

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

WRIT PETITION NO. 282 OF 2017

Abdul Wahid Mashaallah Qureshi ..Petitioner.

Vs

Sharda Ramchandra Patil and .. Respondents
ors.

Ms. Anita Vasani i/b Mr. Omprakash Pandey, Advocate for
Petitioner.

Mr. Raju D. Suryawanshi , Advocate for Respondents no.1 and 2.

**CORAM : R.G.KETKAR,J.
DATE : 14/02/2017**

PC:

1. Heard Ms. Anita Vasani, learned counsel for the petitioner and Mr.R. D. Suryawanshi , learned counsel for respondents no.1 and 2 at length.

2. By this Petition under Article 227 of the Constitution of India, the petitioner, hereinafter referred to as 'defendant no.5', has challenged the Judgment and order dated 29.11.2016 passed by the learned Civil Judge, Sr.Dn., Vasai below Exhibit-158 in Spl. Civil Suit No.6 of 2010. By that order, the learned trial Judge rejected the application made by defendants no. 5 and 6 for setting aside order closing their evidence and also permitting them to lead evidence.

3. In support of this petition, Ms Vasani submitted that the plaintiff had filed application Exhibit-5. Defendants no. 5 and 6 filed reply at Exhibit-27 opposing that application. By order

dated 21.3.2011, the learned trial Judge rejected the application. She submitted that the plaintiff filed application Exhibit 28 dated 20.3.2010 for passing No W.S. order. On the same day, the learned trial Judge passed No W.S. order against defendants no.5 and 6. She invited my attention to Exhibit-27 filed on 20.3.2010 opposing application filed by the plaintiffs at Exhibit-5 and submitted that the say filed by defendants no. 5 and 6 is also written statement opposing the suit. She invited my attention to paragraph 5 of the order dated 21.3.2011 below Exhibit-5, wherein the learned trial Judge has observed that defendants no. 5 and 6 have submitted their say cum Written Statement at Exhibit -27. She, therefore, submitted that the learned trial Judge was not justified in rejecting the application on the basis of the orders passed below Exhibits 28, 126, 128 and 133. She, therefore, submitted that the impugned order deserves to be set aside thereby setting aside order passed by the learned trial Judge closing evidence of defendants no.5 and 6 and permitting them to lead evidence.

4. On the other hand, Mr Suryawanshi supported the impugned order. He submitted that the observation made by the learned trial judge in paragraph 5 of the order dated 21.3.2011 is factually incorrect and contrary to record. He has invited my attention to the reply filed by defendants no. 5 and 6 opposing injunction application. He submitted that the order dated

21.3.2011 passed by the trial Court was set aside by this Court. He, therefore, submitted that as defendants no. 5 and 6 have not filed written statement, they cannot be permitted to lead evidence. As far as the order closing evidence of defendants no. 5 and 6 is concerned, he submitted that after considering the conduct of the defendants, the learned trial Judge has disallowed their prayer. He, therefore, submitted that no case is made out for interfering with the impugned order.

5. I have considered the rival submissions made by the learned counsel appearing for the parties. I have also perused the material on record. It is not in dispute that defendants no. 5 and 6 filed say at Exhibit 27 opposing the application for injunction filed by the plaintiffs. It is no doubt true that in paragraph 5 of the order dated 21.3.2011, the learned trial Judge observed that defendants have filed say cum written statement at Exhibit 27. The said observation is contrary to record. That apart, order dated 21.3.2011 was set aside by this Court.

6. It is also not in dispute that defendants no. 5 and 6 did not file any purshis adopting their say as written statement. By order dated 20.3.2010, the learned trial Judge passed No W.S order. Till date, neither defendants no. 5 and 6 filed any purshis adopting their say nor filed any application for setting aside No W.S order. Thus, the fact remains as of today defendants no.5 and 6 have not filed written statement. If they have not filed written

statement, they cannot be permitted to lead evidence.

7. As far as closing evidence of defendants no. 5 and 6 is concerned, as defendants no. 5 and 6 have not filed written statement, the learned trial Judge was justified in rejecting the application. The suit is proceeded without written statement against these defendants.

8. Mr.Suryawanshi submitted that in fact by order dated 5.8.2014 below Exhibit 126, the application filed by the defendants was allowed subject to payment of costs of Rs.500/- to the plaintiff. Even that order is not complied by defendants no. 5 and 6. I find merit in the submission of Mr.Suryawanshi. While rejecting the application, the learned trial Judge observed that the defendants were given opportunity but they failed and neglected to avail the opportunity. On few occasions, costs was imposed. The conduct of the defendants is careless, reckless and casual attitude. For the reasons recorded in the impugned order, no case is made out for interfering with the impugned order. Hence, petition fails and the same is dismissed. It is, however, expressly made clear that where a decree is appealed from by the petitioner, any error, defect or irregularity in the impugned order, affecting the decision of the case, may be set forth as a ground of objection in the memorandum of appeal as contemplated by Section 105(1) of C.P.C.

(R.G.KETKAR, J.)