

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

WRIT PETITION NO. 15072 OF 2019

Vilas Murlidhar Dhonde & Ors.

...Petitioners

Versus

Balasaheb Bhanudas Yamgar & Ors.

...Respondents

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Shri. S. P. Salgar h/f Shri. N. V. Gaware, Advocate for the petitioners
Shri. V. P. Latange, Advocate for respondent no. 1

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CORAM : BHARATI H. DANGRE, J.

DATE : FEBRUARY 10TH, 2022

PER COURT : -

1. Heard the learned Counsel Shri S. P. Salgar for the petitioner and Shri. V. P. Latange for respondent no. 1/the contesting party.

2. The petitioner is aggrieved by an order dated 11.04.2019 passed by the Civil Judge Senior Division, Shrigonda, below Exh. 327 in R.C.S. No. 181/2013 by which the application filed by the present petitioners, who are the defendant nos. 4 and 5 in the said suit to set aside the exparte order passed against them, has been rejected.

3. Going a little back, it can be discerned that the respondent nos. 2 to 5 filed Reg. Civil Suit No. 181 of 2013 seeking mandatory

injunction and for compensation and this suit initially impleaded respondent no. 1, 6 & 7 as defendants. It was pleaded in the plaint that the original plaintiff had purchased suit land on 23.02.1992 from one Sarjerao Trimbake and the respondent no. 1 i.e. original defendant no. 3 had purchased the share of one Appasaheb Kisan Kharade. At that stage, the Court Commissioner was appointed and upon receipt of the report it is revealed that the respondent nos. 6 & 7 had encroached upon the land of the plaintiff. This gave rise to the cause of action for the suit being filed.

. The respondent no. 1 i.e. the original defendant no. 3 filed a counter claim on 05.7.2016 contending that the petitioner had encroached upon the share of the defendant no. 3 to the extent of 18.50 sq.mtr. and 91.50 sq.mtr., and sought removal of the encroachment and possession. That is how the present petitioners were introduced in the proceeding by way of counterim claim and it is admitted position that they were not party to the original suit in it's original form. The present petitioners who came to be impleaded as defendant nos. 4 & 5, however, failed to appear before the Court despite issuance of the suit summons and the reason cited is, that they were out of station for business puspose and also that they were collecting the relevant documetns and thereafter moved an application below Exh. 327, seeking setting aside of the exparte order

passed on 25.07.2017.

. This application came to be preferred on 10.04.2019 and came up for consideration before the learned Judge.

4. The learned Judge specifically recorded that the applicants (the present petitioners) were not party to the original suit but they came to be impleaded thereafter, when the defendant no. 3 filed a counter claim. Notices were issued to the party and, therefore, it was imperative for them to put their appearance and file written statement to the counter claim but since they failed to appear, the *ex-parte* order came to be passed on 25.07.2017 against defendant nos. 4 & 5 (present petitioners).

5. Noting the objection raised to the application being entertained after a period of almost two years, since the *ex-parte* order was passed on 25.07.2017 whereas the application was moved on 10.04.2019, the chronology of events in the suit was specifically highlighted by the learned Judge in arriving at a conclusion that the application do not deserve consideration. He has noticed that the defendant nos. 4 and 5 were added in the suit in the year 2016 and to be specific on 15.12.2016, but they failed to appear which prompted the Court to proceed *ex-parte* against them by an order

dated 25.07.2017. The time at which the application is moved is also relevant since it is noted that in the proceedings the plaintiff as well as the original defendant produced their further evidence and the matter was adjourned for final argument on 05.03.2019, on which date the plaintiff and defendant nos. 2 and 3 submitted their arguments. After concluding the arguments, the direction was issued to the Dy. Superintendent of Land Records to produce some relevant documents in terms of order passed below Exh. 1 on the very same day and for this purpose, the matter came to be adjourned to 15.03.2019. However, there was failure to produce the said documents and the defendant no. 1 sought permission to argue the matter. This permission was granted and the final argument of the defendant no. 1 was heard on 15.03.2019 and the matter was closed for judgment with a direction to produce the documents.

. From the aforesaid sequence of events, the learned Judge has concluded that the evidence of both the parties was already over and since the final arguments were concluded and the matter was adjourned for documents and judgment, he has clarified the clerical mistake in the Roznama.

6. Recording the aforesaid, the application came to be rejected specifically when the arguments were already concluded and

nothing remained to be heard in the matter.

. Reliance upon the decision of the Apex Court in the case of Arjun Singh Vs. Mohindra Kumar and others reported in AIR 1964 SC 993, is held to be governing the facts, particularly construing the provision of Order IX Rule 7 and Order IX Rule 13, wherein the Apex Court has specifically construed the term 'hearing' of the suit being completed and has held that if the hearing of the suit is completed and the Court being competent to pronounce the judgment, adjourns the suit for purpose of pronouncing the judgment, there is clearly no adjournment of "the hearing" of the suit because there is nothing more to be heard in the suit. Relying upon the said decision of the Apex Court, the learned Judge arrived at a finding that there was no stage to entertain the application and even if the defendant, who filed a counter claim accords his no objection, the application itself being not maintainable is liable to be rejected. In the wake of the aforesaid, the application came to be rejected by the impugned order.

. The learned Counsel for the petitioners has placed reliance upon the decision of the Hon'ble Apex Court in the case of Lal Devi and Anr v. Vaneeta Jain and Ors reported in AIR 2007 SC 1889 which in turn has made a reference to the decision in the case of Arjun Singh. I have perused the necessary facts involved and the conclusion arrived at by the Apex Court. In the peculiar facts when

the Counsel engaged by the defendant did not appear before the court on the date fixed for hearing nor communicated to the court of his absence and the court proceeded ex-parte and examined the witnesses present in the court and heard the arguments and reserved its judgment, by taking a note of the fact that the party should not suffer because the party was not at fault since the Counsel who he instructed failed to appear before the court, the learned Apex Court has granted indulgence. This is not the case here since the petitioners themselves have failed to put an appearance before the court for a long period, as much as two years on the pretext that they were collecting the documents or that they were out of station. The court was not convinced with this ground to call for indulgence, specifically when the suit has advanced at a further stage within the period of two years and the explanation put forth being not found justified, the indulgence was refused. This judgment of the Hon'ble Apex Court in the case of Lal Devi (*supra*) do not, in any way, take further the case of the petitioners.

7. Since the facts and the law on the said aspect being clear and the matter was already closed for judgment, and the present petitioners were not diligent in prosecuting the remedy available to them by filing an appropriate application at the appropriate stage

when the proceeding in the suits was continued, after it was closed for judgment he cannot seek any indulgence and the learned Judge has rightly rejected the application.

8. In the wake of the aforesaid, the writ petition is dismissed by upholding the impugned order. No order as to costs.

9. In view of the order being passed, the learned Civil Judge Senior Division shall pronounce the judgment since he has reserved the proceedings for pronouncement of the judgment.

[BHARATI H. DANGRE]
JUDGE