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IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.2780 OF 2016

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| 1. | Sachin Haridas Shinde
Age - 27 years, Occ - Labour | PETITIONERS |
| 2. | Nitin Haridas Shinde,
Age - 25 years, Occ - Labour | |
| 3. | Ku. Manisha @ Kalawati Haridas Shinde
@ Manisha Kalyan Pawar
Age - 23 years, Occ - Household | |
| 4. | Sumanbai Haridas Shinde,
Age - 45 years, Occ - Household
R/o Sambhaji Nagar, Latur
Taluka and District - Latur | |

VERSUS

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| 1. | Babu Ramkishan Koli
Age - 58 years, Occ - Agri & Labour
R/o Pawarwadi,
Taluka and District - Osmanabad | RESPONDENTS |
| 2. | Haridas Eknath Shinde,
Age - 47 years, Occ - Agri
R/o Sambhaji Nagar, Latur
Taluka and District - Latur | |
| 3. | Kashinath Venkatrao Salunke,
Age - 72 years, Occ - Agri.
R/o Khadgaon, Taluka and District - Latur | |
| 4. | Fayaz Dadamiya Shaikh,
Age - 54 years, Occ - Agri.
R/o Khadgaon, Taluka and District - Latur | |

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Mr. S. G. Jadhavar a/w Mr.N. D. Kendre, Advocate for petitioners
Mr.Amol Joshi h/f Mr.R.S.Deshmukh, Adv. for respondent No.1

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[CORAM : SUNIL P. DESHMUKH, J.]

DATE : 26th JULY, 2016

ORAL JUDGMENT :

1. Rule. Rule made returnable forthwith and heard learned advocates for appearing parties finally, with consent.
2. Learned advocate for the petitioners submits that the petitioners had instituted regular civil suit No.743 of 2006 seeking partition and separate possession of suit properties including the ones parted with in favour of present respondent No.1 and others.
3. Respondent No.1 had been duly served with summons and he had appeared through an advocate. However, subsequently, he did not attend to the court proceedings and eventually the suit proceeded further culminating into dismissal of the suit in respect of the appearing defendants and allowed against respondent No.1.
4. Respondent No. 1 subsequently had lodged an application purportedly pursuant to Order IX, Rule 13 of the Civil Procedure Code contending that he had been prevented from appearing under a sufficient cause when the suit was called on for hearing.

5. The application at the initial stage before the trial court was rejected, however, in appeal therefrom the order of the trial court was reversed granting the application under Order IX, Rule 13 of the Civil Procedure Code in Miscellaneous Civil Appeal No. 69 of 2010 under order dated 31st October, 2015 by District Judge, Latur. It is thus, the petitioners are before this court.

6. Mr. Shivprasad Jadhavar, learned advocate appearing for the petitioners vehemently contends that the application under Order IX, Rule 13 of the Civil Procedure Code is not maintainable at all having regard to the admitted position that suit summons had been duly served on respondent No. 1 and that he had engaged an advocate on his behalf. As such, learned advocate contends that the decree passed against respondent No. 1 would not be an *ex parte* decree, which is a prerequisite for an application under Order IX, Rule 13 of the Civil Procedure Code. He further goes on to submit that even otherwise, the application moved under Order IX, Rule 13 of the Civil Procedure Code is devoid of any material contentions, for, it does not specifically refer to that respondent No. 1 had been prevented by any sufficient cause from appearing when the suit was called on for hearing. He as such, submits that the impugned order passed

by the appellate court is unsustainable in fact and in law and the writ petition deserves to be allowed.

7. Opposing aforesaid submissions on behalf of respondent No. 1, Mr. Amol Joshi, learned advocate holding for Mr. Rajendra Deshmukh contends that respondent No. 1 is a labourer and had been living in penury and his financial condition was hand to mouth. He had been away from the court's station for earning livelihood in Mumbai to eke out his existence and under the pathetic conditions, he could not keep informed the advocate appearing for him about his whereabouts and in the circumstances had been unaware of the progress of the suit proceedings. he submits that as such, the decree came to be passed only against respondent No. 1 whereas the decree has been refused to be passed in favour of plaintiff against other purchasers. He further draws attention to that almost all the purchases are contemporaneously made. As such, the immovable property, he could purchase is very close to him and he is in dire need of the same as a source of livelihood for him. Aforesaid apart, according to him, even legally, without seeking declaration in respect of sale deed, the suit was not liable to be decreed. Having such merits in the case, according to him, had he really been able to attend to the court proceedings, the

decision certainly would have been adverse to the interest of the plaintiffs, but for his failure to appear, the decree had been passed against him. He submits that the reasons, which have been given in the application, preventing respondent No.1 from appearing before the court though contested, it would have to be taken into account that a deliberate absence was not conducive to the interest of respondent No. 1. Had the need of the hour been not genuine, he would have, in order to protect his property certainly attended to the proceedings. No benefit is derived by respondent No. 1 in keeping away from the suit proceedings. In fact the decree shows that the absence which was not intentional or deliberate has caused detriment to his interest. He, therefore, submits that the contentions as have been advanced on either side will have to be weighed by a scale which will sub-serve the cause of justice.

8. On perusal of the order passed by the trial court and that by the appellate court and after hearing learned advocate for the parties, it transpires that the trial court has considered that the suit has been decided on merits, since defendant No. 3 had filed written statement, issues were framed and the suit was tried and as such, the court purported to consider that Order IX, Rule 13 of the Civil Procedure Code may not hold the situation. The

appellate court, on the other hand, has taken into account the two citations as have been referred to in the impugned order finding that such an application can be deemed to be maintainable, distinguishing a case relied upon on behalf of the present petitioners. The appellate court has in its discretion, considered it appropriate that having regard to the reasons as were given in the application, that the application will have to be considered properly, which would sub-serve cause of justice and as such, has set aside the trial court's order and substituted the same with its order by allowing the application.

9. Since the petitioner is before this court in the discretionary sphere of powers of this court, I would like to be little loath in interfering with the impugned order *inter alia* for the reasons, contest on merits is considered to be hallmark of the jurisprudence as well as that the inconvenience caused to the petitioner in the process may in such a case be made good by imposition of costs.

10. Apart from aforesaid, yet another consideration which may be relevant is that though the impugned order had been passed on 31st October, 2015, the movement against the same has been made belatedly and quite a few dates before the trial court in the

process had intervened.

11. In view of aforesaid, I am disinclined to invoke the extraordinary jurisdiction in favour of the petitioners, however, to balance the situation, inconvenience caused to the petitioners, deem it appropriate to impose costs on respondent No. 1. As such, respondent No. 1 to deposit a sum of Rs.5000/- in the trial court towards costs for setting aside *ex parte* decree under Order IX, Rule 13 of the Civil Procedure Code by order dated 31st October, 2015 passed by District Judge, Latur in Miscellaneous Civil Appeal No.69 of 2010. The costs be deposited within a period of four weeks from the date of receipt of writ of this order. The trial court is directed that the suit be proceeded with as expeditiously as possible and dispose of the same within a period of six months from the date of receipt of writ of this order. Respondent No. 1 is expected not to cause any interlude in the progress of the suit.

12. Writ petition as such, stands disposed of. Rule stands discharged.

[SUNIL P. DESHMUKH, J.]