



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

% ***Judgment pronounced on: February 20, 2024***

+ **CM(M) 1916/2024**

SARA ABODE PRIVATE LIMITED

..... Petitioner

Through: Mr. Sujit Gupta, Adv.

versus

NATH BROTHERS EXIM INTERNATIONAL LIMITED

..... Respondent

Through: Mr. Mohit Kumar, Adv.

CORAM:

HON'BLE MS. JUSTICE SHALINDER KAUR

J U D G M E N T (O R A L)

CM APPL. 10148/2024 (exemption)

1. Allowed, subject to all just exceptions.
2. Application stands disposed of.

CM(M) 1916/2024, CM APPL. 10147/2024—stay

3. The present petition has been filed under Article 227 of the Constitution of India impugning the orders dated 02.05.2023 and 25.07.2023 passed by the learned District Judge Commercial Court -03, South-East, Saket District Courts, Delhi (hereinafter as “Trial Court”) in CS(COMM) No. 1006/2022 titled “*Nath Brothers Exim International Limited vs Sara Abode Private Limited*” whereby the right to file the written statement was closed and application moved on behalf of the Petitioner seeking review of the order dated 02.05.2023 was dismissed by the Learned Trial Court.
4. The factual framework of the case unfolds with the respondent being



the owner of an industrial property No. 12A, Block B, Esotech Extension-I, Greater Noida, District Gautam Budh Nagar, Uttar Pradesh (hereinafter as “Suit property”), which was leased out to the petitioner vide a lease deed executed on 07.08.2019, duly registered with the sub-registrar Greater Noida, Gautam Budh Nagar, Uttar Pradesh, for a period of three years fixed with a monthly rental set at Rs. 3.20 Lakhs w.e.f. 16.08.2019 to 15.08.2022 including a lock-in period of first 12 months.

5. The respondent is a company registered under the Companies Act with its registered office at Hanuman Road, New Delhi 110001 which is engaged in the business of manufacturing, processing and trading of clothes, ready-made garments etc.

6. Following the lapse of the initial 12-month lock-in, the respondent on 09.10.2020, sent a termination notice of the lease vide which the petitioner was directed to vacate the premises and handover vacant possession within three months from the date of receipt of the aforesaid notice. Vide an email dated 30.10.2020, the petitioner agreed to vacate the premises within 3 months period.

7. As per the termination notice, the petitioner was required to vacate the premises by 09.01.2021 however the petitioner vacated the premises only on 25.01.2021 and thus remained in an unauthorized occupation for 16 days. Further, the petitioner paid rent up to 31.12.2020 but failed to pay any use and occupation charges for remaining 25 days and thus was liable to pay a certain sum of arrears. As a consequence, respondent filed a suit before the Learned Trial Court for recovery of Rs. 6,61,204/- along with pendente lite and future interest @12% per annum against the petitioner.

8. Subsequent thereto, the Learned Trial Court issued summons to the



petitioner on 13.10.2022 returnable on 16.12.2022, which were served upon him on 22.10.2022 as per the records of the Learned Trial Court.

9. On the said date of hearing i.e. 16.12.2022, on joint request for resolution of the dispute through mediation, the Learned Trial Court referred the parties to mediation before the Mediation Centre, Saket and in case of failure, the written statement was directed to be filed by 12.01.2023. On the said date of hearing, awaiting the outcome of mediation proceedings, the matter was adjourned and in case of failure, the written statement was again directed to be filed by 04.02.2023.

10. Thereafter, further watching for the result of mediation, the matter was adjourned on 04.02.2023 & 21.02.2023 and the matter came up for hearing on 15.04.2023 whereon the counsel for the respondent submitted that the mediation failed between the parties and matter was adjourned for further proceedings on 02.05.2023.

11. On the said date of hearing, as the maximum time period i.e. 120 days for filing of the written statement from the date of service of summons had expired, the Learned Trial Court closed the right of the petitioner to file the written statement and framed the issues. Thereafter, posted the matter for plaintiff evidence on 25.05.2023.

12. Aggrieved by the order dated 02.05.2023, the petitioner preferred an application before the Learned Trial Court seeking review of the order which came to be dismissed vide the impugned order dated 25.07.2023.

13. The petitioner also preferred an appeal before this court, against the impugned order of the Learned Trial Court, under section 104 read with Order XLIII of the Civil Procedure Code (hereinafter referred as to "CPC") read with Section 13 of the Commercial Courts Act, 2015 which was



registered as FAO(COMM) 174/2022. Further, this court stayed the proceedings before the Learned Trial Court in the present suit vide order dated 13.09.2023. However, the said appeal was withdrawn vide order dated 14.02.2024 with liberty to file a fresh petition as per law. Thus, the present petition under Article 227 of the constitution came to be filed.

14. The learned counsel for the petitioner submits that the Learned Trial Court closed the right to file the written statement which was filed well within 120 days i.e. within 110 days, along with an application for condonation of delay. Also submits that the Learned Trial Court did not consider excluding the time spent in the mediation proceedings before the Mediation Centre, Saket as well as the summer vacation period, when the Courts were closed. Hence, the said time period is to be excluded in calculating the period of 120 days in filing written statement, which has been ignored by Learned Trial Court, which is a reflection of illegality and perversity on the face of the impugned order. Reliance placed on the case of **Red Bull Ag vs. Pepsico India Holdings Pvt. Ltd** [CS (COMM) 1092/2018, DOD 28.08.2019].

15. As against this, the learned counsel appearing on behalf of respondent submitted that, even if, the time spent in mediation by the parties is excluded, still the petitioner did not bother to file written statement within a period of 120 days. The mediation was terminated on 01.04.2023 and the summer vacation commenced on 10.06.2023, the petitioner was required by law to file his written statement by 02.05.2023 or maximum by 04.06.2023, if the submissions of the petitioner are taken on its face value, the written statement could not be filed even a single day later than 04.06.2023. However, the written statement filed on 01.07.2023 is hopelessly barred by



law and the right of the petitioner to file written statement has been correctly struck of by the Learned Trial Court.

Analysis

16. Having heard the parties, it is necessary to first lay down the provisions of the Commercial Courts Act 2015 bringing certain amendments in force on 23.10.2015 with respect to provisions of CPC in Order V Rule 1(1), Order VIII Rule 1 and Order VIII Rule 10, concerning the time period within which written statement can be filed.

17. Order VIII Rule 1 of the CPC is reproduced as under:

“1. Written Statement.—The Defendant shall, within thirty days from the date of service of summons on him, present a written statement of his defence:

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 same on such other day, as may be specified by the Court, for reasons to be recorded in writing, but which shall not be later than ninety days from the date of service of summons.

18. It is relevant to note that a new proviso was substituted to Order VIII Rule 1 of the CPC which reads 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, 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.”

19. Emphasis is further placed on yet another provision, Order VIII Rule 10 CPC, as follows:



“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 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.”

20. As such, while the normal period for filing a written statement in answer to the commercial suit would expire 30 days from the date of service of summons, the written statement may be filed within a further period of 90 days subject to the reasons to be recorded in writing by the Court and payment of such costs as it deems fit to allow such written statement to come on record. Thus, in commercial suit, the defendant shall forfeit the right to file the written statement beyond 120 days from the date of service of summons. This is further emphasised 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. Accordingly, in commercial suit no power vests in the court to condone the delay beyond 120 days.

21. The position of law thus now has been settled that given the consequences of non-filing of written statement, the amended provisions of the CPC have been held to be mandatory which cannot be circumvented even by recourse to inherent power under Section 151 of the CPC. (***SCG Contracts (India) (P) Ltd. v. K. S. Chamankar Infrastructure (P) Ltd., (2019) 12 SCC 210***).



22. Now coming to the determination of the issue whether the opportunity of filing of written statement in the suit has rightly been declined by the Learned Trial Court or same could be extended in view of the time spent by the parties in mediation.

23. The learned counsel for the petitioner submits that the period spent by the parties in mediation has to be excluded to calculate the statutory period of 120 days in filing the written statement. The reliance has been placed on the case of ***Red Bull Ag vs Pepsico India Holdings Pvt Ltd & Anr. in CS(COMM) 1092/2018, D.O.D-28.08.2019.***

24. Pertinently, settling the disputes through Mediation is a recognised mechanism as an alternative to litigation. Undoubtedly, the courts are giving complete effect to alternative dispute resolution mechanism. It is equally true that usually when the parties are in Mediation, the proceedings before the Learned Trial Court can be adjourned in case required so that the parties may use the mediation platform for resolution of their disputes, however, the time period to be used for mediation process is subject to Delhi Mediation and Conciliation Rules, 2006. Even the Commercial Courts Act, 2015 itself recognises the aforesaid mechanism, therefore Section 12A provides for making pre-institution mediation, a mandatory process. Section 12A of the Commercial Courts Act reads as under:-

“12A. Pre-Institution Mediation and Settlement.-- (1) A suit, which does not contemplate any urgent interim relief under this Act, shall not be instituted unless the plaintiff exhausts the remedy of preinstitution mediation in accordance with such manner and procedure as may be prescribed by rules made by the Central Government.



(2) The Central Government may, by notification, authorise the Authorities constituted under the Legal Services Authorities Act, 1987 (39 of 1987), for the purposes of pre-institution mediation.

(3) Notwithstanding anything contained in the Legal Services Authorities Act, 1987 (39 of 1987), the Authority authorised by the Central Government under sub-section (2) shall complete the process of mediation within a period of three months from the date of application made by the plaintiff under sub-section (1):

Provided that the period of mediation may be extended for a further period of two months with the consent of the parties:

Provided further that, the period during which the parties remained occupied with the pre-institution mediation, such period shall not be computed for the purpose of limitation under the Limitation Act, 1963 (36 of 1963).

(4) If the parties to the commercial dispute arrive at a settlement, the same shall be reduced into writing and shall be signed by the parties to the dispute and the mediator.

(5) The settlement arrived at under this section shall have the same status and effect as if it is an arbitral award on agreed terms under sub-section (4) of section 30 of the Arbitration and Conciliation Act, 1996 (26 of 1996).

25. It is manifestly clear that the legislation has given an opportunity to the litigants to settle their disputes according to their satisfaction and to bring peace and harmony in the society.

26. Reverting to the facts of the present case, it is an admitted position that the petitioner was served with summons of the suit on 22.10.2022. In pursuance to the summons, the petitioner had put in appearance before the Learned Trial Court on 16.12.2022. On the very same day, the parties opted



for mediation and were thus referred by the Learned Trial Court. However, as the parties could not settle their disputes within 90 days, the maximum period as provided under the Delhi High Court Mediation and Conciliation Rules, 2004, the learned Judge in-charge, Mediation Centre on 01.04.2023 sent the matter back to the learned Referral Court ("Trial Court") giving liberty to the parties to make a fresh request for referral and accordingly the parties were to appear before the Learned Trial Court.

27. It is relevant to note that on 01.04.2023, none of the parties were present before the learned Judge in-charge, Mediation Centre when the mediation was terminated by him and 14.04.2023 was the date fixed for the parties to appear before the Learned Trial Court. As 14.04.2023 was declared a holiday on account of the birthday of Dr. Bhim Rao Ambedkar, the matter was taken up on 15.04.2023, on the date which the petitioner was not present, however the counsel for the plaintiff (respondent herein) had intimated to the court that the mediation has failed between the parties. Accordingly, the Learned Trial Court listed the case for further proceedings on 02.05.2023. On the said date, the Learned Trial Court closed the opportunity of petitioner to file the written statement. In the meanwhile, the learned Trial Court had directed the petitioner to file written statement by 12.01.2023 and subsequently by 04.02.2023. However, the petitioner did not file the written statement on either of the above mentioned dates.

28. Strictly applying the provisions contained in Order V Rule 1 CPC, Order VIII Rule 1 CPC and Order VIII Rule 10 CPC, the 120th day from the date of service of summons came to an end on 18th February, 2023.

29. The learned counsel for the petitioner vociferously submits that the entire period spent in mediation till the matter was returned back to the



referral Court has to be excluded while calculating the period of 120 days, which culminated on 01.07.2023 when the written statement was filed. It is submitted that the matter was returned as unsettled from Mediation Centre to the Learned Trial Court on 15.04.2023. To the contrary, learned counsel for the respondent submits that the parties were exploring settlement through mediation w.e.f 16.12.2022 to 01.04.2023 as mediation process was terminated by learned Judge In-charge, Mediation Centre on 01.04.2023, therefore, the period of 120 days expired on 04.06.2023.

30. It is to be kept in mind that on appearance of the petitioner before the Learned Trial Court, the parties were referred to Mediation on 16.12.2022 which came to an end on 01.04.2023. Therefore, even if the petitioner is granted benefit of the time spent by the parties in mediation w.e.f 16.12.2022 to 01.04.2023, still the written statement filed by the petitioner does not meet with the statutory requirement of the time frame as provided by Order VIII Rule 1 CPC. While the normal period for filing a written statement would expire after 30 days from the date of service of summons, the proviso provides for the written statement may be filed within a further period of 90 days subject to reasons to be recorded by the Court. Therefore, the reasons have to be expressed by the defendant seeking condonation of delay for filing the written statement. It is not disputed that the petitioner was served with the summons of the suit on 22.10.2022 and he had put in appearance before the Court on 16.12.2022 meaning thereby 55 days had already elapsed by then and the written statement was not filed. Twice the opportunity was granted by the court to the petitioner to file the written statement, the directions which were not complied with. The petitioner was left with another 65 days to file the written statement. The petitioner has not



claimed that on 01.04.2024, he did not have knowledge that the mediation has been terminated. The Mediator would have also explained to the parties that since the period of 90 days had lapsed, the case was being referred back to the referral court. Surprisingly, the petitioner did not appear before the Court on 15.04.2023, even otherwise no reason has been assigned by the petitioner for not filing the written statement since 02.04.2023. The petitioner filed a review petition with respect to the impugned order dated 02.05.2023 on 08.06.2023, however, even then the written statement was not filed by the petitioner. Accordingly, the remaining period of 65 days for filing the written statement on showing reasons, expired on 05.06.2023. The petitioner therefore cannot take the benefit of his own negligence and the law only assist those who are vigilant and not who sleep over their rights, the basis of which is expressed in the pristine legal maxim *vigilantibus, non dormientibus, jura subveniunt*. Thus, in the absence of display of any bona fides, the petitioner cannot seek the benefit beyond the maximum period of 120 days as provided by the proviso to Order VIII Rule 1 CPC. It is needless to say that 120 days had expired on 05.06.2023.

31. Accordingly, in view of the above discussion, this court finds no infirmity with the impugned order. The petition, along with pending application, stands dismissed.

SHALINDER KAUR, J.

FEBRUARY 20, 2024
SU/SDS