



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

% *Date of decision: 6th October, 2022.*

+ **CS(COMM) 281/2022 & I.A. 6622/2022(O-XXXIX R-1 & 2 of CPC)**

PHILLIPS 66 COMPANY Plaintiff

Through: Mr. Raj Shekhar Rao, Senior Advocate with Ms. Diva Arora Menon, Mr. Rohan Krishan Seth, Ms. Archita Nigam and Ms. Parkhi Rai, Advocates.

versus

RAAJ UNOCAL LUBRICANTS LIMITED Defendant

Through: Mr. Jayant K. Mehta, Senior Advocate with Mr. Kapil Wadhwa, Ms. Surya Rajappan, Ms. Tejasvini Puri, Mr. PDV Srikar, Advocates.

**CORAM:
HON'BLE MR. JUSTICE AMIT BANSAL**

AMIT BANSAL, J. (Oral)

I.A. 14474/2022(u/S 151 CPC)

1. The present application has been filed on behalf of the applicant/defendant seeking reclassification of the present suit from a commercial suit to an ordinary suit. Reply has been filed on behalf of the plaintiff, which is not on record. However, a copy of the same has been handed over in Court and taken on record.

2. The present suit has been filed seeking recovery of USD 1,039,268.85/- (Rs.7,72,17,675.5/-) from the defendant on the basis of judgment dated 30th September, 2021 passed by the United States District



Court for the Southern District of Texas, Houston Division (hereinafter “US District Court”) in Civil Action No.4:21-cv-00279 titled ***Phillips 66 Company v. Raaj Unocal Lubricants Limited***. The said suit was filed by the plaintiff for the enforcement of its intellectual property rights against the defendant in the United States of America.

3. Senior counsel appearing on behalf of the applicant/defendant submits that the present suit does not fall within the definition of ‘commercial dispute’ under Section 2(1)(c) of the Commercial Courts Act, 2015. It is stated that the present suit does not fall in any of the categories mentioned in Section 2(1)(c) of the Commercial Courts Act and consequently, cannot be treated as a commercial suit. Reliance in this regard is placed on the judgment of the Supreme Court in ***Ambalal Sarabhai Enterprises Limited v. K.S. Infraspace LLP and Another***, (2020) 15 SCC 585 and order dated 26th April, 2017 passed by a Coordinate Bench of this Court in CS(COMM) 52/2017 titled ***Qatar Airways Q.C.S.C v. Airports Authority of India & Anr.*** It is further contended that the present suit is not based on intellectual property rights in India, which are being litigated between the parties by way of other suits that are pending adjudication before this Court. The suit before the US District Court was based purely on the infringement of intellectual property rights in United States of America and unconnected with the intellectual property rights in India.

4. Senior counsel appearing on behalf of the plaintiff relies upon the words ‘*arising out of*’ occurring in Section 2(1)(c) of the Commercial Courts Act to submit that all disputes that are relatable to intellectual property rights would be covered under Section 2(1)(c)(xvii) of the Commercial Courts Act and therefore, would qualify as a commercial suit. It is further submitted



that the present application has been filed only to circumvent the mandatory maximum statutory time limit of 120 days for filing of written statement in commercial suits.

5. I have heard the counsels for the parties.

6. At the outset, it is deemed apposite to refer to the relevant part of Section 2(1)(c)(xvii) of the Commercial Courts Act, which is set out below:

“2. Definitions.—(1) In this Act, unless the context otherwise requires,—

...

(c) “commercial dispute” means a dispute arising out of—

...

(xvii) intellectual property rights relating to registered and unregistered trademarks, copyright, patent, design, domain names, geographical indications and semiconductor integrated circuits;”

7. It is evident from the wording of Section 2(1)(c) of the Commercial Courts Act that a commercial dispute includes a dispute that arises out of intellectual property rights of a party. The words ‘*arising out of*’ used in Section 2(1)(c) have to be given their natural and ordinary meaning, which would mean to include all disputes involving intellectual property rights of a party. In the present case, the suit filed by the plaintiff before the US District Court was based on infringement of intellectual property rights of the plaintiff in the United States, wherein the US District Court passed an order of permanent injunction and awarded damages to the plaintiff amounting to USD 1,000,000/- along with attorney fees of USD 39,268/-. The present suit has been filed seeking recovery of the aforesaid amount. Since the United States of America is not a reciprocating territory under Section 44A of the Code of Civil Procedure, 1908 (CPC), the plaintiff has filed the present suit seeking of recovery of amounts awarded by the US



District Court. Further, as is evident from the judgment of the US District Court placed on record by the plaintiff, the entire cause of action for filing of the present suit is based on the infringement of intellectual property rights of the plaintiff by the defendant in the United States of America. Therefore, in my view, the present suit would be covered within the definition of ‘*commercial dispute*’ in terms of Section 2(1)(c)(xvii) of the Commercial Courts Act.

8. Reliance placed by the senior counsel for the defendant on the judgment in *Ambalal Sarabhai Enterprises Limited* (supra) is completely misplaced as in the said case, the Supreme Court was seized of a dispute concerning the interpretation of Section 2(1)(c)(vii) of the Commercial Courts Act. The Supreme Court in *Ambalal Sarabhai Enterprises Limited* (supra) has also observed that the provisions of the Commercial Courts Act have to be strictly construed. Even if that be so, the provisions of the Commercial Courts Act have to be given their full effect. Further, the use of the words ‘*arising out of*’ in Section 2(1)(c) leaves no doubt in my mind that all suits based on enforcement of intellectual property rights would be covered under sub-clause (xvii) of Section 2(1)(c). Similarly, the observations of the Coordinate Bench in *Qatar Airways Q.C.S.C* (supra) would be of no assistance to the defendant as the present suit falls within the category of transactions listed under Section 2(1)(c) of the Commercial Courts Act.

9. I do not find any merit in the application and the same is dismissed.

I.A. 15108/2022 (for condonation of delay of 78 days in filing WS)

10. This application has been filed on behalf of the defendant under Order



VIII Rule 1 of the CPC seeking condonation of delay in filing the written statement and affidavit of admission/denial of documents. Reply has been filed on behalf of the plaintiff, which is not on record. However, a copy of the same has been handed over in Court and taken on record.

11. Senior counsel on behalf of the defendant has made the following submissions:

- 11.1 The written statement in the present case was filed on 17th August, 2022, which was within the maximum condonable period of 120 days as prescribed under Order VIII Rule 1 of the CPC applicable to commercial suits.
- 11.2 Once the written statement has been filed, the date of such filing has to be considered for calculating whether or not the written statement has been filed within the condonable period and the fact that the same has not been taken on record would not be relevant. Reliance in this regard is placed on the judgment dated 6th April, 2022 passed by this Court in CS(COMM) 1052/2018 titled ***Cosco International Pvt. Ltd. v. Jagat Singh Dugar.***
- 11.3 The only defect pointed out by the Registry in the written statement filed on 17th August, 2022 was that the affidavit filed along with the written statement was not attested and there was no proof of service. The said defects were pointed out by the Registry on 29th August, 2022 and being merely procedural in nature, were promptly rectified by the defendant on 30th August, 2022.
- 11.4 Sufficient grounds have been pleaded in the application seeking condonation of delay.



12. Senior counsel appearing on behalf of the plaintiff vehemently opposes the present application and has made the following submissions:

- 12.1 The written statement was served by the counsel for the defendant to the counsel for the plaintiff first time on 30th August, 2022 and the application seeking condonation of delay in filing the written statement was served on the plaintiff on 7th September, 2022.
- 12.2 The defendant is bound to bring on record the written statement within the maximum permissible condonable period, failing which the defendant forfeits the right to file the written statement. Reference in this regard is made to the judgment of the Supreme Court in *SCG Contracts (India) Private Limited v. K.S. Chamankar Infrastructure Private Limited and Others*, (2019) 12 SCC 210.
- 12.3 Where a written statement has been filed without an application seeking condonation of delay, the same cannot be permitted to be taken on record. In the present case, the application for condonation of delay was filed beyond the maximum condonable period and therefore, the written statement should not be taken on record. Reliance in this regard is placed on *OK Play India Pvt. Ltd. v. A.P. Distributors and Anr.*, 2021 SCC OnLine Del 4079 and the judgment dated 5th July, 2022 passed by a Coordinate Bench of this Court in CS(COMM) 144/2019 titled *3M Company v. Mr. Vikas Sinha*. Reliance is also placed on my judgments in *Rachna Overseas v. Printech System*, 2021 SCC OnLine Del 5332 and *Intiyaz Sheikh v. Puma SE*, 2021 SCC OnLine Del 4679 in this regard.



- 12.4 No cogent grounds for condonation of delay have been taken in the application.
13. I have heard the rival contentions of the parties.
14. To appreciate the controversy between the parties, a brief timeline of the events is set out below:
- 14.1 On 29th April, 2022, summons in the suit were issued and accepted on behalf of the defendant by their counsel in Court. Thirty days' time was given to the defendant to file written statement.
 - 14.2 On 29th May, 2022, the thirty days' period for filing of the written statement expired.
 - 14.3 On 17th August, 2022, written statement was filed on behalf of the defendant.
 - 14.4 On 27th August, 2022, the maximum permissible condonable period of 120 days from service upon the defendant expired.
 - 14.5 On 29th August, 2022, the Registry pointed out the following defects in the written statement filed on behalf of the defendant:
 - (a) Affidavit was not attested, and
 - (b) Proof of service was not attached.
 - 14.6 On 30th August, 2022, written statement along with affidavit of admission/denial was re-filed after removing the aforesaid objections.
 - 14.7 On 7th September, 2022, application for condonation of delay in filing written statement was filed on behalf of the defendant.
15. In *Cosco International Pvt. Ltd* (supra), a Coordinate Bench of this Court noted the difference between '*filing of the written statement*' and



‘taking on record of the written statement’. The relevant observations of the said judgment, as noted in paragraphs 15 and 16 are set out below:

“15. Upon a conspectus of the timelines as set-out above and in light of the provisions of the CPC as amended by the Commercial Courts, Commercial Division & Commercial Appellate Division Of High Courts (Amendment) Act, 2018 read in conjunction with the Delhi High Court (Original Side) Rules 2018, as also the judicial precedents referred to by the parties, this court is of the view that written statement having been filed within the statutory period; and the defect of non-filing of the affidavit of admission/denial also having been cured well within the permissible time period, nothing further stands in the way of the written statement being taken on record.

*16. For clarity, it is reiterated that what Order V Rule 1(1) and Order VIII Rule 1 CPC provide is the outer time-limit for filing of the written statement of defence. **The filling by the defendant of an affidavit of admission/denial of the plaintiff’s documents, is a separate requirement under Chapter VII Rule 3 and 4 of the Delhi High Court (Original Side) Rules, 2018; and the consequence for not filing such affidavit is that the written statement shall not be taken on record and that the plaintiff’s documents shall be deemed to be admitted by the defendant. However, the filing of a written statement within the prescribed time but without an accompanying affidavit of admission/denial of documents, does not amount to non-est filing, since it cannot be said that nothing was filed at all. It would, however, amount to a defect, that is required to be cured after it is brought to the attention of the party by the Registry. Chapter VII Rule 3 only bars taking on record a written statement that is filed without an accompanying affidavit of admission/denial of documents. Filing of the written statement and it being taken on record are two separate and distinct matters.**”*

16. The dicta of the aforesaid judgment would also be applicable to the facts of the present case. As per the e-filing log of the case, the written statement was filed on behalf of the defendant on 17th August, 2022, which



was within the maximum condonable statutory period of 120 days prescribed under the second proviso to Order VIII Rule 1 of the CPC applicable to commercial suits. On 29th August, 2022, the Registry pointed out only two defects in respect of the said filing, that (i) the affidavit was not attested; and, (ii) the proof of service was not attached. Again, from the e-filing log, it appears that the aforementioned two defects were removed by the defendant on the very next day i.e., 30th August, 2022 and a written statement along with an attested affidavit and an affidavit of admission/denial of documents notarized on 29th August, 2022 along with proof of service were filed. Thereafter, the Registry did not mark any further defects. Therefore, in the present case, the written statement was filed within the maximum condonable statutory period, even if the same was not taken on record within the said period. Further, the defects were also cured within the permissible time period prescribed under the Delhi High Court (Original Side) Rules, 2018.

17. There is nothing to suggest from the e-filing log that the filing of the written statement by the defendant on 17th August, 2022 was a non-*est* filing. The defects pointed out by the Registry, as noted above, were procedural defects and the same were duly rectified. Thereafter, there is no impediment on the written statement being taken on record.

18. Senior counsel on behalf of the plaintiff has vehemently contended that since the written statement was not accompanied by an application for condonation of delay and the said application was filed only on 7th September, 2022, after the expiry of the maximum condonable period of 120 days, the written statement cannot be permitted to be taken on record.

19. *Per contra*, senior counsel for the defendant has placed reliance on the



order dated 12th September, 2022 passed by the Supreme Court in SLP(C) Nos.9733-9734/2022 titled **A. P. Distributors & Anr. v. OK Play India Pvt. Ltd.**, wherein the judgment in **OK Play India Pvt. Ltd. v. A. P. Distributors**, 2021 SCC OnLine Del 4079 has been set aside.

20. The relevant observations of the Coordinate Bench in **OK Play India** (supra) are set out below:

“12. Since the written statement has to be filed within 120 days from the date of service of summons, and a filing beyond 30 days of service of summons is a delayed filing of the written statement, it is crystal clear that the application accompanying the belated filing of the written statement must necessarily have to be filed within the same time period, that is, 120 days. There is nothing in Order VIII C.P.C. to suggest otherwise.

14. To sum up, when a written statement is filed after 30 days of service of summons but before the expiry of further 90 days, the filing of the written statement must be accompanied with a written application setting out the reasons for the delay to allow the court to consider the reasons so given, to condone delay and receive the belated written statement giving reasons for granting such leave and enabling the court to impose appropriate costs. No application can be filed, seeking condonation of delay in filing the written statement after 120 days have elapsed from the date of service of summons.

...

16. The learned Commercial Court erred in observing that the written statement and affidavit had been filed before the expiry of the 120 days' time that is available to the court to allow the filing of the written statement and use its inherent powers under Section 151 C.P.C. and to set at naught the mandatory provisions for filing of the written statement within 30 days or within the further period of 90 days allowed under Order VIII Rule 1 C.P.C., accompanied with an application seeking condonation of delay.”

21. The Supreme Court vide order dated 12th September, 2022, while setting aside the judgment of the Coordinate Bench in **OK Play India**



(supra), made the following observations:

“Having heard learned counsel for the respective parties and in the facts and circumstances of the case and considering the fact that the written statement was filed on the 34th day of the service of notice of summons, however, the application for condonation of delay was filed which was beyond the period of 120 days, the High Court has taken too technical view in setting aside the order passed by the learned Commercial Court directing to accept the written statement filed on behalf of the appellants/defendants. The High Court was not justified in setting aside the order passed by the learned Trial court directing to take the written statement on record.

In view of the above and for the reasons stated hereinabove, the present appeals succeed. The impugned judgment and orders passed by the High Court are hereby quashed and set aside and the order passed by the learned Trial Court directing to take written statement on record after condoning the delay in submitting the written statement is hereby restored.”

22. The judgments in *Intiyaz Sheikh* (supra), *Rachna Overseas* (supra) and *3M Company* (supra) relied on by the plaintiff followed the dicta of *OK Play India Pvt. Ltd.* (supra), which has since been set aside by the Supreme Court. Further, in all the three aforesaid judgments, the defendants could not make out a case on merits for seeking condonation of delay in filing the written statement. Consequently, the aforesaid judgments do not advance the case of the plaintiff.

23. Senior counsel for the plaintiff has also placed reliance on the judgment in *SCG Contracts (India) Private Limited* (supra) in support of his contention that the written statement has to come on record within 120 days from the date of service of summons. What has been observed by the Supreme Court in *SCG Contracts (India) Private Limited* (supra) is that



beyond 120 days from the date of accepting summons, the defendant shall forfeit the right to file the written statement and if the defendant fails to file the written statement within maximum condonable period of 120 days, the court shall not allow the written statement to be taken on record. Both in the second proviso to Order VIII Rule 1 and in the proviso to Order VIII Rule 10 of the CPC, which were considered by the Supreme Court in *SCG Contracts (India) Private Limited* (supra), the time limit prescribed is in respect of filing the written statement and not in respect of the written statement to be brought on record.

24. On merits, the defendant has stated in its application seeking condonation of delay in filing the written statement that since the suit pertains to a judgment passed by a foreign court, substantial amount of time was spent seeking opinions from the foreign counsels and collating documents and during the said period, the concerned officers of the defendant as well as the counsel had also contracted COVID-19. Therefore, taking into account the facts and circumstances of the present case, it is a fit case for condoning the delay in filing of the written statement.

25. However, there is no justification given by the defendant for not serving an advance copy of the written statement on the counsel for the plaintiff or for not filing a notarized affidavit in support of the written statement as well as the affidavit of admission/denial of documents. Therefore, the delay in filing the written statement is condoned and the written statement filed by the defendant is permitted to be taken on record, subject to costs of Rs.1,00,000/- to be paid by the defendant to the plaintiff. Costs shall be paid within a period of two weeks from today.

26. The application stands disposed of in above terms.

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27. In view of the written statement being permitted to be taken on record, replication, if any, be filed within thirty days.

28. List on 16th November, 2022 before the Joint Registrar for completion of pleadings and marking of exhibits.

OCTOBER 6, 2022
dk

AMIT BANSAL, J

