

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

**APEAL FROM ORDER NO. 1 OF 2016
WITH
CA/66/2016 IN AO/1/2016**

LAXMAN BALIRAM BORKAR
VERSUS
NARAYAN NAGOJI FATANGALE AND ANOTHER

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Advocate for Petitioner : Mr M M Parghane
Advocate for Respondents : Mr S S Rathi

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CORAM : V.K. JADHAV, J.
Dated: June 16, 2016

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PER COURT :-

1. With the consent of learned counsel for respective parties, heard finally.
2. Being aggrieved by the Judgment and Order passed by the learned District Judge-1, Hingoli, dated 3.12.2015 in RCA No.4/2011, the original plaintiff/respondent before the lower appellate Court preferred this appeal.
3. Brief facts, giving rise to the present appeal, are as under :-
 - a] The appellant/plaintiff instituted a suit bearing RCS No.28/2010 for the decree of perpetual injunction. The respondents/defendants have appeared in the said matter, but failed to file their written statement. In the result, suit

ordered to proceed against defendants without their written statement vide order dated 24.8.2010 below Exh.1. Thereafter, the plaintiff has examined himself and also his witness and placed reliance on the registered sale deed, 7/12 extract, mutation entry, etc. The learned Judge of the Trial Court, after considering the oral and documentary evidence adduced by the plaintiff, decreed the suit of the plaintiff in terms of the prayer clauses with costs. Being aggrieved by the same, original defendants preferred RCA No.4/2011 before the District Court, Hingoli. Learned District Judge, Hingoli by its impugned judgment and order dated 3.12.2015 in RCA No.4/2011 partly allowed the appeal subject to payment of costs of Rs.1,000/- by the defendants payable to the plaintiff as a conditional precedent within seven days from the date of the order and further directed that, on fulfillment of said condition, suit shall be remanded back to the trial court with further direction that the trial court shall provide reasonable opportunity to the defendants to file Written Statement and counter claim, if any, and then proceed with the suit in accordance with law. Learned Judge of the Lower Appellate Court has further directed that trial court to decide the suit within six months from the date of receipt of order and also directed that in case of failure on the part of the defendants to pay or deposit costs as directed

within stipulated period, appeal shall stand automatically dismissed without any reference to the Court. Being aggrieved by the same, original plaintiff has preferred this appeal.

4. Learned counsel for the appellant/original plaintiff submits that, "No W.S." order passed by the trial court on 24.8.2010 below Exh.1, respondents/defendants have not challenged the said order nor filed their W.S. before the trial court with an application for setting aside said 'No W.S.' order. Consequently, the plaintiff has examined himself and examined two witnesses and also proved the registered sale deed placed on record. Learned counsel submits that, learned Judge of the Trial Court after considering the oral as well as documentary evidence adduced by the plaintiff rightly decreed the suit with costs. Learned counsel submits that, lower appellate court has remanded the matter by giving an opportunity to defendants to file their W.S. on record. Learned counsel submits that lower appellate court has not considered the oral and documentary evidence adduced by the plaintiff in support of his contention before the trial court.

5. Learned counsel for respondents/defendants submits that, trial court has given date of hearing in the suit as 22.12.2010 and the said date appears to have been changed and preponed to 2.12.2010. Learned counsel submits that, there is over writing in the said changed date and there is no record to show that changed date was communicated to the respondents/defendants. Learned counsel submits that, further trial court has committed unnecessary haste in disposing of the matter finally even though respondents/defendants filed an application at Exh.41 pointing out about over writing in the changed date/preponed the date. The Learned Judge of the trial court has rejected said application at exh.41 and pronounced the judgment within 12 days from the date of the said order on application exh.41. Learned counsel submits that, lower appellate court has rightly remanded the matter with certain directions. Respondents/defendants have deposited the costs as directed by the lower appellate Court on 5.12.2015 and endorsement to that effect is appearing on the certified copy of the judgment and order passed in RCA No.4/2011. Learned counsel, on instructions, further submits that, even respondents/defendants have filed their WS and counter claim before the Trial Court. Learned counsel submits that there is no substance in the appeal and the appeal is thus

liable to be dismissed.

6. It appears that, the date 22.12.2010 was preponed to 2.12.2010 by making over writing on it. Furthermore, on 2.12.2010 itself, the plaintiff adduced his evidence by way of affidavit of evidence alongwith his witnesses and matter came to be adjourned to 10.12.2010 for cross examination of the defendants. On 10.12.2010 plaintiff filed affidavit of one more witness and also produced original sale deed and closed his evidence. It further reveals that, on the same date, final arguments were heard and matter was posted for judgment on 14.12.2010. On 14.12.2010, respondents/defendants have moved an application Exh.41 for adjournment pointing out the fact that, hearing date has been changed and preponed date has not been communicated to them. However, learned judge of the trial court has rejected said application for the reason that dictation of the judgment has already given to the steno.

7. In the backdrop of these facts, lower appellate court has rightly held that matter came to be decided by the trial court hastily. Even lower appellate court has considered the fact that ample opportunity was given to the defendants for filing their say. Lower Appellate Court has therefore saddled

costs on respondents/defendants and accordingly, remanded the matter. It appears that suit is instituted for relief of perpetual injunction in respect of the landed property. As submitted by the learned counsel appearing for respondents/defendants W.S. is now submitted before the trial court alongwith counter claim. Learned appellate court has even taken care about expeditious disposal of the suit.

8. In view of this, no interference is called for. There is no substance in the appeal. The appeal is thus liable to be dismissed. Hence, following order is passed.

O R D E R

1. Appeal is hereby dismissed.
2. In the circumstances, there shall be no order as to costs.

(V.K. JADHAV, J.)

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aaa/-