

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 747 OF 2014**

1.Kashinath Vitthal Patil and Ors ..Petitioners.

Vs

1. Smt. Sarala Kishor Patil and .. Respondents
ors.

Mr. S.P.Thorat, Advocate for Petitioners.

Mr.N.R.Bubna, Advocate for Respondents no. 1 and 2.

CORAM : R.G.KETKAR,J.

DATE : 20/12/2016

PC:

1. Heard Mr.S.P.Thorat, learned counsel for the petitioners and Mr.N.R.Bubna, learned counsel for the respondents at length. Rule. Mr. Bubna waives service on behalf of the respondents. In view of the narrow controversy raised in this petition as also at the request and by consent of the parties, Rule is made returnable forthwith and petition is taken up for final hearing.

2. By this Petition under Article 227 of the Constitution of India, the petitioners, hereinafter referred to as defendants no. 2 and 3, have challenged the Judgment and order dated 27.6.2013 passed by the learned 6th Jt. Civil Judge, Jr. Dn., Malegaon below Exhibit-33 in R.C.S. No.74 of 2008. By that order, the learned trial Judge rejected the application filed by defendants no.2 and 3 for setting aside no written statement order passed on 20.1.2010.

3. Respondents no. 1 to 3, hereinafter referred to as 'plaintiffs', have instituted suit for recovery of possession of one room admeasuring 10'x10', plot no. 13 admeasuring 297.39 sq.meter from Survey no.20/4B, sitaute at Mouze-Soyagaon, Tq. Malegaon, District Nashik (for short, 'suit property'). It appears that initially no W.S. order was passed against defendants no.2 and 3. Defendants no. 2 and 3 filed application Exhibit 17 on 5.12.2008 for setting aside no W.S. order. That application was allowed on 31.12.2008 subject to payment of costs of Rs.100/-. Though the written statement was filed, costs were not paid. In view thereof, on 20.1.2010 the learned trial Judge again passed no W.S. order. Defendants no.2 and 3 filed application on 12.6.2013 for setting aside no W.S. order by tendering unpaid costs of Rs.100/-. By the impugned order, the learned trial Judge has rejected the application.

4. In support of this petition, Mr.Thorat submitted that the written statement was already filed. However, the Advocate appearing for defendants no.2 and 3 did not pay the costs of Rs.100/-. Because of negligence on the part of their Advocate, defendants no. 2 and 3 should not suffer.

5. On the other hand, Mr.Bubna supported the impugned order. He submitted that defendants no.2 and 3 are negligent. No W.S. order was initially passed which was set aside on 31.12.2008 subject to payment of costs of Rs.100/-. That costs

was not paid and, therefore, the learned trial Judge passed no W.S. order on 20.1.2010. The present application was made on 12.6.2013 which again demonstrates gross negligence on the part of defendants no.2 and 3. He, therefore, submitted that this is not a fit case for invocation of powers under Article 227 of the Constitution of India.

6. I have considered the rival submissions advanced by the learned counsel appearing for the parties. I have also perused the material on record. As noted earlier, no W.S. order was set aside on 31.12.2008 subject to payment of costs of Rs.100/-. It is also apparent from the record that defendants no.2 and 3 filed written statement, but costs were not paid. In my opinion, once the written statement was filed, the learned trial Judge should have allowed the application subject to imposing further costs on defendants no.2 and 3. By not permitting them to deposit the costs, defendants no.2 and 3 will not be in a position to effectively defend the suit. They will not be in a position to lead evidence in support of their case. In other words, drastic consequences will follow if defendants no.2 and 3 are not permitted to file written statement. In view thereof, in my opinion, the impugned order deserves to be set aside subject to defendants no.2 and 3 depositing costs of Rs.5000/- in the trial Court within four weeks from today under intimation in writing to the plaintiffs' Advocate. Plaintiffs are permitted to withdraw the amount unconditionally.

Hence the following order.

- (i) Impugned order is set aside subject to payment of costs of Rs.5000/- to Respondents no. 1 to 3 -plaintiffs. The costs shall be deposited in the trial Court within four weeks from today under intimation in writing to the plaintiffs' Advocate. Plaintiffs are permitted to withdraw the amount unconditionally.
- (ii) Parties are at liberty to file application for expeditious disposal of the suit. If such application is made, the learned trial Judge will pass appropriate order bearing in mind that defendants no. 2 and 3 are senior citizens.
- (iii) Rule is made absolute accordingly.

(R.G.KETKAR, J.)