

**IN THE HIGH COURT AT CALCUTTA
ORIGINAL SIDE
COMMERCIAL DIVISION**

Present:

The Hon'ble Justice Krishna Rao

**G.A. No. 3 of 2022
&
G.A. No. 5 of 2022
In
CS (COM) No. 354 of 2024
(Old No. CS 41 of 2022)**

KLG Tradefin Private Limited

Versus

Ashoka Hawai & Shoes Private Limited

Mr. Suresh Sahani
Ms. Anjana Banerjee
Mr. Hemant Tiwari

... For the plaintiff.

Mr. Anirban Ray
Mr. V.V.V. Sastry
Mr. Tridib Bose
Mr. Debargha Basu

... For the defendant.

Hearing Concluded On : 20.08.2024

Judgment on : 03.10.2024

Krishna Rao, J.:

1. The defendant has filed an application being G.A. No. 3 of 2022 in CS (COM) No. 354 of 2024 (Old No. C.S. 41 of 2022) praying for rejection of plaint and for dismissal of the suit on the ground that the plaintiff has not taken any steps for lodging of writ of summons or serving the plaint in view of the mandatory provisions of the Commercial Courts Act, 2015 and also the provisions of the Original Side Rules of this Court.
2. The defendant has also filed an application being G.A. No. 5 of 2022 praying for recalling/setting aside the order passed by the Learned Master dated 2nd August, 2022 in GA No. 4 of 2022 in connection with CS (COM) No. 354 of 2024 (Old No. C.S. 41 of 2022).
3. The defendant says that the defendant has filed an interlocutory application being GA No. 3 of 2022 arising out of CS (COM) No. 354 of 2024 (Old No. C.S. 41 of 2022) praying for rejection of plaint and for dismissal of the suit on the ground that the plaintiff has not taken steps for issuance of writ of summons.
4. The defendant says that during the pendency of the said application, the defendant was served with the writ of summons on 13th August, 2022 and on receipt of the writ of summons, the defendant has caused an inspection of the records and during inspection, the defendant found that the plaintiff had filed an application before the Learned Master of

this Court on 26th July, 2022, praying for extension of time to lodge writ of summons and on the said application, by an order dated 2nd August, 2022, the Learned Master has condoned the delay in serving the writ of summons upon the defendant well within time.

5. The defendant says that after filing of the application by the defendant for rejection of the plaint, the plaintiff has filed an application before the Learned Master being GA No. 4 of 2022 without serving the copy to the defendant and obtained an ex parte order from the Learned Master. He submits that the plaintiff ought to have brought to the notice of the Learned Master about the pendency of the application filed by the defendant for rejection of plaint. He submits that the plaintiff has obtained order dated 2nd August, 2022 from the Learned Master by suppressing the material facts.
6. Learned Counsel appearing for the defendant submits that on 11th March, 2022, the plaintiff has presented the plaint before this Court and this Court has admitted the plaint subject to scrutiny by the department. This Court has also granted leave under Clause 12 of the Letters Patent, 1865 and Section 12A of the Commercial Courts Act, 2015. Mr. Ray submits that this Court has admitted the plaint on 11th March, 2022 but the plaintiff has not lodged writ of summons within seven days from the date of admission of the plaint.
7. Learned Counsel appearing for the defendant submits that the plaintiff has filed an application before the Learned Master after the period of

four months from the date of admission of the plaint and after filing of application by the defendant under Order VII Rule 11 of the Code of Civil Procedure, 1908.

8. Learned Counsel appearing for the defendant submits that after the promulgation of the Commercial Courts Act, 2015, the plaintiff has to take appropriate steps for issuance of writ of summons but the plaintiff has not taken the said steps for about four months after the admission of the plaint. Mr. Ray also refers the High Court at Calcutta Commercial Courts Practice Directions, 2021 and relied upon Part-V, Chapter I wherein service of processes by Courier, Fax and Electronic Mail Service/ Short Message Service have been introduced in terms of Order V Rule 9 of the Code of Civil Procedure, 1908 but there is no provision either in the Commercial Courts Act, 2015 or in the High Court at Calcutta Commercial Courts Practice Directions, 2021 by giving power upon the Learned Master for extension of time to lodge writ of summons ex parte without the notice that to after filing an application under Order VII Rule 11 of the Code of Civil Procedure, 1908.

9. Learned Counsel appearing for the defendant submits that the order passed by the Learned Master of this Court by extending the time to lodge writ of summons is without jurisdiction and is liable to be set aside. Mr. Ray submits that the plaintiff ought to have filed an application before this Court for extension of time but instead had filed an application before the Learned Master by suppressing the material facts. He submits that the Learned Master ought to have referred the

said Master's Summons before this Court instead of extending the time to lodge Writ of Summons.

- 10.** Learned Counsel appearing for the plaintiff submits that the application filed by the defendant is misconceived and is liable to be dismissed. He submits that after the admission of the plaint and after grant of leave by this Court, the department has scrutinized the plaint and when all the formalities have been completed by curing the defects, by that time, the time to lodge writ of summons had expired and accordingly, the plaintiff has made a proper application being GA No. 4 of 2022 before the Learned Master for condoning the delay for lodging of Writ of Summons.
- 11.** Learned Counsel appearing for the plaintiff submits that the Learned Master had the power to condone the delay for lodging of Writ of Summons and accordingly, Learned Master on receipt of the application filed by the plaintiff has extended the time to lodge Writ of Summons.
- 12.** Learned Counsel appearing for the plaintiff submits that this Court has admitted the plaint subject to scrutiny by the department and thus, unless and until the Writ of Summons is not served upon the defendant, the defendant has no right to say that he has not been served with the copy of the application and the plaintiff has obtained an ex parte order.
- 13.** Heard the Learned Counsel for the respective parties and perused the materials on record. By an order dated 11th March, 2022, this Court

has admitted the plaint subject to scrutiny by the department and this Court has also granted leave under Clause 12 of the Letters Patent, 1865 and Section 12A of the Commercial Courts Act, 2015. On 15th July, 2022, the defendant has filed an application being GA No. 3 of 2022 for rejection of plaint. Subsequent of filing of the application by the defendant, the plaintiff has filed the application before the Master being GA No. 4 of 2022 on 26th July, 2022, praying for condoning the delay in serving the Writ of Summons upon the defendant. On 2nd August, 2022, the Learned Master has passed the following order on the fiat :

“This is an application made by the plaintiff for extension of time to lodge Writ of Summons which could not be made in time. It is ascertained from the records maintained by the department that scrutiny was completed on 15th July, 2022. In view of the above, there be an order in terms of prayer (i) of the petition. Department is directed to issue a Writ of Summons within a week from date of communication of the order, taking in view of fact that suit is filed under the Commercial Division and the office of the Sheriff is directed to accept the same if lodged within two weeks thereafter. Returnable date is extended by nine weeks from the date of issue. With the aforesaid observation, the application is disposed of.”

- 14.** The contention of the defendant that the plaintiff has filed the application by suppressing the material facts before the Learned Master that the defendant has filed an application for rejection of plaint on the ground of non-lodging of writ of summons by the plaintiff. The order passed by the Learned Master also reveals that this fact was not brought to the notice before the Learned Master. Learned Master has passed the impugned order by allowing the plaintiff to lodge the Writ of

Summons taking into consideration that the scrutiny was completed only on 15th July, 2022.

15. The similar issue was raised in the case in the case of ***Hindustan Motors Limited vs. National Insurance Company Limited*** reported in **2003 0 Supreme (Cal) 485** “Whether the Master had jurisdiction to extend the time for service of writ of summons without condoning the delay? And “Whether the petitioner’s rights were prejudiced by the Master’s orders?

The Coordinate Bench of this Court held as follows:

“32. *Following the same view of His Lordship P.B. Mukherjee, J. I also treat the application filed by the petitioner for recalling of the order passed by the Master as an appeal from the said orders and I set aside the Master's order issuing fresh summons after the time prescribed under Order-IX, Rule 5 of the C.P.C.*

33. *The Hon'ble Division Bench of this High Court in Lakshmi Trading v. Sri Ram Govind Narayanan reported in 61 CWN 212 has held that where the plaintiff has not made an application under Order IX Rule 5 of the C.P.C. for the issuance of fresh summons within three months. The learned Master can no longer entertain an application for an extension of time far less an application for such issue of fresh summons. In such a case, the Court is bound to pass an order dismissing the suit.*

34. *In the instant case, following the same view I am of the opinion that the right of the petitioner was crystallised and such valuable right accrued by virtue of the failure on the part of the plaintiff to take steps in the suit. The learned Master cannot pass such order and extend the time for service of the fresh summons without giving an opportunity to the petitioner of being heard. Such action of the Master destroys the valuable right of*

the petitioner therefore, a violation of natural Justice. The same cannot also be entertained.

35. *THEREFORE, in my opinion, the order so passed by the Master is also bad-in-law. I further do not find any cogent ground made out by the plaintiff for extension of returnable date of the writ either before me or before the learned Master for such extension. Hence, in my opinion both the orders passed by the Masters dated 23.9.1998 and 25.6.2002 are set aside and the application so filed by the petitioner for dismissal of the suit is allowed.*

36. *I do not have any hesitation to hold that there is laches on the part of the plaintiff to serve such summons within the period mentioned in the Order IX Rule 5 and further the grounds as has been mentioned in the petition filed by the defendant the suit has to be dismissed against this defendant. Accordingly, the suit is also dismissed against the petitioner/defendant. For the reasons stated hereinabove, both the applications are disposed of accordingly.”*

- 16.** The order passed in the case of ***Hindustan Motors Limited (Supra)*** was carried in appeal being APD No. 669 of 2003 (Hindustan Motors Limited vs. National Insurance Company Limited) and the Hon’ble Division Bench by an order dated 30th January, 2009, allowed the appeal but had referred the matter to a Larger Bench as the Learned Single Judge had passed order followed by two other Division Bench Decisions. The Hon’ble Division Bench in its order dated 30th January, 2009, held as follows:

“Question thus remains whether in the present case the learned Judge right in dismissing the suit. In the instant case from the facts referred above it is absolutely clear that there had been inordinate laches and delay on the part of the appellant in taking steps in their suit. The Learned Judge, however, dismissed the

suit on the ground that valuable right had accrued in favour of the defendant being the respondent herein. Let us examine such finding of His Lordship. In 1987 the suit was filed. At least upto 1988 there had been some talk of settlement and/or negotiation as reflected in correspondence. In 1992 the writ petition was filed. Hence the respondents were all along aware about the pendency of the suit. At least from 1992 they became aware because of the statement made by the appellant in the writ petition. The respondents could file an application for dismissal of the suit in long ten years instead of waiting till 2002 when the writ of summons was actually served upon them. In this regard, we may refer to the decision in the case of Shaw & Company (Supra). In the said case the suit was instituted in 1950. Although the summons had been issued plaintiff did not take any step for service of the summons after it had been lodged at the Sheriff's office. Summons returned unserved by the Sheriff's office. Fresh writ of summons was ultimately issued on an ex parte order being obtained from the learned Master. The defendant was then served and they entered appearance. Upon entering appearance the defendants searched the records and filed application for dismissal under Order 9 Rule 5. The facts involved in our case are totally distinguishable from the facts involved in Shaw & Company (Supra) relied on by the respondents. There, the defendant did not know about the pendency of the suit until they received the writ of summons. They came to know about the delay and/or latches after receipt of the writ of summons and after causing searches from the department. In the case in our hand the respondents/ defendants knew about the pendency of the suit for at least long ten year Even then they accepted service of the writ of summons in 2002. Hence the right, if any, accrued in favour of the respondents/ defendant because of the delayed service of writ of summons, in our view, stood waived.

Considering the above, we feel that the appeal should be allowed. However, the appellant must be penalised for their latches and the defendant should be compensated with cost which is assessed by us Rupees fifty thousand.

We, however, feel that the matter should be referred to a larger Bench as the judgment and order of the learned Single Judge was followed by two other Division Bench decisions in which His Lordship was a

party being APO No. 16 of 2008 (Steel Authority of India Vs. M.M.Company Limite & Anr.) dated February 20, 2008 and Srikanth Mantri & Ors. vs. Radheshyam Chotia & Ors. (Supra).

Let this appeal be placed before the Hon'ble Chief Justice for constitution of a larger Bench to decide whether the defendant had acquired any valuable right due to delayed service of the writ of summons and whether the Court in the given circumstances was entitled to condone such delay."

- 17.** In terms of the order of the Hon'ble Division Bench, the Larger Bench was constituted and the Larger Bench has disposed of the reference on 25th February, 2009 by passing the following order:

"In our opinion, a bare perusal of the extracts of the reference order reproduced above, clearly shows that the Division Bench has marshalled the relevant facts; delineated the legal issues and thereafter stated the conclusion. Thus, clearly the Division Bench has delivered a judgment on the merits of the appeal.

In such circumstances, we are constrained to observe that the present reference is incompetent.

We, however, hasten to add that we have not considered the issues raised by the parties before the Division Bench on merits. Undoubtedly, the same would be raised by the parties in appropriate proceedings. We, therefore, make it clear that the observations made by us hereinabove have been made only for the purpose of disposal of the reference."

- 18.** In the present case, this Court finds that the plaintiff has presented the plaint before this Court on 11th March, 2022 and on the same day, this Court admitted the plaint, subject to scrutiny by the department. From the order of the Learned Master, it reveals that the department has completed scrutiny only on 15th July, 2022 and the plaintiff has filed an

application praying for condoning the delay of service of writ of summons and leave to serve writ of summons upon the defendant on 26th July, 2022. On 2nd August, 2022, the Learned Master has condoned the delay and directed the department to issue writ of summons within a week from the date of communication of the order.

19. Considering the above facts, this Court did not find any infirmity in the order passed by the Learned Master dated 2nd August, 2022 in G.A. No. 4 of 2022 in CS (COM) No. 354 of 2024 (Old No. C.S. 41 of 2022). Consequently, the plaint cannot be rejected and suit cannot be dismissed as prayed for by the plaintiff in GA No. 3 of 2022.

20. Accordingly, **G.A. No. 3 of 2022** and **G.A. No. 5 of 2022** are **dismissed.**

(Krishna Rao, J.)