

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 8258 OF 2018

Wartsila India Private Ltd.
A Company registered under the Companies
Act, 1956, Having its Registered Office at
Kesar Solitaire, 21st Floor, Plot No.5, Navi
Mumbai, 400 705.
Through its Constituted Attorney,
Mrs. Alka Singh, Age 39 yrs., Legal Counsel
R/at B-15, Bombay Links CHSL, Plot No.69
Sec-17, Vashi, Navi Mumbai – 400 703.

...Petitioner

Versus

Karunakar B. Shetty,
Sole Proprietor of M/s. Unik Engineers,
Having Office at D-10, Ghatkopar Industrial
Estate, LBS Marg, Ghatkopar (W), Mumbai
400 086 and R/at A-703, Presidential
Tower, LBS Marg, Ghatkopar (W),
Mumbai 400 086.

...Respondent

Mr. Saurabh Oka, for the Petitioner.
Mr. Sandesh Patil, I/b Prithviraj Sanjay Gole, for Respondent
no.1.

CORAM: N. J. JAMADAR, J.
DATED: 2nd AUGUST, 2019

Oral Judgment :-

1. Rule. Rule made returnable forthwith and, with the consent of the Counsels for the parties, heard finally at the admission stage.
2. This petition under Article 227 of the Constitution of India takes exception to an order passed by the learned

7th Jt. Civil Judge, Senior Division, Thane, on 14th December, 2017, whereby the application tendered by the petitioner – plaintiff, (defendant in the counter-claim) to condone the delay in filing the written statement to the counter-claim and permit it to file the written statement beyond the period of 90 days prescribed in Order VIII Rule 1 of the Code of Civil Procedure, 1908 (“the Code”), came to be rejected by the learned Civil Judge on the premise that no substantial and satisfactory reason was made out by the petitioner so as to make out a case to accept the written statement.

3. The petitioner had instituted a summary suit bearing Suit No.65 of 2012 for recovery of a sum of Rs.92,28,238.36 ps. against the defendant – respondent on the strength of Leave and Licence Agreement and Infrastructure Agreement executed by and between the parties. Pursuant to leave to defend, the defendant – respondent tendered a written statement containing a counter-claim to the tune of Rs.11,62,84,881.40 ps. The said written statement came to be filed on 14th November, 2017. The summary suit, thus, stood converted into Special Civil Suit No.136 of 2017.

4. By an application dated 12th September, 2017, the

plaintiff sought permission to tender written statement to the counter-claim by condoning the delay and setting aside 'No Written Statement' order, which was passed against the petitioner on account of default in filing the written statement within the prescribed period. In the application, it was averred that there were enormous documents to be examined. Thus, the instructions could not be given to the learned Counsel for the petitioner and due to inadvertence the written statement could not be filed in time. The respondent resisted the application by filing say and objection. It was contended that there was no specific reason assigned by the petitioner for condonation of delay.

5. The learned Civil Judge, after hearing the parties, was persuaded to reject the application, *inter alia*, holding that the petitioner did not even mention the days of delay, which occurred in tendering the written statement, and no substantial and satisfactory reason was also mentioned therein.

6. Heard Mr. Oka, the learned Counsel for the petitioner and Mr. Patil, the learned Counsel for the respondent.

7. The learned Counsel for the petitioner submitted that the learned Civil Judge ought to have taken a view, which

would advance the adjudication of the matter on merits. The delay was not inordinate. The petitioner had ascribed a justifiable reason. If the petitioner is not permitted to join the issue by filing written statement to the counter-claim, the petitioner would suffer serious prejudice.

8. In opposition to this Mr. Patil, the learned Counsel for the respondent supported the impugned order. It was submitted on behalf of the respondent that the application was preferred by the petitioner in a most casual manner. The application lacked necessary particulars and justifiable reason. Though, the Court has jurisdiction to permit the defendant to tender a written statement beyond the period of 90 days, yet, the discretion to take the written statement on record beyond the period of 90 days, is required to be exercised only when there are genuine and acceptable circumstances. In the case at hand, the petitioner has not made out such a case, urged the learned Counsel for the respondent.

9. In support of the aforesaid submission, the learned Counsel for the respondent placed a strong reliance upon a judgment of the Supreme Court in the case of ***Mohd. Yusuf***

vs. Faij Mohammad and ors.¹, wherein it was enunciated that though the Supreme Court construed the provisions contained in Order VIII Rule 1 of the Code of Civil Procedure to be directory in nature, yet, the defendant can be permitted to file a written statement after the expiry of period of 90 days only in exceptional situation.

10. Reliance was also placed on the observations of the Supreme Court in the case of ***R. N. Jadi & Brothers and others vs. Subhashchandra***² to the effect that it is necessary to emphasise that an extension of time beyond 90 days of the service of summons must be granted only based on a clear satisfaction of the justification for granting such extension, the Court being conscious of the fact that even the power of the Court for extension inhering in Section 148 of the Code, has also been restricted by the legislature.

11. It is imperative to note that in the case of ***Kailash vs. Nanhku and others***³, the Supreme Court after construing the nature of the amended Rule 1 of Order VIII observed that considering the object and purpose behind enacting Rule 1 of Order VIII in the present form and the context in which the

1 (2009) 3 SCC 513.

2 (2007) 6 SCC 420.

3 (2005) 4 SCC 480.

provision is placed, we are of the opinion that the provision has to be construed as directory and not mandatory. In exceptional situations, the court may extend the time for filing the written statement though the period of 30 days and 90 days, referred to in the provision, has expired. However, we may not be misunderstood as nullifying the entire force and impact – the entire life and vigour – of the provision. The delaying tactics adopted by the defendants in law courts are now proverbial as they do stand to gain by delay. It was further observed that, ordinarily, the time schedule prescribed by Order VIII Rule 1 has to be honoured. The extension can be only by way of an exception and for reasons assigned by the defendant and also recorded in writing by the Court to its satisfaction. It must be spelled out that a departure from the time schedule prescribed by Order VIII, Rule 1 of the Code was being allowed to be made because the circumstances were exceptional, occasioned by reasons beyond the control of the defendant and such extension was required in the interest of justice, and grave injustice would be occasioned if the time was not extended.

12. In the light of the aforesaid position in law, reverting to the facts of the case, it deserves to be noted that the

distinctive feature of the case is that the petitioner had instituted the suit and in the written statement thereto, the defendant made a counter-claim. Undoubtedly, the rigour contained in Rule 1 of Order VIII applies with equal force to the written statement to a counter-claim. It is true that, the petitioner could have articulated the averments in the application for the condonation of delay in filing the written statement with more precision and better particulars. However, the delay was not inordinate. The written statement containing the counter-claim was filed by the defendant, on 14th February, 2017. The petitioner professed to file the written statement to the counter-claim on 12th September, 2017. The cause assigned by the petitioner that enormous documents were to be examined and detailed instructions could not be given to the Advocate for filing the written statement cannot be said to be totally unreasonable as well.

13. Having regard to the nature and the quantum of the counter-claim of Rs.11,62,84,881.40 ps. made by the respondent – defendant, a serious prejudice would be caused to the petitioner, if he is not given an opportunity to contest the counter-claim. This aspect of grave prejudice to the

petitioner – plaintiff was not adverted to by the learned Civil Judge.

14. In the aforesaid circumstances, in order to advance the cause of substantial justice, it may be appropriate to permit the petitioner to tender written statement on record, by setting aside the impugned order passed by the learned Civil Judge, Senior Division, Thane. The petitioner is, however, liable to be saddled with costs. Hence, I am persuaded to pass the following order:

: O r d e r :

- (i)** The petition stands allowed.
- (ii)** The impugned order dated 14th December, 2017, passed by the 7th Jt. Civil Judge, Senior Division, Thane, is hereby quashed and set aside.
- (iii)** The petitioner (defendant to the counter-claim) is permitted to file the written statement, tendered along with application dated 12th September, 2017 (Exhibit 24), subject to payment of costs of Rs.5,000/- to the respondent – defendant, within three weeks from today, before the trial Court.
- (iv)** Upon payment of costs, the written statement tendered by the petitioner – defendant, along with

application Exhibit 24, be taken on record and the proceedings before the learned Civil Judge shall thereafter proceed in accordance with law.

- (v) Rule made absolute in aforesaid terms.
- (vi) All concerned to act on an authenticated copy of this order.

[N. J. JAMADAR, J.]