

BOMBAY HIGH COURT: 120 DAYS DEADLINE TO FILE WRITTEN STATEMENT DOES NOT APPLY TO COMMERCIAL SUMMARY SUITS

In its judgment, the Bombay High Court has:

- Restated the procedure applicable to summary suits as contradistinguished from the procedure applicable to ordinary suits.
- Held that the procedure applicable to suits instituted in the ordinary manner does not apply to summary suits as far as the special matters provided under Order 37 are concerned.
- Held that the provisions of Order 5 Rule 1 including proviso to Rule 1 or Order 8 Rule 1 do not apply to commercial summary suits.
- Considering the facts of the case, held that the Defendant's active prosecution of its application under Order 7 Rule 11 of the CPC resulting in its not filing its written statement in time was a genuine excuse and was not a malafide plea or an attempt to deliberately prolong the trial.

I. INTRODUCTION

In a recent judgment of *M/s Diligent Media Corporation Ltd. v. Sandy Ltd.*,¹ the Bombay High Court has considered the much debated question of whether the Defendant can be allowed to file its written statement after 120 days from the date of service of the Writ of Summons in a commercial summary suit. The application of the Defendant to file its written Statement after 120 days of the Writ of Summons was allowed by the Hon'ble Court.

II. FACTS

A commercial summary suit was filed on 29 September 2017 by Sandy Ltd., (**"the Plaintiff"**). Writ of summons was issued to Diligent Media Ltd. (**"the Defendant"**) on 11 November 2017. Upon the Defendant entering its appearance, a summons for judgment was taken out by the Plaintiff. During the pendency of the summons for judgment, the Defendant moved an application under Order 7 Rule 11 of the Code of Civil Procedure (**"Code"**) for rejection of the plaint on the ground that the suit was not maintainable, being barred by the law of limitation. That application was moved on 15 March 2018. During the pendency of that application, the summons for judgment was heard and by an order dated 20 August 2018 unconditional leave was granted to the Defendant to defend the suit. By that order, the Defendant was given four weeks' time to file its written statement. The Defendant did not file its written statement in time and instead chose to tender it in the Hon'ble Court on 24 September

¹ *Interim Application (L) no.5323 Of 2020 In Commercial Summary Suit no.778 Of 2017.*

2020. By an order passed on that date, the Defendant was granted leave to file a formal application for condonation of delay and taking its written statement on record. The interim application for condonation of delay was thereafter filed before the Bombay High Court in pursuance of that liberty.

The Bombay High Court heard the application on 8 April 2021 and considered the issue that arose thereunder.

III. ISSUE

Whether the amendments to the Code being introduction of Order 5 Rule 1 and Order 8 Rule 1 whereby the Court is not given any discretion to take on record the Written Statement of the Defendant after the period of 120 days from the date of service of the Writ of Summons apply in the case of a commercial summary suit.

IV. JUDGMENT

Diverging from the procedure applied to commercial suits filed under the Commercial Courts Act, 2015, the Bombay High Court held that the provisions of Order 5 Rule 1 and Order 8 Rule 1 do not apply to commercial summary suits. The Hon'ble Court concluded that it had the power in a commercial summary suit to permit the Defendant to file its Written Statement beyond the period of 120 days from the service of the Writ of Summons.

In this regard, the Hon'ble Court reasoned and held as follows:

- Order 37 of the Code provides for a special procedure known as 'summary procedure' for filing of suits of a specified nature. The suits provided for in sub-rule (2) of Rule 1 of Order 37 are special classes of suits, which may be filed as summary suits. Order 37 makes special provisions for institution of such summary suits.
- Unlike in the case of ordinary suits, or even commercial suits for that matter, where the writ of summons is issued by the Court (under Rule 69 of the Bombay High Court (Original Side) Rules), in case of summary suits filed in the Bombay High Court the form of writ of summons (Form No.10 read with Rule 69 of the Bombay High Court Original Side Rules) requires the defendant to simply enter appearance in person or through advocate within ten days from the service of the writ of summons.
- The special procedure prescribed under Order 37 for issuance and service of writ of summons, for entering of appearance and for grant of leave, conditional or unconditional, and, thereafter, for filing of written statement by the Defendant is special to Order 37. The procedure applicable to the suits instituted in the ordinary manner does not apply to these suits as far as these special matters provided for

under Order 37 are concerned. It is only in other matters, where there is no special provision made under Order 37 that the procedure applicable generally to suits under the Code of Civil Procedure applies.

- There is no warrant for applying the provisions of Order 5 Rule 1 or, for that matter, Order 8 Rule 1 or Rule 10, to summary suits filed in the Bombay High Court, even if they be filed as commercial summary suits after coming into operation of the Commercial Courts Act.
- The submission of learned Counsel for the Plaintiff that the proviso to Order 5 Rule 1 should be read with a modification insofar as written statements to be filed in summary suits after grant of leave are concerned, has no merit. The contention that unlike in the case of ordinary commercial suits, in case of commercial summary suits, the proviso to Order 5 Rule 1 must be read as *requiring the defendant to file its written statement “within a stipulated period” as required by the Court “from the date of grant of delay to the Defendant” or by reckoning the extendable period of ninety days as not “from the date of service of summons” but “from the date of grant of leave”* was repelled. The Hon’ble Court held that such a course would involve substitution of the whole expression, namely, the words “within thirty days from the date of service of writ of summons on that defendant” and reading of the proviso in a wholly different light for which course no known principle of interpretation of statutes permits. The Hon’ble Court reiterated that it cannot substitute words in a statute by other words.
- Relying on the cases of *Desh Raj*² and *SCG Contracts*³ the Hon’ble Court restated the ratio in the said cases that the provision for filing of a Written Statement are special timelines and though they may be treated as directory, no free hand can be bestowed on any litigant or lawyer to file a written statement at their own sweet will and further that the provisions of Order 7 Rule 11 are independent of filing of a written statement and liberty to file such application for rejection under Order 7 Rule 11 cannot be made a ruse for retrieving the lost opportunity to file a written statement,
- In the present case, the Defendant’s claim that due to active prosecution of its application under Order 7 Rule 11, it ended up not filing its written statement in time, appears to be a genuine excuse. The Hon’ble Court further held that it does not appear to be a malafide plea or an attempt to deliberately prolong the trial. In the Hon’ble Court’s opinion, it was therefore a fit case in the interest of justice to condone the delay and allow the Defendant to file its written statement,
- The Hon’ble Court however imposed costs of Rs. 1,00,000/- (Rupees One Lakh Only) on the Defendant for causing delay in the trial of the suit.

² *Desh Raj v. Balkishan (Dead) Through Proposed Legal Representative Ms. Rohini* 2005(3) Mh.LJ 620

³ *SCG Contracts India Pvt. Ltd. v. K.S. Chamankar Infrastructure Pvt. Ltd.* (2019) 12 SCC 210.

V. ANALYSIS

The judgment of the Bombay High Court clarifies the scope of Order 5 Rule 1 and Order 8 Rule 1 of the CPC in its applicability to “commercial” summary suits. This was another laudable effort of the Bombay High Court after the cases of *Smt. Mira Gehani*⁴ to define the contours of the applicability of the provisions of the Commercial Courts Act, 2015 to proceedings filed before Commercial Courts. The judgment of the Bombay High Court averts the likelihood of the provisions of the Commercial Courts Act being interpreted widely and applied to summary suits filed before Commercial Courts.

The judgment of the Bombay High Court may elicit a reconsideration of the advantages of filing a commercial summary suit. Where debts are acknowledged by the defendant, parties may prefer to file a commercial suit and apply for a summary judgment therein so as to leverage the beneficial provisions of the Commercial Courts Act such as the mandatory time limit of 120 days for the Defendant to file its Written Statement which by necessary implication are held to be inapplicable in summary suits.

While under the judgment, the Court is held to have retained its discretion in permitting the Defendant to belatedly file its Written Statement, the Bombay High Court in the present case adopted a dynamic approach in the issue of imposing costs keeping in mind the object of speedy resolution of commercial proceedings.

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⁴ *Smt. Mira Gehani v. Axis Bank Ltd. Notice of Motion Commercial Division no. 196 of 2018 in Commercial Suit no. 156 of 2017.*