

(2011) 12 BOM CK 0071

In the Bombay High Court

Case No : Writ Petition No. 2269 of 2010

Bhagwan Narayan Dhole and Others

APPELLANT

Vs

Arjun Narayan Dhole since deceased through Lrs. Shakuntala
Arjun Dhole and Others

RESPONDENT

Date of Decision : 17-12-2011

Acts Referred:

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

Citation : (2012) 2 ALLMR 138 : (2012) 5 BomCR 576 : (2012) 2 MhLj 867

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

Bench : Single Bench

Advocate : A.P. Kulkarni, for the Appellant; Vimalnath Tiwari, for the Respondent

Judgement

R.M. Savant, J.—Rule, with consent of the parties made returnable forthwith and heard.

2. The above Petition takes exception to the order dated 12/1/2010 passed by the Civil Judge, Senior Division, Baramati by which order the Application Exhibit 38 for setting out the "No Writ Statement Order" filed by the Petitioner No. 4 herein i.e. the Defendant No. 5 to the Special Civil Suit No. 31 of 2008 came to be rejected.

3. In so far as filing of the written statement is concerned, the summons was served on the Defendant No.5 on 1/4/2008 and he appeared in the Court through his advocate on 8/4/2008. Thereafter time was sought to file written statement till 30/6/2008. On the said day i.e. on 30/6/2008 an application was filed for seeking time to file written statement. The said application it seems was granted and as a last chance time was granted up to 17/7/2008. However, on 17/7/2008, the Defendant No. 5 failed to file his written statement and the Application Exhibit 33 filed by him for seeking further time came to be rejected. The Defendant No. 5 i.e. the Petitioner No. 4 herein thereafter filed an Application Exhibit 34 on 2/8/2008 setting out the grounds as to why the written statement could not be filed within the time stipulated by the trial Court. The

said Application came to be rejected. This resulted in the Defendant No. 5 filing a Writ Petition in this Court being Writ Petition No. 1573 of 2009. In the said Writ Petition, the advocate appearing for the Defendant No. 5 in the trial Court has filed his own personal affidavit accepting that on account of the communication gap between the Defendant No. 5 and him, the written statement could not be filed. This Court set aside the order passed on the Application Exhibit 34 and directed the Defendant No. 5 to file a fresh application for the same relief by relying upon the affidavit filed by the advocate in this Court. In the light of the said order passed by this Court dated 16/3/2009, the Defendant No. 5 filed a fresh application, to the said application was appended the affidavit of the advocate filed in this Court as also the fresh affidavit on the same lines. However, the fresh affidavit was not affirmed.

4. The trial Court on the basis that though this Court had granted liberty to the Defendant No. 5 to apply afresh for the same relief, but the same was on the basis of the affidavit of the advocate, that was required to be filed in support of the said application, and since the said affidavit was not affirmed, the trial Court held that the Defendant No. 5 has not complied with the order passed by this Court and has rejected the said Application by the impugned order dated 12/1/2010.

5. Heard the learned counsel for the parties.

6. In the instant case, there is no dispute that the Defendant No. 5 pursuant to the order passed by this Court dated 16/3/2009 had filed a fresh application setting out grounds on which he was seeking extension of time. The said ground was the communication gap between him and his advocate. The affidavit of the advocate which was filed in this Court was appended to the said Application. The said application was also sought to be supported by another affidavit which was on the same lines as the affidavit filed by the advocate in this Court. However, the said affidavit was not affirmed. The trial Court as indicated above, on the said ground, has rejected the said application for setting aside "No Written Statement Order". In my view, since the affidavit of the advocate filed in this Court was already appended to the application, rejection of the said application on account of non affirmation of the affidavit filed in support of the said application would in my view amount to taking a hyper technical view of the matter.

7. In so far as ground set out in the application viz. that there was communication gap between the advocate and Defendant No. 5, the same has not been disputed by the Plaintiff and the same is also not a ground which is found not acceptable by the trial Court. However, only on the basis that since the affidavit in support of the application was not affirmed, that the said application came to be rejected. It is well settled that procedure is ultimately an hand made of justice and has to be used to further cause of substantial justice and not oppress it. In my view, the trial Court in rejecting the said application Exhibit 38 has taken a hyper technical view of the matter. The rejection of the said

application would have serious consequences for the Defendant No. 5. That cannot be the purport or intent of the rules of procedure. In any event, it is now well settled that Order VIII Rule 1 of the CPC is directory and not mandatory.

8. In that view of the matter, the impugned order dated 12/1/2010 would have to be quashed and set aside and is accordingly quashed and set aside. Resultantly, the Application Exhibit 38 is allowed. The Written Statement filed by the Defendant No. 5 on 2/8/2008 along with the Application-Exhibit 34 to be taken on record.

9. By an order dated 29/3/2010 passed in the suit by which order notice came to be issued to the Respondents, the Petitioners were directed to deposit an amount of Rs. 5000/which according to the learned counsel for the Petitioner, has been deposited and presently lying in deposit in this Court. In my view, the interest of justice would be served if the Respondents are permitted to withdraw the said amount as costs. Rule is accordingly made absolute in the aforesaid terms with parties to bear their own costs. In the facts and circumstances of the case, hearing of the suit is expedited.