

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,  
AURANGABAD BENCH, AT AURANGABAD.**

**Writ Petition No. 12029 of 2017**

District : Jalgaon

Nitesh s/o. Suresh Jain,  
Age : 37 years,  
Occupation : Contractor,  
R/o. Cream Centre,  
4th Floor,  
Ganapati Nagar, Jalgaon,  
Taluka & Dist. Jalgaon,

.. Petitioner  
(Original plaintiff)

**versus**

Jalgaon City Municipal  
Corporation, Jalgaon,  
Through Commissioner,  
Municipal Corporation,  
Jalgaon,  
Taluka & District Jalgaon.

.. Respondent  
(Original defendant)

.....

*Mr. Kishor C. Sant, Advocate, for the petitioner.*

*Mrs. Chaitali P. Kutti (Choudhari), Advocate, for  
the respondent.*

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**CORAM : SMT. VIBHA KANKANWADI, J.**

**DATE : 29TH NOVEMBER 2017**

**ORAL JUDGMENT :**

01. Rule. Rule made returnable forthwith.  
Taken up for hearing forthwith with the consent of  
both the parties.

02. The petitioner, who is original plaintiff, is challenging the order below Exhibits 28, 29 and 30 passed in Special Civil Suit No. 73 of 2014 by 5th Joint Civil Judge (Senior Division), Jalgaon, on 19th August 2017.

03. The factual matrix are that the plaintiff has filed the suit for recovery of amount of Rs. 19,59,200/- along with interest of Rs. 58,776/- against the respondent - Municipal Corporation. Prior to the suit, a legal notice was issued by the plaintiff to the respondent on 11.04.2014 which has been replied by the respondent - Corporation on 08.05.2014. In the said reply, in fact, the Corporation has admitted its liability to pay but stated that the Corporation is facing financial crunches and the amount will be paid after the funds are made available. Thereafter, the suit came to be filed. After the suit summons was served on the Corporation, it appeared through Advocate and took adjournments for filing written statement. When it was not filed, the matter was kept for hearing without written statement. After filing of affidavit in chief of the plaintiff, the respondent did not participate in the proceedings and, therefore, the matter was posted for pronouncement of judgment.

04. Thereafter, for the first time, the respondent filed an application on 15.10.2016 at Exhibit 25 for setting aside the order of 'no say'. The said application came to be allowed, subject to

depositing costs of Rs. 1,000/- within eight days, on 17.12.2016. The said order has also not been complied by the defendant. According to the petitioner, in view of the fact that there is no payment of costs by the defendant, the order below Exhibit 25 should have been treated as cancelled. Thereafter also, the matter got postponed and once again an application has been filed at Exhibit 26 for allowing the defendant to deposit the cost amount. It came to be rejected. However, at later stage, an application was filed at Exhibit 28 seeking permission to deposit the cost amount. Vide application Exhibit 29, time for filing written statement was sought and by application Exhibit 30, an undertaking was given on behalf of the defendant, that the written statement will be filed within eight days.

05. The applications were objected by the plaintiff. However, taking into consideration the provisions under Section 148 of the Code of Civil Procedure, 1908 [**For short, "C.P.C."**], the learned trial Court has allowed the said applications. The said order is under challenge in this writ petition by invoking Article 227 of the Constitution of India.

06. It has been vehemently submitted on behalf of the petitioner - original plaintiff, that once the application Exhibit 27 for deposit of amount and adjournment was rejected, though vide Exhibit 25, 'no say' order was set aside, yet, further stage of

filing Exhibit 28 and allowing the defendant to deposit cost amount had not arisen. The learned trial Court had not taken into consideration those facts and misconceived that the application Exhibit 28 can be considered under Section 148 of the C.P.C. He also pointed out that earlier when the order of 'no say' was filed and the affidavit of examination in chief was filed, the matter was posted for pronouncement of judgment.

07. It has been submitted on behalf of the respondent - Corporation, that the learned trial Court has allowed application Exhibit 28 in the interest of justice since an opportunity should have been given to the defendant to defend the case.

08. In the say to application Exhibit 25 as well as to application Exhibit 28, it has been specifically mentioned that the matter was posted for pronouncement of judgment. This factual situation is not denied by the respondent. Further, in order to support his contention, learned Counsel for the petitioner has produced the cause list from the website of the District Court in respect of the said matter and it appears that from 29.08.2016 to 10.10.2016, the matter was adjourned on five occasions for pronouncement of judgment. That means, after the affidavit of examination in chief was filed by the plaintiff and the respondent had not participated in further proceedings, hearing of the case got culminated and the matter was kept for

pronouncement of judgment. Under such circumstance, none of the further applications i.e. from Exhibit 25 to Exhibit 30 should have been entertained by the learned trial Court. The learned trial Court cannot set the clock in anti-clockwise position when the matter is posted for pronouncement of judgment.

09. The aforesaid position of law has been laid down in the Full Bench judgment of the Apex Court in the case of *Arjun Singh Vs. Mohindra Kumar & others* [AIR 1964 SC 993]. It has been observed, that the opening words of Order IX Rule 7 are "Where the Court has adjourned the hearing of the suit 'ex parte'". Obviously they assume that there is to be a hearing on the date to which the suit stands adjourned. If the entirety of the "hearing" of the suit has been completed and the Court being competent to pronounce the judgment then and there, adjourns the suit merely for the purpose of pronouncing judgment under O. XX Rule 1, there is clearly no adjournment of "the hearing" of the suit, for, there is nothing more to be heard in the suit. Further, this Court in the judgment delivered in Writ Petition No. 07212 of 2011 (*Kamalshankar s/o. Kapilshankar Desai & others Vs. Purushottam s/o. Dagdudas Wani & others*) on 08.10.2013, has placed reliance on *Arjun Singh's* case (*supra*) and it has been reiterated that after the matter has been kept for pronouncement of judgment, the application for amendment could not have been entertained.

10. Therefore, in fact, in this case, basically

the order below Exhibit 25 was not as per the procedure of law and, therefore, the subsequent question of allowing time to be extended for deposit of the amount of costs did not arise. It is also to be noted that by application Exhibit 27, prayer for presenting written statement and adjourning the matter came to be rejected on 04.05.2017. Therefore, in a manner, review of the said order ought not to have been entertained by the trial Court.

11. Taking into consideration the said legal position, which has not been considered by the learned trial Court, it has resulted in passing an erroneous order which is required to be set aside. Hence, the writ petition deserves to be allowed.

12. In the result, the writ petition is allowed.

The order passed below Exhibits 28, 29 and 30 in Special Civil Suit No. 73 of 2014, by 5th Joint Civil Judge (Senior Division), Jalgaon, on 19th August 2017, is hereby set aside.

13. Rule made absolute in the above terms. There shall be no order as to costs.

( Smt. Vibha Kankanwadi )  
JUDGE

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