

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR**

Writ Petition No.597 of 2022

Kamlabai wd/o Jitendrasingh Gahilot and others Vs. Vijaysingh s/o Surendrasingh Gahilot

Office Notes, Office Memoranda of
Coram, appearances, Court's Orders
or directions and Registrar's order

Court's or Judge's Order

Shri U.M. Aurangabadkar, Advocate for the Petitioners

Shri A.M. Ghare, Advocate for the respondent Nos.1, 4, 5, 6(a) to (d), 7(i) to (iii),
8(i) to (iii), 9, 10(ii) to (v), 12 to 16 & 20 (i) to (iii).

CORAM : ANIL S. KILOR, J.

DATED : 12th April 2023

1. Heard.

2. The order below Exh.291, rejecting the application for setting aside *ex parte* order, passed by 3rd Joint Civil Judge Senior Division, Akola in Special Civil Suit No. 85 of 2012, is impugned in the present writ petition.

3. The respondent No.1 filed a suit in the year 2001 and thereafter, the issues were framed in the year 2010. Thereafter, the evidence was recorded. In the meantime, the suit was proceeded *ex parte* against the defendant Nos.10 and 15 and to get the said order set aside, the application Exh.291 was moved by the petitioners, which came to be dismissed by the trial Court, on the ground of delay of 13 years.

4. The learned counsel for the petitioners submits that the petitioners had engaged an Advocate Shri G.R. Parama, who was looking after the matter and as he assured that he would take all

the necessary steps and would inform if the steps are to be taken in the proceeding under the signatures of the petitioners.

5. It is further stated that whenever the inquiry was made with Mr. Parama, Advocate, he informed to the petitioners that the proceeding would take its own time and the petitioners need not to bother, as he would take necessary appropriate steps in the matter. It is further stated that the because of such assurance, the petitioners were under *bona fide* impression that the proper steps are being taken by Shri Parama, Advocate in the matter.

6. It is further pointed out that subsequently because of illness, Shri Parama, Advocate died and new lawyers were engaged. Thereupon, it was revealed that no written statement was filed and hence, the application was moved for setting aside the *ex parte* order. It is submitted that thus, it was a mistake of a lawyer and for the mistake of the lawyer, the petitioners should not be suffered.

7. The learned counsel for the petitioners further submits that though the delay has been properly explained and also the circumstance in which the written statement was not filed, the learned trial Court without considering the reasons stated in the application, rejected the same.

8. On the other hand, Shri Ghare, learned counsel for the respondents submits that in the year 2009 with no objection of Shri Parama, the petitioners had engaged lawyers, namely, M.S. Sambare, Adv. A.K. Sarog and Adv. M.I. Shekhani. He has drawn attention of this Court to the Vakalatnama Exh.88, in support of

his submission. He therefore, submits that after 2009 because of change of lawyer, the ground mentioned and as argued, is not available to the petitioners.

9. In reply, the learned counsel for the petitioners, submits that though the above referred lawyers were engaged, however, the record was with Shri Parama, Advocate, who even drafted the written statement and obtained the signatures of the petitioners on the same, while notarizing the written statement on 03.04.2017. He therefore, submits that the above referred lawyers were engaged in addition to Shri Parama, Advocate, however, Shri Parama, Advocate was looking after the matter.

10. The learned counsel for the respondents points out that this is not a stand taken in the application and therefore, it cannot be considered and relied upon. Accordingly, the learned counsel for the respondents submits that no proper explanation has been given for such an inordinate delay and therefore, the learned trial Court has rightly rejected the application.

11. In the light of the rival submissions of the parties, I have perused the record and the impugned order.

12. From the record, it is evident that on 11.07.2001, the Court proceeded *ex parte* against the defendant Nos.12 and 15 and on 13.03.2002 'No-W.S.' order came to be passed against the defendant Nos.10 and 14.

13. In the impugned order, the trial Court has observed that on 12.06.2009, additional affidavit on behalf of the defendant Nos.10 to 15 was filed. The trial Court has observed that the

petitioners therefore though appeared in the matter but they failed to file their written statement. Admittedly, the application Exh.291 was filed on 11.08.2021 i.e. after more than 20 years, after the *ex parte* order and 'No-W.S.' Order were passed.

14. The submission of the learned counsel for the petitioners that Shri Parama, Advocate was looking after the matter and he assured the petitioners that, he would take all necessary steps in the matter and because of his fault, the order to proceed *ex parte* against the defendant Nos.12 and 15 and 'No-W.S.' against the defendant Nos.10 and 14, were passed, cannot be accepted in view of Vakalatnama (Exh.88) which was filed by three lawyers, on obtaining no objection from Shri Parama, Advocate.

15. In the application Exh. 291, this position has not been explained by the petitioners, even there is no mention of the fact that, subsequently, the other lawyers were engaged. Thus, from the record, it appears that after 2009 Shri Parama, Advocate was not representing the petitioners.

16. In the written statement dated 03.04.2017 copy of which is filed along with the petition, though it bears the signature of Shri Parama, Advocate, however, petitioners have not explained that, after 2009, how Shri Parama, Advocate has signed the written statement, once the other lawyers filed their Vakalatnama with the no objection of Shri Parama, Advocate.

17. In absence of all these explanations and suppression of fact that in the year 2009 the petitioners appointed Adv. M.S. Sambare, by obtaining no objection from Shri Parama, Advocate

and in absence of any satisfactory explanation provided for such a huge delay, I do not find any error committed by the learned trial Court in rejecting the application Exh.291.

18. As litigants, the petitioners have also some duties. The litigants cannot shift their burden on the lawyers by saying that, it was a mistake committed by a lawyer. Nothing has been brought on record to show that what steps the petitioners have taken to contact the lawyer on regular basis and to know the status of the suit.

19. Thus, it appears that the petitioners themselves were not diligent in pursuing the matter and therefore, the submission of the learned counsel for the petitioners that for the mistake of lawyer, the litigants should not suffer, cannot be accepted in the peculiar fact and circumstances of the present case.

20. In the circumstances, I do not find any error committed by the learned trial Court, accordingly, the writ petition is **dismissed**.

Pending application(s), if any, shall stand disposed of accordingly.

[ANIL S. KILOR, J.]