

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 5778 OF 2015**

Eknath Anandrao Phalke

Petitioner

Vs

Pandurang Anandrao Phalke and
Ors

.. Respondent

Mr. Sanjeev P. Kadam, Advocate for Petitioner.

CORAM : R.G.KETKAR,J.

DATE : 15/02/2016

PC:

1. Heard Mr. Sanjeev Kadam, learned counsel for the petitioner at length.

2. By this Petition under Article 227 of the Constitution of India, the petitioner has challenged the Judgment and order dated 13.3.2015 passed by the learned Ill Jt. Civil Judge, Jr. Dn., Vaduj, presently on deputation as Jt. Civil Judge, Jr. Dn., Koregaon below Exh.76 in R.C.S. No.67 of 2005. By that order, the learned trial Judge rejected the application made by the petitioner, hereinafter referred to as defendant no.2 seeking permission to file written statement.

3. Respondent no.1, hereafter referred to as 'plaintiff', instituted suit on 29.4.2005 inter-alia for declaration that the properties in paragraphs 1A, 1B, 1C and 1D of the plaint are exclusive owned by him; for perpetual injunction restraining defendants 1 to 4 from creating third party interest; for declaration that the sale deed mentioned in paragraph 1D of the

plaint is void and is not binding on the plaintiff, among other prayers.

4. Defendant nos 1 to 3 filed Vakalatname of advocate D.S.Jadhav on 10.5.2005. They also filed written statement Exh.22 dated 22.6.2005 through Advocate D.S.Jadhav. Defendant no.2, thereafter filed application Exh.76 dated 21.3.2014, inter alia contending that after institution of the suit, defendant no.2 never appeared in the court. Plaintiff called upon by defendant no.2 to appear in the suit. On 3.3.2014 defendant no.2 made application for obtaining certified copy of the written statement Exh.22 and the same was received on 5.3.2014. After perusing written statement, defendant no.2 realized that said written statement does not bear his signature. Defendant no.2 did not approach any Advocate for signing written statement. Defendant no.2 is, therefore, not admitting the contents of the written statement. He therefore sought permission to file written statement annexed along with application Exh.76. In support of this application he also filed affidavit Exh.77 dated 18.3.2014.

5. Mr. Kadam submitted that signature appearing on the written statement Exh.22 is not of defendant no2. In other words, written statement Exh.22 is not filed by defendant no.2. He further submitted that the plaintiff has not objected to the application Exh.76 and defendants no. 5 and 6 have resisted the application on the ground that written statement Exh.22 is filed

by defendant no.2 in support of the case of defendant no.1 and now he wants to support the plaintiff which is not permissible. Mr Kadam submitted that the learned trial Judge observed that signatures of defendant no.2 on the application, Vakalatnama and written statement Exh.22 as well as summons report Exh.16 are similar. That apart, defendant no.9 has filed application after 9 years from the date of receipt of suit summons and after filing of the written statement. Defendant no.2 cannot be permitted to take inconsistent stand in the suit. He submitted that the said reason is wholly irrelevant while considering the application Exh.76. He, therefore, submitted that the impugned order deserves to be set aside.

6. I have considered the submissions advanced by Mr Kadam. I have also perused the material on record. It is not in dispute that defendant no.2 has signed Vakalatnama dated 10.5.2005 of Advocate D.S.Jadhav. It is also evident from the record that written statement Exh.22 is filed through Advocate D.S.Jadhav on 22.6.2005. The present application is filed by defendant no.2 on 21.3.2014. Careful perusal of the application Exh.76 shows that reasons assigned therein are wholly unacceptable. Defendant no.2 claims that after institution of the suit he never appeared in the trial Court and it is only when the plaintiff asked defendant no.2 to appear in the court, he perused the written statement. On 3.3.2014 he applied for certified copy of that written

statement which was received on 5.3.2014 and thereafter defendant no. 2 realized that it does not bear his signature. The reasons given in the application, to say the least, cannot be accepted more so after the period of 9 years. From perusal of the say filed by defendants no. 5 and 6, it appears that defendant no.2 had filed written statement supporting the case of defendant no.1 and now he wants to support the plaintiff. In other words, defendant no.2 has filed application after 9 years thereby changing the stand in favour of the plaintiff. I, therefore, do not find that the learned trial Judge committed any error in passing the impugned order. The reason given in the application explaining delay of 9 years is also not acceptable. Hence, petition fails and the same is rejected. 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 memorandum of Appeal as contemplated by Section 105(1) of C.P.C.

(R.G.KETKAR, J.)