

(2015) 12 DEL CK 0103

In the Delhi High Court

Case No : I.A. No. 25029/2015 in CS (OS) No. 764/2015

Telefonaktiebolaget L.M. Ericsson

APPELLANT

Vs

Lava International Limited

RESPONDENT

Date of Decision : 09-12-2015

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 5 Rule 1, Order 8 Rule 1, Order 8 Rule 10, 151

Citation : (2016) 226 DLT 342 : (2016) 154 DRJ 59 : (2016) 154 DRJ 434 : (2016) 65 PTC 319

Hon'ble Judges : Manmohan Singh, J.

Bench : Single Bench

Advocate : Prathiba M. Singh, Senior Advocate, Chander M. Lall, Saya Choudhary, Ashutosh Kumar and Rohin Koolwal, Advocates, for the Appellant; A.S. Chandhiok, Senior Advocate, Ashok Agarwal, Swapnil Gupta, Shivambika Sinha, Mayank Bamniyal, Nidhi Gulabani and Honey Kolwar, Advocates, for the Respondent

Judgement

Manmohan Singh, J.—The plaintiff has filed the suit for permanent injunction against the defendant seeking inter alia to restrain violation and infringement of its rights in its 8 patents along with damages, rendition of accounts, delivery up etc. in the month of March, 2015. The defendant appeared before Court on the first date itself. Time to file the written statement was granted for four weeks on 26th March, 2015.

2. The written statement along with counter claim was filed by the defendant on 28th July, 2015. However, written statement to the counter claim was filed by the plaintiff on 5th December, 2015. In fact, a notice in the counter claim was issued by this Court vide order dated 31st July, 2015 and a period of 8 weeks was given to the plaintiff to file its written statement. From 31st August, 2015 till 29th October, 2015 both the parties were negotiating settlement, it is only on 3rd November, 2015 the plaintiff informed the Court that both the parties have not been able to resolve the matter and the matter can proceed on merits.

Thereafter, this Court directed the plaintiff to file its written statement before the next date of hearing and the matter was re-notified for 18th November, 2015. However, on 18th November, 2015 counsel for both the parties mentioned the matter and the same was re-notified for 7th December, 2015 (the plaintiff has filed its replication cum written statement on 5th December, 2015).

3. In the meanwhile, the above mentioned application has been filed by the defendant under Order VIII Rule 10 of the Code of Civil Procedure, 1908 read with Clause 4D(i) of the Schedule to the Commercial Courts, Commercial Division and Commercial Appellate Division of the High Courts Ordinance, 2015 (hereinafter referred to as "Commercial Courts Ordinance") and Section 151 CPC to pass a decree in terms of the counter claim filed by the defendant. Learned counsel for the plaintiff does not wish to file the reply who accepted the notice. Both parties have made their submissions for some time.

4. It is stated in the application that as per Section 16 read with Schedule I of the Commercial Courts Ordinance, a written statement filed after expiry of 120 days from the date of service of summons cannot be taken on record. It is stated in the application that in view of the mandate of Order VIII Rule 1 of CPC as amended by the Commercial Court Ordinance, promulgated on 23rd October, 2015, the plaintiff's right to file the written statement stands closed.

5. Mr. A.S. Chandhiok, learned Senior counsel appearing on behalf of defendant has referred Clause 4D(i) of the Commercial Courts Ordinance has amended the proviso to Order VIII Rule 1 of the CPC. Order VIII Rule 1 of the CPC as amended and applicable to commercial disputes would read as under:

"Written Statement - The defendant shall, within thirty days from the date of service of summons on him, resent 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 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 twenty days from the date of service of summons. On expiry of one hundred 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."

6. Mr. Chandhiok has also referred Section 16 of the Commercial Courts Ordinance which provides that the CPC in so far as it relates to commercial matter of the Specified Value. Section 16 (1) of the Commercial Courts Ordinance reads as under:

"The provisions of the Code of Civil Procedure, 1908 shall, in their application to any suit in respect of a commercial disputes of a Specified Value, stand amended in the manner as specified in the Schedule."

7. It is submitted by the learned Senior counsel appearing on behalf of the

defendant that in view of the mandate of Clause 4D(i) of the Schedule to the Commercial Courts Ordinance, as no written statement has been filed by the plaintiff to the Counter Claim within 120 days, the plaintiff has forfeited its right to do so and the written statement filed later than 28th November, 2015 cannot be taken on record and in accordance with the Ordinance as this Court has no discretion to further extend the time for filing the Written Statement. Therefore, the present application has been filed by the defendant for decreeing the counter claim.

Counsel has referred the decision of Kailash Vs. Nanhku and Others, in support of his submissions. The Supreme Court while interpreting the 90 day period prescribed in the 2002 amendment to the CPC, had opined that such provision would not be mandatory, but only directory. It was held that:

"Though the language of proviso to Rule 1 of Order VIII of the CPC is couched in negative form, it does not specify any penal consequences flowing from noncompliance. The provision being in the realm of procedural law has to be held to be mandatory and not directory."

8. Ms. Pratibha M. Singh, learned Senior counsel appearing on behalf of plaintiff submits that the present suit was filed by the Plaintiff before the Original Side of this Court on 20th March, 2015 and now as per the Commercial Court Ordinance the present suit stands transferred before the Commercial Division of this Court with effect from 15th November, 2015. Therefore, in the light of the proviso of Section 15 (4) of the Commercial Court Ordinance, this Court has the discretion to take on record the written statement filed by the plaintiff on 5th December, 2015 inasmuch as the timelines as laid down by the Commercial Courts Ordinance will become applicable to the present case from 15th November, 2015. The provisions referred by the learned Senior counsel appearing on behalf of defendant are not applicable to the facts of the present case. These may be applied in the cases where the written statement is not filed by outer period of four months after the directions are issued on 15th November, 2015.

9. Therefore, in light of the aforesaid, it is submitted by her that the time period i.e. 31st August, 2015 till 29th October, 2015 during which parties were negotiating settlement cannot be taken into account.

10. Apart from the aforesaid facts, it is stated by Ms. Pratibha M. Singh, learned Senior counsel that the defendant vide its written statement cum counter claim (which runs into 308 pages) has sought revocation of all eight suit patents and has relied upon various technical documents that run into approximately 3000 pages along with two expert affidavits. In order to prepare and file its replication cum written statement, the plaintiff was required to thoroughly analyze and counter such technical documents, which was an extremely time consuming exercise.

11. A brief list of dates detailing various hearings that took place before this Court are as follows :

12. In fact the defendant has filed present application on the basis of time line prescribed by this Court for the plaintiff to file its written statement will be subject to Section 16 read with Schedule I of the Commercial Courts Ordinance, 2015 which amends the provision of the Code of Civil Procedure, 1908 as contained in Order 8 Rule 1 CPC. Mr. Chandhiok, learned Senior counsel argues that as the Commercial Courts Ordinance was notified on 23rd October, 2015 thus, no extension of time can be given to the plaintiff for filing of its written statement after expiry of 120 days from the date of issuance of summons irrespective of any peculiar facts and circumstances.

13. No doubt, the Commercial Courts Ordinance has been promulgated on 23rd October, 2015, became applicable only on 15th November, 2015. The Hon'ble Chief Justice of this Court by order dated 15th November, 2015 constituted the commercial divisions of this Court.

Section 15 (1) of the Commercial Courts Ordinance provides that all the suit or applications (commercial disputes) pending before the Original Side of this Court will have to be transferred to the Commercial Divisions of this Court. Further, Section 15(4) of the said Ordinance provides for case management hearing in relation to such transferred cases for setting new time lines for the adjudication of the dispute with a view to expedite the same.

The proviso of Section 15 (4) of the Ordinance gives the Court discretion to set a new time for filing of written statement in relation to such transferred suit. Section 15 has been reproduced here as under:--

Transfer of pending suits

"15. (1) All suits and applications, including applications under the Arbitration and Conciliation Act, 1996, relating to a commercial dispute of Specified Value pending in a High Court where a Commercial Division has been constituted, shall be transferred to the Commercial Division.

(2) All suits and applications, including applications under the Arbitration and Conciliation Act, commercial dispute of Specified Value pending in any civil court in any district or area in respect of which a Commercial Court has been constituted, shall be transferred to such Commercial Court :

Provided that no suit or application where the final judgment has been reserved by the Court prior to the constitution of the Commercial Division or the Commercial Court shall be transferred either under sub-section (1) or sub-section (2).

(3) Where any suit or application, including an application under the Arbitration and Conciliation Act. 1996, relating to a commercial dispute of Specified Value shall stand transferred to the Commercial Division or Commercial Court under sub-section CD or sub-section (2), the provisions of this Ordinance shall apply to those procedures that were not complete at the time of transfer.

(4) The Commercial Division or Commercial Court, as the case may be, may hold case management hearings in respect of such transferred suit or application in order to prescribe new timelines or issue such further directions as may be necessary for a speedy and efficacious disposal of such suit or application in accordance with Order XIV-A of the Code of Civil Procedure, 1908 :

Provided that the proviso to sub-rule (1) of Rule 1 of Order V of the Code of Civil Procedure, 1908 shall not apply to such transferred suit or application and the court may, in its discretion, prescribe a new time period within which the written statement must be filed.

(5) In the event that such suit or application is not transferred in the manner specified in sub-section (1), sub section (2) or sub-section (3), the Commercial Appellate Division of the High Court may, on the application of any of the parties to the suit, withdraw such suit or application from the court before which it is pending and transfer the same for trial or disposal to the Commercial Division or Commercial Court, as the case may be, having territorial jurisdiction over such suit, and such order of transfer shall be final and binding."

(Emphasis added)

14. Thus, there is an exemption provided under the Commercial Courts Ordinance for matters that were filed prior to the notification of the Ordinance, whereby the Court has the discretion to set a case management timeline and extend the time period for completion of pleadings including the written statement.

15. Otherwise as far as the provisions of Commercial Courts Ordinance as mentioned above are concerned, there is no dispute that the same are applicable in the appropriate matter. However, the facts and situation in the present case are different. The same cannot strictly apply in the circumstances of the present case as during the course of hearing of the interim application, it was pointed out by the learned Senior counsel for the plaintiff that in another matter, the dispute of similar nature has been decided by the Division Bench in FAO (OS) 513/2015 whereby the appellant in the said appeal (defendant in the suit) entered into a Global Patent License Agreement. Without prejudice, as agreed by both the parties, an adjournment was sought in view of proposal for settlement exchanged and the matter was adjourned to 22nd September, 2015 for settlement.

16. On 22nd September, 2015 again an adjournment was sought as the parties had discussed the case for the purpose of settlement and the matter was adjourned to 29th October, 2015. On the said date, counsel for the plaintiff was pressing for hearing of the remaining arguments in the application on the reason that the defendant is not serious about the settlement. Learned Senior counsel appearing on behalf of the defendant however argued the interim application for some time. The matter was adjourned to 3rd November, 2015 for remaining submissions.

17. On 3rd November, 2015 counsel for the defendant pointed out that no written statement to the counter claim was filed and the following order was passed by the Court:

"Mr. Chandhiok, learned senior counsel appearing on behalf of the defendant, has made his submissions for some time in the interim application. During the course of hearing, Mr. Chandhiok has pointed out that the written statement to the counter claim has not been filed wherein the defendant have stated that the patents of subject matter are not standard essential patents. Counsel for the plaintiff states that the written statement could not be filed to the counter claim as the parties were negotiating for settlement. Let the same be filed on or before the next date. List on 18th November, 2015."

18. It is evident that from 31st August, 2015 till 29th October, 2015 undisputedly parties were trying to settle their dispute. Time of 59 days was spent on settlement talks which at the end of the day could not be materialized. Interim application is at the stage of conclusion of the arguments on behalf of the defendant. The advantage, if any, has gone in favour of the defendant as there is no ex-parte interim injunction in the present case. After having heard learned counsel for the parties, I am of the view that since the parties were trying to resolve their dispute amicably and that process has taken 59 days, the said period is to be excluded from the period provided in the Civil Procedure Code and Clause 4D(i) of Commercial Courts Ordinance.

19. Even otherwise, it is a well settled principle of law that if parties are negotiating settlement during the pendency of a matter, then the Court will condone the delay in filing of written statement due to such settlement talks. This Court, in its decision in Dr. Sukhdev Singh Gambhir Vs. Shri Amrit Pal Singh and Others, , inter alia held that:

"5. Having heard, counsel for the parties and taking into consideration the respective pleas urged before me, I am of the view that this is a case where the delay in filing of the written statement deserves to be condoned. Firstly it is a suit for partition concerning family members where every endeavor should be made for amicable settlement. Even otherwise, the mandate under Section 89 effort ought to be made to settle the matter. Secondly, the defendant had already filed the written statement in the suit in District Court. Hence it could not be the situation that the defendant was delaying the case, but on account of the attempts at settlement written statement was not filed "

(emphasis added)

20. The present suit squarely falls under the said exemption and this Court has the discretion to provide for extended timelines for completion of pleadings as per the prior statute.

21. The prescribed period of 120 days" timeline will be applicable in cases filed subsequent to the notification of the Ordinance and the same is not applicable in

the present case.

22. If the said period is excluded, the written statement to the counter claim already filed cannot be taken off from the record as the remaining period of delay has rightly been explained by the learned Senior counsel for the plaintiff to the effect that the plaintiff had to analyze the technical documents running into 3000 pages in order to prepare its replication and written statement to the counter claim. There are sufficient reasons to condone the delay after deducting 59 days which were spent for the purpose of settlements. The same is accordingly taken on record.

23. The application is dismissed.

24. No costs.

25. Dasti under the signatures of the Court Master.