
(2003) 10 BOM CK 0017

In the Bombay High Court

Case No : Appeal No. 608 of 2003 in Suit No. 3092 of 2002

Iridium India Telecom Ltd.

APPELLANT

Vs

Motorola Inc. and Another

RESPONDENT

Date of Decision : 17-10-2003

Acts Referred:

Civil Procedure Code Amendment Act, 2002 — Order 8 Rule 1, 148
Civil Procedure Code, 1908 (CPC) — Section 129, 16

Citation : (2004) 2 BomCR 530 : (2004) 1 CivCC 443 : (2004) 1 MhLj 532

Hon'ble Judges : D.Y. Chandrachud, J;A.P. Shah, J

Bench : Division Bench

Advocate : Mukul Rohatgi, V.R. Dhond and Rishi Agrawala, instructed by N. Sham and Himayatullan, for the Appellant; Aspi Chinoy and D.J. Khambatta, instructed by B. Munim and Co., for the Respondent

Final Decision : Dismissed

Judgement

A. P. Shah, J.—This appeal is directed against an order of the learned single Judge, extending the time for the first respondent to file its written statement beyond the period of 90 days, prescribed by Order VIII, Rule 1 of the Code of Civil Procedure, by exercising inherent power u/s 148 of the Code of Civil Procedure. The learned single Judge extended time by holding that Section 148 could be invoked to extend the period prescribed under Order VIII, Rule 1, notwithstanding the Proviso to Order VIII, Rule 1, which curtails the power of a Court to extend time only up to 90 days. The appeal raises important question involving the scope and interpretation of the provisions of Order VIII, Rule 1 of the CPC as amended by the CPC (Amendment) Act, 2002 (Act 22 of 2002) with effect from 1st July 2002. The more fundamental issue is whether the provisions of Order VIII, Rule 1 would apply to suits on the Original Side or Original Side Rules continue to prevail by virtue of Section 129 of the Code of Civil Procedure.

2. The appellant is the original plaintiff. The appellant is a company whose equity is substantially held by the financial institutions, Banks, Insurance Companies

and their affiliates. Respondent Nos. 1 and 2 i.e. original defendant Nos. 1 and 2 are Corporations incorporated in USA. The appellant has filed the present suit for recovery of a sum of Rs. 960 crores and certain other reliefs. The suit was filed on 16th September, 2002. The first respondent was served with the plaint and proceedings on 20th September 2002. The first respondent was served with the Writ of Summons on 9th April, 2003. Under the provisions of Order VIII, Rule 1, a period of 30 days is available for filing written statement. Under proviso to Order VIII, Rule 1, a Court can extend this period, for the reasons to be recorded in writing, but which shall not be later than 90 days. The 30 day period would have expired on 9th May 2003. On 2nd May 2003 the first respondent made an application for extension of time to 90 days which came to be granted vide order dated 2nd May 2003. While so granting time, the learned single Judge observed that period of 90 days would be more than sufficient, having regard to the fact that a detailed reply had been filed and the plaint had been served on the first respondent as far back as on 20th September 2002. As regards the issue as to whether the first respondent can invoke Section 148 of the CPC and apply for further extension of 30 days beyond 8th July 2003, the learned single Judge observed that the request is premature, and could be considered only on 8th July 2003 provided that the first respondent is capable of making sufficient cause to show that. According to the first respondent, written statement was ready on 8th July 2002 but it was not signed and, therefore, extension of 30 days was sought u/s 148, which was granted by the learned single Judge.

3. To understand the respective contentions of the parties it would be necessary to refer to the relevant provisions of the CPC as amended by the CPC (Amendment) Act, 2002. The Statement of Objects and Reasons of the amending Act specifically provides that the amendment is enacted with a view to curtail delay at every stage so that justice is not delayed. Order VIII, Rules 1 and 10, which are relevant for our purpose read as follows :

"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".

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".

A bare reading of the above shows that the amended provisions mark a complete departure from the earlier provisions. Whilst prior to the amendment, there was

no embargo in extending time, the amendment expressly limited the power of a Court to extend time to 90 days. The amended provisions of Order VIII, Rule 1 were considered by the Supreme Court in *Dr. J.J. Merchant and Others Vs. Shrinath Chaturvedi*, . The Court observed :

"14. For this purpose, even Parliament has amended Order 8, Rule 1 of the Code of Civil Procedure, which reads thus :

"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."

15. Under this Rule also, there is a legislative mandate that written statement of defence is to be filed within 30 days. However, if there is a failure to file such written statement within the stipulated time, the court can at the most extend further period of 60 days and no more. Under the Act, the legislature intent is not to give 90 days of time but only maximum 45 days for filing the version by the opposite party. Therefore, the aforesaid mandate is required to be strictly adhered to".

4. The learned Solicitor General submitted and in our opinion rightly so, that the provisions of Order VIII, Rule 1 are in the nature of self-contained Code insofar as filing of "written statement is concerned. It prescribes the outer limit for filing the written statement and hence reliance upon the general power u/s 148 was not permissible. Moreover Section 148 empowers the Court to enlarge time, where any period is fixed or granted by the Court. The time for filing a written statement is not granted or fixed by a Court, but fixed by the Code and consequently Section 148 would have no application. It has been consistently held by almost all High Courts that the Court has no power to extend a period fixed by statute and not fixed or granted by the Court (See *Jagjit Singh and Others Vs. Sankatha Singh and Another*, , *Kalipada v. Basanta* (1932) 59 Cat 117, *Thayyan Padayachi v. Veluswamy* AIR 1961 Mad 711, *Kathyee Cotton Mills Ltd. Vs. R. Padmanabha Pillai and Others*, . There is also an authoritative pronouncement by the Supreme Court in *Mohan Lal Vs. Hari Prasad Yadav and Others*, , where a two judge Bench observed :

"We are thus left with the question whether Section 148 of the Code would be applicable to the present case or not. Again Section 148 of the Code would not be, applicable to the present case for the simple reason that the time of making an application under Rule 89 of Order 21 of the Code is not fixed by the Court".

5. In our opinion Section 148, which is repository of the general power to extend time cannot override the express limitation of Order VIII, Rule 1, which has been amended by the amending Act and which has prescribed outer limit of 90 days

beyond which written statement could not be entertained. Therefore, the learned single Judge clearly erred in holding that the time to file a written statement could be extended beyond the outer limit of 90 days by resorting to Section 148. Having said this, it would now have to be seen whether the provisions of Order VIII, Rule 1 would apply to suits on the Original Side, or whether they would continue to be governed by Original Side Rules.

6. Mr. Chinoy appearing for the respondents submitted that the application for extension of time u/s 148 was preferred under misconception that Order VIII, Rule 1 is applicable to Original Side. The procedure on the Original Side is governed by the Original Side Rules and not by the CPC to the extent there are provisions in the Original Side Rules-. He drew our attention to the relevant rules for filing a written statement. Rule 88 provides that in suits where the Written Statement is called for by the writ of summons, the defendant shall file an appearance in person or a Vakalatnama, as the case may, within 12 weeks from the service of the Writ of Summons. Further Rule 89 provides that if the defendant commits default in filing his appearance in person or a Vakalatnama and a written statement as provided in Rule 74, the Judge in Chamber may, when the suit appears on board for directions, direct that the suit be set down on board for disposal as an undefended suit on the same day or on such other day as he may deem fit. Rule 265 which is material for the present case reads as follows :

"The Court or the Judge in Chamber shall have power to enlarge or abridge the time appointed by these Rules or fixed by any order for doing any act, or taking any proceedings, upon such terms (if any), as the justice of the case may require and any such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allotted".

The power to extend time under Rule 265 is very wide. The Rule does not proceed that time can be extended only before the expiry of the prescribed time. The only limitation is such as would exist when a Court exercises the judicial discretion.

7. The Original Side Rules are thus clearly inconsistent with the provisions of Order VIII, Rule 1. The question is whether the said Rules would prevail over Order VIII, Rule 1. This question, in our opinion, is concluded by Section 129 of the Code which reads as follows :

"129. Power of Chartered High Courts to make rules as to their original civil procedure. -- Notwithstanding anything in this Code, any High Court, not being the Court of a Judicial Commissioner, may make such rules not inconsistent with the Letters Patent or order or other law establishing it, to regulate its own procedure in the exercise of its original civil jurisdiction as it shall think fit, and nothing herein contained shall affect the validity of any such rules in force at the commencement of the Code".

Under this section any High Court may make rules to regulate its own procedure

in the exercise of its original civil jurisdiction. Such rules may not be consistent with the provisions in the body of the Code, but they must not be inconsistent with the laws establishing it. Therefore where rule has been made by a High Court under this section, the provisions of the Code do not apply. Thus in *Behram Jung v. Sultan Ali* ILR (1913) Bom. 572 it was held that in view of Section 129, a rule in the Code did not apply as it was inconsistent with a rule in the Bombay High Court Rules. In *Shevaram Thadaram Jaisinghani v. Indian Oil Corporation Ltd.* 1968 M.L.J. 748 = 1968 (70) BLR. 546 *Vimadalal, J.* observed as follows :

"Section 129 of the CPC on the other hand, confers on the High Court power to frame rules to regulate the procedure on its Original Civil Side with only this limitation that they must not be inconsistent with the Letters Patent, or other law, establishing the High Court in question. It must, therefore, follow that they could be inconsistent with everything else, including even the body of the Civil Procedure Code".

The learned Judge concluded as follows :

"It must not, however, forgotten that, whilst a rule framed u/s 122 for regulating the procedure on the Original Side of the High Court cannot be inconsistent with the body of the Code, a rule framed u/s 129 of the same Code could be inconsistent therewith. A rule framed under either of those sections can, however, be inconsistent with the rules contained in the First Schedule to the Code of Civil Procedure".

8. Similar is the view taken by the Madras High Court in *Virupaksha Rao Naidu Vs. M. Ranganayaki Ammal*, where it was observed that "Section 129 of the Code gives the High Court the power to make rules, regulating the procedure of the Original Side and nothing in the Code will affect such rules. Similar is also the view of the Calcutta High Court and Allahabad High Court in *Manickchand Durgaprasad Vs. Pratabmull Rameswar and Another*, , *Umeshchandra Banerji Vs. Kunjilal Biswas and Others*, and *Mool Chand and Another Vs. Kamta Prasad and Others*, .

9. We may also refer to the observations made by the Division Bench in *Raja Bahadur Motilal (Bombay) Mills Ltd. Vs. Life Insurance Corporation of India and Others*, , where *Mody J.*, speaking for the Bench observed :

"Now it must be remembered that u/s 129 of the CPC this High Court is entitled to make rules to regulate its own procedure in the exercise of its original civil jurisdiction as it shali think fit and that this High Court has as a matter of fact made the said Original Side Rules. The procedure on the original side of this Court is governed by the Original Side Rules and not by the provisions of the CPC to the extent that there are provisions in the Original Side Rules".

10. In *Printpack Machinery Ltd v. Jay Kay Paper Congeters* AIR 1979 Delhi 219 the Full Bench of the Delhi High Court held that Order 37 as amended by the CPC (Amendment) Act, 1976 will not apply and the Original Side Rules continue to

prevail. The Full Bench also observed in the same vein as follows:

"No doubt the closing words will not save the Original Side Rules of this Court as they were not in force at the commencement of the Code. But, the opening words "Notwithstanding anything in this Code" are self effecting and subordinate the Code to rules made by a High Court for its original sides at any time. The cumulative effect of those two parts of the section is to leave untouched the original side rules of High Court whether framed before or after, 1908. Since Section 2(1) says that the "Code" includes rules, the original side rules will prevail both over the body of the Code and the First Schedule. Therefore the statement in Order 37, Rule 1 (a) that "This order shall apply to ... High Courts" must be read subject to Section 129.....

11) The conclusion thus drawn from Section 129 can also be reached from Section 4(1) of the Code, though not in the manner that was suggested in argument. Section 4(1) of the Code provides that:--"In the absence of any specific provisions to the contrary, nothing in this Code shall be deemed to limit or otherwise affect any special or local law now in force or any special jurisdiction or power conferred, or any special form of procedure prescribed by or under any other law for the time being in force. It has been held that rules made by a High Court or the Supreme Court to regulate their procedure and practice are a "special law" as they deal with a particular subject; *The Union of India (UOI) Vs. Ram Kanwar and Others*, ; *Punjab Co-operative Bank Ltd, Lahore v. Punjab Cotton Press Co Ltd, (In liquidation)* AIR 1941 Lah 25 and *The Deities of Sri Audinarayana Swamy and Anjenayaaswami Temples of Donepudi Vs. R. Hanumacharyulu and Others*, . Nevertheless, the Original Side Rules of Delhi High Court would not be protected by Section 4(1) of the Code. Only those "special laws" are saved which are "now in force", which means 1908. But, they are a "special form of procedure prescribed" by or under a law for the time being in force and would be covered on that account. There is no "specific provision to the contrary," and the result is that nothing in the Code, "shall be deemed to limit or otherwise affect" anything in the Original Side Rules".

11. No case indicating contrary opinion was cited before us. The learned Solicitor General, however, submitted that the Original Side Rules have been superseded by virtue of Section 16 of the Code of Civil Procedure, (Amendment) Act, 2002. Section 16 reads as follows:

"16. Repeal and savings. -- (1) Any amendment made, or any provision inserted in the principal Act by a State Legislature or High Court before the commencement of the Act, shall, except insofar as such amendment or provisions are consistent with the principal Act as amended by this Act, stand repealed".

Relying upon the above section the learned Solicitor General contended that the Rules framed by the High Court which are inconsistent with the provisions of the CPC as amended by the amending Act shall stand repealed. In support of this

proposition he placed reliance on Ganpat Giri Vs. Second Additional District Judge, Ballia and Others, and Kulwant Kaur and Others Vs. Gurdial Singh Mann (dead) by Lrs. and Others etc., . We are unable to agree with the learned Solicitor General. The Original Side Rules were not an amendment made or a provision inserted in the Code. They always existed as a separate body of rules and are beyond the purview of the Code. Therefore the question of Original Side Rules being repealed by the amending Act does not arise. We may add that on identical argument was repelled by the Full Bench of the Delhi High Court in Printpack Machinery Ltd. v. Jay Kay Congeters (supra). The Court observed:

"The Original Side Rules were not an a "amendment made" or a "provision inserted" in the Code. They always existed as a separate body of rules. It is patent from Section 2(18) that they are beyond the purview of the Code. That sub-section defines "rules" to mean those rules and forms "contained in the first schedule or made u/s 122 or Section 125". Significantly, any reference to Section 129 is omitted. Thus, there is no question of the Original Side Rules being repealed.

Section 97(1) of the amending Act was intended to disencumber the Code of accretions gathered over the years due to amendments made by State Legislatures and High Courts, except to the extent that they were consistent with the Code as amended by the Act. In other words, the purpose of the amending Act was to present a renovated Code as the new starting point, as had also been done in 1908. It was not the purpose to repeal all other and independent laws pertaining to procedure. Historically the original side of a High Court had always been treated on a special footing. As Section 129 shows, it has always been governed by its own rules in preference to those in the Code. The amending Act contains no indication that it was intended to depart from that position. Had there been any such intention, the obvious course was to amend Section 129. But it has remained fully intact. So has Section 4 of the Code and even Section 122".

12. We are in respectful agreement with the above observations of the Full Bench. As regards the decision cited by the learned Solicitor General in Kulwant Kaur v. Gurdial Singh Mann, it turns on Section 97(1) of the CPC (Amendment) Act, 1976. This case has no bearing whatsoever on the point under consideration. The second decision relates to inconsistency between the Central Act and State Act and effect of Article 254 of the Constitution. There the question was whether amended Section 100 of the CPC would prevail over Section 41 of the Punjab Courts Act. The Court held that two Acts were inconsistent and provisions of Section 100 would prevail.

13. In view of the foregoing discussion, we hold that the amended provisions of Order VIII, Rule 1 would not apply to suits on the Original Side and such suits will continue to be governed by the Original Side Rules. Therefore, we do not see any reason to interfere with the order under appeal. Appeal fails and the same is dismissed with no order as to cost.