

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

WRIT PETITION NO.1333 OF 2019

Ramesh Shivaji Hakke

... Petitioner

Vs.

Sunil Gopi Marwadi

... Respondent

.....

Mr. Sudhir S. Hardikar for the Petitioner.

Mr. Gautam Hiranandani I/b. Mr. C.G. Gavnekar for the Respondent.

.....

CORAM : M. S. KARNIK, J.

DATE : 30th AUGUST, 2019.

P. C.:

1. Heard learned counsel for the petitioner and learned counsel for the respondent.

2. By this petition filed under Article 227 of the Constitution of India the petitioner is challenging the order dated 25.9.2018 passed by the Trial Court rejecting the application Exhibit 121 and Exhibit 123 filed by the petitioner. The petitioner is the original defendant. The plaintiff had filed a suit for declaration and injunction. The defendant filed his written statement at Exhibit 18 and raised his defence. The defendant preferred a counter claim in the written statement at Exhibit 18.

The plaintiff has filed his written statement/reply at Exhibit 22 to the counter claim. The Trial Court framed issues at Exhibit 50 on the basis of these pleadings.

3. The plaintiff examined himself and thereafter cross examined by the defendants. The stage before the Trial Court was for the defendant to lead his evidence. At that stage the application was moved by the defendant under Order VI Rule 17 of the Code of Civil Procedure for amendment of the written statement and counter claim. The said application was filed on 9.1.2017.

4. The defendant and his advocate remained absent when the matter was called out. The Trial Court passed the order dated 4.11.2017 and 'filed' the application as the defendant and his advocate did not appear in the Court to prosecute the application. The Trial Court was of the opinion that the defendant had lost interest in the matter.

5. Thereafter, the defendant filed an applications for setting aside no evidence order at Exhibit 121 and consequential

application Exhibit 123 for setting aside the order dated 4.11.2017 passed below Exhibit 114 and for deciding Exhibit 114 on merits. The Trial Court for the reasons mentioned in the order dated 25.9.2018 rejected applications Exhibit 121 and 123.

6. Learned counsel for the petitioner invited my attention to the averments made in the applications Exhibit 121 and 123 to point out that it was on account of some mistake in the recording of the dates by the concerned Clerk that the concerned advocate did not notice the date of hearing of the suit. Learned counsel pointed out that not only had the defendant filed the written statement but also filed counter claim and was certainly interested in contesting the suit. Learned counsel would submit that an application was made under Order VI Rule 17 of the Code of Civil Procedure for amendment of the written statement at Exhibit 114. He would submit that an opportunity be given to the defendant to contest application Exhibit 114 and no evidence order be set aside.

7. Per contra, learned counsel appearing on behalf of the petitioner-original defendant supported the order passed by the

Trial Court. He would submit that Trial Court for valid reasons has rejected the applications. He would further submit that the reasons given by the petitioner that the Clerk was responsible for the default is not at all a valid reason. According to him, it is the responsibility of the concerned advocate for noting the correct dates. For all these reasons he would support the order of the Trial Court contending that the petitioner is utterly negligent in contesting the suit.

8. I have heard learned counsel. I have gone through the order passed by the Trial Court. The defendant and his advocate were absent on 4.11.2017 when the matter was called out. The Trial Court dismissed the matter in default observing that the defendant had lost interest in the matter.

9 Thereafter, applications Exhibit 121 and 123 were filed by the defendant stating the reasons as to why the advocate for the defendant could not remain present on 4.11.2017. It is prayed that no evidence order be set aside.

10. In my opinion, the reasons mentioned in the application for non appearance of the defendant and his advocate

on 4.11.2017 needs to be accepted in the interest of justice. No doubt the defendant should have contested the suit diligently and remained present on 4.11.2017 to contest the suit. The defendant however should not be deprived of an opportunity to contest the suit for his non appearance on 4.11.2017 for the reasons stated by him. The plaintiff can always be compensated with appropriate costs for default on the part of the defendant. The explanation given by the defendant that there was mistake of his Clerk in recording the correct date deserves to be accepted.

11. Hence the following order :-

ORDER

1. The Petition is allowed.
2. The impugned order dated 25.9.2018 is set aside.
3. The order dated 4.11.2017 is set aside.
4. The application Exhibit 121 and 123 stand allowed.

12. The Trial Court to consider the application Exhibit 114 on its own merits and in accordance with law. The Writ Petition is allowed subject to payment of cost of Rs.10,000/- to the

respondent. The cost to be deposited in the Trial Court within a period of two weeks from today which the respondent is permitted to withdraw.

(M. S. KARNIK, J.)