

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 11141 OF 2014**

**P. V. Minerals)
registered under the provisions of)
Indian Partnership Act, 1932, having)
its registered office at Flat No.13, Sadan)
B Road, Churchgate, Bombay 400 020) ..Petitioners**

Vs.

**1 Oil & Natural Gas Commission)
a statutory body established under the)
Oil and Natural Gas Commission Act 1959)
having its office at Tel Bhavan Dehradun)
(UP) Indian and its Bombay office at)
3-B, Vasudhara Bhavan, Bandra (E))
Mumbai 400 052)**

**2 Syndicate Bank, registered under the)
provision of Banking Companies (transfer)
& Undertaking)Act, having their head)
office At Manipal and their branch office)
Sugar House, 1st floor, Kazi Sayed Street,)
Bombay 400 003) ..Respondents**

**Mr. Vishal Kanade with Ms Tanmayee Salekar and Ms Chhaya Rane i/b
M/s. Shah for the Petitioner**

**Mr. Sagar Gogare with Mr. S.A.Bhalwal i/b Vyas and Bhalwal for the
Respondent No.1**

**CORAM : R. M. SAVANT, J.
DATE : 29th JANUARY, 2015**

ORAL JUDGMENT

1 At the outset, the Learned Counsel for the Petitioners seeks deletion of the Respondent No.2, Syndicate Bank, from the cause title as in the context of the challenge raised in the present Petition, the said Respondent No.2 is only a formal party. Leave granted. Amendment to be carried out forthwith.

2 Rule, with the consent of the Learned Counsel for the parties made returnable forthwith and heard.

3 The Writ Jurisdiction of this Court under Article 227 of the Constitution of India is invoked against the order dated 23-8-2014 passed by the Learned Judge of the City Civil Court, Bombay , by which order, Notice of Motion No.3475 of 2013 filed by the Petitioners i.e. original Plaintiffs and the Defendants in the Counter Claim for taking its Written Statement to the Counter Claim on record, came to be rejected.

4 Shorn of unnecessary details few facts can be stated thus

 The Plaintiffs have filed the Suit in question being Suit No.1088 of 1993 for recovery of an amount of Rs.5 lacs from the Respondent No.1-ONGC. In the said Suit, the Respondent No.1 herein who is the Defendant has filed a Counter Claim wherein it has claimed an amount of Rs.30 lacs from the

Plaintiffs. The Suit was filed in the year 1993 and the Counter Claim came to be registered on 3-4-1997, whilst the Suit was pending in this Court as the same was originally filed in this Court and bore High Court Suit No.1607 of 1993. It is the case of the Petitioners that after the Counter Claim was registered on 3-4-1997, the Suit never came on board and was dormant in this Court. On the pecuniary jurisdiction of the City Civil Court, Bombay being enhanced, the Suit came to be transferred to the City Civil Court, Bombay and now bears the Suit No.1088 of 1993. Since the Petitioners / Plaintiffs had not filed the Written Statement to the Counter Claim, an order came to be passed on 3-7-2013 by the Learned Judge of the City Civil Court Bombay for the Counter Claim to proceed without the Written Statement of the original Plaintiffs, to the said Counter Claim. It is thereafter on 23-9-2013 that the instant Notice of Motion No.3475 of 2013 came to be filed seeking extension of time to file the Written Statement to the Counter Claim.

5 In the Affidavit in Support of the Notice of Motion, which is filed by the Manager of the Plaintiffs, the ground made out was that one of the partners of the Plaintiffs who was looking after the Suit, namely Mr. Vinod Shah expired on 10-5-2005 and in view of his death all the pending works remained to be looked after. It has further been stated in paragraph 4 of the said affidavit in support that the affiant was informed on 9-11-2012 that all the Suits below the claim of Rs.1 crore were transferred to the City Civil Court,

Bombay. It has further been stated that in view of the non availability of the relevant papers and proceedings the affiant could not attend the office of the Advocate of the Plaintiffs. It has further been averred in paragraph 5 that when the Suit appeared on 3-7-2013, the Advocate appearing on behalf of the Plaintiffs had sought extension of time from the Court to file the Written Statement to the Counter Claim. However, the Learned Judge of the City Civil Court, Bombay refused to grant any time and after recording that no Written Statement was filed to the Counter Claim, directed the framing of issues. It has further been averred that after collecting the papers the affiant approached the Advocate of the Plaintiffs who thereafter prepared the Written Statement / reply to the Counter Claim. It is on the basis of the reasons which are appearing in paragraphs 3, 4 and 5 of the affidavit in support that the extension of time to file the Written Statement to the Counter Claim was sought.

6 The said Notice of Motion was replied to on behalf of the Respondent No.1 herein. It was contended in the said reply that there is a gross delay of 5952 days which is unexplained. The reasons put forth in the affidavit in support were questioned as also the ground that the Plaintiffs have a good case on merits.

6 The Trial Court considered the said application and has by the

impugned order dated 23-8-2014 rejected the same on the ground that the reasons put forth do not constitute a proper explanation for the said huge delay of 5952 days in filing the Written Statement to the Counter Claim. The Trial Court has also referred to the Judgment of the Apex Court reported in 2009(1) Bom CR 81 as also the Judgment of a Learned Single Judge of this Court in Notice of Motion No.128 of 2012 in Suit No.1696 of 2011, wherein the Learned Single Judge has held that unless there is a proper explanation, time cannot be extended. As indicated above, it is the said order dated 23-8-2014 which is taken exception to by way of the above Petition.

7 Heard the Learned Counsel for the parties.

8 The Learned Counsel for the Petitioners Mr. Kanade would reiterate the case of the Petitioners as urged in the Trial Court and would contend that since the Suit has not progressed no prejudice would be caused to the Respondent No.1 if the Plaintiffs are permitted to file their Written Statement to the Counter Claim. The Learned Counsel would contend that for the inconvenience and prejudice that is caused to the Defendant No.1, the same can be adequately compensated by way of costs .

9 Per contra, the learned Counsel appearing for the Respondent No.1, Mr. Gogare would oppose the grant of reliefs in the above Petition. The

Learned Counsel would contend that the facts disclose that there is gross negligence on the part of the Petitioners/Plaintiffs in filing the Written Statement to the Counter Claim. The Learned Counsel would seek to place reliance on the Judgment of the Apex Court in the matter of **Amalendukumar Bera & Ors. Vs. State of West Bengal**¹. The Learned Counsel would contend that in view of the fact that the Written Statement to the Counter Claim has not been filed, a right has accrued to the Defendant No.1 to obtain a decree against the original Plaintiffs.

10 Having heard the Learned Counsel for the parties, I have considered the rival contentions. In so far as Order VIII Rule 1 of the Civil Procedure Code is concerned, it is well settled by the Judgment of the Apex Court that the same is directory and not mandatory. It is required to be noted that the Suit in the instant case was originally filed in this Court and was pending in this Court up to November 2012 when it came to be transferred to the City Civil Court, Bombay. Whilst the Suit was pending in this Court, it was governed by the rules which are applicable namely the High Court Original Side Rules. The fact that the Suit lay dormant right from the year 1997 till it was transferred in November 2012 to the City Civil Court, Bombay, is not disputed. It seems that the Suit was also not listed before the Learned Prothonotary and Senior Master of this Court for filing of the Written Statement to the Counter Claim. It is only after the Suit came to be transferred

1 (2013) 4 SCC 52

to the City Civil Court that the same was listed before the Learned Judge of the City Civil Court, Bombay and on 5-7-2013, the Learned Judge of the City Civil Court, Bombay directed the Suit to proceed without the Written Statement of the Plaintiffs to the Counter Claim. Hence after 1997 the Suit was listed before the Court only in July 2013, after it was transferred to the City Civil Court, Bombay. Though the reasons which have been put forth by the Plaintiff for seeking extension of time to file the Written Statement have not commended acceptance to the Trial Court. It is required to be borne in mind that it is always desirable that a party should be given an opportunity to prosecute the proceedings on merits rather than being thrown out on technicalities. The fact that one of the partners of the Petitioners firm i.e. the Plaintiffs firm died in the year 2005, cannot be lost sight of as also the fact that it is the case of the Plaintiffs that the said partner was looking after the affairs of the firm including the Suit in question. Though there can be said to be some negligence on the part of the Plaintiffs in the matter of filing its Written Statement to the Counter Claim, the situation is not such that it has become irreversible so as to cause grave prejudice to the Defendants who have filed the Counter Claim. It is well settled that in so far as Order VIII Rule 1 is concerned, the Court is not powerless and can extend the time if it deems appropriate in the fact situation of a particular case. As indicated above, the Suit was dormant when it was pending in this Court and it is only after it was transferred to the City Civil Court that the same was listed and the order for the Counter Claim to proceed

exparte came to be passed only on 3-7-2013 and it is immediately thereafter on 23-9-2013 that the above Notice of Motion came to be filed. If the said facts are taken into consideration then in my view, the Plaintiffs are required to be given an opportunity to file its Written Statement to the Counter Claim. For the inconvenience or prejudice that is caused to the Respondent No.1 – ONGC it can be adequately compensated by way of costs.

11 The Judgment of the Apex Court in Amalendukumar Bera's case (Supra) was rendered in the facts prevailing in that case where there was a gross negligence on the part of the State. The said judgment would have no application in the fact situation of the present case.

12 In that view of the matter the impugned order dated 23-8-2014 is required to be quashed and set aside and is accordingly quashed and set aside, resultantly Notice of Motion No.3475 of 2013 would accordingly stand allowed. Since the Learned Counsel for the Petitioners states that the Written Statement to the Counter Claim is ready, the same to be filed within two weeks from date. In the facts and circumstances of the case, the Plaintiffs to pay costs of Rs.25,000/- to the Respondent No.1 ONGC within two weeks from date and evidence to be produced before the Trial Court and tendered along with the Written Statement. The payment of costs is a condition precedent, in the event the costs are not paid as directed by the instant order, the benefit of this order

would not enure to the Petitioners and resultantly the above Petition would be deemed to have been dismissed. The cheque / pay order for the said costs to be handed over to M/s. Vyas and Balwal the Advocates for the Respondent No.1, as Shri Balwal states that he would accept the said costs on behalf of the Respondent No.1- ONGC.

13 Rule is accordingly made absolute in the aforesaid terms with parties to bear their respective costs of the Petition.

[R.M.SAVANT, J]