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O.S.A.(CAD)No.29 of 2024

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 02.04.2024

CORAM

THE HONOURABLE MR.JUSTICE M.SUNDAR

and

THE HONOURABLE MRS.JUSTICE K.GOVINDARAJAN THILAKAVADI

**O.S.A(CAD)No.29 of 2024**

**and**

**C.M.P.No.5391 of 2024**

**in**

**O.S.A.(CAD)No.29 of 2024**

B.Bayalan  
S/o.Baskar Duraiswamy

... Appellant

Vs

1. State Bank of India  
Local Head Office,  
College Lane, Nungambakkam  
Chennai-600 006.  
Rep. by Asst. General Manager  
Mr.R.Ramabadran
2. State Bank of India  
Vadiveeswaram Branch  
Vadiveeswaram  
Nagercoil, K.K.District  
Rep. by Branch Manager  
Raghunandan Kumar.
3. The Professional Couriers Pvt. Ltd.,  
103, Avvai Shanmugam Salai  
Chennai-600 014.



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4. S.Agasthiyalingam  
S/o.Madhavan Pillai
5. Nazer @ Raj Kapoor  
S/o.Alavuddin
6. S.Suresh
7. B.Yasin
8. M.Ansari
9. Sudalayandi
10. Umapathy  
S/o.Sivaraj Pandian
11. T.Mohan  
S/o.Thangasamy
12. R.Gopal  
S/o.Ratnam
13. Azar @ Niyazkhan
14. S.Shaik Abdulla  
S/o.Shaik Sultan Basha

.. Respondents

Original Side Appeal filed under Section 13(1) of the Commercial Courts Act, 2015 to set aside the order dated 23.02.2023 made in A.No.7293 of 2018 in C.S.No.82 of 2006 by allowing the above appeal.

|                 |   |                                |
|-----------------|---|--------------------------------|
| For Appellant   | : | Mr.D.Rajagopal                 |
| For Respondents | : | Mr.M.L.Ganesh<br>for R1 and R2 |



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## **J U D G M E N T**

(Judgment of the Court was delivered by **M.Sundar, J.**)

Captioned intra-Court Appeal i.e., Original Side Appeal No.29 of 2024 has been preferred by the 'eighth defendant' ['D8' for the sake of brevity and convenience] in a civil suit being C.S.No.82 of 2006 which is now on the file of the Commercial Division of this Court. As regards C.S.No.82 of 2006, the same has been filed by 'State Bank of India' ['SBI' for the sake of brevity] against 13 defendants *inter alia* making a claim for a little over Rs.3 Crores [Rs.3,00,03,191/- to be precise] together with *pendente lite* interest at the rate of 14.85% per annum for a little over Rs.1.97 Crores [Rs.1,97,75,998/- to be precise] and also future interest till realization of the suit claim. The usual residuary prayer and prayer for costs also form part of the prayer in the plaint.

2. Captioned intra-Court appeal is directed against an 'order dated 23.02.2024 made in A.No.7293 of 2018 in C.S.No.82 of 2006' [hereinafter 'impugned order' for the sake of convenience and clarity].

Though obvious, we make it clear that the impugned order has been made



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by a Hon'ble single Judge presiding over Commercial Division of this Court, in and by the impugned order, the Commercial Division has dismissed an application filed by D8 seeking 'Condonation of Delay' [CoD' for the sake of brevity] qua 4562 days [Four Thousand Five Hundred Sixty Two days] delay in filing written statement of D8.

3. Commercial Division has recorded the factual position that the suit being C.S.No.82 of 2006 was transferred to the Commercial Division in 2018 and the position that D8 did not take steps either for filing written statement or for seeking leave of the Court qua time for filing written statement. The Commercial Division has also proceeded on the basis that the point that suit summons were not served in the prescribed form i.e., Form 9 of Original Side Rules of this Court is the lone point on which CoD prayer of D8 is predicated.

4. Contending that D8 is aggrieved by the impugned order, captioned intra-Court appeal has been filed in this Court on 21.02.2024.

5. On 08.03.2024, Hon'ble predecessor Bench issued notice to respondents returnable by 20.03.2024.



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6. Mr.D.Rajagopal, learned counsel for appellant / D8 submitted that Hon'ble predecessor Bench had directed notice to be served only on SBI counsel i.e., counsel for plaintiffs and therefore, notice had been served on learned counsel for SBI. Pursuant to such notice, Mr.M.L.Ganesh, learned counsel for SBI i.e., R1 and R2 in the captioned OSA is before us.

7. We notice that Hon'ble predecessor Bench has not admitted the captioned OSA and only notice has been issued. Therefore, the matter continues to be in the Admission Board. Considering the facts of the case, more particularly nature of the impugned order, we are of the view that it will suffice if plaintiffs are heard out on notice regarding admission and the question of issuing notice to other respondents will arise only if the captioned matter passes muster in the Admission Board and therefore, in this view of the matter, we took up the main appeal i.e., O.S.A(CAD).No.29 of 2024 with the consent of both sides and the same was heard out / tested as to whether it passes muster in the Admission Board.



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8. After hearing detailed submissions made by Mr.D.Rajagopal,

learned counsel for appellant / D8 and Mr.M.L.Ganesh, learned counsel for SBI, in the light of case file before me, facts and circumstances of the case, we are of the considered view that the captioned OSA does not pass muster in the Admission Board and the reasons are set out infra. To be noted, in the adumbration of reasons infra, we shall be setting out points, discussion and dispositive reasoning for each point one after the other.

This adumbration is as follows:

(i) Learned counsel for appellant submitted that the suit summons not being served under Form 9 of the Original Side Rules of this Court is not the only the point as D8 vide Paragraph No.3 of the support affidavit has also adverted to criminal proceedings that were initiated by SBI and that the same culminated in acquittal. In any event, learned counsel submitted that D8 is entitled to benefit of Section 14 of 'The Limitation Act, 1963' [hereinafter 'said Act' for the sake of convenience and clarity]. We are unable to agree. The reason is, Section 14 of said Act will kick in only for exclusion of time spent by the litigant in a wrong fora, under the *bona fide* intention that it is the correct fora



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but that is not the case as regards captioned matter. There are two parallel proceedings i.e., criminal proceedings and civil proceedings initiated by SBI. Therefore, the point on Section 14 of said Act does not cut ice with us. Learned counsel for appellant submitted that this point, though urged and articulated in paragraph No.3 of the support affidavit, has not been considered in the impugned order. A perusal of impugned order brings to light that this submission is correct but that does not denude powers of this Court to consider the same in the intra-Court appeal on hand and therefore, we have considered that point also and discussed the same by giving dispositive reasoning supra in previous point;

(ii) This takes us to the next point i.e., suit summons not being served on D8. It is the specific case of D8 that suit summons under prescribed form i.e., under Form 9 of Original Side Rules of this Court has not been served on D8. It may not even be necessary to dilate on this aspect of the matter and the reason is paragraph No.2 of the support affidavit. We deem it appropriate to extract and



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reproduce paragraph No.2 of support affidavit qua A.No.7293 of 2018 before the Commercial Division and the same reads as follows:

*'2. I submit that though the summon was served upon me on 07.03.2006, I could not contact my counsel for filing the written statement in time allowed under law. Even though I have filed the Vakalath on the reason for not filing the written statement in time was due to non-service of summons in Form 9 as mandated under Order 3 Rule 1 of the Madras High Court Original Side Rules.'*

Interestingly and intriguingly, the date of filing of vakalatnama is blank. It is rather surprising as to how the Registry takes on file such affidavit. However, we ferreted out the same from the support affidavit captioned CMP i.e., CMP No.5391 of 2024. Paragraph No.4 of the affidavit filed in support of the captioned CMP gives the date of filing of vakalatnama as 28.03.2006 and the relevant portion reads as follows:

*'4. I submit that the mandatory requirement of serving the suit summons under Form No.9 of O.S. Rules was not complied with. Accordingly, the service*



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*of suit summons not completed insofar as the appellant is concerned. Even though I have filed Vakalath on 28.03.2006, for want of service of suit summons under Form No.9 of O.S.Rules, I could not file the written statement.....'*

*(underlining made by this Court  
for ease of reference)*

Therefore, 28.03.2006 is the date on which D8 has filed vakalatnama. As regards filing of vakalatnama, from a perusal of E-Court portal it is seen that there have been multiple applications which have been considered and the same read as follows:

| Applications Details |                |                 |                    |                |                  |                          |
|----------------------|----------------|-----------------|--------------------|----------------|------------------|--------------------------|
| Sl. No.              | Applicant Name | Respondent Name | Application No.    | Date of Filing | Date of Disposal | Disposal Remarks         |
| 1                    | A-25/2016      |                 | Subscribed         | 28/03/2016     |                  | MT.S.HAJA HEBBETEN GUTHA |
| 2                    | A-2581/2006    | Prayer Granted  | Bring on Record    |                | 04/01/2016       |                          |
| 3                    | A-2737/2006    | Prayer Granted  | Subscribed Service |                | 19/06/2016       |                          |
| 4                    | A-2738/2006    | Prayer Granted  | Subscribed Service |                | 25/06/2016       |                          |
| 5                    | A-7290/2016    |                 | Subscribed         | 18/09/2016     |                  | MT.S.HAJA HEBBETEN GUTHA |

This takes us to Sub-Rule(3) of Rule 7 of Order IV of 'Original Side Rules of Madras High Court' [hereinafter 'OS



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Rules' for the sake of brevity]. Sub-Rule(3) of Rule 7 of Order IV of OS Rules makes it clear that service of copy of plaint on the counsel, who has entered appearance in interlocutory applications will be considered as service of suit summons. It is nobody's case that copy of this plaint was not served on learned counsel for D8. This means that Sub-Rule(3) of Rule 7 of Order IV of OS Rules nails the matter qua D8. Therefore, the argument that the suit summons has not been served in Form 9 does not find favour with this Court.

(iii) The next point directly turns on the question as to whether time can be extended for filing of written statement by a defendant in a suit before the Commercial Division beyond 120 days (30 days prescribed time + 90 days cap) prescribed vide proviso which has been added to Rule 1 of Order VIII of 'the Code of Civil Procedure, 1908 (5 of 1908)' [hereinafter 'CPC' for the sake of brevity, convenience and clarity] as in Schedule to 'The Commercial Courts Act, 2015 [Act 4 of 2016]' {hereinafter 'CCA' for the



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sake of brevity} read with Section 16 thereat. This principle is also governed by authoritative pronouncement of Hon'ble Supreme Court in ***SCG Contracts (India) Private Limited Vs. K.S.Chamankar Infrastructure Private Limited*** reported in ***(2019) 12 SCC 210*** and relevant paragraph is paragraph No.8 which reads as follows:

*'8. The Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015 came into force on 23.10.2015 bringing in their wake certain amendments to the Code of Civil Procedure. In Order V, Rule 1, Sub-rule (1), for the second proviso, the following proviso was substituted:*

*"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 and 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."*

*Equally, in Order VIII Rule 1, a new proviso was substituted as follows:*

*"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 and twenty days from the date of service of summons and on expiry of one hundred and 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."*

*This was re-emphasized by re-inserting yet another proviso in Order VIII Rule 10 Code of Civil Procedure, which 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*



*pronouncement of such judgment a decree shall be drawn up:*

*Provided further that no Court shall make an order to extend the time provided Under Rule 1 of this Order for filing of the written statement."*

*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 VIII Rule 10 also adding that the Court has no further power to extend the time beyond this period of 120 days.'*

Therefore, even delay of 1 day beyond 120 days is not condonable is now a settled position of law as regards filing of written statement by defendant in Commercial Division. Therefore 4562 days is 'out of the question' to say the least.



(iv) This takes us to the next line of submission

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which was advanced by Mr.D.Rajagopal, learned counsel for appellant. Learned counsel predicated his submission on proviso to Sub-Section (4) of Section 15 of CCA. Learned counsel submitted that on transfer of a suit to the Commercial Division a fresh time line can be prescribed. In the case on hand, as already alluded to supra, the Commercial Division in impugned order has recorded (without any dispute or contestation) that the suit was transferred to the Commercial Division in 2018 itself.

(v) The aforementioned CoD application itself can be construed as a plea for extension of time and the same has been negatived. Therefore, in this view of the matter, we find that the proviso to Sub-Section (4) of Section 15 of CCA also does not come to the aid of the appellant in the case on hand considering the facts and circumstances of the case, the nature of matter and length of delay.

(vi) This takes us to the next point pertaining to



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length of delay. As already alluded to supra, the delay sought to be condoned is 4562 days and this by itself means the delay is nearly 12 1/2 years. To put it differently, a decade and a little over two years. A decade and two years makes the suit vintage even under normal circumstances, in the light of CCA it is not just vintage and it becomes ancient. Therefore, we are of the considered view that acceding to CoD at this distant point of time will be a clear anathema to sublime philosophy underlying CCA and salutary principle which is the basis for CCA which kicked in on 23.10.2015 by way of an Ordinance.

(vii) This takes us to the next question as to whether the defendant who is appellant before us i.e., D8 can participate in the trial in terms of cross-examination. In this regard, law is well settled that a defendant, who has not filed written statement will not lose his right of cross-examination. Therefore, though it tantamounts to stating the obvious qua participation in cross examination, we make it clear that D8 can exercise his right of cross-examination.

9. Commercial Suit is now 18 years old i.e., 1 1/2 decade and



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three years old. As already alluded to supra, even under normal circumstances, this makes the suit vintage and in the light of CCA it has become ancient. We are of the considered view that the suit deserves expeditious disposal subject to the business of Commercial Division.

10. Both learned counsel before us namely, Mr.D.Rajagopal, learned counsel for appellant and Mr.M.L.Ganesh, learned counsel for R1 and R2 or in other words, Mr.D.Rajagopal, learned counsel for D8 and Mr.M.L.Ganesh, learned counsel for plaintiffs / SBI before us submit that the suit is scheduled to be listed on 10.04.2024 before the Commercial Division for 'Case Management Hearing' ['CMH'] which is a legal drill under Order XV-A of CPC which has been introduced in CPC vide amendment by way of Schedule to CCA read with Section 16. Both sides undertake to file time lines and trial will obviously kick in and as already alluded to supra suit deserves expeditious disposal subject of course to business of Hon'ble Commercial Division.

11. The question as to whether the impugned order is an 'interim order' and whether an appeal would lie {in the light of *Hindustan Unilever Limited Ponds House v. S.Shanthi* reported in 2022 (6) CTC 1 and *Suraj Lal Vs. Pradeep Stainless India Pvt. Ltd., and Others* being order dated 02.03.2023 made in O.S.A.Nos.26 to 29 of 2020} is left open



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in this case considering expeditious disposal the matter deserves in our hands.

12. Ergo, the sequitur is, captioned OSA does not pass muster in the Admission Board and therefore, we affirm the position that notice to other respondents namely, R3 to R14, who are co-defendants is really not necessary. Suffice to say that the captioned intra-Court Appeal fails and the same is dismissed. Captioned CMP also perishes along with the main appeal as a consequence. However, though obvious, we make it clear that rights of D8 qua cross-examination are preserved in the manner set out supra. There shall be no order as to costs.

(M.S.J.) (K.G.T.J.)  
02.04.2024

Index:Yes/No  
Neutral Citation: Yes/No  
Speaking / Non-speaking order  
mk

**P.S. I:** Upload forthwith

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To



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The Sub Assistant Registrar,  
Original Side, High Court,  
Madras.



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**M.SUNDAR.J.,  
and  
K.GOVINDARAJAN THILAKAVADI, J.,  
*mk***

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