

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO.5088 OF 2011

**RAMCHANDRA DASHRATHRAO WAGHMARE
VERSUS
VIJAY DASHRATHRAO WAGHMARE AND OTHERS**

...
Advocate for Respondent No.5 : Mr. P. B. Rakhunde

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CORAM : NITIN B. SURYAWANSHI, J.

DATE : 30th AUGUST, 2022

PER COURT :

1. By this petition, the petitioner challenges order dated 07/06/2011, passed by learned 2nd Joint Civil Judge, Senior Division, Osmanabad, below Exhibit-57 in Special Civil Suit No.28/2011.

2. The suit is filed by respondent No.1/plaintiff for partition and separate possession claiming 1/5th share in the suit property. Petitioner is original defendant No.4. Though the other defendants filed written statement opposing the suit, petitioner failed to file written statement in time. The trial Court, therefore, by order dated 16/04/2011, directed that the suit should proceed without written statement of defendant No.4/petitioner. The petitioner, therefore, filed application Exhibit-57 praying for setting aside the 'no written statement' order and filed written statement along with the said application. The application was opposed by the plaintiff. Trial Court

has rejected the application on the ground that no sufficient ground is shown for not filing written statement within stipulated time and the petitioner cannot take advantage of his own wrong. It is further held that the petitioner was well aware about the fact that order is passed against him, issues were framed and evidence was recorded, but still he has not taken specific step within time.

3. At the time of admission, this Court by order dated 25/07/2011, issued notice to the respondents and granted ad-interim stay to the further proceedings in the suit. The said interim relief is continued from time to time.

4. In view of unfortunate death of learned advocate representing petitioner, by order dated 05/01/2021 notice was directed to be issued to the petitioner. Record indicates that the said notice is served on the petitioner, however, the petitioner has not appeared in the matter. Again, by order dated 24/01/2022, fresh notice was issued to the petitioner, which is served on the petitioner, but the petitioner has failed to appear.

5. The matter is moved by learned advocate for respondent No.5, contending that the suit of the year 2011 is stayed and the same needs to be heard expeditiously by vacating the stay.

6. Taking into consideration the fact that the petitioner had filed application Exhibit-57 within a period of two months from the date of passing of 'no written statement' order, the trial Court appears to have taken hyper technical view in rejecting the said application. With a view to give fair opportunity, written statement of the petitioner needs to be accepted. The impugned order, therefore, in the opinion of this Court is unsustainable. Hence, the following order :-

ORDER

- (I) The impugned order is hereby quashed and set aside.
- (II) Application Exhibit-57 is allowed and the petitioner is permitted to file written statement, subject to payment of cost of Rs.10,000/- to the plaintiff.
- (III) The suit shall proceed from the stage of recording evidence of the plaintiff.
- (IV) The suit is expedited.

With these directions, the writ petition is disposed of.

(NITIN B. SURYAWANSHI, J.)