

HARSHADA H. SAWANT
(P.A.)

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.8210 OF 2024

Nilesh Subhash Akkar and Anr.

.. Petitioners

Versus

Thakubai Walu Waghchaure since deceased
through legal heirs Ambadas Walu Waghchaure
and Ors.

.. Respondents

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- Mr. Sanjay P. Shinde, Advocate for Petitioners.
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CORAM : MILIND N. JADHAV, J.

DATE : JUNE 10, 2024

P.C.:

- 1.** Heard Mr. Shinde, learned Advocate for Petitioners.
- 2.** This Writ Petition maintains a challenge to twin orders passed below Exhibits-43 and 45 by the learned Trial Court in Special Civil Suit No.1364 of 2022. The order dated 19.12.2023 is passed in the Application filed below Exhibit-43 rejecting the request sought for by Defendants to comply with the directions contained in the order dated 29.11.2023 and permitting Defendants to deposit the cost of Rs.5,000/- with the Plaintiff. The order dated 29.11.2023 is the order by which 'no-cross' order dated 08.08.2022 passed against Defendants was set aside and he was permitted to cross-examine the Plaintiff. It is seen that Suit is filed in the year 2022. The impugned order dated 19.12.2023 proceeds on the premise that Defendants are guilty of protracting and prolonging Suit proceedings and in that view of the

matter, within a period of one month after passing of order dated 29.11.2023, Application seeking extension of time to deposit the amount of Rs.5,000/- stood rejected. The order dated 29.11.2023 itself does not determine any time limit whatsoever and in that view of the matter undoubtedly the Defendants are entitled to deposit the amount within a reasonable amount of time. By virtue of Application filed below Exhibit-43, the Defendants prayed for seeking extension of time which ought to have been allowed in the first instance itself.

3. Be that as it may, I am inclined to reject the reasons stated by the learned Trial Court in the hand written order dated 19.12.2023 determining the Application filed below Exhibit-43. The said order deserves to be interfered with since the Defendants cannot be non-suited at the outset itself. It is not a case where the suit has languished for a long period of time and it is the *prima facie* case that Application filed below Exhibit-43 was the first Application filed within 20 days after passing of order dated 29.11.2023 and it came to be rejected by the impugned order on the same day itself. Hence the order dated 29.11.2023 is not sustainable and is quashed and set aside.

4. Resultantly, Defendants shall be entitled to deposit the costs within a period of two weeks from today as informed by the learned Advocate appearing for Defendants and on such costs being deposited as directed by the order dated 29.11.2023, the 'no-cross' order dated

08.08.2023 shall stand quashed and set aside and learned Trial Court shall list Special Civil Suit No.1364 of 2022 on its Board and pass appropriate direction for conducting cross-examination of Plaintiff. On the date of which cross-examination of Plaintiff is fixed, the Defendants shall be intimated by the Trial Court and Defendants and Advocate for Defendants shall remain present to complete the cross-examination of Plaintiff and thereafter decide the Suit proceedings on its own merits in accordance with law.

5. The second order impugned is order passed below Exhibit-45. The said order is appended at page No.60, Exhibit-H of the Writ Petition. Mr. Shinde would submit that during the course of pendency of aforesaid Application as also cross-examination of Plaintiff, the Defendants filed Application seeking amendment to its written statement which was already taken on record. The Plaintiff resisted the Application. Perusal of the Application filed below Exhibit-45 reveals that the Defendants desire to give an explanation, list of dates and events from the date on which Suit was filed and events which occurred thereafter and desire to give an explanation for the same. It is needless to state that Defendants shall be entitled to refer to and rely upon the evidence in rebuttal in support of its case and pleadings. The Defendants explanation in the Application filed below Exhibit-45 is somewhat convoluted.

6. The Application is at Exhibit-F, page No.46 of the Writ Petition. On perusal of the Application it is seen that after going through the explanation with respect to documentary evidence and the sale deed referred to and relied upon between the parties, Defendants have taken a fresh plea of adverse possession in amended paragraph No.15(c). This is precisely something which the Trial Court has outrightly rejected. However while doing so the learned Trial Court has adhered to the conduct of Defendants in not remaining present during cross-examination of the Plaintiff and referred to the order dated 19.12.2023 and has adopted that very reason of the Defendants having protracted and prolonged the trial while passing the impugned order dated 04.03.2024 below Exhibit-45 and rejecting the Defendants' plea for amendment to its written statement.

7. Incidentally, the learned Trial Court has given innocuous reasons namely that Defendants did not make out any good ground for grant of amendment under Order VI Rule 17 of the Code of Civil Procedure, 1908 as the trial is concluded. This particular aspect though incorrect, I am still inclined to hold that Defendants had showed no due diligence whatsoever and Application filed below Exhibit-45 seeking to add explanation to the already filed written statement cannot be countenanced at the stage at which the trial stands. Defendants are yet to cross-examine the Plaintiff and therefore all their contentions are kept open. Exhibit-45 has therefore been

correctly rejected by the Trial Court while holding that no due diligence which has been shown and fresh plea of adverse possession on the basis of sale deed having been taken by Defendant in the amendment Application. In view of the above, impugned order dated 04.03.2024 stands sustained.

8. It is clarified that Defendants shall be entitled to contest all of its contentions strictly in accordance with law and as per its written statement as available to the Defendants strictly in accordance with law. It is clarified that rejection of this order shall not come in the way of Defendants to maintain statutory challenge in appeal to the decree which shall be available to Defendants as per law.

9. With the above directions, Writ Petition stands partly allowed.

H. H. SAWANT

[MILIND N. JADHAV, J.]

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