

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.5773 OF 2016

Alka Namdo Shelar ... Petitioner
Vs.
Kaluram Housaram Harpale (decd) through LRs
Pooja K. Harpale and others ... Respondents

Mr. Drupad S. Patil for Petitioner.
Mr. V. S. Talkute a/w. Mr. S. R. Ghanavat for Respondent No.1(2).

CORAM : R. G. KETKAR, J.
DATE : JANUARY 20, 2017

P.C. :

Heard Mr. Patil, learned Counsel for petitioner and Mr. Talkute, learned Counsel for respondent No.1(2). Mr. Patil states that respondent No.1(2) is the only contesting respondent, and therefore, seeks leave to delete rest of the respondents. In view thereof, leave to delete as prayed for is granted. Amendment shall be carried out forthwith. Rule. Mr. Talkute waives service on behalf of respondent No.1(2). Having regard to the narrow controversy raised in the Petition as also 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, petitioner has challenged the order dated 16.04.2014 passed by the learned Civil Judge, Junior Division, Pune below exhibit-192 in Regular Civil Suit No.22 of 2007. By that order, the learned trial Judge rejected the application made by the plaintiff for recalling the order dated 19.09.2013. By order dated 19.09.2013, below exhibit-1, the learned trial Judge passed no evidence order against the plaintiff.

3. Mr. Patil submitted that on 19.09.2013, plaintiff was not well, and

therefore, could not attend the matter. The learned trial Judge passed no evidence order and closed the evidence of the plaintiff. He submitted that on 09.10.2013, application was made for recalling the order dated 19.09.2013. By the impugned order, the learned trial Judge has rejected the application. He submitted that the Suit is for partition and separate possession and therefore, in the ends of justice, order dated 19.09.2013 deserves to be set aside.

4. On the other hand, Mr. Talkute supported the impugned order. He submitted that though plaintiff claimed that he was not well, and therefore, could not attend the proceedings on 19.09.2013, no medical certificate was produced substantiating the said ground. The learned trial Judge was therefore, justified in rejecting the application.

5. 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 shows that plaintiff has instituted Suit against the defendants for partition and separate possession of the property situate at Village Fursungi, Taluka Haveli, District Pune (for short 'suit property'). Plaintiff has claimed 1/6th share in the suit property. The matter appears to have been kept on 19.09.2013 for the plaintiff's evidence. As the plaintiff was not present, the learned trial Judge closed the evidence. On 09.10.2013, plaintiff has filed application for recalling the order dated 19.09.2013. Having regard to the fact that Suit is for partition and separate possession wherein the defendants are also plaintiffs, in my opinion, interest of justice will be served by setting aside the impugned order subject to imposing costs on the plaintiff. Hence, the following order:

- a. Impugned order dated 16.04.2014 is set aside subject to the plaintiff depositing costs of Rs.5000/- within four weeks from

today;

b. Respondents No.1 and 2 are permitted to withdraw that amount unconditionally;

c. Rule is made absolute in the aforesaid terms.

6. Mr. Patil assures that plaintiff will not seek undue adjournment and will extend co-operation for completing her evidence. Assurance is recorded.

(R. G. KETKAR, J.)

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