

WRIT PETITION No. 3027 OF 2016

DATE : OCTOBER 30, 2018

1. The Petitioner, who is original defendant No. 3, by this writ petition under Article 227 of the Constitution of India, is challenging the order dated 23rd November, 2007 passed by the learned trial judge in Special Civil Suit No. 140 of 2004, and the judgment and order dated 10.12.2015 passed by 4th Ad-hoc District & Sessions Judge, Pune in Misc. Civil Appeal No. 431 of 2014. The Petitioner has filed written-statement in the suit, filed by Respondent No. 1 (original plaintiff), praying for declaration,

possession, mandatory and temporary injunction.

2. The plaintiff has examined witness, who was not cross-examined by the Petitioner (defendant No. 3). There was order of “no cross” against the petitioner. The said order was also not challenged by the Petitioner. The trial court ultimately passed *exparte* judgment and decree on 23rd November, 2007. The Petitioner made an application for certified copy of judgment and decree dated 23.11.2007 on the next day. Thereafter, the Petitioner filed an application for setting aside *exparte* judgment and decree. Oral evidence was led by the petitioner in the said application before the trial court. The Petitioner examined a doctor, who had treated the Petitioner during the period when the matter was listed before the trial court for recording the evidence and the arguments.

3. After considering the oral and documentary evidence, trial court dismissed the said application, viz. Misc. Application No. 118/2008, by an order dated 19.9.2009 passed below Exhibit 1, after recording detailed reasons. 4Th Ad-hoc District &

Sessions Judge, Pune dismissed Misc. Civil Appeal No. 431/2014 filed by the Petitioner by order dated 10th December, 2015, confirming the order dated 19.9.2009 passed by the trial court. Both these orders are impugned by the Petitioner in this writ petition, filed under Art. 227 of the Constitution of India.

4. The learned counsel for the Petitioner drew my attention to the findings of both the courts below and submitted that his client was totally unwell during the period when the matter was listed before the trial court for recording the evidence and the arguments. He fairly submits that there are several lapses on the part of his client, who remained absent on several occasions before the trial court. He, however, submits that as his client had filed the written-statement before the trial court, opportunity of hearing may be granted by setting aside the orders of both the courts below. He submits that if both the impugned orders are set aside, Appellant will cooperate with the trial court in deciding the suit on merits expeditiously.

5. The learned counsel for the Petitioner repeats the

proposal recorded in order dated 9th March, 2016 to the effect that the plaintiff be appointed as an agent of the Court Receiver and put in possession of the suit property subject to his depositing Rs. 1,80,000/- in the trial court.

6. Learned counsel for the original plaintiff, on the other hand, submits that common written-statement was filed by the Petitioner alongwith original defendant No. 4. The Petitioner was opposing the applications filed by the plaintiff in the suit from time to time, and was fully aware about the progress of the suit. The Petitioner has also opposed the application filed by the plaintiff for leading secondary evidence. It is submitted that since the Petitioner deliberately remained absent, the order of 'no cross' was passed by the learned trial court. He submits that on the very next day of the exparte judgment and decree, Petitioner filed application for the certified copies said judgment and decree. He was fully aware of progress of the suit and passing of the exparte decree against him.

7. Learned counsel invited my attention to order dated

4th January, 2012 passed in Appeal From Order No. 253 of 2011 which was filed by original defendant No. 4 against the original plaintiff and submitted that the said exparte decree was also passed against original defendant No. 4. Original defendant No. 4 has also applied for setting aside exparte judgment and decree on the similar ground of his sickness, as also his family members. He submits that the learned trial judge dismissed the said application, which was confirmed by the first appellate court, and thereafter by this Court by an order dated 4th January, 2012. He submits that original defendant No. 4 has handed over possession of the suit property to the plaintiff in compliance of the same exparte decree.

8. It is submitted by the learned counsel that both the courts below have rightly considered oral and documentary evidence and recorded findings of fact to the effect that Petitioner was fully aware about the progress of the suit and had remained absent deliberately. He submits that this Court shall not interfere with the findings of both the courts below.

9. A perusal of the record and findings of the two courts below shows that the Petitioner was aware about progress of the suit. He has filed objection to the application filed by the plaintiff for leading secondary evidence. The Petitioner, however, remained absent when the evidence was led by the original plaintiff. Though there was order of “no cross” passed by trial court, the petitioner did not challenge the said order and allowed the matter to be proceeded further. Learned trial court accordingly considered the oral evidence and the documents produced by the plaintiff, and was pleased to pass an exparte decree against all the defendants. The learned counsel for the Petitioner does not dispute that on the very next date of exparte decree passed by the trial court, petitioner filed application for certified copy. In my view, since the application for certified copy was filed on the very next day, it is clear that petitioner was fully aware of the decree, as also the progress of the suit.

10. The doctor examined by the Petitioner also could not support the case of the petitioner that the petitioner or his family

members were bed-ridden. It is not in dispute that a common written-statement was filed by the petitioner alongwith defendant No. 4. Similar, exparte decree was also passed against defendant No. 4, who also applied for setting aside exparte decree and lost upto this court. Defendant No. 4 has already handed over possession of the suit property to the plaintiff.

11. In my view, the proposal now made by the petitioner in this writ petition does not appear to be bona fide. As the petitioner was fully aware of progress of the suit, which was filed in 2004, no indulgence can be shown by this Court. Though an opportunity was granted by the trial judge to prove the bona fides, petitioner remained absent during the progress of the suit. The petitioner failed to prove and make out a sufficient cause for his absence, when exparte decree was passed. Both the courts below have considered documentary as well as oral evidence led by the parties in the application for setting aside exparte decree. The finding of fact of the courts below being not perverse, cannot be interfered with, in exercise of powers under Article 227 of the

Constitution of India. The writ petition being devoid of merits stands dismissed.

12. At the request of the learned counsel for the Petitioner, ad-interim protection granted by this Court is continued for a period of four weeks from today, subject to condition that the Petitioner shall not create any third party interest nor part with possession of the suit property, and if he wants to file Special Leave Petition, he shall serve a copy of the same on the respondent in advance. It is made clear that no further extension of stay would be granted.

Sd/-
[R. D. DHANUKA, J.]