

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.2498 OF 2018
(Nandkumar s/o Gopalrao Kate and others Vs. Tanaji Nanasaheb
Jagtap and another)

Mr.S.S.Gangakhedkar, Advocate for the petitioners.
Mr.P.P.Mandlik, Advocate for respondent No.2.

(CORAM : Ravindra V.Ghuge, J.)

DATE : 13/03/2019

PER COURT :

1. Heard the learned Advocates for the respective sides at length.
2. On 09/03/2019. I had passed the following order :-
 - “1. The petitioners are the original defendants, who are aggrieved by the order dated 29.1.2018, passed by the trial Court in RCS No.16 of 2004, by which, application Exhibit 124, filed by defendant Nos.1(1 & 2) and 2(1 to 3), praying for recalling and setting aside the "Proceed Ex-parte" orders dated 11.9.2014, 12.6.2014 and 16.4.2015 has been rejected on the ground that there is a long delay.
 2. Contention is that the trial Court had initially decreed the suit on 19.10.2015 and the said judgment was set aside by the appellate Court in RCA No.48 of 2015 on 13.12.2017 and thereafter, the matter had been remitted for a re-hearing. It was

in this backdrop, that an application was promptly filed praying for recalling of the ex-parte order.

3. *Issue notice to the respondents, returnable on 13.4.2018.*

4. *On the condition that each of these petitioners would deposit an amount of Rs.2,500/- before the trial Court on/or before 26.3.2018, the trial Court would adjourn RCS No.16 of 2014, till the returnable date in this matter.*

5. *Leave to add detailed address of respondents 1 and 2 and supply copies of the petition paper book shall be furnished for issuance of notice on/or before 16.3.2018, failing which this petition shall stand dismissed without reference to the Court on 17.3.2018."*

3. Learned Advocate for respondent No.2 has strenuously opposed this petition on the ground that the petitioners have put forth a palpably false reason in Exhibit 124 while seeking recalling of the "proceed ex-parte" order. Paragraph No.8 of the impugned order, which evidences the factual aspects of service of suit summons, is highlighted.

4. It, therefore, appears that the respondents had been duly served with suit summons. Yet they had failed to participate in the

proceeding and the suit proceeded ex-parte. It is, therefore, contended that this petition deserves to be dismissed and in the event this Court is inclined to consider the interest of the respondents, heavy costs may be awarded and a portion of the costs would be donated for the treatment of the poor patients.

5. I do find merit in the submissions of Mr.Mandlik in view of the fact situation which is reflected in paragraph No.8 of the impugned order. No doubt, it appears that the respondents have attempted to suggest that they were never served with suit summons.

6. Notwithstanding this position, the judgment and decree dated 19/10/2015 was subsequently set aside by the Appellate Court in RCA No.48/2015 vide judgment dated 13/12/2017. The suit was remitted to the Trial Court for a re-hearing. Exhibit 124 was filed immediately on 16/01/2018. These peculiar facts of the case should have been considered keeping in focus that an immovable property is at issue in the suit and if the respondents / defendants are not granted the opportunity of participating in the suit, there would be no contest and an irreparable loss would be caused to these defendants.

7. Considering the above, this petition is allowed. The impugned order dated 29/01/2018 is quashed and set aside. Exhibit 124 is allowed on the following conditions : -

[a] Defendant No.1 (1 and 2) and 2 (1 to 3) shall file their written statements either jointly or severally before the Trial Court, on or before 05/04/2019 and there shall be no liberty to seek an adjournment.

[b] The amount of Rs.2,500/- deposited before the Trial Court shall be withdrawn by the LR's of the original plaintiff without conditions.

[c] A further amount of Rs.2,500/- shall be deposited by these petitioners in this Court, on or before 29/03/2015 as donation to the Government Medical College and Hospital, Aurangabad, **through Medical Officer, High Court Dispensary, Aurangabad**, either in cash or by Demand Draft (Demand Draft be drawn in the name of "**Dean, Government Medical College and Hospital, Aurangabad Dengi Samiti**") and produce a receipt of such deposit before the Trial Court on 05/04/2019.

[d] The Trial Court shall decide RCS No.16/2004 as expeditiously as possible and on or before 31/12/2019.

(Ravindra V.Ghuge, J.)