

IN THE HIGH COURT OF JUDICATURE AT MUMBAI
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.549 OF 2016

Dharmraj Sitaram Gavli ... Petitioner
Vs.
Namdev Sitaram Gavli and others ... Respondents

Mr. Sanjay A. Ghaisas for Petitioner.

CORAM : R. G. KETKAR, J.
DATE : FEBRUARY 15, 2016

P.C. :

Heard Mr. Ghaisas, learned Counsel for petitioner at length.

2. By this Petition, under Article 227 of the Constitution of India, petitioner has challenged the order dated 28.09.2015 passed by the learned Civil Judge, Junior Division, Nashik below exhibit-16 in Regular Civil Suit No.1062 of 2012. By that order, the learned trial Judge rejected the application made by the petitioner, hereinafter referred to as defendant No.1, for setting aside No W.S. and No Cross Order.

3. Respondents No.1 to 4, hereinafter referred to as plaintiffs, have instituted Suit against the petitioner and other respondents for partition and separate possession of their half share. On 05.10.2012, after service of suit summons, defendants appeared in the matter. On 11.06.2013, the learned trial Judge recorded that though defendants No.1 to 8 appeared in the Suit on 05.10.2012, they failed to file their say / written statement. No application for adjournment or seeking time for filing written statement is made. Hence, Suit to proceed without written statement of defendants No.1 to 8.

4. On behalf of plaintiffs, Ms Changunabai Madhukar Bhivsan filed additional affidavit of evidence on 03.02.2014 on which the learned trial Judge passed No Cross Order on 18.06.2014.

5. Defendants thereafter filed application exhibit-16 on 30.03.2015 for setting aside No W.S. and No Cross Order. In the application, it is asserted that defendant No.1 is illiterate. Other defendants are residing at various places. Defendant No.1 is the person who is looking after the Suit. Defendant No.1 is aged and his vision is also impaired. Defendant No.1 is ill and other defendants are residing at various places. They were unaware of the dates. Defendant No.1 could not give instructions to the Advocate in time and also could not furnish the documents and information. On these among other grounds, defendant No.1 contended that say and written statement could not be filed. It is further asserted that already no written statement and no-cross order is passed and matter is fixed for delivering judgment and defendant No.1 is filing written statement along with the application, which may be taken on record after setting aside No W.S. Order as also no cross order.

6. Plaintiffs resisted the application by filing reply dated 21.04.2015 denying the assertions made. Plaintiffs contended that no case is made out either for setting aside no W.S. order or for setting aside no cross order. By the impugned order, the learned trial Judge rejected the application. Mr. Ghaisas reiterated the submissions advanced before the trial Court.

7. Perusal of the cause title of the Suit, and in particular occupation of the defendants No.3 is shown as service. Defendant No.6 is represented by one Namdev Hari Gaikwad, who is a member of Panchayat Samiti, Niphad. Defendant No.8 is represented by one

Bhavrao Dhum, working as peon in the District and Sessions Court, Aurangabad. It, therefore, cannot be said that all the defendants are ignorant or unaware of the court proceedings. In view thereof, reasons given by the defendants in the application cannot be accepted at all. Defendants have posed defendant No.1 on the ground that he is illiterate as also he is aged and his vision is impaired. However, there is no explanation as to why defendants No.3, 6 and 8 did not file written statement though appearance was entered on 05.10.2012. Equally, there is no explanation as to why cross-examination was not conducted. In other words, there is no sufficient ground made out for setting aside no W.S. order and no cross order. That apart, the reasons given are vague and of general nature. In view thereof, I do not find that the learned trial Judge has committed any error in rejecting the application. Hence, Petition fails and the same is dismissed.

8. 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 the memorandum of appeal as contemplated by Section 105(1) of C.P.C.

9. If at all, defendants make fresh application giving reasons for not filing written statement as also for setting aside no cross order, the said application shall be decided, uninfluenced by the observations made in the impugned order. It is expressly made clear that if such application is taken out, all contentions of the plaintiffs are left open including the maintainability of such application. Order accordingly.

(R. G. KETKAR, J.)