

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO. 1159 OF 2017

M/s Advance Surfactants (India)
Ltd and Anr.

Petitioners

Vs

M/s Sampurn K Ghaswala and
Ors.

.. Respondents

Mr. Vijay V. Nene, Advocate for Petitioners.

Mr. G.H.Keluskar, Advocate for Respondent no. 1.

CORAM : R.G.KETKAR,J.
DATE : 02/03/2017

PC:

1. Heard Mr.Vijay Nene, learned counsel for the petitioners and Mr. G.H.Keluskar, learned counsel for respondent no.1 at length. Mr.Nene seeks leave to delete respondents no 2 to 4 on the ground that respondent no.1, being original plaintiff, is the only contesting respondent. Leave as prayed for is granted. Amendment shall be carried out forthwith.

2. Rule. Mr.Keluskar waives service for respondent no.1. Having regard to the narrow controversy raised in this petition and at the request and by consent of the parties, Rule is made returnable forthwith and petition is taken up for final hearing.

3. By this petition under Article 227 of the Constitution of India, the petitioners, hereinafter referred to as 'defendants no. 4 and 5', have challenged the Judgment and order dated 15.12.2016 passed by the learned Judge of City Civil Court,

Greater Bombay in Notice of Motion No. 4512 of 2016 in S.C.Suit No. 986 of 2016 to the extent of imposition of costs of Rs.50,000/-.

4. In support of this petition, Mr. Nene submitted that defendants no. 4 and 5 were served in the month of May, 2016. They filed Vakalatnama on 1.10.2016 and on the same day filed application for rejection of the plaint. On 29.11.2016, present Notice of Motion was taken out for condoning the delay in filing written statement. It was contended that after the service of suit summons in May 2016, head of the legal department of defendant no.4 company left services. Records and documents were not traceable which caused delay in filing written statement. There is delay of 150 days in filing written statement which may be condoned. By the impugned order, the learned trial Judge condoned the delay. However, while condoning the delay, the learned trial Judge imposed the costs of Rs. 50,000/- as the amount claimed by the plaintiff in the suit is Rs.99 lakhs. Having regard to the amount claimed by the plaintiffs in the suit and the period of delay, in the facts and circumstances of the case, the learned trial Judge thought it desirable that the amount of costs of Rs.50,000/- would be appropriate. He submitted that in so far as the written statement of defendants no. 1 to 3 is concerned, though there was delay of 100 days, the learned trial Judge has condoned delay without imposing any costs. He further

submitted that the learned trial Judge in fact did not pass “No W.S. order”. He further submitted that along with the motion, defendants no. 4 and 5 also annexed written statement duly verified on their behalf.

5. On the other hand, Mr. Keluskar supported the impugned order. He submitted that the reasons given by defendants no.1 to 3 in the motion for condoning the delay and reasons given by defendants no. 4 and 5 are different and reliance placed by defendants no.4 and 5 in condoning delay of 100 days in filing written statement by defendants no.1 to 3 without imposition of costs, is of no assistance. He submitted that the learned trial Judge was justified in imposing the costs of Rs.50,000/- having regard to the claim made by the plaintiffs in the suit.

6. I have considered the rival submissions advanced by the learned counsel appearing for the parties. I have also perused the material on record. A perusal of the impugned order shows that defendants no.4 and 5 have filled Vakalatnama on 1.10.2016 and filed application for rejection of the plaint. The said application was, however, not pressed. On 29.11.2016 motion was taken out along with duly verified written statement. It is not in dispute that the learned trial Judge did not pass order “No.W.S”. In paragraph 7, the learned trial Judge observed that in reply to the notice of motion, the plaintiffs annexed the postal acknowledgment of service of defendant no.5 which was received

by the department on 13.6.2016. On 15.6.2016, from the record it appears that Advocate for the plaintiff was present and fresh writ of summons was issued against defendants no.1 to 5 by R.P.AD., returnable on 29.7.2016. The learned trial Judge therefore, observed that no importance can be attached to the postal acknowledgment dated 13.6.2016. However, as the defendants no.4 and 5 claimed that as copy of the plaint was received by them in the month of May 2016, the period of limitation for computation of 30/90 days in filing the written statement is to be computed from the first date of appearance, i.e. 15.6.2016. In my opinion, the reasons given by the learned trial Judge in paragraph 7 are irreconcilable.

7. That apart, a perusal of paragraph 9 shows that the learned trial Judge imposed costs of Rs. 50,000/- only on the ground that the amount claimed in the suit by the plaintiffs is Rs.99 lakhs. In my opinion, the learned trial Judge should have considered whether the imposition of costs should commensurate with the delay factors or the claim made in the suit. Having regard to the fact that the learned trial Judge did not pass 'No W.S. Order' and further also having due regard to the fact that along with the Motion, defendants no. 4 and 5 filed duly verified written statement coupled with the fact that the learned trial Judge did not impose the costs while condoning the delay of 100 days in filing written statement by defendants no. 1 to 3, in my opinion,

the costs of Rs.5,000/- would be reasonable and appropriate. Hence the following order.

8. Costs of Rs. 50,000/- imposed by the learned trial Judge shall stand substituted by the costs of Rs. 5,000/-. Rest of the order of the trial Court remains as it is. Impugned order stands modified accordingly.

9. Amount of costs of Rs.5000/- shall be deposited by defendants no. 4 and 5 in the trial Court within one week from today under intimation in writing to the plaintiffs' Advocate. Plaintiffs are at liberty to withdraw that amount unconditionally. The learned trial Judge will take on record Written Statement of defendants no. 4 and 5.

10. All the parties including the trial Court will act on the authenticated copy of this order.

(R.G.KETKAR, J.)