

ORDER SHEET

APO/106/2023
WITH
CS/161/2022
CS-COM/403/2024

IN THE HIGH COURT AT CALCUTTA
Civil Appellate Jurisdiction
ORIGINAL SIDE
(Commercial Division)

RAJENDRA KUMAR KOTHARI AND ANR.
VERSUS
VARUN KOTHARI AND ANR.

BEFORE:

The Hon'ble JUSTICE SOUMEN SEN
AND

The Hon'ble JUSTICE BISWAROOP CHOWDHURY

Date : 17th February, 2025.

Appearance:

Mr. Rupak Ghosh, Adv.

Mr. Balarko Sen, Adv.

Mr. Debaditya Banerjee, Adv.

...for the appellant/plaintiff

Mr. Surajit Nath Mitra, Sr. Adv.

Mr. Sakya Sen, Sr. Adv.

Ms. Manali Ali, Adv.

Mr. Zulfiqar Ali, Adv.

...for the respondent

1. The appeal is arising out of the order dated 16th May, 2023 by which an application for extension of time to file written statement in a suit filed in the Commercial Division of this Court was allowed beyond 120 days.
2. Admittedly, the written statement was affirmed within 120th Day but not filed in the department within 120 days from the date of receipt of the writ of summons. The 120th day expired on 9th April,

2023 and, as such, the same was affirmed on 10th April, 2023. The cut off date being a holiday, any affirmation on the immediate next day would be valid in view of the provisions of the Limitation Act, 1963 read with the provision of the General Clauses Act, 1987.

3. However, for the purpose of filing any application for extension to file a written statement, the Original Side Rules require to take out a Master's Summons along with an affidavit to be taken up by the Judge in Chamber for acceptance of such written statement beyond the stipulated time. The Master's Summons is treated as an application and the affidavit in support of the Master's Summons is considered to be the grounds on which the Court may decide the said application. The Master's Summons is dated 20th April, 2023. As rightly pointed out by the learned Single Judge, there could not be any application prior to 20th April, 2023 and by that time 120 days period had expired.

4. The defendants are represented by a reputed solicitor firm. It is unlikely that the solicitors would be unaware of the practice of obtaining a special leave for short service in accordance with Chapter VI Rule 5 of the Original Side Rules and to have the Master's Summons treated as of taken out on that date with the leave of the Court. For convenience the said Rule is reproduced below:-

“5. Service and return of summons.- Unless otherwise ordered, such summons, not being an originating summons, shall be served two clear days before the return thereof. A summons may be made returnable in a shorter time, by leave

of the Registrar or Master, which shall be endorsed on it. In case of summons for time only, the summons may be served on the day previous to the return thereof.”

5. Surprisingly, knowing fully well that the 120th day had expired on 9th April, 2023 or latest by 10th April, 2023, no attempt was made to mention the matter before the learned Single Judge with the original written statement and made an oral prayer for acceptance of the said written statement or to obtain special leave of short service upon the plaintiff in order to justify that the application at least was filed within the period of limitation.
6. We have allowed acceptance of written statement when we find that the application was filed within the period of limitation but the business of the Court may not have permitted such matter to be taken up. The filing of the Master’s Summons along with the affidavit and a copy of the written statement annexed could have saved the day for the defendants.
7. The learned Single Judge has considered the judgment of the Hon’ble Supreme Court in *SCG Contracts India (P) Limited v. K.S. Chamankar Infrastructure (P) Limited* reported in (2019) 12 SCC 210. However, the learned Single Judge was of the view that notwithstanding the application for Master’s Summons being taken out beyond the 120th day having regard to the fact that the written statement was affirmed within 120th day, may save the defendants and the defendants may be permitted to file the written statement.

8. Although we are unable to accept the said reasoning as the date of affirmation or verification is not crucial and would have the same consequences when a plaint verified within the period of limitation and not presented in the department. As the plaintiff cannot be permitted to file a suit beyond the period of limitation, similarly in view of the decision of the Hon'ble Supreme Court in *SCG Contracts (Supra)*, the Court does not have much to say if it is not filed or presented within 120 days from the date of service of the writ of summons.
9. We have taken note of the affidavit of the law clerk of the solicitors firm and the report of the Master and Official Referee which are on record.
10. There is a categorical denial by the Office that of any such instruction being given to the law clerk for visiting different departments for the purpose of taking out the Master's Summons, it has been categorically stated that the Master's Summons along with the petition being GA/3/2023 was submitted to the department after filing the affidavit of competency in the Suit Registry Department on 20th April, 2023. Admittedly the affidavit of competency was filed on 20th April, 2023. Upon completion of scrutiny of the Master's Summons along with the petition, the same was issued on the same date i.e., 20th April, 2023 on which date the affidavit of competency was filed. The Master and Official Referee in the report has also highlighted the following facts:-

“It has been observed that sometimes the Advocate concerned takes two-three days or more to cure the defects. The fact cannot be denied that it is the onus on the Learned Advocates concerned to cure the defects. Unless the defects are cured, the department is unable to issue the Master’s Summons.

In addition to the aforesaid, Your Lordships are also being apprised that in some cases, applications/affidavits/petitions affirmed long back and endorsement of filing of Vakalatnama and/or Affidavit of Competency made thereon were submitted to the department for scrutiny and issuance of the same on a much later date. A copy of such affidavit affirmed on 19th January, 2024 and submitted before this department on 10th February, 2025 for scrutiny and issuance, is being humbly placed herewith for ready reference (Flag “Z”).

In view of the above, the date of affirmation of the affidavit/petition/application cannot be reckoned as the date of submission of the same to the department for scrutiny and issuance.”

11. The difficulty being faced by this Court is the appellability of the order in view of Section 13(1-A) read with 13(2) of the Commercial Courts Act, 2015. If we are endowed with the power to decide the appellability on the anvil of Clause 15 of the Letters Patent, then possibly we could have held that the said order would be beyond the jurisdiction of the learned Single Judge in extending the said period.

12. The impact of the aforesaid provisions has been considered in *Kandla Export Corporation and Another vs. OCI Corporation and Another* reported in (2018) 14 SCC 715 in which the proviso to the

aforesaid Section 13(1-A) was considered vis-a-vis the appellability of such order under the Letters Patent. Paragraphs 13 and 14 of the said judgment are stated below for convenience:-

“**13.** Section 13(1) of the Commercial Courts Act, with which we are immediately concerned in these appeals, is in two parts. The main provision is, as has been correctly submitted by Shri Giri, a provision which provides for appeals from judgments, orders and decrees of the Commercial Division of the High Court. To this main provision, an exception is carved out by the proviso. The primary purpose of a proviso is to qualify the generality of the main part by providing an exception, which has been set out with great felicity in *CIT v. Indo-Mercantile Bank Ltd.*, thus: (SCR pp. 266-267: AIR pp. 717-18, paras 9-10)

“9...The proper function of a proviso is that it qualifies the generality of the main enactment by providing an exception and taking out as it were, from the main enactment, a portion which, but for the proviso would fall within the main enactment. Ordinarily it is foreign to the proper function of a proviso to read it as providing something by way of an addendum or dealing with a subject which is foreign to the main enactment.

‘8...it is a fundamental rule of construction that a proviso must be considered with relation to the principal matter to which it stands as a proviso’.

Therefore it is to be construed harmoniously with the main enactment. (Per Das, C.J. in *Abdul Jabar Butt v. State of Jammu & Kashmir*, SCR p. 59 : AIR p. 284, para 8). Bhagwati, J., in *Ram Narain Sons Ltd. V. CST*, said : (SCR p. 493: AIR p. 769, para 10)

‘10. It is a cardinal rule of interpretation that a proviso to a particular provision of a statute only embraces the field which is covered by the main provision. It carves out an exception to the main provision to which it has been enacted as a proviso and to no other.’

10. Lord Macmillan in *Madras & Southern Maharatta Railway Co. v. Bezwada Municipality* laid down the sphere of a proviso as follows: (IA p. 122 : SCC OnLine PC)

‘...The proper function of a proviso is to except and deal with a case which would otherwise fall within the general language of the main enactment, and its effect is confined to that case. Where, as in the present case, the language of the main enactment is clear and unambiguous, a proviso can have no repercussion on the interpretation of the main enactment, so as to exclude from it by implication what clearly falls within its express terms.’

The territory of a proviso therefore is to carve out an exception to the main enactment and exclude something which otherwise would have been within the section. It has to operate in the same field and if the language of the main enactment is clear it cannot be used for the purpose of interpreting the main enactment or to exclude by implication what the enactment clearly says unless the words of the proviso are such that that is its necessary effect. (Vide also *Toronto Corpn. v. Attorney-General for Canada*, AC p. 37)”

14. The proviso goes on to state that an appeal shall lie from such orders passed by the Commercial Division of the High Court that are specifically enumerated under Order 43 of the Code of Civil Procedure Code, 1908, and Section 37 of the Arbitration Act. It will at once be noticed that orders that are

not specifically enumerated under Order 43 of the CPC would, therefore, not be appealable, and appeals that are mentioned in Section 37 of the Arbitration Act alone are appeals that can be made to the Commercial Appellate Division of a High Court.”

13. On such consideration, we dismiss the appeal as not maintainable.

(SOUMEN SEN, J.)

(BISWAROOP CHOWDHURY, J.)