

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 12223 OF 2015**

Shri Ishwar Kalappa Madkari and
Ors

..Petitioners

Vs

Shri Baburao Kalappa Madkari
and Ors

.. Respondents

Mr. Prashant Bhavake, Advocate for Petitioners.

CORAM : R.G.KETKAR,J.

DATE : 04/01/2016

PC:

1. Heard Mr.Prashant Bhavake, learned counsel for the petitioners at length.
2. By this Petition under Article 227 of the Constitution of India, original plaintiffs have challenged the judgment and order dated 31.7.2014 passed by the learned Jt. Civil Judge, Jr. Dn., Gadhinglaj, below Exh.63 in R.C.S.No.65 of 2012. By that order, the learned trial Judge allowed the application filed by defendants no.1 and 2 for setting aside 'No W.S. Order'.
3. Mr. Bhavake submitted that the petitioners instituted suit for partition on 23.3.2009. Suit summons was served on defendants no.1 and 2 on 30.4.2009. They appeared on 12.6.2009. Issues were framed on 6.9.2010. Defendants have applied for setting aside 'No W.S' order, nearly after 5 years. The reason given by them in the application at Exh.63 is also not genuine. Defendants no.1 and 2 gave explanation that

compromise talks were going on between the parties and that copies of relevant and material documents were not made available from Revenue Department. Thus, except this bald statement, defendants 1 and 2 did not give any reason for condoning delay of approximately 5 years in filing W.S. The learned trial Judge was, therefore, not justified in allowing the application.

4. I have considered the submissions advanced by Mr Bhavake. I have also perused the material on record. While allowing the application, the learned trial Judge noted that suit is for partition and that if the application is rejected it will cause irreparable loss to the defendants and also there will be multiplicity of proceedings. On the other hand, if the application is allowed no prejudice will be caused to the plaintiffs. Delay of 5 years was condoned subject to imposing costs of Rs.2500/- on defendants no.1 and 2.

5. In the case of Shailaja A. Sawant Vs.Sayajirao Ganpatrao Patil, 2004 (2) Mh.L.J. 419, this Court has held that provisions of Order VIII, Rule 1 and 2 are directory in nature and not mandatory. Apart from that, it is not in dispute that the petitioners have instituted suit for partition. The explanation given by defendants no.1 and 2 that compromise talks were going on between the parties, is plausible explanation. The

learned trial Judge has exercised discretion and allowed the application for the reasons stated in paragraph 6 which cannot be said to be perverse. The learned trial Judge has also imposed costs on defendants no.1 and 2. In view thereof, no case is made out for invocation of powers under Article 227 of Constitution of India.

6. Mr. Bhavake submitted that suit is instituted in the year 2009 and because of delay on the part of defendants no.1 and 2, prejudice is caused to the plaintiffs and, therefore, the trial Court may be directed to dispose of the suit in a time bound manner. In case the plaintiffs take out application for deciding the suit in a time bound manner, it is expected that the learned trial Judge will pass appropriate order having regard to pendency of cases as also other expedited suits.

7. Subject to above, Petition fails and the same is dismissed. 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.)