

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.3525 OF 2016

Khanderao Aambu Gundgal and another ... Petitioners
Vs.
Pundalik Vishwanath Gundgal and others ... Respondents

Mr. G. C. Jhaveri a/w. Mr. Amey Deshpande for Petitioners.
Mr. S. P. Dighe for Respondents No.1 to 4.

CORAM : R. G. KETKAR, J.
DATE : FEBRUARY 22, 2017

P.C. :

Heard Mr. Jhaveri, learned Counsel for petitioners and Mr. Dighe, learned Counsel for respondents No.1 to 4 at length. Mr. Jhaveri seeks leave to delete respondents No.5 and 6 on the ground that respondents No.1 to 4 being the original plaintiffs are the only contesting respondents. In view thereof, leave to delete respondents No.5 and 6 is granted. Amendment shall be carried out forthwith. Rule. Mr. Dighe waives service on behalf of respondents No.1 to 4. At the request and by consent of the parties, Rule is made returnable forthwith and the Petition is taken up for final hearing.

2. By this Petition under Article 227 of the Constitution of India, petitioners, hereinafter referred to as 'defendants No.3 and 4', have challenged the judgment and order dated 05.02.2016 passed by the learned Civil Judge, Junior Division, Manmad below exhibit-52 in Regular Civil Suit No.13 of 2006. By that order, the learned trial Judge rejected the application made by defendants No.3 and 4 for setting aside 'No W.S. Order' dated 08.09.2015 and for taking on record their written statement.

3. In support of this Petition, Mr. Jhaveri submitted that defendants No.3 and 4 were not originally impleaded in the Suit. They filed application at exhibit-41 under Order I, Rule 10(2) of the Code of Civil Procedure, 1908 (for short 'C.P.C.') on 10.01.2011. By order dated 03.04.2013, application was allowed. The learned trial Judge directed plaintiffs to implead petitioners as defendants No.3 and 4 in the Suit and amend the plaint accordingly.

4. On 08.09.2015, the learned trial Judge passed 'No W.S. Order' against defendants No.3 and 4. On 09.12.2015, defendants No.3 and 4 filed application exhibit-52 for setting aside 'No W.S. Order' and for taking on record their written statement. It is the case of the defendants No.3 and 4 that though they were impleaded as party defendants No.3 and 4, they were not served with the amended plaint. They received copy on 02.11.2015 and even before that, on 08.09.2015, the learned trial Judge passed 'No W.S. Order'. In fact, earlier, defendants No.3 and 4 filed application for dismissing the Suit on the ground that amendment was not carried out by the plaintiffs as per order dated 03.04.2013. The learned trial Judge disposed of that application on 17.07.2015 by observing that plaintiffs have already effected the amendment. He submitted that as the amended plaint was served on defendants No.3 and 4 on 02.11.2015, the learned trial Judge was not justified in passing 'No W.S. Order' on 08.09.2015.

5. On the other hand, Mr. Dighe supported the impugned order. He submitted that defendants were bound to file written statement within 90 days from their impleadment. Even after passing of 'No W.S. Order' on 08.09.2015, they did not file written statement within 90 days, and therefore, the learned trial Judge was justified in rejecting the application.

6. I have considered the rival submissions advanced by the learned Counsel appearing for the parties. I have also perused the material on record. Perusal of the record and in particular exhibit-49, amended copy of the plaint shows that defendants No.3 and 4 received it on 02.11.2015. Even in paragraph 6 of the Petition, defendants No.3 and 4 have averred that plaintiffs filed amended copy of the plaint on 15.03.2014 and the same was received by the Advocate for defendants No.3 and 4 on 02.11.2015. In ground (d), same averment is reiterated. Though the plaintiffs are duly served with the Petition, no reply is filed controverting the said assertions. Perusal of the record also shows that amended plaint was received by the defendants No.3 and 4 on 02.11.2015 that is to say after passing of 'No W.S. Order' on 08.09.2015. Before passing No W.S. Order on 08.09.2015, the learned trial Judge also did not verify whether defendants No.3 and 4 were served with the amended copy of the plaint.

7. In view thereof, the impugned order cannot be sustained and the same is liable to be set aside more so when defendants No.3 and 4 have already filed their written statement along with application exhibit-52. Hence, impugned order dated 05.02.2016 is set aside. The learned trial Judge will take on record Written Statement dated 10.12.2015 of defendants No.3 and 4, which is at pages 16 to 18 of the Petition. Petition succeeds. Rule is made absolute accordingly with no order as to costs.

(R. G. KETKAR, J.)