

Intiyaz Sheikh vs Puma Se on 27 August, 2021

Author: Amit Bansal

Bench: Amit Bansal

\$~18

* IN THE HIGH COURT OF DELHI AT NEW DELHI

+ CM(M) 225/2021 & CM No.10177/2021 (stay)
INTIYAZ SHEIKH Petitioner
Through: Mr. Vijay Dutt Gahtori, Mr. Kapil
Payla and Mr. Latesh Kumar,
Advocates.

versus

PUMA SE Respondent
Through: Mr. Ranjan Narula, Ms. Shashi
Ojha and Ms. Payal Kalhan,
Advocates.

CORAM:
HON'BLE MR. JUSTICE AMIT BANSAL
ORDER

% 27.08.2021
[VIA VIDEO CONFERENCING]

1. The present petition was filed impugning the order dated 29th January, 2021 of the District Judge (Commercial), South East, Saket, New Delhi in CS(COMM) No. 323/2019, of dismissal of the application of the petitioner / defendant under Order VIII Rule 1 of the Central Procedure Code (CPC) for condonation of delay in filing the written statement. The said application was dismissed vide the impugned order, on the ground that the Commercial Courts, under the law have no power to extend the period of 120 days for filing the written statement.

2. This petition was listed along with CM (M) No. 132/2021 which came up before a Division Bench of this Court (of which I was a part), exercising powers as Commercial Appellate Division, on 28th May, 2021 when the following questions were framed:

"(i) whether after coming into force of the Commercial Courts Act, 2015, a petition under Article 227 of the Constitution of India lies with respect to non-appellable orders of the Commercial Courts.

(ii) if the answer to the above is in the affirmative, whether the said petition is to be considered by a Single Judge of this Court or, on a parity of the jurisdiction for hearing appeals being of a Commercial Division (sic for Commercial Appellate

Division) of this Court, by a Commercial Division (sic for Commercial Appellate Division) of this Court.

(iii) when were the Commercial Courts constituted in the District Court and whether the suit from which this appeal arises was instituted prior or after thereto.

(iv) whether the petitioner is deemed to have been served with the summons of the suit only on 19th* September, 2019, when the complete copy of the plaint and documents was furnished to the counsel for the petitioner before the Commercial Court and if so, whether the delay till 11th December, 2019 in filing the written statement was of 54 days only."

3. The aforesaid questions (i) and (ii) were answered by the Division Bench (of which I was a part) in the judgment dated 10th August, 2021 in the following manner:-

"11. Thus, the question no.(i) aforesaid is answered by holding that the petition under Article 227 of the Constitution of India to with respect to orders of the Commercial Courts at the level of the District Judge is maintainable and the jurisdiction and powers of the High Court has not been and could not have been affected in any manner whatsoever by Section 8 of the Commercial Courts Act. The use of the word "petition" in Section 8 is not and could not have been with reference to a petition under Article 227 of the Constitution and is with reference to a revision application/ revision petition only.

XXXX XXXX XXXX

14. The senior counsel for the respondent in CM (M) No. 132/2021 has again rightly contended that the remedy under Article 227 of the Constitution of India being dehors the Commercial Courts Act, would not be governed and guided by the Commercial Courts Act and would be governed by the roster allocation of this Court. It thus follows, that petitions under Article 227 of the Constitution of India arising from proceedings in commercial suits at the level of the District Judge also would be heard by the bench empowered under the roster to hear such petitions and which bench as per the present roster is of a Single Judge of this Court. Of course, it is open to Hon'ble the Chief Justice to in his discretion allocate hearing of petitions under Article 227 emanating from commercial suits at the level of the District Judge, to any other bench including to a division bench. The question no.(ii) aforesaid also stands answered accordingly."

4. Thereafter, the Division Bench went on to hold as under:

28. A petition under Article 227 of the Constitution of India is a discretionary remedy and which discretion is ordinarily not exercised when an alternative remedy is available under the CPC. In, Surya Dev Rai supra as well as in Punjab National Bank

Vs. O.C. Krishnan (2001) 6 SCC 569, Om Prakash Saini Vs. DCM Limited (2010) 11 SCC 622, Major General Shri Kant Sharma supra, Hameed Kunju Vs. Nazim (2017) 8 SCC 611 and Virudhunagar Hindu Nadargal Dharma Parihalana Sabai Vs. Tuticorin Educational Society (2019) 9 SCC 538, it has been held that Article 227 cannot be invoked where the remedy of appeal or revision are available. Thus, de hors Section 8 of the Commercial Courts Act, a petition under Article 227 would not have been entertained against an order of dismissal of an application under Order VII Rule 10 of the CPC, for the reason of the statutory remedy of revision petition being available to the petitioners/defendants. The exercise by the High Court of power/jurisdiction under Article 227 is subject to well known/well settled rules of self-discipline and practice. Such jurisdiction/power is not to be exercised in derogation of statutory provisions. In Koyilerian Janaki Vs. Rent Controller (Munsif), Cannanore (2006) 9 SCC 406, it was held that it was not appropriate for the High Court to have interfered with the order in exercise of powers under Article 227 when the proceedings arose under a special Act which did not provide for second appeal or revision to the High Court; that the purpose behind not providing such remedy was to give finality to the order passed under the Act. Similarly, in Niyas Ahmed Khan Vs. Mahmood Rahmat Ullah Khan (2008) 7 SCC 539, it was held that the power of superintendence under Article 227 cannot be exercised in a manner ignoring or violating the specific provisions of the statute and that the High Court, while purporting to exercise powers under Article 227 to keep inferior Courts and Tribunals within the limits of their authority, should not itself cross the limits of its authority. To the same effect is Sunita Rani Vs. Shri Chand (2009) 10 SCC 628. In A. Venkatasubbiah Naidu Vs. S. Challappan (2000) 7 SCC 695 it was held that though no hurdle could be put against the exercise of the constitutional powers of the High court, it was a well recognized principle which gained judicial recognition, that the High Court should direct the party to avail himself of statutory remedies, before resorts to a constitutional remedy. The petition under Article 227 was held to be not maintainable owing to the availability of the remedy of appeal under the CPC. In Surya Dev Rai supra also it was held that to safeguard against a mere appellate or revisional jurisdiction being exercised in the garb of exercise of supervisory jurisdiction under Article 227, the Courts have devised self imposed rules of discipline on their power;

supervisory jurisdiction may be refused to be exercised when an alternative efficacious remedy by way of appeal or revision is available to the person aggrieved. It was held that the High Court should have regard to legislative policy formulated on experience and expressed by enactments where legislature in exercise of its wisdom has deliberately chosen certain orders and proceedings to be kept away from exercise of appellate and revisional jurisdiction in the hope of accelerating the conclusion of proceedings and avoiding delay and procrastination which is occasioned by subjecting every order at every stage of proceeding to judicial review by way of appeal or revision. To the same effect is Ajay Bansal Vs. Anup Mehtab (2007) 2 SCC

29. The reasoning in the aforesaid judgments gave rise to the question, that since the remedy of revision under Section 115 of the CPC though available under the CPC against the order of dismissal

of application under Order VII Rule 10 of the CPC, has been taken away under the Commercial Courts Act, whether a petition under Article 227 would lie.

30. We are of the view that once the Commercial Courts Act has expressly barred the remedy of a revision application under Section 115 of the CPC, with respect to the suits within its ambit, the purpose thereof cannot be permitted to be defeated by opening up the gates of Article 227 of the Constitution of India. The scope and ambit of a petition under Article 227 is much wider than the scope and ambit of a revision application under Section 115 of the CPC; whatever can be done in exercise of powers under Section 115 of the CPC, can also be done in exercise of powers under Article 227 of the Constitution. Allowing petitions under Article 227 to be preferred even against orders against which a revision application under Section 115 CPC would have been maintainable but for the bar of Section 8 of the Commercial Courts Act, would nullify the legislative mandate of the Commercial Courts Act. Recently, in *Deep Industries Limited Vs. Oil and Natural Gas Corporation Limited* (2020) 15 SCC 706, in the context of petitions under Article 227 of the Constitution of India with respect to orders in an appeal against an order of the Arbitral Tribunal under Section 17 of the Arbitration & Conciliation Act, 1996, it was held that if petitions under Article 226/227 of the Constitution against orders passed in appeals under the Arbitration Act were entertained the entire arbitral process would be derailed and would not come to fruition for many years. It was observed that though Article 227 is a constitutional provision which remains untouched by a non-obstante Clause 5 of the Arbitration Act but what is important to note is that though petitions can be filed under Article 227 against judgments allowing or dismissing First Appeals under the Arbitration Act, yet the High Court would be extremely circumspect in interfering with the same taking into account the statutory policy, so that interference is restricted to orders which are patently lacking in inherent jurisdiction. Thus, though we are of the view that gates of Article 227 ought not to be opened with respect to orders in commercial suits at the level of the District Judge against which a revision application under CPC was maintainable but which remedy has been taken away by the Commercial Courts Act, but abiding by the judgments aforesaid, hold that it cannot be said to be the law that jurisdiction under Article 227 is completely barred. However the said jurisdiction is to be exercised very sparingly and more sparingly with respect to orders in such suits which under the CPC were revisable and which remedy has been taken away by a subsequent legislation i.e. the Commercial Courts Act, and ensuring that such exercise of jurisdiction by the High Court does not negate the legislative intent and purpose behind the Commercial Courts Act and does not come in the way of expeditious disposal of commercial suits.

31. We thus hold the petition under Article 227 of the Constitution of India to be maintainable with respect to the order impugned in CM(M) No.132/2021. However the discretion whether in the facts and circumstances such petition is to be entertained or not, having under the roster been vested in the Single Judge, we leave it to the Single Judge to exercise such discretion."

5. As regards question (iii) framed above, the Division Bench answered in the following manner:

"(i) the Commercial Courts at the level of the District Judge were constituted on 7th July, 2018 i.e. prior to the institution of the suit from which CM(M) No.225/2021 arises;"

6. As regards the question (iv), the said question remained unanswered and matter was placed before the Single Judge as per the Roster.

7. Accordingly, the present petition has come up for hearing before me today.

8. At the outset, without prejudice to the contentions in respect of question no. 4 framed by this Court, the counsel for the respondent submits that there may not be a requirement to go into the said issue in light of the admitted facts in the present petition.

9. The counsel appearing on behalf of the respondent submits that even as per the case set up by the petitioner, the entire paper book of the suit was supplied to him on 19th September, 2019. The written statement was filed by the petitioner on 11th December, 2019, after expiry of the 30 days' period for filing written statement, but before the maximum permissible period of 120 days provided in Order VIII Rule 1 of the CPC.

10. The condonation of delay application was filed by the petitioner on 26th February, 2020 which was beyond the maximum condonable period of 120 days provided in Order VIII Rule 1.

11. He places reliance on the decisions of the Co-ordinate Benches of this Court dated 15th January, 2020 in CS (COMM) 140/2019 titled as Friends Motel Pvt. Limited Vs. Shreeved Consultancy LLP & Ors. and dated 17th August, 2021 in CM (M) 346/2020 titled as M/S OK Play India Pvt. Ltd. Vs. M/S A P Distributors & Anr., to contend that if the application for condonation of delay in filing written statement is filed beyond a maximum permissible period of beyond 120 days, in respect of a Commercial suit, the written statement cannot be taken on record.

12. The counsel appearing on behalf of the petitioner submits that he requires time to study the aforesaid two judgments and to place on record judgments in support of his contentions.

13. List on 20th September, 2021.

AMIT BANSAL, J.

AUGUST 27, 2021 Sakshi R.