

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

WRIT PETITION NO. 12855 OF 2015

M/s. Parsik Industries

..Petitioners

Vs

Chaudhary labels Pvt. Ltd,

.. Respondents

Mr.Vinay M. Bhate, Advocate for Petitioners.

Mr.Firoz Bharucha i/b J.M.B Partners, Advocates for Respondents.

CORAM : R.G.KETKAR,J.

DATE : 05/02/2016

PC:

1. Heard Mr. Vinay Bhate, learned counsel for the petitioners and Mr.Firoz Bharucha, learned counsel for the respondents at length.

2. By this petition under Article 227 of the Constitution of India, the petitioners have challenged the judgment and order dated 29.10.2015 passed by the learned Judge, presiding over Court Room no.27 of the Bombay City Civil Court at Greater Bombay in Notice of Motion No 2850 of 2015 in Summary Suit No.7870 of 1996 (High Court Summary Suit No.2662 of 1996). By that order, the learned trial Judge dismissed the notice of motion taken out by the petitioners, hereinafter referred to as plaintiffs, seeking permission to file written statement to the set off

claimed by the respondents after condoning the delay in submitting the written statement.

3. Initially on the Original Side of this Court, the plaintiffs instituted Summary Suit against the respondents, hereinafter referred to as 'defendants', inter alia, for recovery of sum of Rs.4,83,321/-. On 9.11.1998 the defendants filed written statement in which set off was claimed. In the year 2012, suit was transferred to the Mumbai City Civil Court because of enhancement of pecuniary jurisdiction. On 23.7.2014 issues were framed. On behalf of the plaintiffs, affidavit of evidence was filed on 22.8.2014. Additional issues were framed on 9.12.2014 in view of set off claimed by the defendants. The plaintiffs filed purshis Exh.26 closing their evidence. The witness of defendants filed affidavit in examination-in-chief and was partly cross examined by the plaintiffs on 14.7.2015. It is at that stage the plaintiffs took out present motion on 4.8.2015 seeking permission to file written statement to the set off claimed by the defendants after condoning delay. By the impugned order, the learned trial Judge rejected the motion.

4. Mr. Bhate submitted that along with the Motion the plaintiffs have filed written statement to the set off of the defendants. Inadvertently, the plaintiffs did not realise that the defendants have claimed set off in the written statement and

therefore, did not file their written statement opposing the set off. The plaintiffs did not find any counter claim set up by the defendants in the written statement. However, at the time of leading of evidence, the plaintiffs realised this fact. If the plaintiffs are not given opportunity to oppose the same, it may be construed that the plaintiffs are conceding to the claim of set off. It is necessary in the interest of justice to allow to the plaintiffs to file written statement in the set off more so when along with the motion the plaintiffs have annexed written statement dated 4.8.2015.

5. On the other hand Mr. Bharucha supported the impugned order. He submitted that for the reasons stated in para 3 of the impugned order, no case is made out for interference.

6. I have considered the rival submissions made by the learned counsel appearing for the parties. I have also perused the material on record. It is not in dispute that on 9.11.1998 the defendants filed written statement wherein they have claimed set off. The plaintiffs ought to have filed written statement to the set off claimed by the defendants within 30 days. Admittedly the plaintiffs did not file written statement to the set off. The suit was transferred from the Original Side of this Court to the city Civil Court in the year 2012. Issues were framed on 23.7.2014. In view of the set off claimed by the defendants, additional issues

were framed on 9.12.2014. It is not in dispute that in the presence of the Advocate appearing for the parties, additional issues were framed on 9.12.2014. The plaintiffs filed evidence closure pursuant to Exh.26. The witness of defendants filed their examination-in-chief and witness was cross examined partly by the plaintiffs on 14.7.2015. It is at that stage on 4.8.2015 the plaintiffs took out motion. In my opinion, after perusing the reasons given in paragraphs 4 and 5 of the affidavit in support and for the reasons assigned in paragraph 3 of the impugned order, no case is made out by the plaintiffs for condoning the delay. The learned trial Judge rightly rejected the motion. The learned trial Judge rightly observed that if at this stage the plaintiffs are allowed to file written statement it will amount to reopening of trial. Reasons given for condonation of delay by the plaintiffs are not sufficient. In view thereof, Petition fails and the same is dismissed.

7. It is, however, expressly made clear that where a decree is appealed from by the petitioner, any error, defect or irregularity in the impugned order, affecting the decision of the case, may be set forth as a ground of objection in Memorandum of Appeal as contemplated by Section 105(1) of C.P.C.

(R.G.KETKAR, J.)