Compactors and rest of the sum representing 70% of the cost of Compactors was to be paid by the Defendant No. 2. Accordingly, Proforma Invoices dated 15.03.2017 were prepared and issued by the Plaintiff Company from its registered office.”

28. What emerges from a reading of the aforesaid paragraph is that the amount of Rs.2,51,13,295/- claimed in the present suit was based on the proforma invoices dated 15th March, 2017 raised by the plaintiff on the defendant no.1, which in turn were based on the Purchase Orders, as noted in the invoice itself.

29. The relationship between the plaintiff and the defendant no.1 was throughout governed by the Purchase Orders issued by the defendant no.1 on the plaintiff. Even after the Delivery Order was sent by the defendant no.2 to the plaintiff on 25th April, 2017, the plaintiff, in its communications dated 5th June, 2017 and 3rd July, 2017 to the defendant no.1, makes a reference to the Purchase Orders issued by the defendant no.1, filed at pages 58 and 59 of the plaintiff's documents and no reference has been made to

the Delivery Order. Therefore, there is no merit in the submission of the counsel for the plaintiff that the aforesaid Delivery Order constituted a tripartite agreement between the plaintiff and the defendants no.1 and 2 or that the aforesaid Delivery Order was in supersession of the Purchase Order dated 3rd November, 2016 issued by the defendant no.1 on the plaintiff. It may also be noted here that the Delivery Order does not bear the signatures of the defendant no.1, nor has it been sent to the defendant no.1.

30. In terms of the revised Purchase Order issued on 3rd November, 2016, the plaintiff was to deliver 53 portable compactors to the defendant no.1. The plaintiff has admitted in paragraph 27 of the plaint that the plaintiff has delivered 29 of the said 53 portable compactors. Therefore, in terms of prayer clause (a) of the plaint, it cannot be disputed that the delivery of the aforesaid Portable Compactors are in terms of the aforesaid Purchase Orders.

31. It is clear from the perusal of the documents filed by the parties that there was no privity of contract between the plaintiff and the defendant no.2. In the communication sent on behalf of the plaintiff to the defendant no.2 on 27th August, 2019 filed at page 64 of the plaintiff's documents, it has specifically been stated on behalf of the plaintiff that there is no contractual arrangement between the plaintiff and the defendant no.2.

32. Counsel for the defendant no.1 has correctly relied on the judgment of the Coordinate Bench in *M/S Damco India Pvt. Ltd* (supra), wherein it has been observed that when the parties in the suit are not parties in the arbitration agreement and are neither necessary nor proper parties for adjudication of the disputes, the parties to the arbitration agreement can be referred for arbitration under Section 8 of the A&C Act, and the judgment of

the Supreme Court in *Sukanya Holdings Pvt. Ltd. v. Jayesh H. Pandya*, AIR 2003 SC 2252, would not come in the way of the application filed under Section 8 of the A&C Act being allowed. The aforesaid observations are fully applicable in the present case. A perusal of the plaint and the prayers made in the plaint would clearly show that the suit has been filed for recovery of amounts by the plaintiff from the defendant no.1 only. No relief has been claimed against the defendant no.2. Therefore, the presence of the defendant no.2 is neither necessary nor proper for the adjudication of the disputes raised in the present suit.

33. In view of my observations that the dispute raised in the present suit is fully covered by the arbitration clause contained in the aforesaid Purchase Orders, the judgment in *Yogi Agarwal* (supra) shall have no application in the present case.

34. Consequently, the application is allowed and the parties are accordingly referred to arbitration in terms of the arbitration clause contained in the aforesaid Purchase Orders.

35. In view of the fact that no relief in the suit has been claimed against the defendant no.2, the suit stands dismissed against the defendant no.2.

36. The decree sheet be drawn up.

AMIT BANSAL, J

NOVEMBER 23, 2022

dk/sr