

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.4672 OF 2023

Netaji Shivaji Gadakar

Petitioner

Versus

Tulshiram Tukaram Gadakar And Another

Respondents

Mr. Shoyab Shaikh, Advocate for the petitioner.

Mr. K.J. Suryawanshi h/f Mr. Amit Ghute, Advocate for respondents.

.....

[CORAM : NITIN B. SURYAWANSHI, J.]

DATE : 13th SEPTEMBER, 2023

ORDER :

1. Leave to correct prayer clause.
2. Petitioner is aggrieved by the order passed by learned 4th Joint Civil Judge, Senior Division, Osmanabad, below Exhibit- 102 in Regular Civil Suit No. 217/2012, thereby rejecting the application filed by the petitioner seeking permission to lead evidence.
3. Petitioner/plaintiff has filed suit for declaration of ownership and perpetual injunction in respect of suit land admeasuring 1 Hectare 11 Are. Defendants opposed the suit by filing written statement. Thereafter, plaintiff filed his affidavit in

lieu of examination-in-chief and matter was posted for cross examination. However, it is the case of the petitioner/plaintiff that as he was suffering from jaundice, he could not remain present for cross examination. He was taking treatment from private person for jaundice. Since, petitioner/plaintiff could not remain present, suit filed by the plaintiff was dismissed in default by order dated 28.04.2022.

4. Since, there was counter claim filed by the defendants, technically the suit could not have been dismissed, therefore, the suit was again taken on board by order dated 29.04.2022. Thereafter, present application Exhibit-102 is filed by the petitioner seeking permission to treat his earlier evidence affidavit as his evidence and contending that he is ready for the cross examination. This application is rejected by the Trial Court holding that only for technical purpose, the suit was taken up on board and in spite of having sufficient opportunity, plaintiff has failed to remain present and therefore he is not entitled for the relief claimed in the application.

5. Heard the learned advocate for the petitioner and learned advocate for the respondents. Perused the memo of writ petition, annexures thereto and the impugned order.

6. It is a matter of record that the petitioner is prosecuting the suit since 2012. Though, there are lapses committed by the petitioner, since valuable rights of the petitioner are involved in the suit, in the interest of justice, this Court is inclined to allow the petition, so as to give fair opportunity to the petitioner to contest the suit on merits. Hence, following order:

ORDER

- (I) Writ petition is allowed.
- (II) Impugned order dated 17.12.2022, passed by learned 4th Joint Civil Judge, Senior Division, Osmanabad, below Exhibit-102, in Regular Civil Suit No. 217/2012, is hereby quashed and set aside.
- (III) Application Exhibit-102 is allowed, subject to the petitioner paying cost of Rs. 15,000/- to the defendants in the Trial Court.

[NITIN B. SURYAWANSHI, J.]