

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 3867 OF 2011**

Vallimohammed Nijamsaheb
Mulani and Ors

Petitioners

Vs

Samir Jabbar Mulani and Ors

.. Respondents

Mr. K.P. Shah i/b P.B.Shah, Advocate for Petitioners.

Mr. Nitin P. Dalvi, Advocate for Respondents.

CORAM : R.G.KETKAR,J.

RESERVED ON : 02/07/2015

PRONOUNCED On : 07/07/2015.

ORDER:

1. Heard Mr. K.P.Shah, learned counsel for the petitioners and Mr. Nitin Dalvi, learned counsel for the respondents at length.

2. By this Petition under Article 227 of the Constitution of India, original plaintiffs have challenged the Judgment and order dated 30.3.2011 passed by the learned Civil Judge, Jr. Dn., Madha, below Exhibit - 29 in Regular Civil Suit No.128 of 2010. By that order, the learned trial Judge set aside 'No.W.S. and No Say' order dated 5.1.2011 below Exhibit 1 and application for temporary injunction against respondents no.1 to 4 subject to costs of Rs.4000/-. Defendants no.1 to 4 were directed to deposit costs of Rs.1000/- each. After depositing costs, defendants no. 1 to 4 are permitted to file Written Statement and Say on record.

3. In support of this Petition, Mr. Shah submitted that the petitioners, hereinafter referred to as 'plaintiffs', instituted suit for perpetual injunction restraining the defendants from causing

obstruction to possession of the properties as more particularly described in paragraph 1 of the Plaint. He submitted that on 29.6.2010, the learned trial Judge issued summons to defendants for their appearance and answering the claim and for filing Written Statement of their defence, returnable on 6.7.2010. By order dated 5.1.2011, the learned trial Judge passed 'No W.S. and No Say' order. It was recorded therein that defendants no.1 to 4 appeared through G.S.Trimbake, Advocate at Exhibit-16 on 6.7.2010. Till date they did not file Written Statement and Say. They had sought time from time to time for filing Say and Written Statement. The learned trial Judge, therefore, ordered suit and application Exhibit-5 to proceed without Written Statement and Say respectively.

4. Mr. Shah submitted that on 20.1.2011 Purshis was filed on behalf of the plaintiffs that their oral evidence is complete. On 22.2.2011 the defendants filed application at Exhibit-29 for setting aside 'No W.S.' and 'No Say' order. He submitted that, however, no prayer was made for condonation of delay. The plaintiffs resisted application by filing reply dated 16.3.2011. It was contended that the reasons given in the application that defendant no.1 was not well and, therefore important documents and information could not be furnished by him, are patently false. He submitted that in fact defendant no.1 Sameer J. Mulani had attended office of Sub Registrar in connection with registration of

documents on 10/11/2010, 15/12/2010, 20/12/2010, 4/1/2011. The learned trial Judge, without considering the material on record as also without appreciating that no prayer for condonation of delay was made, passed the impugned order permitting the defendants to file Written Statement and Say. He submitted that the order passed by the learned trial Judge is without jurisdiction as unless and until delay is condoned the Court cannot enter into merits of the case. For all these reasons, he submitted that the impugned order deserves to be set aside.

5. Mr. Dalvi fairly stated that no prayer was made out for condoning the delay. He submitted that since the dispute is between brothers, the trial Court may be directed to dispose of the suit in a time bound manner. In any case, he submitted that if the Court is inclined to set aside the impugned order, Application Exhibit-29 may be restored to the file of the Court and the defendants may be permitted to amend application setting out therein sufficient cause that prevented them from filing application earlier as also praying for condonation of delay.

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 5.1.2011 the learned trial Judge had passed 'No W.S.' order and also 'No Say' to application Exhibit-5. Defendants no.1 to 4 filed application Exhibit-29 on 22.2.2011. Perusal of the application at Exhibit-29

shows that the defendants did not pray for condoning the delay in filing the application on 22.2.2011. Perusal of the say filed by the plaintiffs on 16.3.2011 along with Annexure was not considered by the learned trial Judge for finding out whether the defendants were justified in not filing Written Statement and Say. The learned trial Judge also noticed that no prayer for condonation of delay was made. Thus, the order passed by the learned trial Judge, without condoning the delay and entering into merits, is wholly without jurisdiction and on this ground alone is liable to be set aside. At the same time, I find request of Mr Dalvi to grant leave to amend application Exhibit-29 is reasonable. Hence, Petition succeeds and is disposed of in the following terms:

- (i) The impugned order dated 30.3.2011 is quashed and set aside. Application at Exhibit-29 is restored to the file of the trial Court. Defendants no.1 to 4 are granted leave to amend application Exhibit-29 for incorporating grounds for condoning the delay as also praying for condoning the delay.
- (ii) The learned trial Judge will decide the application Exhibit-29 afresh on the basis of material on record and in accordance with law uninfluenced by observations made herein.
- (iii) Rule is made absolute accordingly with no order as to costs.

(R.G.KETKAR, J.)