

Urmila Ingale

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 12333 OF 2015

Shri Ashok Chintamani Vasulkar .. Petitioner
Vs.
Smt.Mohini Narayan Vasulkar and ors. .. Respondents

Mr.Vilas B.Topkar, for the Petitioner.
Mr.Siddhartha R.Ronghe, for the Respondents No. 1 to 4
& 6.

CORAM : M.S.KARNIK, J.

DATE :16th SEPTEMBER 2019

P.C. :

. Heard learned Counsel for the petitioner.

2. The petitioner is original defendant No.1. Respondent No.4 - original plaintiff had filed Suit for seeking half share in the business. It is the contention of the petitioner - original defendant No.1 that he has half share in the suit property. Accordingly, he had filed the written statement.

3. Defendant No.3 had filed counter claim claiming that he has 1/4 th share in the suit property. The Suit came to be dismissed for non-prosecution. However, insofar as the counter claim is concerned, the same proceeded and the trial Court decreed the counter claim. Defendant No.3 was given 1/5th share in the suit property along with others.

4. Defendant No.1 filed an application for setting aside the order decreeing the counter claim. According to the petitioner - defendant No.1, defendant No.1 was not heard and therefore the decree is an exparte decree. There was delay of 8 days in filing the application for setting aside exparte decree. Defendant No.1 therefore prayed for condonation of 8 days delay in filing the application for setting aside exparte decree. The trial Court rejected the said application by impugned order dated 20/10/2015. Learned Counsel for the petitioner submitted that the trial Court has adopted hyper technical approach by rejecting the

application for condonation of 8 days delay. He submitted that the petitioner was 74 years of age at the relevant time and he is suffering from illness. Learned Counsel for defendant No.3 in whose favour the counter claim is decreed submitted that defendant No.1 had not only filed written statement in the proceedings, but had also participated in the counter claim at all stages. According to him, said decree cannot be said to be an exparte decree. While supporting the order passed by the trial Court, learned Counsel would submit that the delay in filing the application cannot be condoned. According to him, application for setting aside exparte decree itself is not maintainable as the order passed by the trial Court allowing the counter claim cannot be said to be an exparte decree. He has objection to the maintainability of the application. He has moreover submitted that along with the application, the petitioner – defendant No.1 has not submitted any document to show that he was suffering from any illness. For all these reasons, learned Counsel would submit that the

trial Court was justified in rejecting the application.

5. In my opinion, the order passed by the trial Court calls for interference. There is delay of 8 days in filing the application for setting aside exparte decree. As on the date of filing of the application, the petitioner was 74 years of age. The order passed by the trial Court records that xerox copy of medical certificate has been filed along with the application. However, the trial Court did not place reliance on the said xerox copy as the petitioner failed to produce the original on record.

6. Considering that the petitioner is 74 years of age and the delay is of 8 days in filing the application, in my opinion, the trial Court should have condoned the delay. The question whether application for setting aside exparte decree is maintainable or not is kept open. All objections of the defendant No.3 to the maintainability of the application for setting aside exparte decree are kept open. The delay in filing the

application is condoned. The impugned order of the trial Court is set aside. The trial Court is directed to decide the application for setting aside ex parte decree in the counter claim on its own merits.

7. The Writ Petition is allowed in the above terms with no order as to costs.

(M.S.KARNIK, J.)