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IN THE HIGH COURT OF JUDICATURE AT MUMBAI

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 9413 OF 2013

Anuj Developers

... Petitioner

Vs.

Smt. Bhamabai Popat @ Krishna Chakankar

S/D., by heirs

1A. Kamal Popat @ Krishna Chandekar and others ... Respondents

Mr.Madhav Jamdar, Advocate for Petitioner.

CORAM : R. G. KETKAR, J.

DATE : 15th JUNE, 2015

P.C. :

. Not on board. At the request of Mr.Madhav Jamdar, taken up in the Production Board.

2. Heard Mr.Madhav Jamdar, learned Counsel for the petitioner. Rule. 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 defendant No. 20 has challenged the judgment and order dated 10/09/2012 passed by the learned Civil Judge, Senior Division, Pune in Special Civil Suit No. 892 of 2012 as also judgment and order dated 08/03/2013 passed by the learned 4th Joint Civil Judge, Senior Division, Pune below Exhibit 26 in Special Civil Suit

No. 892 of 2012. By order dated 10/09/2012, the learned trial Judge passed “No W.S” order. Mr. Jamdar submitted that suit summon was served on defendant No.20 on 17/08/2012 and immediately within 24 days, the learned trial Judge passed “No W.S” order which is in the teeth of Order 8 Rule 1 of the Code of Civil Procedure, 1908 (for short ‘C.P.C.’). He further submitted that the petitioner took out application at Exhibit 26 on 05/01/2013 for setting aside “No W.S” order. In paragraph 2 of that application, the petitioner set out that he is filing the written statement opposing the plaint. By the impugned order, the trial Judge rejected the application.

4. I have considered the submissions advanced by Mr.Jamdar. I have also perused the material on record. Despite service, none appears for the respondent. In view of the order dated 06/01/2014, I have proceeded to decide the petition finally at the stage of admission. The petition was heard on 06/01/2014 when notice before admission was issued to the respondents, returnable on 03/02/2014. The respondents were put to notice that petition will be disposed of finally at the stage of admission subject to the convenience of the Court. Mr.Jamdar submitted that all the respondents are duly served. In fact, respondent No.1 expired leaving behind respondents No. 2 to 4 & 17 who are already on record. That apart, as per order dated 21/01/2015 passed in the

Civil Application No. 2728 of 2014, her legal heirs were also brought on record. He submitted that despite service, respondents have not entered appearance. He submitted that application at Exhibit 26 was rejected by the trial Court on 08/03/2013. He submitted that the orders dated 10/09/2012 and 08/03/2013 deserve to be set aside.

5. As noted earlier, in the order dated 08/03/2013, the learned trial Judge has recorded that suit summon was duly served on defendant No.20 on 17/08/2012. Instead of giving 30 days time as per provisions of Order 8 Rule 1 of C.P.C., the learned trial Judge passed “No W.S” order on 10/09/2012. In my opinion, the learned trial Judge in the first instance was not justified in passing “No W.S” order. Order 8 Rule 1 lays down that the defendant shall, within thirty days from the date of service of summons on him, present a written statement of his defence. Proviso thereto lays down that in case, the defendant fails to file the written statement within a period of thirty days, he shall be allowed to file the same on such other day, as may be specified by the Court, for reasons to be recorded in writing, but which shall not be later than ninety days from the date of service of summons. The learned trial Judge before expiry of 30 days had passed “No W.S” order. The said order cannot be sustained. Secondly, the petitioner filed application at Exhibit 26 on 05/01/2013 and along with the application, he also filed written statement. In my opinion, the learned trial Judge ought to have set

aside “No W.S” order and allowed the application. In case of *Shailaja A.Sawant (Dr.) Vs. Sayajirao Ganpatrao Patil*, **2004(2)Mh.L.J. 419**, the learned Single Judge of this Court considered Rules 9 & 10 of Order 8 and Rule 7 of Order 9 of C.P.C. and it was held that the provisions of Order 8 Rule 1 of C.P.C are directory and not mandatory. However, it does not mean that order extending time to file reply may be passed repeatedly unmindful of and totally ignoring the provision that the extension may not exceed 90 days. This provision has always to be kept in mind while passing the order extending the time to file reply. The Court cannot do it arbitrarily. It can be done only in exceptional cases where the defendant can satisfy the Court that he could not file the written statement within the prescribed period as events were beyond his control. The powers under Rule 1 of Order 8 should be used only in exceptional cases and that too for the reasons to be recorded in writing and cannot be exercised by a defendant as a matter of right. Such exercise of discretion must be judicial and not capricious and in keeping with the spirit of the recent amendment. There could be variety of situations where the Court may have to exercise the power vested in it, such as circumstance or events beyond the control of the defendant. As to the circumstances in which the discretion vested in the Court should be exercised no hard and fast rule can be laid down. For instance, an illness whether natural or accidental which

does not permit the defendant to move from the bed for a long time and such illness is proved by the defendant, or negligence or carelessness of the advocate inviting the complaint for disciplinary action. It all depends on the particular facts of each case. The reasons recorded should reflect the circumstances in which the discretion vested is exercised. An endeavour should be to avoid 'snap decision'. The grounds, such as the advocate was not available, ignorance of law, the relevant documents were not available or any such ground, which could be turned as frivolous, cannot be a ground for the Court to exercise powers vested in it under the provisions of Rule 1 of Order 8 for extending time for filing a written statement beyond the period prescribed under Rule 1 of Order 8 Civil Procedure Code.

6. For all these reasons, the impugned orders cannot be sustained and the same are liable to be set aside. Hence, rule is made absolute in the aforesaid terms with no order as to costs.

7. The impugned orders dated 10/09/2012 passed by the learned Civil Judge, Senior Division, Pune in Special Civil Suit No. 892 of 2012 as also order dated 08/03/2013 passed by the learned 4th Joint Civil Judge, Senior Division, Pune below Exhibit 26 in Special Civil Suit No. 892 of 2012 are quashed and set aside.

8. The trial Court will take on record written statement filed by defendant No.20 along with application at Exhibit 26 dated

05/01/2013 and thereafter, proceed with the suit in accordance with law.

(R. G. KETKAR, J.)