* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% **Pronounced on: 17th December, 2021**

\+ **CS(COMM) 119/2020**

HT MEDIA LIMITED & ANR. ..... Plaintiffs
Through: Mr. Vivek Ayyagori, Advocate

versus

BRAINLINK INTERNATIONAL, INC. & ANR..... Defendants
Through: Mr. Manish Dhir, Advocate

CORAM:
HON'BLE MS. JUSTICE ASHA MENON

O R D E R

I.A.9531/2021 (by the defendants under Order VIII Rule 1 read with Section 151 CPC for condonation of delay in filing the written statement)

1. This order will dispose of the application filed by the defendants under Order VIII Rule 1 read with Section 151 CPC for condonation of delay in filing the written statement. The suit has been instituted by 'HT Media Limited & another' against the defendants seeking a restraint on the defendants from infringing the trademark/domain name of the plaintiffs. A prayer was also made seeking a restraint on the defendants from pursuing the civil action before United States District Court for the Eastern District of New York, particularly, in respect of the civil action titled *Brainlink International, Inc. v. HT Media Ltd. & Anr. (Civil Action No. 1 20-cv-01279)*. A decree for rendition of accounts and damages has

also been sought.

2. By way of the present application, the defendants have claimed that they have not been served with the summons in the present suit, having merely received an intimation about the suit having been filed and the order dated 28th April, 2020 having been passed by the court, through email, in compliance of requirements of Order XXXIX Rule 3 CPC. It has been submitted that pursuant thereto, the defendants entered appearance and filed reply to the interim application filed by the plaintiffs and was under *bona fide* belief that the defendants were not required to file a written statement of defence until and unless served with the summons of the suit. It was also submitted that during this time, the entire world was affected by the Covid-19 pandemic. Even the Supreme Court of India took cognizance of the situation and extended the limitation. Hence, it was prayed that the delay in filing the written statement be condoned and the same be taken on record.

3. The plaintiffs have filed their reply to the said application seeking condonation of delay, opposing the same by submitting that the defendants had filed their written statement on 13th July, 2021, i.e., nearly 441 days, after the ad-interim order was passed in this suit on 28th April, 2020. It was submitted that no cogent reasons have been given to explain the delay and in the light of the fact that throughout, the defendants have appeared in the court, through their counsel, on various dates i.e., on 29th May, 2020, 2nd June, 2020, 9th July, 2020, 17th August, 2020, 16th October, 2020, 4th December, 2020, 22nd February, 2021 and 6th July, 2021, prior to the filing of the written statement, no ground was made out

to condone the delay. Thus, it has been prayed that the application be dismissed and the right of the defendants to file the written statement be closed.

4. Both sides have filed their written arguments. I have heard learned counsel and I have perused the material placed on the record. Mr. Manish Dhir, learned counsel for the defendants, has stressed that the 30 days' time-line provided for filing of the written statement, extendable for a period of 120 days, is to be calculated from the date when the summons were served. However, in the present case, summons were never served as the defendants had appeared in response to the information furnished in compliance of Order XXXIX Rule 3 CPC. Thus, according to the learned counsel, in actual fact, there is no delay in filing of the written statement.

5. Learned counsel for the defendants has also relied on the judgment dated 23rd September, 2021 of the Supreme Court **in *Cognizance For Extension of Limitation, In re.*** (2020) 9 SCC 468 [Misc. Appl. No.665/2021 in SMW(C) 3/2020], to contend that the limitation period has been extended for all purposes. He has further relied on the judgment of the Division Bench of this court in ***Rohit Sharma v. A.M. Market Place Pvt. Ltd.,*** 2021 SCC OnLine Del 3092 (of which I was a Member). Learned counsel submitted that the delay be condoned and the written statement be taken on record.

6. *Per contra*, Mr. Vivek Ayyagori, learned counsel for the plaintiffs, has submitted that none of the grounds raised by the defendants, has any force. In the written submissions filed on behalf of the plaintiffs, it has

been pointed out that this was not a case in which the defendants had been prevented from participating in the proceedings. The suit, which itself had been filed while the pandemic was raging and the first order having been passed on 28th April, 2020, when the video conferencing hearings had commenced, and when the interim directions were issued, indicated that urgent matters were being heard by this court. The defendants had in fact appeared before the court on 29th May, 2020, through counsel, when it was informed to the court that two applications were being listed on 2nd June, 2020. One of these applications was filed by the defendants under Order XXXIX Rule 4 CPC.

7. Clearly, therefore, the defendants knew about the pendency of the suit and their claim that they expected to be served with the summons before filing their written statement, is untenable. A list of other applications filed by the defendants has also been given in the written submissions as also in the reply, to point out that the defendants were not prevented by the pandemic from taking various steps or participating in different proceedings before different fora. Hence, it was submitted that the benefit of the Supreme Court decision in ***Cognizance For Extension of Limitation (supra)***, could not enure to the defendants.

8. It was further submitted that the present application has been filed only after the plaintiffs had filed their application under Order XIII-A CPC, being I.A.7795/2021, on 3rd July, 2021, seeking summary judgment in their favour, which was listed before the court on 6th July, 2021. The condonation application [I.A.9531/2021] along with the written statement was filed on 13th July, 2021. Learned counsel has also relied on the

judgment in ***Love Chauhan v. Ajay Kumar Kathuria,*** 2021 SCC OnLine Del 4861, ***Sagufa Ahmed v. Upper Assam Polywood Products Private Limited and Others.*** (2021) 2 SCC 317 and ***Bharat Kalra v. Raj Kishan Chabra***, 2021 SCC OnLine Del 3976, to contend that the benefit of extension of time pursuant to the orders of the Supreme Court on 23rd March, 2020 and thereafter, was not automatically available to all. Reliance has been placed on the judgment in ***Flight Center Travels Pvt. Ltd. v. Flight Centre Limited***, 2013 SCC OnLine Del 331, ***Siraj Ahmad Siddiqui v. Prem Nath Kapoor,*** (1993) 4 SCC 406, ***Nath Agrawal v. Nath,*** 1981 SCC OnLine All 445 and ***Sunil Poddar v. Union Bank of India,*** (2008) 2 SCC 326, to contend that once the defendants participated in the proceedings, the defendants waived the right to be served with the summons.

9. There is no dispute on the dates i.e., the suit came up for hearing for the first time on 28th April, 2020; the defendants filed an application under Order XXXIX Rule 4 CPC on 27th May, 2020, and appeared before the court on 29th May, 2020, through counsel; and, simultaneously, an application under Order XXXIX Rule 2A [I.A.4132/2020] was filed by the plaintiffs alleging violation of the interim directions issued on 28th April, 2020 and the reply was filed thereto by the defendants. It appears that the defendants stated before the court on 9th July, 2020 that the interim order must not be read to mean that the defendant is restrained from approaching the statutory authority for filing objections to the trademark. In fact, the defendants have already filed their objections before the Trademark Registry on 15th May 2020.

10. It is thus, more than apparent that the conditions that prevailed due to the pandemic did not actually impact the defendants to prevent them from interacting with their counsel and filing appropriate applications and replies before this court. To that extent, the orders of the Supreme Court in ***Cognizance For Extension of Limitation (supra)*** would not be applicable to the facts of the present case.

11. Another factor that needs to be noted in the present case is that, the parties were referred to mediation on 22nd February, 2021 and the report was received on 30th June, 2021 that the mediation efforts had failed. Thereafter, on 6th July, 2021, the plaintiffs applied for summary judgment. That seems to have woken up the defendants to the need of filing a written statement and the same has been accompanied with the application for condonation of delay.

12. It is a matter of record that on 28th April, 2020, summons were directed to be issued and process fee was also directed to be filed. Though the record discloses that the one-time process fee was filed by the plaintiffs, however, the Registry does not seem to have issued any summons, though intimation was sent to the defendants giving the particulars of the case and the interim directions of this Court. The question is whether this lapse, if it be one, would enure to the benefit of the defendants.

13. The Supreme Court in ***Sunil Poddar (supra)*** had the occasion to consider this question, no doubt, in the context of an application under Section 22(2)(g) of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 read with Order IX Rule 13 CPC. Nevertheless, the

observations made therein would be relevant here. In that case, it was held that the question is not whether the defendants were actually served with the summons in accordance with the procedure laid down and in the manner prescribed under Order V CPC, but whether the defendants had sufficient notice of the date of hearing and had sufficient time to appear and answer the claim of the plaintiffs. It would be useful to reproduce paragraphs No. 23 and 24 of the said judgment for ready reference, as under: -

> *"**23.** It is, therefore, clear that the legal position under the amended Code is not whether the defendant was actually served with the summons in accordance with the procedure laid down and in the manner prescribed in Order 5 of the Code, but whether (i) he had notice of the date of hearing of the suit; and (ii) whether he had sufficient time to appear and answer the claim of the plaintiff. Once these two conditions are satisfied, an ex parte decree cannot be set aside even if it is established that there was irregularity in service of summons. If the court is convinced that the defendant had otherwise knowledge of the proceedings and he could have appeared and answered the plaintiff's claim, he cannot put forward a ground of non-service of summons for setting aside ex parte decree passed against him by invoking Rule 13 of Order 9 of the Code. Since the said provision applies to the Debts Recovery Tribunals and the Appellate Tribunals under the Act in view of Section 22(2)(g) of the Act, both the Tribunals were right in observing that the ground raised by the appellants could not be upheld. It is not even contended by the appellants that though they had knowledge of the proceedings before DRT, they had no sufficient time to appear and answer the claim of the plaintiff Bank and on that ground, ex parte order*

deserves to be set aside.

> ***24.*** *In our opinion, the Tribunals were also right in commenting on the conduct of the appellant-defendants that they were appearing before the civil court through an advocate, had filed written statement as also applications requesting the court to treat and try certain issues as preliminary issues. All those facts were material facts. It was, therefore, incumbent upon the appellants to disclose such facts in an application under Section 22(2)(g) of the Act when they requested DRT to set aside ex parte order passed against them. The appellants deliberately and intentionally concealed those facts. There was no whisper in the said application indicating that before the civil court they were present and were also represented by an advocate. An impression was sought to be created by the appellant-defendants as if for the first time they came to know in December 2000 that an ex parte order had been passed against them and immediately thereafter they had approached DRT. The Debts Recovery Tribunal, Jabalpur, therefore, in our opinion was right in dismissing the said application."* ***(emphasis added)***

14. A coordinate Bench of this Court in ***Flight Center (supra)*** has held that when the defendant had knowledge of the case and had entered appearance through counsel, a technical process of service of summons need not be insisted upon. It was observed as below: -

> *"25. The objective of the process of issuance of summons is to obtain the presence of the defendant for final opportunity to be given to him to rebut the claim against him. Thus, if he appears at the initial stage in a sense there is waiver of the right to have summons served on him. This*

position has been explained in the case of Sri Nath Agrawal case (supra) and to that extent the aforesaid has been upheld by the Supreme Court in Siraj Ahmad Siddiqui case (supra).”

15. There is no reason to take a different view in the present case. Here, the defendants were fully aware of the present case. They participated on various dates from 29th May, 2020, including in mediation, and chose not to file their written statement. Had they been not represented by a counsel, a probable view could have been taken that the procedure was unknown to the defendants. However, they have been assisted by counsel throughout and the very number of the case would have flagged to them that this was a commercial suit, which entailed strict timelines. The plea of the learned counsel for the defendants that since the summons had not been served to them, the time had not begun to run, cannot be accepted. Thus, on both grounds, there is no merit found in the present application. The same is dismissed.

16. Since the delay has not been condoned, the delayed filing of the written statement cannot be accepted and the written statement cannot be taken on record. It is ordered accordingly.

17. The order be uploaded on the website forthwith.

(ASHA MENON)
JUDGE

DECEMBER 17, 2021
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