M/S Scg Contracts India Pvt. Ltd. vs Ks Chamankar Infrastructure Pvt. Ltd. on 12 February, 2019

Equivalent citations: (2019) 3 ICC 52, (2019) 3 UC 1833, AIR 2019 SUPREME COURT 2691, AIRONLINE 2019 SC 361, 2019 (4) ADR 541, (2019) 1 CLR 1142 (SC), (2019) 200 ALLINDCAS 137 (SC), 2019 (12) SCC 210, (2019) 135 ALL LR 758, (2019) 145 REVDEC 429, (2019) 1 CURCC 310, (2019) 200 ALLINDCAS 137, (2019) 262 DLT 645, (2019) 2 KER LJ 343, (2019) 2 RECCIVR 249, (2019) 3 ALL RENTCAS 903, (2019) 4 ANDHLD 169, 2019 (4) KCCR SN 265 (SC), (2019) 4 SCALE 574, AIR 2019 SC (CIV) 2002

Author: R.F. Nariman

Bench: Vineet Saran, Rohinton Fali Nariman

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IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 1638 OF 2019
(Arising out of Special Leave Petition (C) No. 103/2019)

M/S SCG CONTRACTS INDIA PVT. LTD.

VERSUS

K.S. CHAMANKAR INFRASTRUCTURE PVT. LTD. & ORS.

J U D G M E N T

R.F. Nariman, J.

1) Leave granted.

2) In the present case, a Suit was filed on 10.03.2017 claiming a sum of Rs. 6,94,63,114/-. The Defend

served with the summons in the Suit on 14.07.2017. 120 days from this date takes us to 11.11.2017, by which date no written statement had been filed. Meanwhile, however, an Order VII Rule 11 application was filed. This application was taken up and rejected by the first impugned order dated 05.12.2017. After rejecting the Order VII Rule 11 application, the learned Single Judge recorded that none appeared for the plaintiff inspite of advance copy stated to have been given. He also records that the counsel for the defendant No.1 now states that seven days time be granted to file a written statement. Para 14 of the aforesaid order then reads as follows:

> "14. Subject to the defendant No.1 paying costs of Rs.25,000/- to the counsel for the plaintiff on or before 15th December, 2017, the time for filing the written statement is extended till 15th December, 2017. If either of the conditions is not complied with, the right of the defendant No.1 to file written statement shall stand closed without any further order."

> 3) In obedience to this order, a written statement was filed on 15.12.2017 by the defendant No.1. By a belated application dated 06.08.2018, it was averred that the recent changes that have been made in the Code of Civil Procedure were not adhered to as a result of which the written statement which had yet to be taken on record could not so to be taken on record in view of the fact that 120 days had elapsed from the date of service of summons of this Suit.

> 4) On 24.09.2018, another learned Single Judge took up this application and held that the 05.12.2017 order being final, even though the provisions of law may provide otherwise, the defendant No.1's written statement which was filed on 15.12.2017 should be taken on record. The petitioner has filed a Special Leave Petition against the aforesaid two orders.

5) Learned counsel appearing on behalf of the petitioner has taken us through the recent amendments made in the Code of Civil Procedure and argued, laying great emphasis on State of Bihar and Others vs. Bihar Rajya Bhumi Vikas Bank Samiti, (2018) 9 SCC 472 as well as Canara Bank vs. N.G. Subbaraya Setty and Anr. AIR 2018 SC 3395 for the proposition that the amendments so made now provide for the consequence of non- filing of written statement, and as this is so, the provisions of Order VIII Rules 1 and 10 can no longer be said to be directory but can only be said to be mandatory. In this view of the matter, since a statutory prohibition now exists, the doctrine of res judicata cannot be availed.

6) As against this, learned counsel appearing on behalf of the respondents has argued, basing himself on the decisions in Bhanu Kumar Jain vs. Archana Kumar and Another, (2005) 1 SCC 787 and Shaikh Salim Haji Abdul Khayumsab vs. Kumar and Others, (2006) 1 SCC 46 that the vital difference between res judicata in a subsequent suit and res judicata in two different stages of the same proceeding must be kept in view. He stated that as the 05.12.2017 order had attained finality and could only now be challenged after the decree in the Suit is passed, clearly, the order of

24.09.2018 is correct. He also stated that by now the order dated 05.12.2017 had been acted upon and a wrongful act of the Court therefore, cannot prejudice him. He also argued citing the judgment of R.K. Roja vs. U.S. Rayudu and Another, (2016) 14 SCC 275 that as an Order VII Rule 11 application had been filed and that had to be answered before trial of the Suit could commence, it was clear that a written statement could not be filed. He then relied upon Section 151 of the Code of Civil Procedure which preserves the inherent power of the court, more particularly, that of a Court of record - the High Court, and can be invoked in cases like the present where grossly unjust consequences would otherwise ensue.

7) Having heard learned counsel for both parties, it is important to first set out the statutory provisions.

8) The Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015 came into force on 23.10.2015 bringing in their wake certain amendments to the Code of Civil Procedure. In Order V, Rule 1, sub-rule (1), for the second proviso, the following proviso was substituted:

> "Provided further 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 days, 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 and on expiry of one hundred and 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." Equally, in Order VIII Rule 1, a new proviso was substituted as follows:
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> "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 and twenty days from the date of service of summons and on expiry of one hundred and 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." This was re-emphasized by re-inserting yet another proviso in Order VIII Rule 10 CPC, which reads as under:-
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> "Procedure when party fails to present written statement called for by Court.- Where any party from whom a written statement is required under Rule 1 or Rule 9 fails to present the same within the time permitted or fixed by the Court, as the case may be, the Court shall pronounce judgment against him, or make such order in relation to the suit as it thinks fit and on pronouncement of such judgment a decree shall be drawn up.

> Provided further that no Court shall make an order to extend the time provided under Rule 1 of this Order for filing of the written statement." A perusal of these provisions would show that ordinarily a written statement is to be filed within a period of 30 days.
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> However, grace period of a further 90 days is granted which the Court may employ for reasons to be recorded in writing and payment of such costs as it deems fit to allow such written statement to come on record. What is of great importance is the fact that beyond 120 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. This is further buttressed by the proviso in Order VIII Rule 10 also adding that the Court has no further power to extend the time beyond this period of 120 days.

9) In Bihar Rajya Bhumi Vikas Bank Samiti (supra), a question was raised as to whether Section 34(5) of the Arbitration and Conciliation Act, 1996, inserted by Amending Act 3 of 2016 is mandatory or directory. In para 11 of the said judgment, this Court referred to Kailash vs. Nanhku, (2005) 4 SCC 480 referring to the text of Order 8 Rule 1 as it stood pre the amendment made by the Commercial Courts Act. It also referred to the Salem Advocate Bar Association vs. Union of India, (2005) 6 SCC 344, which, like the Kailash judgment, held that the mere expression "shall" in Order 8 Rule 1 would not make the provision mandatory. This Court then went on to discuss in para 17 State vs. N.S. Gnaneswaran, (2013) 3 SCC 594 in which Section 154(2) of the Code of Criminal Procedure was held to be directory inasmuch as no consequence was provided if the Section was breached. In para 22 by way of contrast to Section 34, Section 29-A of the Arbitration Act was set out. This Court then noted in para 23 as under:

> "23. It will be seen from this provision that, unlike Sections 34(5) and (6), if an award is made beyond the stipulated or extended period contained in the section, the consequence of the mandate of the arbitrator being terminated is expressly provided. This provision is in stark contrast to Sections 34(5) and (6) where, as has been stated hereinabove, if the period for deciding the application under Section 34 has elapsed, no consequence is provided. This is one more indicator that the same Amendment Act, when it provided time periods in different situations, did so intending different consequences."
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> 10) Several High Court judgments on the amended Order VIII Rule 1 have now held that given the consequence of non-filing of written statement, the amended provisions of the CPC will have to be held to be mandatory. [See Oku Tech Private Limited vs. Sangeet Agarwal & Ors. by a learned Single Judge of the Delhi High Court dated 11.08.2016 in CS (OS) No. 3390/2015 as followed by several other judgments including a judgment of the Delhi High Court in Maja Cosmetics vs. Oasis Commercial Pvt. Ltd. 2018 SCC Online Del 6698.

> 11) We are of the view that the view taken by the Delhi High Court in these judgments is correct in view of the fact that the consequence of forfeiting a right to file the written statement; non-extension of any further time; and the fact that the Court shall not allow the written statement to be taken on record all points to the fact that the earlier law on Order VIII Rule 1 on the filing of written statement under Order VIII Rule 1 has now been set at naught.
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> 12) However, learned counsel appearing for the respondents relied strongly upon the judgment in Bhanu Kumar Jain (supra) and Shaikh Salim Haji Abdul Khayumsab (supra) and, in particular, paras 22 and 27 of the first judgment and paras 4 & 19 of the second judgment.
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> 13) We are of the view that since both these judgments dealt with the pre-amendment position, they would not be of any direct reliance insofar as the facts of the present case is concerned.
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> 14) Learned counsel appearing for the respondents also relied upon R.K. Roja vs. U.S. Rayudu and Another (supra) for the proposition that the defendant is entitled to file an application for rejection of plaint under Order VII Rule 11 before filing his written statement. We are of the view that this judgment cannot be read in the manner sought for by the learned counsel appearing on behalf of the respondents.

Order VII Rule 11 proceedings are independent of the filing of a written statement once a suit has been filed. In fact, para 6 of that judgment records "However, we may hasten to add that the liberty to file an application for rejection under Order 7 Rule 11 CPC cannot be made as a ruse for retrieving the lost opportunity to file the written statement".

15) Learned counsel appearing for the respondents then argued that it cannot be assumed that the learned Single Judge did not know about these amendments when he passed the first impugned order dated 05.12.2017. We do not wish to enter upon this speculative arena. He then argued that since this judgment permitted him to file the written statement beyond 120 days, it was an act of the Court which should prejudice no man. This doctrine cannot be used when the res is not yet judicata. The 05.12.2017 order is res sub judice inasmuch as its correctness has been challenged before us.

16) Learned counsel for the respondents then strongly relied upon the inherent powers of the Court to state that, in any case, a procedural provision such as contained in the amendment, which may lead to unjust consequences can always, in the facts of a given case, be ignored where such unjust consequences follow, as in the facts of the present case. We are again of the view that this argument has also no legs to stand on, given the judgment of this Court in Manohar Lal Chopra vs. Rai Bahadur Rao Raja Seth Hiralal, [1962] Suppl 1 SCR 450. In this judgment, the Court held:

> "The suit at Indore which had been instituted later, could be stayed in view of s.10 of the Code. The provisions of that section are clear, definite and mandatory. A Court in which a subsequent suit has been filed is prohibited from proceeding with the trial of

that suit in certain specified circumstances. When there is a special provision in the Code of Civil Procedure for dealing with the contingencies of two such suits being instituted, recourse to the inherent powers under s.151 is not justified…" (at page 470) Clearly, the clear, definite and mandatory provisions of Order V read with Order VIII Rule 1 and 10 cannot be circumvented by recourse to the inherent power under Section 151 to do the opposite of what is stated therein.

17) Clearly, therefore, the 05.12.2017 order which applies in the face of the amendments made to the Civil Procedure Code cannot be sustained. When we come to the second order dated 24.09.2019, the only reason for this order is that 05.12.2017 has attained finality.

18) Factually speaking, this is not correct as a Special Leave Petition from the said order has been filed. Even otherwise, this Court in Canara Bank vs. N.G. Subbaraya Setty and Anr. (supra) has held (page 3414):

"(ii) An issue of law which arises between the same parties in a subsequent suit or proceeding is not res judicata if, by an erroneous decision given on a statutory prohibition in the former suit or proceeding, the statutory prohibition is not given effect to. This is despite the fact that the matter in issue between the parties may be the same as that directly and substantially in issue in the previous suit or proceeding. This is for the reason that in such cases, the rights of the parties are not the only matter for consideration (as is the case of an erroneous interpretation of a statute inter parties), as the public policy contained in the statutory prohibition cannot be set at naught. This is for the same reason as that contained in matters which pertain to issues of law that raise jurisdictional questions. We have seen how, in Natraj Studios (AIR 1981 SC 537) (supra), it is the public policy of the statutory prohibition contained in Section 28 of the Bombay Rent Act that has to be given effect to. Likewise, the public policy contained in other statutory prohibitions, which need not necessarily go to jurisdiction of a Court, must equally be given effect to, as otherwise special principles of law are fastened upon parties when special considerations relating to public policy mandate that this cannot be done." The aforesaid para applies on all fours to the facts of the present case, as even assuming that the 05.12.2017 order is final, res judicata cannot stand in the way of an erroneous interpretation of a statutory prohibition. The present is one such case. Therefore, the second order must also be set aside.

19) The appeal is allowed, with the consequence that the written statement of Defendant No.1 must be taken off the record.

..... J.

(ROHINTON FALI NARIMAN) ..... J.

(VINEET SARAN) New Delhi;

February 12, 2019.