

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 8408 OF 2023

Kisan Anandrao Shinde

... Petitioner

Versus

Rajaram Nana Tupe and Ors.

... Respondents

— —
Mr. Wasim Samlewale, for the Petitioner.
— —

CORAM : SHARMILA U. DESHMUKH, J.

DATE : August 10, 2023.

P. C. :

1. By order dated 7th July, 2023, notice was issued to the respondent No.1-original plaintiff. Hamdast was permitted and in addition, the petitioner was permitted to serve the respondent No.1 by private notice. Office noting shows that the notice issued to the respondent No.1 is awaited. Learned counsel for the petitioner has filed affidavit of service stating that the copy of the petition with annexures was duly served upon the respondent no.1. Considering the controversy involved in the present petition, the same is taken up for hearing, though none appears for the respondent No.1.

2. The challenge in the petition is to the order dated 22nd June, 2023 rejecting the petitioner's application for setting aside "no evidence" order which was passed 17th November, 2022.

3. Learned counsel appearing for the petitioner submits that "no ws" order was passed against the petitioner, who is the defendant no.6 on 9th October, 2021. He would submit that on 17th December, 2021, the order of "no ws" was set aside and the written statement of the defendant no.6 was taken on record. He would further submit that on 17th November, 2022, the order of "no evidence" came to be passed, as against which the application was filed on 12th December, 2022 on the day, on which the defendant no.6, become aware of the order.

4. Considered the submissions.

5. Regular Civil Suit No.81 of 2017 has been instituted seeking partition and separate possession of the suit property. By order dated 7th December, 2021 the order of "no ws" was set aside and the written statement taken on record. Perusal of the written statement would indicate that it is a specific case of the defendant no.6 that by virtue of registered sale deed, defendant no.6 is the owner of the suit property. From a perusal of the impugned order, it

appears that the defendant's evidence has been closed, for the reasons that in the application the defendant has not sought permission to cross-examine the plaintiff's witnesses and subsequently, the matter was listed for defendant No.6's evidence, however, as no evidence was led, the "evidence close" order has been passed. The trial Court also considered the written statement of the defendant no.6 and came to a finding that the same does not reflect any specific defence and as such, defendant no.6 is seeking to protract the proceedings.

6. Upon perusal of the written statement, specific assertion as regards the purchase of the property can be found. Therefore, it cannot be said that the written statement does not disclose any specific defence as such. Further, the trial Court itself by order dated 17th December, 2021 has set aside the order of "no ws" and permitted the written statement to be taken on record. Subsequently, it appears that the plaintiff's evidence was closed and the matter was listed for evidence of the defendants. As no evidence was led on behalf of the defendant no.6, the evidence closed on 17th November, 2022, as against which on 12th December, 2022, the application was filed. The sequence of dates and events do not reflect that after the written statement was taken on record, the

defendant no.6 was grossly negligent as to decline him opportunity to lead evidence in the matter.

7. Considering that the suit is for partition and separate possession and a specific assertion is made that the defendant no.6 has purchased the property, in event the evidence of the defendant is foreclosed, grave prejudice would be caused to the defendant no.6. The order of “no evidence” was passed on 17th November, 2022 and the application was filed on 12th December, 2022, upon the defendant no.6 becoming aware of the same. As such, it cannot be said that there is so gross a delay that application could not have been considered. In my view, the defendant no.6 is entitled to contest the suit on merits and closing of the evidence will deprive him of a valuable right.

8. In light of the above, the impugned order dated 22nd June, 2023 is quashed and set aside, subject to payment of costs of Rs.10,000/- (Rupees Ten Thousand) by the defendant no.6 to the plaintiff. The costs to be paid within a period of two weeks from today. As the impugned order is quashed and set aside, the application filed below Exh.53 stands allowed. The defendant no.6 is permitted to lead evidence. However, it is made clear that no

further adjournments are to be granted to the defendant no.6 for purpose of leading evidence.

9. Writ Petition stands allowed in the above terms.

(Sharmila U. Deshmukh, J.)