

IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
CIVIL APPELLATE JURISDICTION

**Writ Petition NO. 2228 OF 2015**

Sou. Pallavi Nilesh Mayekar  
And Ors

...Petitioners

*Versus*

Shri. Arun Maruti Kandhare  
And Ors

...Respondents

....

Mr. Rahul S. Kadam, Advocate for the Petitioners.

Ms. T.J. Kapre i/b. J.S. Kapre, Advocate for the Respondents.

....

CORAM : R. G. KETKAR, J.

DATE : 05<sup>th</sup> JANUARY, 2017

P.C.

1. Heard Mr.Rahul Kadam, learned counsel for the petitioners and Ms.T.J. Kapre, learned counsel for the respondents, at length.

2. Rule. Ms.Kapre waives service. Having regard to the narrow controversy raised in this Petition as also at the request and by consent of the parties and in view of order dated 18.11.2015, Rule is made returnable forthwith and the petition is taken up for final hearing.

3. By this Petition under Article 227 of the Constitution of

India, the petitioners, hereinafter referred to as 'defendants No.2 to 5', have challenged the order dated 19.1.2015 passed by the learned trial Judge below Exhibit-44 in S.C.S. No.8/2014. By that order, the learned trial Judge rejected the application made by defendants No.2 to 5 for condoning the delay of seven months in filing written statement.

4. Respondent No.1, hereinafter referred to as the 'plaintiff', has instituted the suit against the petitioners and rest of the respondents *inter alia* praying for partition and separate possession of his share; for cancellation of the gift deed dated 18.11.2013 executed by defendant No.1 in favour of defendants No.2, 4 and 5 and sending the same to the office of Sub-Registrar after cancellation; for perpetual injunction restraining the defendants from dispossessing the plaintiff and creating third party interest in the suit property.

5. Defendants No.2 to 5 appeared in the matter on 20.2.2014. They did not file written statement and, therefore, 'No-WS' order was passed. Defendants No.2 to 5 filed application Exhibit-44 for condoning the delay of seven months in filing the written statement and for taking

written statement and say to interim application on record.

6. By the impugned order, the learned trial Judge rejected the application on the ground that no sufficient ground is made out.

7. Mr. Kadam invited my attention to paragraph-2 of the application, wherein defendants No.2 to 5 contended that they were trying to settle the dispute with the plaintiff. Defendants No.2 to 5 are residing at different places as mentioned in the caption of the suit and, therefore, there is delay of seven months in filing written statement. He, therefore, submitted that the impugned order deserves to be set aside thereby taking written statement and say to the interim application on record.

8. On the other hand Ms.Kapre supported the impugned order and submitted that defendants No.2 to 5 have not made out sufficient cause for condoning the delay. The reason given by the defendants No.2 to 5 that the parties were trying to settle the dispute is illusory and is not borne out from the record. In any case, in case the

Court is inclined to set aside the impugned order, costs may be imposed.

9. I have considered the rival submissions advanced by learned Counsel appearing for the parties. I have also perused the material on record. As noted earlier, the suit is instituted by the plaintiff for partition and separate possession, amongst other prayers. In view thereof, it cannot be said that the reason given by defendants No.2 to 5 that they were trying to settle the dispute with the plaintiff to be wholly irrelevant. Defendants No.2 to 5 further contended that they are residing at different places as mentioned in the caption of the suit. In view thereof, in my opinion, the learned trial Judge should have allowed the application subject to imposing costs upon defendants No.2 to 5. By rejecting the application, defendants No.2 to 5 will not be in a position to effectively defend the suit. Defendants No.2 to 5 will not be in a position to lead evidence in support of their case and at the highest they will be entitled to cross-examine the plaintiff's

witness.

10. In view thereof, the impugned order is set aside and the application Exhibit-44 stands allowed subject to payment of costs of Rs.5,000/-. Costs shall be deposited in the trial Court within two weeks from today under intimation in writing to the respondents' Advocate. The respondents are permitted to withdraw the amount unconditionally. Mr. Kadam assures that within one week from today, defendants No.2 to 5 will file written statement and say to interim application and serve copy in advance on the respondents. Rule is made absolute in aforesaid terms. Order accordingly.

(R. G. KETKAR, J.)

Deshmane (PS)