

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

WRIT PETITION NO. 6787 OF 2015

Shri Suresh Waman Jadhav

Petitioner

Vs

1. Smt. Mangal Waman Jadhav
and Ors.

.. Respondents

Mr. Vivek V. Salunke, Advocate for the petitioner.

CORAM : R.G.KETKAR,J.

DATE : 07/08/2015

PC:

1. Heard Mr. Vivek Salunke, learned counsel for the petitioner at length.

2. By this Petition under Article 227 of the Constitution of India, original plaintiff has challenged the Judgment and order dated 12.12.2014 passed by the learned Jt. Civil Judge, Jr. Dn., Saswad, below Exhibit 65 in R.C.S. No. 12 of 2014. By that order, the learned trial Judge allowed the application filed by respondents no.1 to 4 and set aside 'No Say and No W.S.' order. Mr. Salunke submitted that after the suit was instituted by the plaintiff, suit summons was served on defendants no.1 to 3 on 10.1.2014. On 21.1.2014, they appeared through Advocate and sought adjournment for filing Written Statement and Say. On 14.5.2014, defendant no.4 was served with suit summons. On 17.6.2014 defendant no.4 appeared through Advocate and sought time for filing Say and Written Statement. However,

defendants no. 1 to 4 thereafter did not appear in the suit. On 23.4.2014, learned trial Judge passed order 'No Say and No W.S' against defendants no.1 to 3. Similar order was passed on 5.9.2014 against defendant no.4. He submitted that defendants no.1 to 4 filed application on 10.11.2014 for setting aside 'No Say and No W.S.' order. In so far as defendants no. 1 to 3 are concerned, there is delay of 7 months. In so far as defendant no.4 is concerned, there is delay of 3 months in applying for setting aside 'No Say and No W.S.' order. He submitted that no case is made out for setting aside orders of 'No Say and No W.S.'. Defendants no.1 to 4 contended that they belong to Wadar community and they have no knowledge about court procedure. However, since they were represented by Advocates, the said explanation cannot be accepted.

3. Mr. Salunke further submitted that on 9.1.2014, the learned trial Judge directed the defendants to maintain status-quo over the suit property and especially not to create third party interest in favour of third party. Though the defendants no. 1 to 4 were duly served, notwithstanding the order of status-quo, defendants no.1 to 3 executed Agreement of sale styled as 'Visar Pavti' on 12.2.2014 in favour of Pradip Machinder Ghone. In view of the conduct of defendants no.1 to 3 also, the learned trial Judge was not justified in passing the impugned order.

4. I have considered the submissions advanced by Mr

Salunke. I have also perused the material on record. As noted earlier, defendants no.1 to 3 were served with suit summons on 10.1.2014. On 21.1.2014, they appeared through Advocate and sought adjournment for filing Written Statement and Say. As far as defendant no.4 is concerned, he was served with suit summons on 14.5.2014. Defendant no.4 appeared through Advocate on 17.6.2014. Defendants no.1 to 4 sought time for filing Say and Written Statement. However, since they did not file Say and Written Statement and on 23.4.2014, the learned trial Judge passed 'No Say and No W.S.' order against defendants no.1 to 3. Similar order was passed against defendant no.4 on 5.9.2014. Defendants no.1 to 4 filed application Exh.65 on 10.11.2014, inter alia, contending that they belong to Wadar community. They are not aware of the court procedure. They further contended that after service of the suit summons, they approached the plaintiff for settlement and the parties decided to settle matter amicably and plaintiff represented that he will withdraw the suit. Defendants no. 1 to 4 contended that in view of this assurance they did not meet their advocates and the defendants remained absent before the Court. Having regard to the fact that defendants no. 1 to 4 belong to backward community as also having regard to the fact that the learned trial Judge accepted their explanation, I do not find that this is a fit case for exercising powers under Article 227 of the Constitution

of India. The explanation offered by defendants no. 1 to 4 is plausible and the learned trial Judge has held that Order VIII, Rule 1 is directory in nature and not mandatory. The limitation prescribed in Order VIII, Rule 10 basically is for expediting trial and not to scuttle it. The learned trial Judge has passed discretionary order. It cannot be said that the discretion exercised by the learned trial Judge is either arbitrary, capricious or perverse. Having due regard to the fact that there was delay of 7 months as far as defendants no. 1 to 3 are concerned and the delay of 3 months as far defendant no.4 is concerned, I do not find that this is a fit case for invoking jurisdiction under Article 227 of the Constitution of India, more so when learned trial Judge has permitted defendants no.1 to 4 to file Written Statement subject to costs of Rs. 4000/-.

5. As far as grievance made by Mr. Salunke that despite status quo order dated 9.1.2014, defendants no.1 and 3 executed Agreement of Sale styled as 'Visar-pavti' on 12.2.2014 is concerned, liberty is reserved to the plaintiff to take out appropriate proceedings. Mr. Sakhare submits that the plaintiff has already filed affidavit of evidence in lieu of examination-in-chief. In view thereof, the plaintiff is at liberty to file additional/further affidavit of evidence in lieu of examination-in-chief after W.S is filed by defendants no. 1 to 4. It is made clear that I have not expressed any opinion as regards merits of the

proposed proceedings. Subject to above, Petition fails and the same is dismissed. 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 the memorandum of appeal as contemplated by Section 105(1) of C.P.C.

(R.G.KETKAR, J.)