

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 16TH DAY OF AUGUST, 2021

PRESENT

THE HON'BLE MR.JUSTICE ARAVIND KUMAR
AND
THE HON'BLE MR. JUSTICE PRADEEP SINGH YERUR

COMMERCIAL APPEAL NO.134/2021

BETWEEN:

M/S VIJAI ELETRICALS
NO. 6-3-648/1 & 2
OFF RAJ BHAVAN ROAD
SOMJIGUDA, HYDERABAD
TELANGANA, INDIA - 500 082
REP BY PANKAJ SHARMA.

...APPELLANT

(BY SRI. ANISH ACHARYA, ADVOCATE)

AND:

1. M/S TRUE LOGISTICS PVT LTD
GAYATRI LAKE FRONT, NO.118
RING ROAD, HEBBAL
BENGALURU - 560 024
REP BY CHAIRMAN
SRI. UMAPATHI RAJU P.
2. SRI. ANOOP KUMAR SINGH
S/O RAMRAJ SINGH
AGED ABOUT 41 YEARS
R/AT FLAT NO.1059/103
NEETHI KHAND 1, INDIRAPURAM
SHIPRA SUN CITY, GHAZIABAD
UTTAR PRADESH - 201 014.
3. SRI. PADMANABHA IYER K
S/O KRISHNAN IYER K

AGED ABOUT 67 YEARS
 12AB, SRIDURGA APARTMENTS
 PONNIAMMAN KOIL STREET
 SATHYANARAYANAPURAM
 MOULIVAKKAM, PORUR
 CHENNAI - 600 116.

4. SRI. ANIL KUMAR PANDEY
 S/O RANGNATH PANDEY
 AGED ABOUT 36 YEARS
 BLOCK (B), VISTHAPIT
 BHEL ROAD, NEAR BSP
 OFFICE, HARIDWAR
 UTTAR KHAND - 249 403.

...RESPONDENTS

(BY SRI. VARUN VEDACHALA, ADVOCATE FOR R-1;
 V/O DATED 12.08.2021 NOTICE TO R-2, R-3 & R-4
 DISPENSED WITH)

THIS COMMERCIAL APPEAL IS FILED UNDER
 SECTION 13(1A) OF THE COMMERCIAL COURT ACT 2015
 READ WITH SECTION 37(1)(B) OF THE ARBITRATION AND
 CONCILIATION ACT, 1996 READ WITH ORDER XLII RULE
 1® OF THE CODE OF CIVIL PROCEDURE, 1908 PRAYING
 TO SET ASIDE THE ORDER DATED 05.08.2021 PASSED BY
 THE LEARNED LXXXIV ADDITIONAL CITY CIVIL JUDGE,
 (COMMERCIAL JUDGE), AT BENGALURU CCH 85 IN
 COMM.O.S.NO.7900/2018 ON IA NO.4 AND 5 STRIKING
 OFF THE WRITTEN STATEMENT FILED BY THE
 DEFENDANT NO.1.

THIS COMMERCIAL APPEAL COMING ON FOR
 ADMISSION THIS DAY, **ARAVIND KUMAR J.**, DELIVERED
 THE FOLLOWING:

JUDGMENT

Heard Sri Anish Acharya, learned Advocate appearing for appellant and Sri Varun Vedachala, learned Advocate appearing for respondent-1. Perused the records.

2. Parties are referred to as per their rank in the commercial court.

3. A suit came to be filed by the plaintiff against defendants for recovery of sum of Rs.5.37.834/- with interest @ 18% p.a. from the date of suit till the date of payment which resulted in summons being issued to the defendants and defendant No.1 appeared in person on 07.03.2020 and prayed for time to file written statement and it came to be granted. Subsequently, suit was transferred to C.H.19 and thereafter to C.H.No.83 - Commercial Court by notification dated 17.08.2020. Subsequently, suit was withdrawn from C.H.No.83 and transferred to newly established Commercial Court by notification dated 22.12.2020. When the matter was called for the first time before the Commercial Court,

plaintiff filed Interlocutory Application for issuance of suit summons to defendants-1, 2 and 4 by substituted service namely, through paper publication. Commercial Court, after noticing that first defendant was present before court on 07.03.2020 but had failed to engage a counsel or file a written statement, yet ordered for issuance of summons by substituted service.

4. Once again, for the second time, first defendant was duly served that too, by way of paper publication but failed to appear and as such, he was placed exparte on 20.03.2021. On 07.04.2021 first defendant filed I A.No.2 for setting aside the same and sought time to file written statement. Though Commercial Court, set aside the order placing first defendant exparte, time prayed for filing written statement came to be rejected by relying upon the judgment of Hon'ble Apex Court in the case of **DESHRAJ vs BALIKISHAN (DEAD) THROUGH PROPOSED LEGAL REPRESENTATIVES** reported in **(2020)2 SCC 708**. Commercial Court also noticed that though first defendant had appeared personally before

court on 07.03.2020 but had not chosen to file written statement within 120 days from the date of service of summons as provided under Order 8 Rule 1 CPC.

5. It is thereafter applications - I.A.No.4 under Order 8 Rule 1 read with Section 151 CPC seeking recall of the order dated 07.04.2021 and I.A.No.5 under Section 5 of the Limitation Act to condone the delay in filing the written statement came to be filed. Though in the affidavit supporting the applications, first defendant had contended that he has tested positive for COVID-19 and was unable to give instructions to the counsel and as a result, there has been delay in filing the written statement, no piece of document had been produced before the Commercial Court or even before this court till date to evidence this fact. In fact, there has been delay of more than one year in not filing the written statement. In the prevalent situation namely, pandemic present through out the country, this court would have accepted the reason assigned by first defendant for condoning the delay but for the lapses on the part of first defendant and as such, on the basis of his self

serving testimony, said reason assigned for delay in filing written statement cannot be accepted.

6. In fact, it would not be out of context to refer at this juncture itself that first defendant having appeared before Commercial Court on 07.03.2020 and having sought for time to file written statement, thereafter did not appear at all, had perforced the Commercial Court to re-issue the summons to first defendant which also did not yield positive result. Thus, left with no option, plaintiff had filed Interlocutory Application to serve summons through substituted service namely, through paper publication and only after notice through paper publication was taken out, first defendant surfaced before the Commercial Court. Conduct of first defendant does not inspire confidence in this Court also that reason assigned by first defendant for non-appearance had to be accepted either by the Commercial Court or by this Court.

7. Proceedings of the Commercial Court has been made available for perusal of this Court by learned

Advocate appearing for plaintiff. Perusal of the same would indicate that for filing of written statement by first defendant, matter has been adjourned to 07.03.2020 to 12.06.2020 and thereafter to 26.06.2020. As noticed herein above, by virtue of the notification dated 17.08.2020, matter came to be transferred to Commercial Court and was listed before Commercial Court on 29.08.2020. From 13.10.2020 to 08.12.2020, due to extant SOP operating, there was closure of courts. On 08.02.2021, first defendant did not appear. Hence, application filed for substituted service was allowed and on 20.03.2021, defendant Nos.1,2 and 4 were placed exparte. Though matter was listed on 29.03.2021, none appeared on behalf of plaintiff also and on the subsequent dates i.e., 07.04.2021 Sri Anish Acharya, learned counsel filed vakalath on behalf of first defendant and filed an application for setting aside the order dated 20.03.2021 and same came to be allowed and time sought for filing written statement on behalf of first defendant came to be rejected on the ground that 120 days prescribed under Order 8 Rule 1 CPC had

lapsed. On the same day, issues were framed and Case Management Hearing held and schedule for hearing was fixed. Subsequently from 27.05.2021 till 18.06.2021, matter came to be adjourned from time to time for fresh Case Management Hearing. On 23.07.2021, learned counsel appearing for plaintiff and first defendant appeared on which date, the calendar of hearing was re-scheduled. On the day when the matter was fixed for recording evidence of the parties, learned Advocate appearing for first defendant has filed affidavit evidence under Order 11 Rules 4 and 5 CPC. On account of first defendant having not filed written statement, Commercial Court discarded the said affidavit evidence also. In fact, there was no representation on behalf of plaintiff and third defendant in the post lunch session. On the next date i.e., on 05.08.2021, first defendant has filed an application to recall the order dated 07.04.2021 as already noticed herein above.

8. Learned Advocate appearing for first defendant has contended that a plea has been set up by first defendant in the written statement which was filed

before Commercial Court to the effect that first defendant is liable to pay only Rs.67,000/- as against the claim of Rs.5,67,522/- made in the plaint at Rs.5,37,834/-.

9. There being no dispute to the fact that provisions of CPC being applicable to the proceedings before Commercial Court, we are of the considered view that first defendant though had filed the application belatedly, in the light of defence set up in the written statement, it would be open to him to substantiate the same. In fact, Commercial Court ought to have extended a last opportunity to cross examine the plaintiff's witness and this was also not done. Hence, we are of the considered view that an opportunity deserves to be granted to first defendant - appellant conditionally, on payment of costs of Rs.50,000/- payable to plaintiff - first respondent herein failing which, impugned order would automatically stand restored.

Hence, we proceed to pass the following:

ORDER

(1) Commercial Appeal is allowed.

(2) Order dated 05.08.2021 passed by the Commercial Court, Bengaluru (CCH-85, LXXXIV Additional City Civil and Sessions Judge, Bengaluru) in Commercial O.S.No.7900/2018 (Annexure-E) is set aside.

(3) I.A.Nos.4 and 5 filed by petitioner - first defendant are allowed. Written statement is ordered to be taken on record of Commercial O.S.No.7900/2018 and Commercial Court is at liberty to re-fix the schedule - Fresh Case Management Hearing on the next date of hearing.

(4) Payment of costs shall be condition precedent to proceed with the matter.

**SD/-
JUDGE**

**SD/-
JUDGE**

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