

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.12451 OF 2018

Sandip Jaywant Desai & Ors. ... **Petitioners**
Versus
Pratap Vamanrao Desai & Ors. ... **Respondents**

.....

Mr.Dilip Bodake i/b. Ms.Shraddha Pawar, Advocate for the
Petitioners.

Mr.Ajit N. Jakhadi, Advocate for the Respondent Nos.1,2,9 and 14.

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CORAM : A.M.BADAR J.

DATED : 5th NOVEMBER 2019.

P.C. :

1 This is a petition by original plaintiffs challenging the Order dated 01/10/2018 passed by the learned Civil Judge Junior Division, Doda Marg thereby allowing the application at Exhibit 124 filed on behalf of defendant Nos.1,2,9 and 14 for taking their written statements on record and by respondent No.1 and 2 for taking their replies to the application for temporary injunction on record. The learned trial Court by the impugned Order was pleased to allow the application for taking the replies as well as written statements on record subject to cost of Rs.1,500/-

2 Heard the learned Counsel appearing for the petitioners/plaintiffs. He vehemently argued that after lapse of six years, in a suit for partition and separate possession and application for temporary injunction written statements and replies on record came to be filed and the same is allowed erroneously by the learned trial Court. It is argued that evidence of the plaintiffs is already over and no-cross Order was also passed by the learned trial Court. Subsequently, the application at Exhibit 124 came to be filed with incorrect averments that the written statements could not have been filed because the suit was transferred from the Court at Sawantwadi to the Court at Doda Marg. It is further argued that no application for condonation of delay was filed along with application for taking the written statements and replies on record. The learned Counsel further argued that after lapse of ninety days, after service of summons, the learned trial Court ought not to have taken the written statements and replies on record and this course of action would certainly lead to delay in disposal of the trial. Issues will have to be framed and then again the trial will have to be held. This course, according to the learned Counsel for the petitioner, is contrary to the provision of Order VIII Rule 11 of the Code of Civil Procedure. Support is drawn from the Judgments of the Honourable Apex Court in the matter of *Mohammed Yusuf Versus Fajj Mohammad & Ors.*¹ , *Atcom Technologies Limited Versus*

1 2009(2)ALL MR 486.

*Y.A.Chunawala & Co. & Ors.*², and *R.N.Jadi & Brothers & Ors. Versus Subhashchandra*³ The learned Counsel for the petitioner further relied on Judgment of the learned Single Judge of this Court in the matter of *Milind Arvind Killedar (Dr.) Versus Prashant Mane & Ors.*⁴ and *Parasmal Daulatram Jain Versus Rameshwar Rathanlal Karwa.*⁵

3 The learned Counsel for respondent/defendant by relying on judgment of the Honourable Apex Court in the matter of *Bhivchandra Shankar More Versus Balu Gangaram More & Ors.*⁶ contended that in a suit for partition written statement of defendants is necessary for complete adjudication of the matter. He argued that the learned trial Court considered it necessary to have written statements on record and, therefore, the application came to be allowed.

4 I have considered the submissions so advanced and also perused the material placed before me including the impugned Order.

5 The discretionary Order for taking the written statements as well as the replies to the application for temporary injunction on record is challenged before this Court. Scope of this

2 2018(6) SCC 639.

3 2007(6) SCC 420.

4 2018(3) Mh.L.J. 115.

5 2019 DGLS (Bom.) 901.

6 Civil Appeal No.4669 of 2019 (Arising out of SLP(Civil) No.28938 of 2014).

Court in entertaining such challenge is limited to the illegality, irrationality or procedural impropriety in passing such Order. I have carefully considered the law laid down on this aspect relied by the learned Counsel appearing for the petitioners. The application for taking written statements on record after the prescribed period need to be decided not by following routine manner, but on examining whether there is sufficient justification for departing from the time limit fixed by the legislature in filing the written statement on record. The provisions in this regard are directory and not mandatory.

6 Primary function of the Court is to adjudicate the dispute on its own merit rather than adhering the technicality of law. The case in hand is that of partition and separate possession. The learned trial Court has exercised the discretion for accepting the written statements and replies on record by holding that for complete adjudication of the matter, it is necessary to have written statements and replies of defendant Nos.1,2,9 and 14 on record. For accepting the written statements and replies on record, cost of Rs.1,500/- is imposed on defendants. The discretion so exercised cannot be said to be exercised arbitrarily or capriciously. There is no any illegality, irrationality or procedural impropriety in passing the impugned Order by directing that the written statements and replies of the defendants be taken on record.

7 The petition, as such, is devoid of merit and the same is, therefore, dismissed.

(A.M.BADAR, J.)