

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 6620 OF 2016

1. Sunil S/o. Laxman Randhve,
Age : 41 yrs., Occu. Agri.,
2. Subhash S/o. Laxman Randhve,
Age : 50 yrs., Occu. Agri.,
3. Balbhim S/o. Laxman Randhve,
Age : 55 yrs., Occu. Agri.,
4. Pandurang S/o. Laxman Randhve,
Age : 53 yrs., Occu. Agri.,
5. Navnath S/o. Laxman Randhve,
Age : 50 yrs., Occu. Agri.,
6. Narayan S/o. Laxman Randhve,
Age : 60 yrs., Occu. Agri.,
7. Sambhaji S/o. Popat Randhve,
Age : 35 yrs., Occu. Agri.,
8. Shiva S/o. Popat Randhve,
Age : 41 yrs., Occu. Agri.,
9. Smt. Shivbai Balu Randhve,
Age : 40 yrs., Occu. Agri.,
10. Garjabai Laxman Randhve,
Age : 78 yrs., Occu. Agri.,

All above R/o. Bhambhora,
Tq. Karjat, Dist. Ahmednagar.

Through G.P.A. Holder,

Suresh S/o. Subhash Randave,
Age : 39 yrs., Occu. Agri.,
R/o. Bhambhora,
Tq. Karjat, Dist. Ahmednagar. ...Petitioners.

Versus

Bapu S/o. Bajirao Giri,
Age : 32 yrs., Occu. Agri.,
R/o. Bhambhora,
Tq. Karjat, Dist. Ahmednagar.

Advocate for Petitioners : Shri N.V. Gaware.
Advocate for Respondent : Shri R.R. Karpe.

CORAM : RAVINDRA V. GHUGE, J.
Dated : 19th June, 2017

ORAL JUDGEMENT :-

1. Rule. Rule made returnable forthwith and heard finally by the consent of the parties.
2. The petitioners are aggrieved by the order dated 11/04/2016, passed by the Trial Court, by which, application Exhibit 45, filed by original defendant Nos. 1 to 9 and 11, praying for vacating 'No WS Order' has been rejected.
3. I have heard the submissions of the learned advocates for

the respective sides. Shri Karpe, learned advocate appearing for the original plaintiff, vehemently opposes this petition and prays for its dismissal by imposing heavy costs.

4. The respondent / plaintiff has preferred the said suit seeking perpetual injunction and for restraining the petitioners / defendants from disturbing his peaceful possession with regard to the agricultural land, mentioned in the said suit. No WS order was passed against defendant No. 10 on 25/07/2014, after his appearance on 18/06/2014. No WS order was passed against defendant Nos. 1 to 9 and 11, on 15/09/2015. Defendant Nos. 1 to 9 and 11, preferred application Exhibit 45 on 20/03/2015, praying for vacating the No WS order. By impugned order, the said application is rejected on the ground that proper reasons have not been assigned.

5. It is trite law, that if laches or malafide intentions are not attributed to the conduct of the defendant for delaying to file a WS, the application for recalling no WS order has to be

considered liberally. The Hon'ble Apex Court in the matter of Salem Advocates Bar Association, Tamil Nadu Versus Union of India (AIR 2005 SC 3353) has concluded in paragraph Nos. 21 and 22 as under :

"21. The use of the word 'shall' in Order VIII Rule 1 by itself is not conclusive to determine whether the provision is mandatory or directory. We have to ascertain the object which is required to be served by this provision and its design and context in which it is enacted. The use of the word 'shall' is ordinarily indicative of mandatory nature of the provision but having regard to the context in which it is used or having regard to the intention of the legislation, the same can be construed as directory. The rule in question has to advance the cause of justice and not to defeat it. The rules of procedure are made to advance the cause of justice and not to defeat it. Construction of the rule or procedure which promotes justice and prevents miscarriage has to be preferred. The rules or procedure are hand-maid of justice and not its mistress. In the present context, the strict interpretation would defeat justice.

22. In construing this provision, support can also be had from Order VIII Rule 10 which provides that where any party from whom a written statement is required under Rule 1 or Rule 9, fails to present the same within

the time permitted or fixed by the Court, the Court shall pronounce judgment against him, or make such other order in relation to the suit as it thinks fit. On failure to file written statement under this provision, the Court has been given the discretion either to pronounce judgment against the defendant or make such other order in relation to suit as it thinks fit. In the context of the provision, despite use of the word 'shall', the court has been given the discretion to pronounce or not to pronounce the judgment against the defendant even if written statement is not filed and instead pass such order as it may think fit in relation to the suit. In construing the provision of Order VIII Rule 1 and Rule 10, the doctrine of harmonious construction is required to be applied. The effect would be that under Rule 10 of Order VIII, the court in its discretion would have power to allow the defendant to file written statement even after expiry of period of 90 days provided in Order VIII Rule 1. There is no restriction in Order VIII Rule 10 that after expiry of ninety days, further time cannot be granted. The Court has wide power to 'make such order in relation to the suit as it thinks fit'. Clearly, therefore, the provision of Order VIII Rule 1 providing for upper limit of 90 days to file written statement is directory. Having said so, we wish to make it clear that the order extending time to file written statement cannot be made in routine. The time can be

extended only in exceptionally hard cases. While extending time, it has to be borne in mind that the legislature has fixed the upper time limit of 90 days. The discretion of the Court to extend the time shall not be so frequently and routinely exercised so as to nullify the period fixed by Order VIII Rule 1, Section 39.”

6. It is trite law that in the matters involving immovable properties, which are a source of livelihood to the litigants, it would be advisable not to have the suit decreed ex-parte. So also, the suit at issue cannot be said to be a very old suit in which it would be too late to recall the No WS order and permit the filing of the WS. At the same time, the comparative hardships suffered by the plaintiff also have to be kept in mind and such hardships can be softened by imposing costs.

7. Considering the above, this petition is partly allowed. The impugned order dated 11/04/2016, is quashed and set aside and application Exhibit 45, is allowed on the following conditions :

(a) Each of the petitioners shall deposit an amount of

Rs. 1,000/- (Total Rupees Ten Thousand) before the Trial Court on / or before 21/07/2017, as costs, which can be withdrawn by the plaintiff without any conditions.

(b) Each of the petitioners can / may file their individual written statements on / or before 21/07/2017, failing which, the suit would proceed without their WS.

(c) Failure on the part of the petitioners (that is defendant Nos. 1 to 9 and 11) to comply with either of the directions set out herein above, would lead the Trial Court to decide the suit without the WS of the respective defendants.

8. Rule is made partly absolute.

(RAVINDRA V. GHUGE, J.)