
(2013) 03 BOM CK 0160

Bombay High Court

Case No: Writ Petition No. 4161 of 2012

Smt. Yashoda Bhimrao
Jadhav and Another

APPELLANT

Vs

Mahendra Mandanlal
Gundecha and Others

RESPONDENT

Date of Decision: March 5, 2013

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 8 Rule 1

Citation: (2013) 3 ABR 395

Hon'ble Judges: R.M. Savant, J

Bench: Single Bench

Advocate: N.N. Gavankar instructed by Sharon Patole, for the Appellant; Priyadarshini Birje, for the Respondent

Judgement

@JUDGMENTTAG-ORDER

R.M. Savant, J.

At the outset the learned counsel for the petitioners in both the petitions seeks deletion of the respondent Nos. 2 to 5 in Writ Petition No. 4161 of 2012 and the respondent Nos. 2 to 4 in Writ Petition No. 4160 of 2012. Leave granted. Amendment to be carried out by 7th March, 2013. Rule, with the consent of the learned counsel for the parties made returnable forthwith and heard.

2. The above petitions arise out of the common order dated 03/01/2012 passed by the learned Civil Judge, Senior Division, Ratnagiri by which order the Application Exhibits 25 and 27 filed by the petitioners in the above petitions for setting aside the No. W.S. order passed against them on 16/04/2010 came to be rejected. The said rejection is on the ground that in terms of Rule 1 of Order VIII of the CPC the said prayer of the petitioners cannot be granted as the period for filing the Written Statement mentioned therein is 30

days.

3. The petitioners in Writ Petition No. 4161 of 2012 are the original defendant Nos. 2 and 3, and the petitioner in Writ Petition No. 4160 of 2012 is the original defendant No. 5. The suit in question has been filed by the original plaintiff i.e. the respondent No. 1 herein in each of the above petitions claiming specific performance of the agreement dated 12/5/2007 and also seeking declaration in respect of the sale deed dated 29/6/2009 executed by the petitioner in Writ Petition No. 4160 with other defendants i.e. the defendant Nos. 1 to 3. It appears that in the said suit summons came to be served on the defendants on or about 17/11/2009. In so far as the defendant No. 5 is concerned, he appeared on 23/11/2009 and sought time to file Written Statement. The extended period in terms of Rule 1 of Order VIII of the CPC for filing the Written Statement has expired on 17/2/2010. In view of the fact that the Written Statements were not filed by the said two sets of defendants, the Trial Court passed the order dated 16/4/2010 to the effect that the matter to proceed ex parte against the said defendants. It is (hereafter on 17/6/2010 that applications Exhibits 25 and 27 came to be filed by the said two sets of defendants being defendant No. 5 and the defendant Nos. 2 and 3. The case of the defendants in the said applications was that they were engaged in the proceedings in the appeal filed before the Maharashtra Revenue Tribunal (for short the MRT) and therefore the originals of the relevant papers which were required for filing of the Written Statements were with the lawyer who was appearing for them in the said Appeal before the MRT. According to the defendants the said proceedings were being heard by the MRT sometime in February 2010. The Trial Court did not accept the justification given by the defendants for not filing the Written Statements within the time stipulated and has by the impugned order rejected the said applications.

4. Heard the learned counsel for the parties. The learned counsel appearing for the petitioners would reiterate the case of the petitioners i.e. the defendants in the said applications (Exhibits 25 and 27) and would contend that it is on account of the fact that the papers were not available with the defendants and were with the lawyer who was engaged in the proceedings before the MRT that the Written Statements could not be filed by the said two sets of defendants. The learned counsel would contend that having regard to the fact that Rule 1 of Order VIII of the CPC is held to be directory and not mandatory, the Applications (Exhibits 25 and 27) ought to have been allowed by the Trial Court.

5. Per contra, the learned counsel appearing for the respondent No. 1 herein i.e. the original plaintiff opposes the applications and would contend that the reasons mentioned in the applications do not make out a case for acceptance of the Written Statement filed by the defendants beyond the period stipulated in Rule 1 of Order VIII of the Code of Civil Procedure. The learned counsel for the Respondent No. 1 would contend that the defendants i.e. the petitioners above named have during the pendency of the above petitions carried out the construction in the plot of land in question and thereby prejudiced the claim of the Plaintiff in the suit.

6. Having heard the learned counsel for the parties, in my view, the above petitions are required to be allowed and the said two sets of defendants are required to be permitted to file their Written Statements. It is well settled by catena of judgments of this Court as well as the Apex Court that the provisions of Rule 1 of Order VIII of the CPC are directory and not mandatory and for just and sufficient reasons the delay in filing the Written Statement can be condoned. The facts of the present case, as indicated above, disclose that the defendants were engaged in the litigation before the MRT wherein the documents in question required for filing of their Written Statements were with the lawyer who was engaged by them in the proceedings before the MRT. The said reason given by the defendants can be said to be a plausible reason for the defendants for not filing their Written Statements within the period mentioned in Rule 1 of Order VIII of the Code of Civil Procedure. It is well settled that a party should be given an opportunity to contest a matter on merits rather than being thrown out on technicalities. The delay in filing the Written Statements in the instant case is not such that it cannot be condoned. A party cannot be left defenceless especially when it contends that it was impeded in filing the Written Statement in view of the fact that the relevant papers were not available with it. In that view of the matter, the impugned order dated 03/01/2012 is required to be quashed and set aside and is accordingly quashed and set aside, Resultantly the Applications (Exhibits 25 and 27) are required to be allowed and are accordingly allowed and the petitioners in each of the above petitions are permitted to file their Written Statements. They may do so within a period of six weeks from date. In the facts and circumstances of the present case, where the delay has occurred on the part of the defendants, it would be just and proper to impose costs on the said two sets of defendants. The said two sets of defendants i.e. the petitioners in the above petitions therefore to pay costs of Rs. 5000/- each to the plaintiff i.e. the respondent No. 1 making a total amount of Rs. 10,000/- The said costs to be paid within a period of four weeks from date and the evidence of the same to be produced before the Trial Court along with the Written Statements. Rule is accordingly made absolute on the aforesaid terms with parties to bear their respective costs.