

IN THE HIGH COURT OF JUDICATURE AT BOMBAY:
NAGPUR BENCH : NAGPUR
Writ Petition No.6912 of 2015
[Altaf Hussain Mohd. Isak & another Vs. Abdul Samad Mohd. Isak & others]

Office Notes, Office Memoranda of
Coram, appearances, Court's orders
or directions and Registrar's orders.

Court's or Judge's orders

Mr. J.A. Malnas, Adv., for the petitioners.
Mr. A.S. Siddiqui, Adv., holding for Mr. A.B. Mirza, Adv., for
respondent no.1.

- - - -

CORAM : A.S. CHANDURKAR, J.

DATE : 10th August, 2016

Heard.

The challenge in the present writ petition is to the order dated 20th July, 2015 passed by the Trial Court rejecting the application moved by the defendant nos. 2 and 11 for seeking permission to file their Written Statement on record. By the impugned order, this application has been rejected.

The respondent no.1 is the original plaintiff who

has filed a suit for partition and separate possession. This suit was filed by the plaintiff against his father and other family members. As the defendant nos. 1 to 8, 10 and 11, though served, did not appear in the suit, the same was proceeded ex parte against them by order dated 23rd October, 2013. On 10th June, 2015, the defendant nos. 2 and 11 filed application below Exh.48 praying that said ex parte order be set aside. The Trial Court rejected the said application on the ground that sufficient reasons for the delay of almost two years had not been explained.

The learned counsel for the petitioners submitted that the defendant nos. 2 and 11 were aged persons and after appointing their counsel, they expected that their interest would be taken care of in the suit. After getting knowledge of the aforesaid order, the application, in question, came to be moved. It was submitted that on account of inaction of the counsel, the parties should not suffer. The learned counsel placed reliance upon the judgment of the Hon'ble Supreme Court in **Rafiq & another Vs. Munshilal & another** [AIR 1981 SC 1400].

The learned counsel for the respondent no.1 supported the impugned order. It was pointed out that no details were given in the application below Exh.48 and the Trial Court was justified in rejecting the said application.

Perusal of the impugned order indicates that the defendant nos. 2 and 11 were served on 6th March, 2013 and 7th March, 2013 respectively. Vakalatnama on their behalf was filed on 22nd April, 2013. The Written Statement was required to be filed by 4th June, 2013; but the same was not done. Before the Trial Court, the plaintiff filed a Pursis stating that the defendant no.1 had expired on 31st May, 2014 and that all his legal heirs were record. Thereafter, affidavits in lieu of evidence were also filed. It is thereafter that on 10th June, 2015, the present application came to be moved. The averments in the application below Exh.48 are vague without giving details. The date when the knowledge of the ex parte order was received has not been stated. It has only been stated that as the father of the said defendants was looking after the proceedings, the defendant nos. 2 and 11 were under such bona fide impression. There is no averment that the counsel was negligent in not filing the Written Statement. On that count, the ratio of the judgment in Rafiq & another [supra] cannot be made applicable to the facts of the present case.

The Trial Court, after considering the entire record, has found that the defendant nos. 2 and 11 were not diligent, as well as two years had lapsed from the stage of filing the Written Statement. The suit had also proceeded further. In absence of any sufficient cause being shown by the defendant nos. 2 and 11, I do not find any case made out to interfere in writ jurisdiction.

In view of aforesaid Writ Petition is **dismissed**.
No costs.

Judge

|hedau|

C E R T I F I C A T E

I certify that this Judgment/Order uploaded is a true and correct copy of original signed Judgment/Order.

Uploaded by : R.B. Hedau,
Pvt. Secretary.

Uploaded on : 10th Aug., 2016

-0-0-0-0-