



GAHC010270032022

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THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : CRP(IO)/6/2023

BLACK SHORT INDIA LIMITED AND ANR
HAVING ITS OFFICE AT 406, 4TH FLOOR, MGF METROPOLIS MALL, NEAR
MG ROAD METRO STATION, GURUGRAM, HARYANA-122002 THROUGH
ITS COO AND AUTHORIZED PERSON RAJEEV KUMAR

2: RAJEEV KUMAR
COO OF BLACK SHORT INDIA LIMITED HAVING ITS OFFICE AT 406
4TH FLOOR
MGF METROPOLIS MALL
NEAR MG ROAD METRO STATION
GURUGRAM
HARYANA-12200

VERSUS

POBITRA DAS
S/O PRAFULLA DAS, PROPRIETOR OF M/S PAWAN PUTRA ENTERPRISES,
C/O PRABHAT CHANDRA DAS, VILL-KHARGULI, JOYPUR, HOUSE NO. A52,
NEAR JAYANTA MADHAB, P.S.-LATASIL, GUWAHATI, KAMRUPM (M),
ASSAM, PIN-781004

Advocate for the Petitioner : MR A DEKA

Advocate for the Respondent : MS S DAS



BEFORE

HON'BLE MR JUSTICE ARUN DEV CHOUDHURY

For the Petitioner : Mr. S. Deori. Advocate.

For the Respondents : Ms. S. Das. Advocate.

Date of Hearing : 19.05.2023, 12.06.2023

Date of Judgement : 20.06.2023

JUDGMENT & ORDER (CAV)

1. Heard Mr. S. Deori, learned counsel for the petitioner. Also heard Ms. S. Das, learned counsel for the respondents.
2. The present revision petition is filed assailing an order dated 03.12.2022 passed by the learned Court of Civil Judge No. 2, Kamrup (M) at Guwahati in M.S. No. 92/2021, whereby the application filed by the defendant under Order VII Rule 11 of C.P.C. 1908, was rejected on the ground that the defendants have not taken any steps to file written statement inspite of the fact that they have entered appearance on 17.01.2022 and accordingly directed the suit shall proceed ex-parte.
3. The respondent/plaintiff filed a money being M.S. No. 92/2021 claiming recovery an amount of Rs. 1,52,00,000/- (one Crore Fifty Two Lakhs Only) from the defendants. The respondent entered appearance in the suit on 17.01.2022 and thereafter, filed an application under Order 7 Rule 11 of the CPC, 1908 for rejection of the plaint, as according to the defendants the dispute redressal is covered by an agreement which includes an arbitration

clause. However, the defendants failed to produce any such agreement. Accordingly, the learned trial Court below under its order impugned dated 03.12.2022, dismissed the aforesaid application and also directed that suit should proceed ex-parte as the defendants have in the meantime has not filed the written statement.

4. The impugned order whereby the prayer for rejection of plaint was dismissed is not under challenged, what is under challenge is that the direction to proceed the suit ex-parte.
5. The petitioners contends that he may be granted a chance to file written statement inasmuch as the written statement was not filed for the pendency of the application under Order VII Rule 11 of the CPC, 1908 and therefore, on the rejection of the aforesaid petition, the learned Court below ought to have given a chance to file the written statement.
6. Countering such argument, Ms. Das, learned counsel for the respondent/plaintiff submits that the learned trial Court is not within its competence and jurisdiction to extend time maximum beyond 120 days from the date of receipt of summons by the defendants for the reason that the suit was a commercial suit and the Hon'ble Apex Court in the case of ***M/s Scg Contracts India Pvt. Ltd. -Vs- Ks Chamankar Infrastructure Pvt. Ltd*** reported in ***AIR 2019 SC 2691*** held that in terms of Order V Rule 1 (1) of the CPC, 1908, the period of 120 days as mandated cannot be extended by a Court.
7. Ms. Das, learned counsel also contends that the suit in question was a commercial suit in its nature, value and subject matter. The suit was filed



on 23.11.2021 and the Commercial Courts Act, 2015 came into existence from 23.10.2015. A notification under Section 3 of the Commercial Courts Act, 2015 (**hereinafter referred to as Act, 2015**) was issued for the State of Assam on 13.02.2019. Therefore, according to Ms. Das, learned counsel on the date of filing of the suit, the suit was, for all meaning and purport, a commercial suit. Therefore, in view of the decision in **M/s Scg** (supra), this Court in exercise of power under Article 227 of the Constitution of India may not extend the time of filing written statement beyond the period of 120 days.

8. Countering such argument, Mr. Deori, learned counsel for the petitioner submits that though the suit was filed on 23.11.2021, however, the mandatory provision of Order V Rule 1 (1) of the CPC, 1908 regarding the issuance of notice and putting defendants under notice that suit is a commercial suit was not issued and therefore, the petitioners cannot be deprived of their rights to file written statement taking the recourse to the provision of the Act, 2015.
9. Mr. Deori, learned counsel further contends that the procedure as required under Section 12A read with 3 of the Commercial Courts (Pre-Institution Mediation and Settlement) Rules, 2018 has also not been followed. The learned counsel for the petitioners further submits that as none of the provisions like Order V Rule 1 (1) of the CPC, 1908, Section 12A and Rule 3 of the Rules, 2018 as well as the provisions of Order VI Rule 15 A of the CPC, 1908 has not been followed, the suit cannot be termed as commercial suit for the purpose of denying the petitioners right to file written statement. Further the plaint is not supported by affidavit and



verification that is required in a Commercial Suit.

10. Mr. Deori, learned counsel for the petitioners also argues that the proviso to Section 15 (2) of the Act, 2015 entitles that in the transitional period, the petitioners be granted a chance to file written statement and the strict mandate of Order V Rule 1(1) of the CPC, 1908 is having no application in this period. Mr. Deori, learned counsel also contends that his case is squarely covered by the decision of the Hon'ble Apex Court in the case of ***Raj Process Equipments and Systems Pvt. Ltd. –Vs- Honest Derivatives Pvt. Ltd.*** passed in ***Civil Appeal No. 8089/2022*** on 03.11.2022.
11. Ms. Das, learned counsel for the respondent also submits that the alleged defects of Rule 12 A is not mandatory in view of the transitional period after 2015 when the Commercial Court Act came into operation inasmuch as such Rule was mandated to be mandatory w.e.f. 20.08.2022 in view of the decision rendered by the Hon'ble Apex Court in the case of ***M/s Patil Automation Private Limited –Vs- Rakheja Engineers Private Limited*** reported in ***AIR 2022 SC 3848***.
12. Ms. Das, learned counsel for the respondent further submits the defects in the affidavit are a curable defect and it is settled proposition of law. In support of her contention, relies on the judgment of the Calcutta High Court in the case of ***FMC Corporation –Vs- Natco Pharma Limited*** reported in ***AIR Online 2020 Del 962***.
13. Heard the learned counsel for the parties and thoughtful consideration thereto.



14. The Act, 2015 came into effect on 23.11.2015. The Governor of Assam on the recommendation of Gauhati High Court notified and designated the Courts of All Civil Judges Senior Division as Commercial Courts by notification No. JDJ-111/2018-ESTT-JUDI-12 dated 13.02.2019. The suit was filed on 23.11.2021. Thus on the date of filing of the suit, the Act, 2015 was in force and the Court's were also notified as Commercial Court's.
15. There is no dispute that the suit filed by the petitioner fulfils the criteria to be treated as a Commercial Suit.
16. After coming into effect of the Act, 2015, the Code of Civil Procedure was amended to suitably supplement the procedure of a Commercial suit. One of them is Order V Rule 1 sub Rule 1 of the CPC, 1908 and as per the amendment, the Court is not empowered to grant time to a defendant to file written statement beyond 120 days from the date of service of summons. Such provision has been held to be mandatory in **Scg Contracts** (supra).
17. Further Rule 3 A was inserted which deals with form of pleading in Commercial Court's and the said provision mandates that the forms of pleading shall be in such form as prescribed under High Court's Rule and practice direction. Rule 15 A of Order VI of the CPC, 1908 was inserted prescribing the form of and requirement of verification of pleading in Commercial dispute.
18. The summons were mandated to be issued under Order V Rule 1 sub Rule 1 of the CPC, 1908. Such amendments were brought in on 30.05.2018. Therefore, such procedures were brought into effect prior to filing of the



suit by the plaintiff on 23.11.2021.

19. The Act, 2015 was also amended with effect from 03.05.2018 by incorporating Chapter III A wherein Section 12 A was inserted mandating Pre Institution and Mediation and Settlement. In the case of ***M/s Patil Automation Private Limited and Others –VS- Rakheja Engineers Private Limited*** reported in ***(2022) 10 SC 1***, the Hon'ble Apex Court while referring to the judgment of the Hon'ble Apex Court in the case of ***Kailash vs- Nanhku & Ors*** reported in ***2005 4 SCC 480*** held that in ***Kailash*** (supra), the Hon'ble Apex Court held the proviso to Order VIII Rule 1 CPC, 1908 is mandatory being in the domain of procedural law and Section 12 A of the Act, 2015 cannot be described as a mere procedural law and the parliament intended to give it a mandatory flavour. Such provision has become mandatory from the date of pronouncement of judgment by the Hon'ble Apex Court on 17.08.2022. Coming into the case of the plaintiff though on the date of filing of the suit, the Act, 2015 was in force, the suit is qualified to be a Commercial suit, the amendment of the schedule of the Act 2015 and the Section 12 A of the Act, 2015 was in operation, however, suit was filed as a normal suit. Admittedly, the procedure mandated under Section 12 A of the Act, 2015 was not followed, the verification of the suit was not done in terms of the mandate of the schedule of the Act, 2015, summons were also not issued as per the schedule of the Act, 2015, rather the verification, pleading and summons were issued as a normal suit not as a commercial suit.
20. The learned counsel for the plaintiff is correct in saying that the provision of Section 12 A of the Act, 2015 became mandatory by virtue of the



pronouncement in **Patil Automation** (supra) and with effect 17.08.2022 but fact remains that the plaintiff who filed the suit prior to such judicial pronouncement did not follow the procedure mandated under the Act, 2015 and the Rules frame thereunder.

21. This Court is of the opinion that the Act, 2015 was enacted in the year 2015, the amendment were made in the year 2018, the notification by the Governor was issued so far relating to the State of Assam on February, 2019 and the notification mandating change a nomenclature (Commercial Suits) of all the suits of commercial nature within the jurisdiction of the Gauhati High Court as commercial suit only on 01.08.2022. The entire systems of registration, transfer and giving a definite nomenclature were in a transitional stage and such view of this Court is ascertained in the present case itself, when a suit was filed having all qualifications of a commercial suit, same was filed without adhering to any provision of the Act, 2015 and the Rules framed there under.
22. In fact, Section 15 of the Act, 2015 deals with transfer of pending cases. Sub Section 2 of Section 15 of the Act, 2015 mandates that suit and application relating to commercial dispute of a specified value pending in any civil Courts need to be transferred to the commercial Court's where Commercial Court's has been constituted. In the State of Assam by notification dated 13.02.2019, all the Civil Judges Senior Division were designated as Commercial Court's. However, the nomenclature were changed only on 01.08.2022.
23. Sub Section 3 of Section 15 of the Act, 2015 mandates that in case of transfer under Sub Section 2 of Section 15 of the Act, 2015, the provision

of the Act, 2015 shall be applied to those procedure that were not complete at the time of transfer.

24. Sub Section 4 of Section 15 of the Act, 2015 provides for case management hearing in respect of transfer suit or application in order to prescribe new time line or any further order as may be necessary for speedy and efficacious disposal of the suit subject to the provision that Order V Rule (1) (1) of CPC, 1908 shall not apply to such transferred suit and a discretion has been granted to the Court to prescribe a new time period within which the written statement shall be filed.
25. From the aforesaid, it can be safely concluded that such exemption to Order V Rule 1(1) of the CPC, 1908 was given by the legislature with an intention to deal with a transitional stage and to ascertain that during this period a valuable right to file a written statement is not taken away by virtue of strict and mandatory procedure.
26. The Hon'ble Apex Court in the case of ***Raj Process Equipments*** (supra) held that where a suit is instituted before a normal civil Court and transferred to commercial Court after expiry of 120 days and if the ratio of ***Scg*** (supra) is made applicable in such a case, the same would give a complete twist to the interpretation given to proviso to Order VIII Rule 1 of the CPC, 1908 by the Apex Court in ***Salem Advocate Bar Association – Vs- Union of India*** reported in ***2005 6 SCC 344*** inasmuch as ***Scg*** (supra) was decided by a two judges bench and Salem (supra) was decided by a three judges bench.
27. Though present is not a case of transfer and therefore, the proviso to Sub



Section 4 of Section 15 of the Act, 2015 may not *stricto sensu* applicable however, in the given facts of the present case, more particularly, the facts that the suit itself was not filed as a commercial suit and that the procedure as discussed in detailed hereinabove were not followed and that the nomenclature was changed only on 01.08.2022, the spirit of such proviso need to be applied in the present case to avoid miscarriage of justice.

28. The fact also remains that neither the suit was filed as a commercial suit nor was it dealt by the trial Court as a commercial suit though by that time, the trial Court was notified as a commercial Court. The trial Court issued summons as a normal suit, not as a commercial suit. The summon in terms of Order V Rule 1 (1) of the CPC, in case of commercial dispute, is to notify to the defendant that his right to file written statement shall be forfeited, if such written statement is not filed within 120 days from the date of receipt of such summon. Admittedly, summon was not issued by the learned trial Court in that manner, rather it was issued as a normal suit. The object of the amendment of form of summon so far relating to commercial suit is to put the defendant on notice that he has a limited period to file written statement from the date of receipt of such summons and such right shall be extinguished after 120 days from the date of receipt of summons. Admittedly in the case in hand, the defendant was not put to notice of such fact by the learned trial Court below nor the suit was filed in the manner, it was required under the Act, 2015. Therefore, for such lapse, the petitioner/defendant cannot be penalised more so when the plaintiff itself has not followed the required provision in filing the suit as a commercial suit.



29. The fact also remains that while rejecting the prayer to allow time to file written statement the learned trial Court has not rejected the same on the ground that the suit is a commercial suit and therefore, the Court is having no power to grant further time beyond 120 days. Such issue of forfeiture of the defendant to file written statement has been raised in this Court for the first time. Be that as it may, as the learned counsel has raised a substantial issue involving the provisions of Act, 2015, the same is answered in this petition as hereinabove.
30. In view of the aforesaid discussion and reasons, the impugned order dated 03.12.2022 passed by the learned Court of Civil Judge No. 2, Kamrup (M) at Guwahati in M.S. No. 92/2021, in so far as same relates to ordinary ex-parte proceeding, is set aside and quashed. The defendant is permitted to file its written statement within a period 20 days from today, if so advised. if such written statement is filed, the learned trial Court shall take the same on record and proceed as per law. If no such written statement is filed within the aforesaid period, the trial Court may proceed in terms of the impugned order dated 03.12.2022.
31. With the aforesaid, this revision petition is allowed. Parties to bear their own cost.

JUDGE

Comparing Assistant