

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.4765 OF 2014

1. Smt. Rajulben Shailesh Shah]
Indian Inhabitant residing at]
60 B Daulat Banglow,]
Vallabhnagar Society E. W.]
Road No.2, Juhu Scheme,]
Vile Parle, Mumbai-49.]
2. Mr. Harendra Dolatrai Shah,]
Indian Inhabitant, residing at]
Flat No.7 & 8, Plot No.27,]
Krishna Building, 4th Floor,]
E.W. Road, No.6, Juhu Scheme,]
Vile Parle (West), Mumbai-49.]
3. Shri. Rajendra Dolatrai Shah,]
Indian Inhabitant, residing at]
60 B, Daulat Banglow,]
Vallabhnagar Society, E.W. Road]
No.2, Juhu Scheme, Vile Parle,]
Mumbai-49.]
4. Shri. Pankaj Dolatrai Shah,]
Indian Inhabitant, 60 B, Daulat]
Banglow, Vallabhnagar Society,]
E.W. Road No.2, Juhu Scheme,]
Vile Parle, Mumbai-49.]
5. Shri. Shailesh Dolatrai Shah,]
Indian Inhabitant, residing at]
60 B, Daulat Banglow,]
Vallabhnagar Society,]

E.W. Road No.2, Juhu Scheme,
Vile Parle, Mumbai-49.

]].. Petitioners

Versus

1. Tahsildar of Murbad

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having office at Murbad,
Dist-Thane.

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2. Shri. Pradeep Achut Joshi,

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Indian Inhabitant, residing
at B-5 Durvankur Society,
Plot No.RX-31, 3, M.I.D.C.,
Dombiwali (East), Thane.

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].. Respondents

Mrs. Lata Desai i/by Ms. Pallavi Divekar, for the Petitioners.

CORAM : R.M. SAVANT, J.

DATE : 28th SEPTEMBER, 2015

ORAL JUDGMENT

1. Rule, considering the challenge raised in the above Petition made returnable forthwith and heard. Though notice of final disposal was issued by a Learned Single Judge of this Court (R. G. Ketkar, J) by order dated 17.06.2015 the Respondent No.2 herein, who is the main contesting Respondent has not chosen to appear though served.

2. The Writ Jurisdiction of this Court is invoked against the order dated 18.03.2014 passed by the Learned Civil Judge Senior Division,

Kalyan, by which order the application filed by the Petitioners/Plaintiffs being application dated 11.03.2014 came to be rejected. The suit in question being Special Civil Suit No.388 of 2008 has been filed by the Plaintiffs for declaration and injunction. Suffice it would be to state that in the suit the Plaintiffs filed an application for temporary injunction which application in so far as the Defendant No.2 is concerned was replied by him vide his reply which was marked as Exh.16. The reply has been styled as under :-

“WRITTEN STATEMENT OF
DEFENDANT NO.2 IN REPLY
TO SHOW CAUSE NOTICE
AND AGAINST GRANT OF
AD-INTERIM INJUNCTION.”

3. The Defendant No.2 i.e. Respondent No.2 herein therefore has not filed a Written Statement in the suit in question and the only pleading that he has filed is the reply to the application for temporary injunction marked as Exh.16. On the Defendant filing the affidavit of examination-in-chief, an objection came to be raised on behalf of the Plaintiffs vide the instant application and the said application was founded on the fact that the Defendant No.2 has not filed his Written Statement in the suit in question and therefore should not be permitted to file his affidavit of evidence, though the main thrust of the said application filed by the Plaintiffs was as regards the affidavit of evidence which was filed

on behalf of the Defendant, the Trial Court it seems misinterpreted or misconstrued the said application and proceeded on the basis that the Plaintiffs have an objection to the Defendant No.2 being entitled to cross-examine the Plaintiff's witness. Resultantly, the Trial Court has not addressed the issue as to whether the Defendant No.2 is entitled to file the affidavit of evidence when in fact he has not filed his Written Statement. The Trial Court has referred to the reply filed to the application for temporary injunction filed by the Plaintiffs Exh.16 by the Defendant No.2 and has thereafter observed that since the reply has been filed, Defendant No.2 would be entitled to cross-examine the Plaintiff's witness. There can be no doubt about the fact that a Defendant who has not filed his Written Statement is still entitled to cross-examine the Plaintiff's witness on questions which revolve around issues of law. However, the Defendant undoubtedly is not entitled to file the affidavit of evidence as the same goes against the very tenets of our jurisprudence namely there cannot be any evidence without pleadings. It is required to be noted that the reply as indicated above is to the application for injunction. The reply does not deal with the plaint para-wise and only deals with the application for injunction. Further there is no application by the Defendant No.2 to treat the said reply as his Written Statement. In my view, the Trial Court has therefore proceeded on a wrong premise, whilst the objection of the

plaintiff is to the affidavit of examination-in-chief filed by the Defendant No.2 in the absence of pleadings, the Trial Court has observed that the Defendant No.2 would be entitled to cross-examine the Plaintiff's witness and thereby has not dealt with the issue as to whether the Defendant is entitled to file his affidavit of evidence in the absence of pleadings. In my view, therefore, the impugned order dated 18.03.2014 is required to be quashed and set aside and is accordingly quashed and set aside and the matter is relegated back to the Trial Court for a de-novo consideration of the application filed by the Plaintiffs at Exh.105 dated 11.03.2014 in terms of the observations made herein above. The Petition is allowed to the aforesaid extent. Rule is accordingly made absolute with no orders as to costs.

[R.M. SAVANT, J]

CERTIFICATE

Certified to be true and correct copy of the original signed
Judgment/Order.