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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION No. 11791 of 2015

Vaijayanta D. Kambale & Ors ..Petitioners.

Vs

Rau Ramu Shinde & Ors ..Respondents.

Mr S.M. Sabrad for the petitioners.

Mr. Kayval Shah for the Respondent No. 1, 14 to 17.

CORAM : RAJESH G. KETKAR, J.

DATE : 16th MARCH, 2017.

P.C.

1) Heard Mr. S.M. Sabrad, learned Counsel appearing for the petitioners and Mr. Kayval Shah, learned Counsel appearing for respondent Nos. 1, 14 to 17, at length.

2) By this petition, under Article 227 of the Constitution of India, the petitioners, hereinafter referred to as defendants, have challenged the order dated 13.08.2015 passed by the learned Civil Judge, Junior Division, Koregaon, District Satara below exhibit-26 in Regular Civil Suit No.4 of 2014. By that order, the learned Trial Judge allowed the application made on behalf of defendants no. 1 and 14 to 17 for setting aside, 'No W.S. Order' dated 18.09.2014 and granting them permission to file written statement subject to cost of Rs.2,500/- to the plaintiffs.

3) Mr.Sabrad submitted that plaintiffs have instituted Suit for partition and separate possession of their 1/8th share each in the suit properties. On behalf of the defendant no.1 and 14 to 17, application exhibit 26 was filed for setting aside 'No W.S.Order' and for permission to file written statement. He submitted that the said application is signed only by defendant no.15. Plaintiffs filed reply dated 20.02.2015. In paragraph 2, plaintiffs specifically contended that defendant no.15 did not file Power of Attorney or also did not assert that on the basis of Power of Attorney given by defendants no. 1,14,16 and 17 to him, he is filing application on their behalf. By order dated 13.08.2015, the learned trial Judge however has allowed the application without dealing with dealing with this contention. Upon taking instructions from Mr.Dnyaneshwar D.Kamble Power of Attorney Holder of petitioners, Mr Sabrad states that even after raising objection in the reply dated 20.02.2015 defendant no.16 did not tender Power of Attorney before the trial Court. He further states that the next date of hearing before the trial Court is 11.02.2016.

4) Mr. Sabrad submitted that the application dated 20th January, 2015 was verified by defendant No.15 Dinkar Rau Shinde.

In the verification clause, he did not state that he is verifying the contents of the application on behalf of defendant Nos. 1, 14, 16 and 17. In other words, the verification is made by defendant No.15 on his behalf alone. He also invited my attention to the impugned order wherein the learned Trial Judge recorded that the defendants did not produce any material to substantiate that they were prevented from filing written statement because of illness or agricultural operations or that on account of employees. The learned Trial Judge also held that the reasons given by these defendants are not satisfactory. Despite that the learned Trial judge allowed the application only on the ground that it is necessary to decide the suit on merits and it will be in the interest of justice to permit the defendants to file written statement. He submitted that once the learned Trial Judge held that no satisfactory reasons are given, she was not justified in allowing the application.

5) On the other hand, Mr. Shah has tendered affidavits made by respondent Nos. 1, 14, 16 and 17. In Paragraph 1 of this affidavit, it is stated that these defendants have authorized and appointed defendant No.15 to look after the proceedings of R.C.S.No.4 of 2014 on their behalf and the application Exh.26 was

filed by defendant No.15 as per their instructions and they affirmed the contents of the said application.

6) Mr. Shah submitted that there was delay of 255 days in filing the application for written statement. The written statement dated 20th January, 2015, duly verified by Defendant Nos. 1, 14 to 17, was also filed along with the application Exh.26. The learned Trial Judge has also imposed costs of Rs.2500/- for condoning the delay of 255 days. Upon taking instructions, he states that the cost is paid and the written statement is taken on record. He therefore submitted that no case is made out for interfering the discretionary order passed by the Trial Court.

7) I have considered the rival submissions advanced by the learned Counsel for the parties. I have also perused the material on record. It is no doubt true that in the reply dated 20th January, 2015 filed by the defendants, it is specifically contended that defendant No.15 did not file power of attorney holder nor he contended that on the basis of power given by defendant Nos. 1, 14, 16 and 17 he filed application on their behalf. Nonetheless affidavits tendered in this Court by defendant Nos. 1, 14,16 and 17 and Paragraph No.1 thereof shows that application Exh.26 filed by defendant No.15 was

as per their instructions and they affirmed the contents of that application.

8) Apart from that as noted earlier, the plaintiff has instituted a suit for partition and separate possession of their 1/8th share each in the suit property. Considering the nature of controversy between the parties, as also, having regard to the fact that the learned Trial Judge has condoned the delay of 255 days in filing the written statement, subject to payment of costs of Rs.2500/- which is also paid by these defendants and also the fact that the written statement duly verified by these defendants is filed on 20th January, 2015, in my opinion, no case is made out for interference with the discretionary order passed by the learned Trial Judge. It cannot be said that the discretion exercised by the learned Trial Judge is arbitrary, capricious or perverse. Hence, the petition fails and same is dismissed.

9) It is made clear that where a decree is appealed from by the petitioner, any error, defect or irregularity in any order, affecting the decision of the case, may be set forth as a ground of objection in the memorandum of appeal as contended by section 105 (1) of C.P.C.

10) Liberty is reserved for the parties to apply for expediting the suit. If this application is made, the learned Trial Judge will pass appropriate order bearing in mind that some of the parties are Senior Citizens. Order accordingly.

(RAJESH G. KETKAR, J.)