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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **CS(COMM) 1136/2018**
MR. TOSHIAKI AIBA AS THE BANKRUPTCY TRUSTEE OF
THE ESTATE OF VIPAN KUMAR SHARMA

..... Plaintiff

Through: Ms. Savita Sarna & Ms. Manila
Munjal, Advocates.

versus

MR. VIPAN KUMAR SHARMA & ANR.

..... Defendant

Through: Mr. Shashank Garg, Adv. for D-1
Mr. Divyakant Lahoti & Ms. Amrita
Grover, Advocates for D-2

CORAM:
SH. VIJAY SHANKAR (DHJS), JOINT REGISTRAR
(JUDICIAL)

ORDER
% **17.09.2019**

I.A.No. 2196/2019 under Section 5 of the Limitation Act r/w
Section 151 CPC filed on behalf of the defendant no.1 for
condonation of delay in filing the written statement

By way of present order, I shall dispose of application of the defendant no.1 under Section 5 of the Limitation Act r/w Section 151 CPC. In the present application, the defendant no.1 has prayed for condonation of delay of 48 days in filing the written statement.

Brief facts necessary for just adjudication of the present application, as stated in the application, are that the defendant no.1 is the permanent resident of Japan and the plaintiff is well aware

regarding the said fact. The plaintiff is fully aware of the fact that the defendant no.1 is not allowed to travel outside Japan without the permission of *Japanese* Court. The plaintiff *malafidely* chosen not to serve the defendant no.1 at his place of permanent residence of Japan rather allegedly served at Delhi address wherein he is not residing. Vide order dated 13/12/2018, the Hon'ble Court has accepted deemed service upon the defendant no.1 at Delhi address, which is neither the permanent address nor residence of the defendant no.1. The information with respect to the order dated 13/12/2018 was provided by the defendant no.2 to the defendant no.1. After receiving this information, the defendant no.1 immediately contacted Mr. Shitiz Sharma, who is resident of Delhi, requesting him to provide the details of the case with the assistance of the defendant no.2. The defendant no.1 had to travel to Singapore in the month of December, 2018. Thus, the defendant no.1 had instructed Mr. Shitiz Sharma to collect all the documents with respect to the present suit and to reach at Singapore. Mr. Shitiz Sharma had gone to Singapore on 16/12/2018 and delivered the copy of the plaint to the defendant no.1. The defendant no.1 had first time received the copy of the plaint on 16/12/2018. After receiving instructions from the defendant no.1 to contest the present suit, Mr. Shitiz Sharma came back to India on 23/12/2018. After long exercise, the defendant no.1 has identified a lawyer in Delhi through Mr. Shitiz Sharma and provided him relevant documents and information to file a written statement. The defendant no.1 has also executed a power of attorney dated 10/01/2019 in Japan in favour of Mr. Shitiz Sharma so that he can act on behalf of the

defendant no.1 in the legal matters since the defendant no.1 is required to take permission from the *Japanese* Courts for each time, he has to travel outside the territory of Japan under Article 37 of the Bankruptcy Act. Immediately after receiving the power of attorney, Mr. Shitiz Sharma had instructed the counsel to prepare the written statement on 15/01/2019. The written statement was drawn on 30/01/2019 by the counsel and verified by the attorney holder on 31/01/2019 and the written statement was filed on 01/02/2019. The delay of 48 days is merely procedural in nature and without any intention to delay the proceedings in the present suit. No *prejudice* would be caused to the plaintiff, if the present application is allowed and the delay is condoned.

The plaintiff has contested the present application by filing detailed reply wherein the plaintiff has denied the contents of the application and prayed for dismissal of the same.

Arguments already heard on the aforesaid application of the defendant no.1. Perused the material available on record.

The present suit is a commercial suit filed under The Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015 (hereinafter referred to as “Act”). By way of present application, the defendant no.1 is seeking condonation of delay of 48 days in filing the written statement. The period for filing the written statement has to be governed by the provisions of Act. As per Act, the defendant shall file the written statement within the statutory period of 30 days and not later than 120

days from the date of service of summons and on expiry of 120 days from the date of service of the summons, the defendant shall forfeit the right to file written statement and the Court shall not allow the written statement to be taken on record.

In the present case, the plaintiff has filed the tracking report of summons of the suit wherein the defendant no.1 is stated to be served on 04/10/2018. The defendant no.1 has not filed any document contrary to the same. Even otherwise, vide order 13/12/2018, it was observed by the Hon'ble Court that the defendant no.1 has been served. In view of the same, the date of service of summons upon the defendant no.1 shall be treated as 04/10/2018. In the present case, the defendant no.1 has filed the written statement on 02/02/2019 and re-filed the same on 06/02/2019.

In the present case, no application for condonation of delay in re-filing the written statement has been filed by the defendant no.1. In the absence of any application for condonation of delay in re-filing the written statement, the date of filing the written statement shall be treated as 06/02/2019.

It is the contention of the defendant no.1 that summons of the suit was served upon the defendant no.1 at Delhi address but Delhi address is neither permanent address nor residence of the defendant no.1. The application of the defendant no.1 is silent as to who received the summons on behalf of the defendant no.1 at Delhi address. No reasonable explanation has been adduced on by the defendant no.1 regarding the same.

In the present application, it is mentioned that the defendant no.1 has received the copy of the plaint on 16/12/2018. But the defendant no.1 has filed the written statement in the present case on 06/02/2019. No reasonable explanation has been adduced on record by the defendant no.1 as to why he took so much time to prepare/file the written statement. It is well settled law that the defendant has to explain delay of each and every day in filing the written statement. But the defendant no.1 has failed to explain the delay of each and every day in filing the written statement.

In the present case, the defendant no.1 has filed the written statement beyond the statutory period of 120 days from the date of service of the summons. It is well settled law that on expiry of 120 days from the date of service of the summons, the defendant shall forfeit the right to file written statement and the Court shall not allow the written statement to be taken on record. In view of the same, the written statement of the defendant no.1 cannot be permitted to be taken on record. Considering the facts, circumstances and in view of the submissions made, the aforesaid application of the defendant no. 1 is dismissed. No order as to costs.

IA stands disposed of.

CS (COMM) 1136/2018

Re-notify the matter for admission/denial of the documents on
10th January, 2020.

**VIJAY SHANKAR (DHJS)
JOINT REGISTRAR (JUDICIAL)**

SEPTEMBER 17, 2019_{/nk}