

05.09.2023
Court No. 19
Item no.15
CP/GB

C.O. No. 3524 of 2022
CAN 2 of 2023
Government of West Bengal,
service through the Chief Secretary & ors.
Vs.
S.S. Civil Construction Private Limited & anr.

Mr. Debasish Ghosh
Mr. Suddhadev Adak
Mr. Ratul Das

... for the Petitioners.

Mr. Biswanath Chatterjee
Mr. Sobhan Kumar Pathak

... for the Opposite Party.

In the order dated August 1, 2023, C.O. No. 3524 of 2023 be corrected as C.O. 3524 of 2022.

The department is directed to take steps accordingly.

CAN 2 of 2023 is an application for vacating the interim order dated August 1, 2023, passed in C.O. 3524 of 2022. The said vacating application is not in the list, but the parties are ready to proceed with the hearing of the revisional application. The said application is taken up with the consent of the parties and treated to be as on the day's list.

The petitioners, who are defendants in the suit, are the Government of West Bengal and the respective departments and officers. The revisional application has been filed challenging the order dated September 12, 2022, passed by the learned Judge, Commercial Court at Alipore in Money Suit No. 26 of

2021. By the order impugned, the learned Judge rejected two applications, i.e., IA 03 of 2022 and IA 02 of 2022, both filed by the petitioners.

IA 02 of 2022 was an application for vacating the order dated March 5, 2022, by which the suit was fixed for ex parte hearing. IA 03 of 2022 was an application in the nature of a show cause, filed under the provisions of Section 151 of the Code of Civil Procedure, inter alia, stating the reasons as to why the written statement should be accepted beyond time. Both the applications were rejected, inter alia, on the following grounds:

- a) The conduct of the defendants in contesting the suit, was not satisfactory.
- b) The defendants were not diligent in pursuing their remedy.
- c) The causes shown by the defendants for the delay in filing the written statement and in not contesting the suit by appearing on the dates fixed by the learned court below, were not satisfactory causes.

Mr. Ghosh, learned advocate appearing on behalf of the petitioners drew the attention of the court to the fact that the written statement was filed before the learned Civil Judge (Senior Division) at Sealdah on January 21, 2019 along with two applications. The order of the learned Civil Judge

(Senior Division) was brought to the notice of the court. The learned Judge directed that the applications would be heard on the next date and the copy of the written statement should be served. Thus, according to Mr. Ghosh, the fact remains that the written statement was already on record before the learned Civil Judge who was adjudicating the money suit prior to transfer of the suit to the court of the learned Commercial Judge at Alipore, for adjudication as a commercial suit. According to Mr. Ghosh, a suit which was transferred from a civil court to the commercial court, would not attract the rigours of the Commercial Courts Act, 2015 as also the amendment to the Code of Civil Procedure with regard to the time prescribed for filing a written statement in a commercial suit. Thus, Mr. Ghosh submits that as a huge quantity of money is involved, the defendants' written statement be accepted so that the defendants may contest the suit efficaciously. Secondly, it is urged that the summons were not received from the commercial court, case management hearing was not held and the defendants were totally unaware of the pendency of the commercial suit.

Taking the court through the grounds for the delay caused as also for non-appearance, Mr. Ghosh submits that the dates which were missed by the

petitioners were fixed during the entire stretch of the pandemic. The notices were not properly served upon the petitioners and the government authorities were busy with their emergent activities under the provisions of the Disaster Management Act. Mr. Ghosh further submits that the benefit of the decisions of the Hon'ble Apex Court with regard to extension of time and/or the period of limitation prescribed by all statutes, should be allowed in this case and the written statement should be accepted.

Mr. Chatterjee, learned advocate appearing on behalf of the opposite parties/plaintiffs submits that the conduct of the petitioners/defendants was deplorable. On January 21, 2019 the written statement was filed before the learned Civil Judge (Senior Division) at Sealdah after the suit had been fixed for ex parte hearing and several opportunities had been given to the defendants to file their written statement. Along with the said written statement, two further applications were filed. Both the applications were taken up by the learned Civil Judge (Senior Division) at Sealdah on June 19, 2019. On that day as well, the defendants did not appear and the show cause for the delay in filing the written statement as also the application for setting aside the order of ex parte hearing of the suit, were rejected. The defendants failed to take steps on that date.

Again, the suit continued to run in the ex parte board. The order dated June 19, 2019 was not challenged. Soon thereafter, the suit was transferred to the commercial division. He further submits that summons were served by the learned commercial court. Postal track reports and receipts in support of such contention have been annexed to the application for vacating. The learned commercial court also fixed the suit for ex parte hearing on March 5, 2022 on account of failure of the defendants to enter appearance, to contest the suit. Thereafter, two applications were filed being I.A. 2 of 2023 and I.A. 3 of 2023.

According to Mr. Chatterjee, the earlier applications showing cause for the delay in filing the written statement along with a prayer for acceptance of the written statement as also the application for removal of the suit from the ex parte board, were already rejected by the learned Civil Judge (Senior Division) at Sealdah, which was the court of competent jurisdiction at the relevant point of time. The order dated June 19, 2019 remained unchallenged. The suit was already on the ex parte board and the prayer of the defendants for acceptance of the written statement and to allow the defendants to contest the suit, by removal of the suit from the ex parte board, had been turned down by

the learned Civil Judge (Senior Division) at Sealdah. Again, after summons were served upon the defendants and they failed to enter appearance before the learned commercial judge, the suit was fixed for ex parte hearing on March 5, 2022. After several dates, the applications were filed. The said applications were rejected by the order impugned.

Heard the parties.

The learned court below observed that it was an admitted fact that the records of the suit were received from the Sealdah court on October 1, 2021, on transfer. On November 23, 2021, none appeared despite having received the court's notice. On January 12, 2022, the plaintiffs appeared before the court, but the defendants did not take steps. On January 18, 2022, the opposite parties were directed to issue notice upon the defendants. On February 3, 2022, the plaintiffs filed affidavit-of-service, but the defendants did not appear. Thereafter, due to non-appearance of the defendants, the order dated March 5, 2022 was passed directing that the suit would proceed ex parte. On subsequent dates, namely, April 2, 2022, April 7, 2022 and April 13, 2022 the defendants were absent. Ultimately, on April 21, 2022, the defendants appeared before the court by filing a memorandum of appearance. It was the stand of the defendants that their learned advocates were

not aware of the suit. Hence, the court should vacate the order fixing the suit for ex parte hearing, and allow the defendants to contest the suit, on the basis of the written statement which was already on record.

The learned court rejected the contentions of the defendants by holding that the explanations were not plausible. Relying on a decision of the Hon'ble Apex Court, the court observed that if the government machinery was so inefficient and incapable of taking steps on time, the solution may lie in vesting the legislature with the power to expand the period of limitation for government authorities, because of their gross incompetence. The defence of the petitioners was struck off by the order impugned.

The correctness of such order is under challenge before the court. First and foremost, the suit has been proceeding as a commercial suit on and from October 1, 2021. The court records that the parties received the court's notice. The court records that the plaintiffs also served the defendants and filed affidavit-of-service. Those documents have also been produced before this court, by way of a vacating application. The court records how the defendant failed and neglected to take steps on various dates fixed by the learned commercial judge. Even though, this is a transferred suit from the court of the learned

Civil Judge (Senior Division) at Sealdah to the court of the learned Commercial Judge at Alipore, the civil court also did not accept the written statement and refused to set aside the order fixing the suit for ex parte hearing. The suit was running in the ex parte board, even before the learned civil judge.

Thus, the contention of Mr. Ghosh that the suit should not be treated as a commercial suit from its inception and the written statement which was already on record before the learned civil court should be accepted, is not correct. The civil court rejected similar applications and posted the suit for ex parte hearing without accepting the written statement. Such order of the civil court attained finality. Thereafter, on several dates when the suit proceeded before the learned commercial judge, the defendants failed to take steps.

Under such circumstances, I do not find any illegality with the order impugned. Moreover, the defendants also failed to take steps within 120 days after transfer of the suit to the commercial court. Thus, no special advantage can be given to the defendants in the case in hand. The applications being I.A.2 of 2023 and I.A. 3 of 2023 are also barred by the principles of res judicata. It is settled law that the principles of res judicata also apply to interlocutory proceedings in the same suit and this

Court is constrained to hold under the facts and circumstances discussed hereinabove, that the learned court below rightly struck off the defence of the defendants. However, in the decision of ***Modula India versus Kamakshya Singh Deo*** reported in ***(1988) 4 Supreme Court Cases 619***, The Hon'ble Apex Court had held that in a suit which was appearing undefended, the defendant may enter appearance by exercising a limited right to cross-examine the plaintiffs witnesses and to advance arguments to demolish the plaint case. Relevant paragraph is quoted below:-

“For the above reasons, we agree with the view of Ramendra Mohan Dutta, ACJ that, even in a case where the defence against delivery of possession of a tenant is struck off under section 17(4) of the Act, the defendant, subject to the exercise of an appropriate discretion by the court on the facts of a particular case, would generally be entitled:

- (a) to cross-examine the plaintiff's witnesses; and
- (b) to address argument on the basis of the plaintiff's case.

We would like to make it clear that the defendant would not be entitled to lead any evidence of his own nor can his cross-examination be permitted to travel beyond the very limited objective of pointing out the falsity or weaknesses of the plaintiff's case. In no circumstances should the cross-examination be permitted to travel beyond this legitimate scope and to convert itself virtually into a presentation of the defendant's case either directly or in the form of suggestions put to the plaintiff's witnesses.”

Under such circumstances, the revisional application is disposed of with a direction upon the learned court below to allow the defendants to cross-examine the plaintiffs' witnesses, but without setting up their own case either directly or in the nature of suggestions and further allow the defendants to advance arguments on the basis of the plaint case. As the suit is at the stage of evidence justice, would be subserved if the suit is disposed of within a period of six months from the date of communication of this order.

Accordingly, the revisional application as also the connected application, are disposed of.

All the parties are directed to act on the basis of the server copy of this order.

(Shampa Sarkar, J.)