

Ajay

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

WRIT PETITION NO. 10886 OF 2024

Shree Tatyasaheb Kore Warana Sahakari Sakhar
Karkhana Ltd.,

Through its Managing Director

.. Petitioner

Versus

M/s. Global Cane Sugar Services Pvt. Ltd.,

Through its Manager (Accounts)

.. Respondent

-
- Mr. Nitin Gaware Patil, Advocate for Petitioner.

.....
CORAM : MILIND N. JADHAV, J.

DATE : AUGUST 05, 2024.

P.C.:

- 1.** Heard Mr. Gaware Patil, learned Advocate for Petitioner.
- 2.** By virtue of the impugned order dated 13.09.2023 passed in Application below Exhibit “14” in Commercial Suit No.2 of 2022, the Defendant’s Application for seeking to set aside no written statement order dated 12.09.2022 stands rejected. Admittedly, Suit No.2 of 2022 is a Commercial Suit and there is a strict rule of the statutory period of limitation required to be adhered to for filing of written statement. In the present case, it is seen that Defendant was served with the said Suit Summons on 20.05.2022 and statutory period of 120 days expired on 17.09.2022. Admittedly, there is a delay of 46 days. The written statement alongwith the counter claim and list of documents came to be filed by the Defendant on 03.11.2022.

3. The learned Trial Court heard the Application filed below Exhibit “14” and decided the same by adhering to the provisions of Order VIII Rule 1 of the Code of Civil Procedure (for short “**CPC**”) and after going through the citations filed by the parties returned findings in paragraph Nos.10 to 12 of the impugned order.

4. There are two contentions raised by the Defendant in the first instance. The first contention is that in exceptional cases the Court can take into consideration the written statement even after expiry of 120 days. One example given was of the order passed by the Supreme Court in Suo Motu Writ Petition No.3 of 2020 and it is contended that Defendant would be entitled to the benefit of arresting the period of limitation under such extant order of the Supreme Court passed due to Covid-19 pandemic and in that view of the matter, the actual delay would be much less, rather negligible. The Trial Court has rejected the Defendant’s case and rightly so held that the delay of 46 days in this case cannot be equated with the power of the Supreme Court to condone the delay which was done during the Covid-19 pandemic period. I am in complete agreement with the finding returned by the learned Trial Court in so far as the first contention of the Defendant is concerned.

5. In so far as the second contention of the Defendant is concerned, according to him, the provisions of Order VIII Rule 6A(1) of

the CPC allow the Defendant to file a counter claim even subsequent to the filing of the written statement and upto the framing of issues despite there being a delay to file the same. According to Mr. Gaware Patil, learned Advocate for Defendant, considering the imprimatur of the provisions of Order VIII Rule 6A, he would urge that the Court should consider that it will always be open to the Defendant to file his counter claim pursuant to filing of the written statement and at any point of time until the framing of issues and hence the counter claim should be permitted.

6. In support of this submission, he would refer to and rely upon the decision of the Supreme Court in the case of ***Ashok Kumar Kalra Vs. Wing CDR, Surendra Agnihotri and Ors.***¹ and draw my attention to the contents of paragraph Nos.18, 56 and 57 thereof to contend that the provisions of Order VIII Rule 6A of the CPC permit filing of counter claim after filing of the written statement and the Court has the discretion to refuse such filing if it is done at a highly belated stage. He would submit that refusal to filing of the counter claim to Defendant would lead to multiplicity of litigation and proceedings by driving the party to file a separate Suit. In the course of submissions, he has referred to the decision in the case of ***Salem Advocate Bar Association T.N. Vs. Union of India***² and more particularly paragraph No.21 to submit that the provisions of Order

1 (2020) 2 SCC 394

2 (2005) 6 SCC 344

VIII Rule 10 of CPC state that the Court has wide power to allow the filing of counter claim after filing of written statement, as it thinks fit.

7. In the present case, it is seen that the written statement and the counter claim are both filed together. Assuming for the sake of argument even if the counter claim is filed subsequently, both the aforesaid decisions i.e. the decision in the case of *Ashok Kumar Kalra* (*1st Supra*) as also the decision in the case of Salem Advocate Bar Association (*2nd Supra*) do not come to the assistance of the Defendant. In both these decisions, it is seen that they both proceed on the premise that the written statement is filed and the right that would then accrue to the Defendant on filing of the written statement is to file the counter claim thereafter. In the present case in the first instance itself the right of the Defendant to file the written statement stands ousted due to the statutory provisions of law itself and in that view of the matter, the plea of the Defendant to permit his counter claim to be taken on record as argued by the Defendant cannot be countenanced in isolation without there being a written statement containing the defence of the Defendant. This is so because an argument or plea of counter claim is always based upon the denial of the Defendant in his written statement of the assertions of the Plaintiff in the Suit plaint which will give rise to the claim in the counter claim. In this view of the matter, I am in complete agreement with the findings returned by the learned Trial court in paragraph Nos.9 to 13

of the impugned order, which for the sake of reference are reproduced herein below:-

“9. The proviso to O.8 R.1 of CPC as applicable to the commercial suits reads as under :

“Provided that where the defendant fails to file the written statement within the said period of thirty day, he shall be allowed to file the written statement on such other day, as may be specified by the Court, for reasons to be recorded in writing and on payment of such costs as the Court deems fit, but which shall not be later than one hundred twenty days from the date of service of summons, and on expiry of one hundred twenty days from the date of service of summons, the defendant shall forfeit the right to file the written statement and the Court shall not allow the written statement to be taken on record”.

10. From the language of the above proviso, it is clear that it is mandatory in nature which leaves no discretion with the Court to allow the written statement to be filed beyond the prescribed period of 120 days. The objection of the defendant that the period of 120 days was going to expire on 17/9/2022 but before that, ‘No w.s.’ order was passed on 12/9/2022 has no substance. The law does not permit the defendant to exhaust entire period of 120 days thereby, precluding the Court from passing the ‘No w.s.’ order. In fact, the period of limitation for filing written statement is 30 days. Further period is at the discretion of the Court to be extended on showing sufficient cause or exceptional an extraordinary circumstance. The ‘No w.s.’ order was passed on 12/9/2022 because the matter was fixed on that date for filing written statement by the defendant which was not filed. The defendant was not precluded from filing it on or before 17/9/2022, by showing the just ground to allow it to file the written statement.

11. The second contention of the defendant is that the defendant intends to file not only the written statement but a counter claim which is within limitation. To deal with this aspect, the provisions of O.8, R.6A(1) of CPC which reads that -

“A defendant in a suit may, in addition to his right of pleading a set off under Rule 6, set up, by way of counter claim against the claim of the plaintiff, any right or claim in respect of a cause of action accruing to the defendant against the plaintiff either before or after filing of the suit but before the defendant has delivered his defence or before the time limited for delivering his defence has expired, whether such counter claim is in the nature of a claim for damages or not”.

12. The plain language of this provision makes it clear that it is incumbent upon the defendant to deliver his defence before the

time limited for it along with the counter claim. Thus, the plea of counter claim cannot be considered in isolation without there being written statement containing the defence of the defendant.

13. Upshot of the above discussion is that the written statement is sought to be filed after 46 days from the date of expiry of the period of 120 days provided for filing the written statement in commercial suit. The Court has no power to extend such period as the proviso applicable to the commercial suit is mandatory in nature. No other extraordinary or exceptional circumstance has been put forth by the defendant which would entitle him to claim exemption from delay to entertain his written statement. The application sans merit and is therefore, liable to be rejected. Hence, the order.

ORDER

The application is rejected.”

8. I find no reason to interfere with the cogent reasons returned by the learned Trial Court in the order dated 13.09.2023. The said order is sustained and upheld. However, it shall not preclude the Defendant from filing a separate Suit if permissible in respect of any claim that the Defendant may have against the Plaintiff provided filing of such separate Suit and maintaining such action is available to the Plaintiff in accordance with law.

9. With the above directions, Writ Petition is dismissed.

[MILIND N. JADHAV, J.]

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AJAY TRAMBAK
UGALMUGALE
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