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IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.4031 OF 2022

D.C.S. Ltd., through Director Ram Kumar Saini PETITIONER

VERSUS

M/s Chaitanya Electricals Pvt Ltd., and Others RESPONDENTS

Mr. Sanket S. Kulkarni, Advocate for the petitioner
Mr. Girish S. Rane, Advocate for respondents No1 (I), 1(ii)
Mr. Ankush N. Nagargoje, Advocate for respondent No.3

[CORAM : NITIN B. SURYAWANSHI, J.]

DATE : 14th MARCH, 2023

ORDER :

1. The petitioner is aggrieved by order dated 18th February, 2022 passed by learned District Judge -2, Jalgaon below Exhibit-123 in Commercial Suit No. 2 of 2019, thereby rejecting the application filed by the petitioner – original defendant No.2, under Order VIII, Rule 1 read with section 151 of the Civil Procedure Code, seeking condonation of delay of two years in filing written statement.

2. Respondent No.1 – plaintiff filed Special Civil Suit No.115 of 2013 in the Court of learned Civil Judge, Senior Division, Jalgaon, against the defendants / petitioner and respondents

No.2 and 3 for recovery of Rs.1,45,75,726/-.

3. Suit summons was served on the petitioner – defendant No.2, on 26th July, 2013. On failure of the petitioner to appear, *ex-parte* order came to be passed against the petitioner on 23rd October, 2013. Vakalatnama came to be filed on behalf of the petitioner – defendant No.2 on 29th October, 2013 and on 29th October, 2013 application for setting aside *ex parte* order was filed, which was allowed on the same day.

Thereafter, applications of the petitioner – defendants seeking time to file written statement were allowed on 28th November, 2013 and 8th January, 2014. Thereafter, application seeking time to file written statement, by the petitioner was rejected on 26th February, 2014. On 13th August, 2014, "*No written statement*" order was passed against the petitioner and suit was directed to proceed without written statement of defendant No.2. Thereafter, applications filed by the petitioner on 6th September, 2014 and 7th April, 2015 were rejected. On 5th April, 2016, application Exhibit-6 for interim injunction is allowed. On 16th December, 2016, petitioner filed application (Exhibit-123) for condonation of delay in filing written statement. Thereafter, on 23rd January, 2019, Special Civil Suit, filed by the plaintiff is re-registered as Commercial Suit No. 2 of 2019.

4. By the impugned order dated 18th February, 2022, the Trial Court rejected application Exhibit-123 of the petitioner. Hence, the present writ petition.

5. Heard learned advocate for the petitioner and the learned advocate for respondents No.1 (i) and 1 (ii). Perused the grounds raised in the writ petition, the documents annexed, the affidavit in reply filed by the respondent - plaintiff and the impugned order.

6. Admittedly, when application Exhibit-123 was filed, the suit was pending before Civil Court being Special Civil Suit No. 115 of 2013 and the same ought to have been considered by the Civil Court under Order VIII, Rule 1 read with section 151 of the Civil Procedure Code. Admittedly, the suit is filed for recovery of Rs.1,45,75,726/- and, therefore, the petitioner cannot be deprived of an opportunity to contest the suit on merits.

7. It is necessary to note here that the grounds, which are raised in application Exhibit-123, were also raised in application Exhibit-125 filed by the petitioner under Order III, Rule 1, read with section 151 of the Civil Procedure Code for change of authorized representative of the petitioner – defendant No.2. The Trial Court has accepted said grounds, while allowing

application Exhibit-125 and permitting petitioner to change authorized representative.

8. The Trial Court has observed that no sufficient ground is made out by the petitioner to allow application Exhibit-123 for condonation of delay. In "***Salem Advocate Bar Association V. Union of India***" (2005) 6 SCC 344, the Supreme Court has held that proviso to Rule 1 of Order VIII of the Civil Procedure Code is directory and not mandatory. Since the present suit was initially instituted before Civil Court and was subsequently transferred to Commercial Court, after expiry of 120 days, the Trial Court ought to have considered the application favourably and with a view to give fair opportunity to contest the suit on merits, ought to have permitted the petitioner to file written statement, by condoning delay. The impugned order, therefore, cannot be sustained.

9. In the result, following order -

ORDER

- A. Writ petition is allowed.
- B. Impugned order dated 18th February, 2022 passed by learned District Judge -2, Jalgaon below Exhibit-123 in Commercial Suit No. 2 of 2019, is hereby quashed and set aside.

- C. Application Exhibit-123 is allowed, subject to petitioner paying cost of Rs.50,000/- to the plaintiff in Trial Court, within two weeks from the date of receipt of writ of this order.
- D. Petitioner shall file written statement within two weeks from the date of receipt of writ of this order.
- E. Considering the fact that the suit is filed in the year 2013, trial of the suit is expedited.

[NITIN B. SURYAWANSHI]
JUDGE