



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

% ***Judgment reserved on: 16.02.2024***
Judgment pronounced on: 08.05.2024

+ CM(M) 119/2022, CM APPL. 6018/2022--Stay

EXCEL PACK PVT LTD Petitioner

Through: Mr. Rishabh Kapur, Adv.

versus

IGB POLYMERS PVT LTD Respondent

Through: Mr. Kamlesh Anand, Adv.

CORAM:
HON'BLE MS. JUSTICE SHALINDER KAUR

J U D G M E N T

1. The short controversy arising from the present petition revolves around the two applications filed by the respondent. Firstly, under Section 151 of the Code of Civil Procedure, 1908 ("CPC") for recalling of the order dated 05.03.2019, whereby the right of the respondent to file its written statement was closed. Secondly, under Order IX Rule 7 CPC seeking recall of the exparte order dated 23.11.2019. Vide impugned order dated 12.01.2022, the aforesaid applications were allowed by the learned Trial Court i.e. Civil Judge-01, South-West District, Dwarka District Courts, New Delhi in CS SCJ No. 941/2017 titled as "*M/s Excel Pack Pvt. Ltd. vs. IGB Enterprises Pvt. Ltd.*".



2. The relevant facts culminating into filing of the present petition are that on 31.08.2017, the petitioner instituted a suit before the learned Trial Court against the respondent seeking a recovery of Rs. 2,60,167/-.
3. Subsequently, the summons of the suit were duly served upon the respondent, who then entered appearance on 09.04.2018 and was directed by the learned Trial Court to file the written statement within the stipulated statutory period. Meanwhile, the petitioner filed an amended memo of parties documenting the change in the respondent's name from "*IGB Enterprises Pvt. Ltd.*" to "*IGB Polymers Pvt. Ltd.*".
4. On 14.05.2018, the learned Trial Court directed the petitioner to file an amended memo of parties to include the directors of the respondent since the respondent is a company and had not been impleaded through its directors. On the next date of hearing, the learned Trial Court again directed the petitioner to file the amended memo of parties since the suit had not been instituted through its directors. On 14.01.2019, the petitioner filed a fresh memo of parties along with an application under Order VIII Rule 10 CPC.
5. The learned Trial Court vide order dated 05.03.2019, noted that the respondent failed to file its written statement despite nearly one year having been passed since the service of the summons. Consequently, the learned Trial Court closed the right of the respondent to file the written statement and listed the matter for the petitioner's evidence on 27.04.2019. On the next date of hearing, none appeared on behalf of the respondent. Furthermore, none appeared on behalf of the respondent on the next two dates of hearings i.e. 20.07.2019 and 21.09.2019.



6. On 23.11.2019, the learned Trial Court proceeded with the suit *ex parte*. Subsequently, the petitioner moved an application under Order VII Rule 14(3) CPC to place additional documents on the record. Upon service of the aforesaid application, the respondent entered appearance through a new counsel on 02.02.2021, when the matter was listed for *ex parte* petitioner's evidence before the learned Trial Court.

7. Thereafter, the respondent filed an application under Section 151 CPC seeking recall of the order dated 05.03.2019 along with an application under Order IX Rule 7 CPC to recall the *ex parte* order dated 23.11.2019. Additionally, the respondent filed two applications seeking exemption from filing attested affidavits along with the aforesaid applications.

8. Vide impugned order dated 12.01.2022, the learned Trial Court allowed the two applications filed by the respondent under Order IX Rule 7 CPC and Section 151 CPC. Further, the written statement filed by the respondent was taken on record subject to a cost of Rs. 15,000/- to be paid by the respondent to the petitioner. Aggrieved by this, the petitioner has filed the present petition under Article 227 of the Constitution of India, challenging the aforesaid order passed by the learned Trial Court.

9. Learned counsel for the petitioner submitted that in the impugned order dated 12.01.2022, the learned Trial Court has wrongly condoned a delay of nearly 4 years in filing the written statement from the date of service of the summons, while dismissing the reasons presented by the respondent for justifying the condonation of the said delay. Reliance is placed upon *Atcom Technologies Ltd. vs. Y.A. Chunawala and Company and Others, 2018 SCC OnLine SC 499*.



10. Learned counsel also submitted that an application under Order IX Rule 7 CPC necessitates the fulfillment of two essential conditions: i) the applicant appears at or before the next date of hearing, and ii) provides a valid reason for previous non-appearance. In the present case, neither of these conditions is satisfied, let alone both. Reliance is placed on the judgment of the Hon'ble Supreme Court in ***Sangram Singh vs. Election Tribunal, Kotah & Anr, AIR 1955 SC 425.***

11. It is also submitted by the learned counsel that the learned Trial Court, despite acknowledging that the respondent tried to put the entire blame on its previous counsel without adducing any evidence to substantiate these claims including any action taken against the said counsel, appears to have condoned the said actions on the part of the respondent. Learned counsel submitted that such baseless attempts to malign the earlier counsels have been criticized by this Court in ***Gloria Chemicals vs. R.K Cables & Ors: 1987 SCC Online Del 209.***

12. Learned counsel further submitted that the learned Trial Court failed to consider the judgment of the Hon'ble Supreme Court in ***Budhia Swain & Ors vs. Gopinath Deb & Ors: (1999) 4 SCC 396***, wherein it was held that a Court may exercise its inherent power of recall the *ex parte* proceedings only in case of: i) Fraud or collusion in obtaining the order, ii) The proceedings suffer from a patent inherent lack of jurisdiction, iii) There has been a mistake of the Court prejudicing a party, iv) A necessary party has not been served or has died. Additionally, it is submitted that in the present suit, there are neither any such pleadings nor has the learned Trial Court held as such. Learned counsel further placed reliance on the judgment of this Court in ***Sasken Communication Technologies Ltd. vs.***



Prime Telesystems Ltd. & Ors: 2015 SCC Online Del 9536 to substantiate his arguments.

13. Concluding his submissions, the learned counsel submitted that grave prejudice has been caused to the petitioner since the learned Trial Court has allowed the said applications in a mechanical manner thereby condoning the delay of over 4 years without adequately considering the various submissions and legal precedents presented by the petitioner. Further, it is submitted that jurisdiction of this Court has aptly been invoked as this Court may not interfere merely to correct errors; it ought to interfere in case of manifest miscarriage of justice. To support the above contention, reliance was placed on the judgment of this Court in ***Nawal Kishore vs. Mohd. Yakub: 2017 SCC Online Del 12778***.

14. On the other hand, the learned counsel for the respondent vehemently controverted the submissions made by the petitioner and submitted that the learned Trial Court after meticulously hearing the arguments of both the parties and based on the material on record passed a well-reasoned order dated 12.01.2022 in favour of the respondent, hence no interference is required in the impugned order.

15. Further, the learned counsel submitted that the matter is at the stage of evidence and ex-parte evidence has yet not been completed before the learned Trial Court, thus no prejudice shall be caused to the petitioner in case respondent is permitted to participate in the trial of the case and to contest the same by bringing his defence on record through his written statement.

16. It is also submitted by the learned counsel that the learned Trial Court vide its order dated 01.10.2018, imposed a cost of Rs. 2,000/- on the



petitioner for failing to file the amended memo of parties. Moreover, the petitioner took numerous adjournments just to file the correct memo of parties before the learned Trial Court, hence petitioner is himself responsible for causing delay in trial of his suit, whereas, respondent had genuine reasons for his absence and for not filing his written statement.

17. Learned counsel also submitted that the non-appearance of the respondent was neither intentional nor deliberate but purely because of the legal advice received from the earlier counsel.

18. The learned counsel for the respondent relied upon the following judgments:

- i. *Shoraj Singh vs. Charan Singh in SLP (C) No. 13129/2018, decided on 8th October, 2021.*
- ii. *Kailash vs. Nanhku & Ors.: 2005 SCC OnLine SC 691.*
- iii. *Zolba vs. Keshao & Ors.: AIR 2008 SCC 2099.*
- iv. *Bank of India vs. M/s Mehta Brothers and others: AIR 1991 Delhi 194.*
- v. *Hanif (deleted) & Ors. vs. Sant Singh Bal: (2018) 01 DEL CK 0532.*
- vi. *Jyoti Devi vs. Ld. Munsiff, Basohli & Another: 2014 SCC OnLine J&K 186.*

Analysis and findings

19. This Court has considered the submissions made on behalf of the parties, the record as well as the impugned order passed by the learned Trial Court. Relevantly, the respondent after service of summons had entered appearance before the learned Trial Court on 09.04.2018 and was



directed to file written statement within statutory period. It is necessary to note that on 14.05.2018, the petitioner was directed to implead the directors of the respondent company and to file amended memo of parties, which could only be done on 14.01.2019. Therefore, till the directors of the respondent company were impleaded and a fresh memo of parties was filed, the respondent could not have filed the written statement. The written statement came to be filed on 29.09.2021. The record reveals that on 05.03.2019, the right to file written statement was closed and the respondent was permitted to file written statement vide order dated 12.01.2022. The respondent had pleaded before the Court that he had handed over signed and verified copy of the written statement at the office of his previous counsel for filing the same in the Court and was thus, under the impression that the same had been filed on the record. Subsequently, he came to know that the written statement was not filed and thereafter, he moved an application under Section 151 CPC for recall of order dated 05.03.2019.

20. From the above, it can be ascertained that the entire fault does not lie with the respondent for not filing the written statement within the statutory period, rather he got an effective opportunity to file the written statement on record only after 14.01.2019 when the petitioner impleaded the other directors of the respondent company. The learned Trial Court has rightly allowed the respondent to place the written statement on record and also compensated the petitioner by way of cost to compensate any kind of delay in not bringing the written statement on record in time. Therefore, there is no infirmity in the said order to that extent.



21. The other grievance of the petitioner is that the learned Trial Court had set aside the *ex-parte* order dated 23.11.2019 on flimsy grounds raised by the respondent before the Court. Learned counsel submitted that infact, the respondent had never been diligent in pursuing his defence and deliberately derailed the case of the petitioner. Be it noted, on 27.04.2019, none had appeared on behalf of the respondent and matter was listed for 20.07.2019, however, on the said date, the learned Presiding Officer was not available and the matter was listed for 21.09.2019. On that date of hearing also, the respondent failed to appear and finally on 23.11.2019, due to non-appearance of the respondent, he was proceeded *ex-parte*. The respondent has submitted that his erstwhile counsel was not appearing before the learned Trial Court, the fact which he came to know when he had engaged a new counsel, therefore, an application under Section 151 CPC along with an application under Order IX Rule 7 CPC was moved. The said applications are duly supported with an affidavit filed by the respondent.

22. Needless to say, the learned Trial Court has rightly considered the circumstances of the case by observing that the default has been extended partly sufficiently and partly on the allegation against the counsel. It is trite in law that the litigant should be vigilant in pursuing its reliefs before the Court of law, however, in the aforesaid facts and circumstances, this Court does not find any reason to interfere with the approach of the learned Trial Court in allowing the applications moved on behalf of the respondent. The judgments relied upon by the parties are decided on their own facts distinguishable from the facts of the present case.



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23. Accordingly, the petition stands dismissed, along with pending application if any.

SHALINDER KAUR, J.

MAY 08, 2024/ss