

**ORDER BELOW EXH.114.**

The defendant No.33 filed the application for setting aside 'Dismissal in Default' order passed against him below Exh.64 dt. 13/02/2023. The application is supported by affidavit. Say of the plaintiff was called thereon.

2) Ld. Adv. Shri. A.S.Mane for defendant No. 33 has submitted that, due to service, death of child of defendant No. 33, due to sorrow, due to COVID-19 pandemic and other reasons, the defendant No. 33 was unable to remain present in the Court and unable to prosecute his counter claim. Therefore, dismissal in default order of the counter claim was passed against him. In order to decide the counter claim on its merits and in the interest of the justice, the application may be allowed.

3) Ld. Adv. Shri. P.K.Gaikwad for plaintiff has submitted that, reasons in the application are false and not justifiable. Defendant No. 33 was discharging official duties and was taking responsibilities of his family. He could have proceeded with the counter claim through his counsel. The defendant No. 33 deliberately remained absent and prolonged the proceeding. Even, initially, he caused huge delay in filing written statement. Despite opportunities being given, he deliberately prolonged the counter claim. With this application he is trying to prolong the suit and counter claim. It caused prejudice to the plaintiff. Hence, he prayed to reject the application. Alternatively, he prayed to impose costs of Rs. 10,000/-, if the application is allowed.

4) Perused the application, say and record. Heard both sides. Undisputedly, 'Dismissal in Default order' of the counter claim was passed against defendant No.33 below Exh.64. At the stage of arguments, the defendant No.33 moved this application.

5) Through this application, the defendant No.33 has shown willingness to prosecute his counter claim. Therefore, though, dismissal in

default order in counter claim is passed but, the main suit being pending and this being a Trial Court, an opportunity is required to be given to the defendant No.33 for bringing out his defence and for deciding the suit as well as counter claim on its merits. If, the application is allowed then no prejudice would be caused to the plaintiffs. Whereas, if, the application is rejected then, the defendant No.33 would certainly prevent, from bringing out his case. But, as stated above, the defendant No.33 has caused delay. Therefore, said delay has to be compensated by imposing necessary costs. Thus, the application is required to be allowed subject to costs of Rs.1,200/-, which appears to be reasonable, considering the facts of the case. The suit is old one. Therefore, the defendant No. 33 is required to be directed to proceed with trial of the suit expeditiously. Hence, following order is passed.

### **ORDER**

- i) The application (Exh.114) is allowed subject to costs of Rs.1,200/- to be paid to the plaintiff by the defendant No.33 on or before next date. After payment of costs, dismissal in default order of the counter claim (Exh.64) passed against the defendant No. 33 is set aside.
- ii) The defendant No. 33 shall expediate trial of the suit and counter claim.

Date :- 17/10/2023.

( P. S. Girgaonkar )  
Civil Judge (Jr. Div.)  
Patan.