

Anand

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO.6096 OF 2014

Namdev Ganpatrao Sawant & ors .Petitioners

Vs.

Dnyandev Ganpatrao Sawant & ors. .Respondents

**WITH
CIVIL APPLICATION NO.854 OF 2016
(For Vacating Stay)
IN
WRIT PETITION NO.6096 OF 2014**

Dnyandev Ganpatrao Sawant .Applicant

IN THE MATTER OF

Namdev Ganpatrao Sawant & ors .Petitioners

Vs.

Dnyandev Ganpatrao Sawant & ors. .Respondents

Mr.P.K.Shahane i/b. Mr.Milind Deshmukh, Advocate, for the Petitioners
Mr.V.B.Tapkir, APP, for the Respondent No.1

CORAM : R.G.KETKAR, J.

DATE : 22.03.2017

P.C.

. Heard Mr. Shahane, learned counsel for the Petitioners and
Mr. Tapkir, learned counsel for the Respondent No.1 at length.

2. The Petitioners, hereinafter referred to as “Defendants No.1, 3 & 4” have challenged the Judgment and Order dated 24.04.2014 passed by the learned C.J.J.D., Saswad below Exh.137 in R.C.S.No. 73 of 2011. By that Order, the learned trial Judge rejected the Application made by the Defendants No.1, 3 & 4 (For short “these Defendants”) for review of the Order dated 08.08.2011 passed below Exh.33.

3. Rule. Mr. Tapkir waives service on behalf of the Respondent No.1. Having regard to the narrow controversy raised in this Petition as also in view of the Order dated 01.09.2014 passed by this Court (CORAM : R.M.SAVANT, J.) and at the request and by consent of the parties, Rule is made returnable forthwith by dispensing notice to the rest of the Respondents and the Petition is taken up for final hearing.

4. In support of this Petition, Mr. Shahane submitted that on 22.06.2011, 'No W.S.' Order was passed against these Defendants. On 27.06.2011, they filed Application Exh.33 for setting aside 'No W.S.' Order. The Plaintiffs filed a reply inter alia contending that if the Court is inclined to set aside the Order dated 27.06.2011, costs of

Rs.2,500/- may be imposed on these Defendants. However, instead of allowing the Application subject to payment of costs, the learned trial Judge dismissed the Application on 08.08.2011 as none appeared on behalf of these Defendants. These Defendants, thereafter, filed the Application at Exh.137 under Section 114 r/w. XLVII, Rule 1 of the Code of Civil Procedure, 1908 (For short "CPC") for review of the Order dated 08.08.2011 which is rejected by the impugned Order. He submitted that suit is for partition and separate possession. All the parties are in possession of the suit properties. If the impugned Order is set aside, no prejudice will be caused to the Plaintiffs.

5. On the other hand, Mr. Tapkir supported the impugned Order. He has taken me through the Affidavit in reply filed by the Plaintiffs. He submitted that after dismissal of the Application Exh.33 on 08.08.2011, the Plaintiffs filed an Affidavit of examination-in-chief on 21.03.2012. Defendants filed the Application Exh.68 on 10.08.2012 for setting aside the Order dated 08.08.2011 below Exh.33. By Order dated 15.10.2012, Application Exh.68 was rejected. On 18.12.2012, Defendants were not allowed to cross examine the Plaintiffs as 'No W.S.' Order was passed against them as also on the ground that they had no right to take cross-examination. These Defendants filed the

Application Exh.74 on 18.12.2012 for taking cross-examination of the Plaintiffs on legal points. On 29.01.2013, they filed the Application Exh.77 for taking cross-examination of the Plaintiffs on legal points. On 17.06.2013, Application Exh.77 filed by the Defendants was allowed. These Defendants took cross-examination of the Plaintiffs on legal points. He submitted that these Defendants participated in the trial and only on 24.04.2014 they filed the Application Exh.137 for review of the Order dated 08.08.2011 below Exh.33. He submitted that as these Defendants have participated in the trial, no case is made out for interfering with the impugned Order. He, therefore, submitted that Petition is liable to be dismissed.

6. I have considered rival submissions advanced by the learned counsel for the parties. I have also perused the material on record. It is common ground between the parties that on 22.06.2011, 'No W.S.' Order was passed against these Defendants. It is also not in dispute that on 27.06.2011 i. e. immediately after five days, these Defendants filed the Application for setting aside 'No W.S.' Order. It also appears from the record that the Plaintiffs filed a reply inter alia contending that they have no objection for setting aside 'No W.S.' Order subject to the Defendants paying costs of Rs.2,500/- to them. However,

as none appeared on behalf of the Defendants, the learned trial Judge dismissed the Application in default on 08.08.2011. In my opinion, basically, the learned trial Judge was not justified in dismissing the Application Exh.33 in default, more so when the Plaintiffs did not seriously oppose the said Application and insisted for payment of costs. If the impugned Orders are not set aside, these Defendants will be precluded from leading evidence and they will not be in a position to effectively participate in the trial. It is also relevant to note that parties are in possession of the suit property. Having due regard to the fact that suit is for partition, in my opinion, the learned trial Judge should have allowed the Application Exh.33. In view thereof, the Order dated 08.08.2011 below Exh.33 cannot be sustained and as such is liable to be set aside subject to payment of costs of Rs.5,000/- to the Plaintiffs. Resultantly, it is not necessary to consider legality of the Order dated 15.10.2012 passed below Exh.68 as also the impugned Order dated 24.04.2014 passed below Exh.137. Costs shall be deposited in the trial Court within two weeks from today under the intimation in writing to the Plaintiffs' Advocate. Plaintiffs are permitted to withdraw this amount unconditionally.

7. Mr. Tapkir submitted that inadvertently, the Plaintiffs did not include other joint family properties. He seeks leave to amend the plaint. Mr. Shahane has no objection. In view thereof, leave to amend the plaint is granted. Amendment shall be carried out within two weeks from today and amended plaint shall be served on these Defendants. Hence, I pass the following order.

O R D E R

- (i) The Order dated 08.08.2011 passed below Exh.33 is quashed & set aside & the Application Exh.33 stands allowed. Resultantly, the Order dated 15.10.2012 below Exh.68 and the impugned Order are set aside;
- (ii) The Plaintiffs shall amend the plaint and serve a copy of the amended plaint well in advance on these Defendants within two weeks from today;
- (iii) These Defendants shall file Written Statement to the amended plaint within four weeks from receipt of the amended plaint;
- (iv) The Plaintiffs are at liberty to file a fresh Affidavit of examination-in-chief and trial Court will, thereafter, proceed with the matter in accordance with law;
- (v) Defendants shall deposit costs of Rs.5,000/- in the trial Court within two weeks from today under the intimation in writing to the

Plaintiffs' Advocate;

(vi) Plaintiffs are permitted to withdraw the amount unconditionally.

8. In view of disposal of the Petition, Civil Application does not survive and same stands disposed of accordingly. Liberty is reserved to the parties to apply for expeditious disposal of the suit. If such Application is filed, the learned Judge will pass appropriate orders.

(R.G.KETKAR, J.)