

IN THE HIGH COURT OF JUDICATURE AT MUMBAI
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.8601 OF 2013

Dr. Ms Ferheiz Cooverji Bharucha and another ... Petitioners
Vs.
Feriz Firdaus Kothavala ... Respondent

Mr. M. S. Ansari i/b. Mr. Harshad Bhadbhade for Petitioners.
Mr. Mihir S. Raje for Respondent.

CORAM : R. G. KETKAR, J.
DATE : 2ND JULY, 2015

P.C. :

Heard Mr. Ansari, learned Counsel for petitioners and Mr. Raje, learned Counsel for respondent at length.

2. Rule. Mr. Raje waives service for respondent. At the request and by consent of the parties, Rule is made returnable forthwith and the Petition is taken up for Final Hearing.

3. By this Petition under Article 227 of the Constitution of India, original defendants have challenged the judgment and order dated 29.04.2013 passed by the learned Joint Civil Judge, Senior Division, Pune below exhibits 28 and 29 in Special Civil Suit No.1855 of 2011. By that order, the learned trial Judge rejected the application at exhibit-28 made by the petitioner for setting aside 'No W.S.' Order dated 14.02.2012 as also application at exhibit-29 seeking permission to file written statement.

4. In support of this petition, Mr. Ansari submitted that on 12.01.2012 after service of suit summons, petitioners had filed application under Order VII Rule 11 of the Code of Civil Procedure,

1908 (for short 'C.P.C.') for rejecting Plaint on the ground that it is barred by limitation as also hit by the principles of res judicata. On 14.10.2012, application made by the petitioners was rejected by the trial Court. Aggrieved by that decision, petitioners preferred Civil Revision Application in this Court, which was also dismissed on 08.08.2014. In the meantime, petitioners filed application at exhibit-28 on 07.11.2012 for setting aside 'No W.S.' Order. Petitioners also filed application at exhibit-29 for permission to file Written Statement. The learned trial Judge rejected the applications mainly on the ground that in view of the decision of the Apex Court in the case of Saleem Bhai Vs. State of Maharashtra, AIR 2003 SC 759, the learned trial Judge held that application under Order VII Rule 11 C.P.C. has to be decided on the basis of averments made in the Plaint and, therefore, for deciding that application, Written Statement was not necessary. By merely filing application under Order VII, Rule 11 C.P.C. does not give relaxation to the directory rule contemplated under Order VIII, Rule 1 C.P.C.

5. On the other hand, Mr. Raje supported the impugned order. He submitted that the 'No W.S.' Order was passed on 14.02.2012 and application at exhibit-28 was filed on 07.11.2012. He submitted that the learned trial Judge has rightly rejected the application.

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 dispute that the defendants have filed application under Order VII, Rule 11 on 12.01.2012. 'No W.S.' Order was passed on 14.02.2012. It is relevant to note that application under Order VII, Rule 11 C.P.C. was rejected by the trial Court on 14.10.2012. Aggrieved by that decision, petitioners preferred Civil Revision Application in this Court, which was dismissed on 08.08.2014. In my opinion, the learned

trial Judge failed to appreciate that if defendants were to succeed in application under Order VII, Rule 11 C.P.C., there was no occasion for them to file written statement. It is also material to note that on 07.11.2012, petitioners filed application for setting aside 'No W.S.' Order dated 14.02.2012. In view thereof, it cannot be said that defendants were indolent in defending the Suit. In the case of *Shaileja A. Sawant Vs. Sayajirao Ganpatrao Patil*, 2004 (2) Mh.L.J. 419, the learned Single Judge of this Court has held that the provisions of Order VIII, Rule 1 C.P.C. are directory and not mandatory.

7. In view thereof, I am of the opinion that the learned trial Judge has committed error in dismissing the application, more so when written statement was also enclosed with the application dated 07.11.2012 for setting aside 'No W.S.' Order. The impugned order, therefore, deserves to be quashed and set aside subject to payment of costs quantified at Rs.10,000/-. Petitioners shall pay costs to the respondent or deposit in the trial Court under due intimation to the Advocate of the respondent in the trial Court within 2 weeks from today. Applications at exhibits 28 and 29 are allowed. Rule is made absolute in the aforesaid terms.

(R. G. KETKAR, J.)

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