

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO. 7259 OF 2015

Behram Merwanji Sethna

..Petitioner.

Vs

Silloo Dara Zaiwalla and Ors.

.. Respondents

Mr. V.Y.Sanglikar, Advocate for Petitioner.

Mr. Bomi Patel i/b M/s Mulla & Mulla & C.B.&C., Advocates for Respondent no.1.

Mr. Parikshit Barpujari i/b Zaiwalla & Co., Advocates for Respondents no.2 to 4.

**CORAM : R.G.KETKAR,J.
DATE : 06/12/2016**

PC:

1. Heard Mr. V.Y. Sanglikar, learned counsel for the petitioner, Mr. Bomi Patel, learned counsel for respondent no.1 and Mr. Parikshit Barpujari, learned counsel for respondents no.2 to 4 at length.

2. By this Petition under Article 227 of the Constitution of India, the petitioner has challenged the Judgment and order dated 11.6.2015 passed by the learned District Judge, City Civil Court, Bombay in Notice of Motion No.4452 of 2014 in Suit No. 108644 of 1992. By that order, the learned trial Judge dismissed the notice of motion taken out by defendant no.1 for setting aside order dated 16.4.2014 passed in Notice of Motion No.1321 of 2014. By order dated 16.4.2014, the learned trial Judge

allowed that Motion in terms of prayers clause (a) and (b) for taking on record written statement of defendants 2 to 4 by condoning the delay.

3. In support of this petition, Mr.Sanglikar submitted that respondent no.1, hereinafter referred to as 'plaintiff, has instituted suit praying, inter alia, for removal of defendant no.1 as a trustee of private Trust known as 'Merwanjee F. Sethna Trust'. Defendants no.2 to 4 are daughters of the plaintiff. The plaintiff has prayed for declaration that defendants no.2 to 4 are the new trustees of the said Trust in accordance with deed of appointment of new trustees dated 16.3.1992. He submitted that the suit summons was duly served on defendants no. 2 to 4. However, they failed to file written statement. They took out Notice of Motion No.1321 of 2014 for condoning the delay in filing written statement and for taking on record the written statement. The Notice of Motion was not served on defendant no.1. The plaintiff gave no objection and the learned trial Judge allowed the Motion and took on record the written statement of defendants no. 2 to 4. Defendant no.1, therefore, took out Notice of Motion No.4452 of 2014 for setting aside the order dated 16.4.2014 whereby Notice of Motion No.1321 of 2014 was allowed in terms of prayers clause (a) and (b). He submitted that in paragraph 3 of the impugned order, the learned trial Judge observed that though defendant no.1 is the contesting defendant, he has no

right to object defendants no.2 to 4 in filing their written statement on the ground that the plaintiff gave no objection in that regard. He further submitted that the plaintiff and defendants no.2 to 4 are represented by one and the same Advocate. Even till date, he has not been served with written statement of defendants no. 2 to 4. He submitted that as the order was passed on 16.4.2014 in Notice of Motion No.1320 of 2014 without hearing defendant no.1, the learned trial Judge should have allowed the Motion taken out by defendant no.1. However, by the impugned order, the learned trial Judge dismissed the Motion

4. On the other hand, Mr.Patel and Mr. Barpujari supported the impugned order. Mr. Barpujari have tendered copy of the written statement dated 4.3.2014 filed by defendants no. 2 to 4 which is taken on record and marked "X" for identification. The said written statement reads thus:

"Defendants no.2 to 4 are the daughters of the plaintiff abovenamed. Defendants no. 2 to 4 confirm the contents of the plaint and support the plaint. Defendants no.2 to 4 confirm that it is in the interest of justice that the above suit be made absolute."

5. Learned counsel for defendants no.2 to 4 state that defendants no.2 to 4 will not amend the written statement dated 4.2.2014 and proceed with the suit on the basis of the written

statement which is already filed on record. Statement made by the learned counsel for defendants no.2 to 4 is accepted.

6. It nodoubt appears from record that Notice of Motion No.1321 of 2014 was not served on defendant no.1. That Motion was allowed on 16.4.2014 on the basis of reply filed by the plaintiff and after giving no objection for the Motion. In other words, defendant no.1 was not heard before allowing that Motion on 16.4.2014. Perusal of the written statement filed by defendants no.2 to 4 shows that they are merely supporting the plaintiff. In other words, apart from paragraph 1 of the written statement, defendants 2 to 4 have not stated anything as regards merits of the case. In fact, defendants 2 to 4 could have even orally indicated that they support the plaintiff. Instead of that, they have filed written statement which at best can be termed as purshis supporting the plaintiff. Understood thus, I do not find that it will any cause prejudice to defendant no.1. I have already accepted the statement made on behalf of defendants no. 2 to 4 that they will not amend the written statement and will proceed on the basis of written statement already on record. Written statement is taken on record.

7. In view thereof, no case is made out for invocation of powers under Article 227 of the Constitution of India. Petition fails and the same is dismissed.

(R.G.KETKAR, J.)