

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO.6869 OF 2013

1	Ashokkumar Daulatsingh Madan Since deceased through legal heirs	]]]
1A]	Mina Ashok Madan Age : Major, Occ : Household	]]]
1B]	Mohit Ashok Madan Age : Major, Occ : Business	]]]
1C]	Manisha Ashok Madan @ Manisha Surendra Gaba Age : Major, Occ : Household	]]]]
1D]	Rakhi Ashok Madan Age : Major Occ : Household	]]]
	All R/o. Shivdarshan Society, Near GPO N.D. Patel Road, Nashik	]]]..... Petitioners.

Versus

1]	Hemant Narayandas Pamnani Age : 59 years, Occ : Agri & Business Chowkmandai, Nashik	]]]]
2]	Sudama Jodharam Hanswani Age : 55 years, Occ : Business C/o. D.J. Builders 1, Hrishikesh Society Opp. Model Colony, HTP Colleged Road Nashik – 5	]]]]]]..... Respondents.

**Mr.R M Haridas i/by Mr. Tushar Sonawane for the Petitioners.
Mr. Shriniwas S Patwardhan for the Respondent No.1.
Mr. G S Godbole i/by Mr. Sumit S Kothari for the Respondent No.2.**

CORAM : R. M. SAVANT, J.
DATE : 30th September 2015

ORAL JUDGMENT

1 Rule with the consent of the learned counsel for the parties made returnable forthwith and heard.

2 The writ jurisdiction of this Court is invoked against the order dated 13/06/2013 passed by the learned 2nd Joint Civil Judge, Senior Division, Nasik by which order the Application (Exhibit 117) filed by the Petitioners came to be rejected.

3 The facts giving rise to the above Petition can in brief be stated thus :-

The suit in question being Special Civil Suit No.347 of 1991 has been filed by the Respondent No.1 – original Plaintiff for specific performance of the contract/agreement entered into between the Plaintiff and the Defendant No.1. The subject matter of the said contract/agreement is the land bearing Survey No.704, Hissa No.1+2/8 (old Survey No.704/2B/1/4/4 admeasuring 20 Ares situated at Nashik. The Plaintiff in the said suit has alternatively prayed for damages to the tune of Rs.15,25,000/- with 2% interest from the date of filing of the suit till its realization. The Defendant No.1 has entered into a contract with the Plaintiff as there was an agreement to sale between the Defendant No.1 and the Defendant No.2 in respect of the

said property. In so far as the Defendants are concerned i.e. the Defendant No.1 and the Defendant No.2, they have filed a joint written statement on 20/03/1992 in which written statement the Defendants have accepted the agreement to sale executed by the Defendant No.2 in favour of the Defendant No.1 and have sought to defend the suit by filing the said joint written statement.

4 At this stage it is required to be noted that on the suit summons being served, the Defendant No.2 Ashokkumar Daulatsingh Madan had appeared in the suit and had engaged advocate Shri S L Deshpande who had filed his vakalatnama on behalf of the Defendant No.2. The Defendant No.1 had also independently engaged an advocate who was appearing for him in the said suit. The Defendant No.2 died on 27/08/2005. The said date assumes some significance in the light of the instant application (Exhibit 117). However, prior to the death of the Defendant No.2 i.e. Ashokkumar Daulatsingh Madan the suit came to be dismissed for non-prosecution on 11/12/2000 and was thereafter restored on 12/01/2004, by virtue of the order passed in Civil Misc. Application No.39 of 2001 in which application both the Defendants had appeared independently and contested the said application.

5 It is also required to be noted that the Defendant No.1 Sudama Jodharam Hanswani had filed Civil Revision Application in this Court being

Civil Revision Application No.84 of 2004 challenging the order dated 12/01/2004 passed by the Trial Court restoring the suit. Hence in the said Civil Revision Application also the Defendant Nos. 1 and the Defendant No.2 had engaged independent advocates and had prosecuted the Civil Revision Application. The said Civil Revision Application came to be allowed by a learned Single Judge of this Court by order dated 21/12/2005, albeit only to the extent of imposing costs on the Plaintiff and in favour of the Revision Applicant i.e. the Defendant No.1. Hence the Defendant No.2 in his life time had contested the application for restoration of the suit as also the Civil Revision Application which had been filed by his co-Defendant i.e. the Defendant No.1 against the order of restoration of the suit.

6 On the death of the Defendant No.2 in the year 2005, the Petitioners herein who are his heirs were brought on record and were arrayed as Defendant Nos.2(A) to 2(D). It is after they being brought on record, that the Petitioners had filed the instant application (Exhibit 117) for being permitted to file the written statement and to take a stand which was divergent to the stand taken by the original Defendant No.2 in the joint written statement filed on 20/03/1992. The said application has been rejected by the instant impugned order by the Trial Court. However, the Petitioners had filed another application (Exhibit 119) for setting aside the “No W.S. Order” and for being permitted to file their written statement. The said application (Exhibit

119) came to be allowed by the Trial Court and the Trial Court set aside the “No W.S. Order” and vide clause (2) of the said order dated 10/09/2013 permitted the Petitioners to file the written statement. However, this Court in Writ Petition No.7220 of 2014 which is companion to the above Petition has clarified that in view of the order impugned in the present Petition, the said direction as contained in clause (2) of the order passed on the Application (Exhibit 119) would stand eclipsed by the impugned order. By issuing the said clarification, the said Writ Petition was thereafter dismissed.

7 Be that as it may, in so far as the instant impugned order is concerned, the Trial Court rejected the application (Exhibit 117) filed by the Petitioners for the reasons mentioned in the impugned order. The ground made out by the Petitioners that the signature of the Defendant No.2 has been forged and that the Defendant No.2 was not even aware of the written statement being filed did not commend acceptance to the Trial Court. As indicated above it is the said order dated 13/06/2013 which is taken exception to by way of the above Writ Petition.

8 Heard the learned counsel for the parties. The main thrust of the submissions of the learned counsel for the Petitioners Shri Haridas was towards demonstrating that the Defendant No.2 in his life time was not aware of the joint written statement filed on behalf of the Defendant Nos.1 and 2, and since

it is the allegation of the heirs of the Defendant No.2 i.e. the Petitioners herein that the signature of the Defendant No.2 has been forged, that the Petitioners should be permitted to file their independent written statement taking a stand which may be divergent to the stand taken by the original Defendant No.2 in the joint written statement which was filed in the suit. The learned counsel for the Petitioners would contend that for the said purpose the Trial Court ought to have conducted an enquiry by permitting the Petitioners to lead evidence and ought not to have rejected the application (Exhibit 117) in the manner it is done. The learned counsel sought to place reliance on the judgment of the Apex Court reported in (2007) 10 SCC 82 in the matter of Sumtibai and others v/s. Paras Finance Co. Regd. Partnership firm Beawer (Raj.) Through Mankanwar (Smt) w/o Parasmal Chordia (Dead) and others. The learned counsel for the Petitioners sought to place reliance on the observations made by the Apex Court in paragraph 7 of the said judgment wherein the Apex Court has held that the legal representatives of a party to the suit have right to take defence by way of filing an additional written statement and adduce evidence in the suit.

9 Per contra, the learned counsel appearing for the Respondent No.1 Shri Patwardhan and the learned counsel appearing for the Respondent No.2 Shri Godbole would support the impugned order. The learned counsel appearing for the Respondents by drawing this Court's attention to the facts

antecedent to the passing of the impugned order would contend that having regard to the said facts, no enquiry is necessitated. The sum and substance of the contention of the learned counsel for the Respondents was that the Defendant No.2 in his life time never questioned the filing of the joint written statement on behalf of himself as well as the Defendant No.1. The learned counsel would contend that the Defendants were also represented by independent advocates and in so far as the Defendant No.2 was concerned, he was represented by advocate Shri S L Deshpande till he expired in the year 2005 and thereafter his heirs i.e. the Petitioners engaged advocate Shri Limaye who was on record till 2010 and thereafter another advocate has been engaged by them. The learned counsel would question the motives of the Petitioners in making the said allegation and it was the submission of the learned counsel that the Petitioners are seeking to take advantage of the fact that in view of the dismissal of the suit in the year 2000 and since the suit was restored thereafter in the year 2004, in terms of the Civil Manual the "D" File was required to be destroyed since the "D" File comprises the papers including vakalatnama of the parties and the suit summons, that the Petitioners have now invented a theory that even the suit summons was not served upon the Defendant No.2 that the vakalatnama was also not filed on behalf of the Defendant No.2.

10 Having heard the learned counsel for the parties, I have

considered the rival contentions. The question that is posed in the present Petition is, whether the Petitioners who are the heirs of the original Defendant No.2 are entitled to take a stand which is divergent to the stand taken by the Defendant No.2 in the joint written statement as original filed on behalf of both the Defendants. In so far as filing of the written statement after the death of the Defendant No.2 and the heirs of the Defendant No.,2 being brought on record is concerned, the same is governed by Order XXII Rule 4(2) of the Code of Civil Procedure. The said provision postulates that the legal representative who is brought on record of a Defendant is entitled to take a defence appropriate to his character as the legal representative of the deceased Defendant. Hence in terms of Order XXII Rule 4(2) of the Code of Civil Procedure the Petitioners though are entitled to file their written statement would not be entitled to take a defence which is contrary to their character as legal representatives of the Defendant No.2. It is to extricate themselves from this legal position that the Petitioners have come out with a case that the suit summons was not served on the Defendant No.2 and that the signature of the Defendant No.2 on the joint written statement filed on behalf of both the Defendants was forged when in fact the Defendant No.2 was not even aware of any written statement being filed on behalf of the Defendants in the suit.

11 The question that is required to be answered is whether in the light of the said allegation any enquiry is warranted. For the answer to the said

question the following facts would have to be noted. As indicated above, the suit has been filed in the year 1991, the suit summons were served in the year 1991, the Defendant No.2 appeared in the suit in the year 1991 as also the Defendant No.1, the joint written statement was filed by them on 20/03/1992. the Defendant No.2 had engaged advocate Shri S L Deshpande who continued to appear for the Defendant No.2 till his death i.e. up to the year 2005. Significantly neither the Defendant No.2 nor the advocate Shri S L Deshpande made any grievance about the joint written statement which was filed in the said suit. In fact the Defendant No.2 had affixed his signature on the joint written statement in the presence of advocate Shri S L Deshpande. As indicated herein above, the suit came to be dismissed for non-prosecution in the year 2000 and the application for restoration came to be filed in the year 2001 i.e. Civil Misc. Application No.39 of 2001. Both the Defendants were served with the notice of the application for restoration, pursuant to which both the Defendants had independently appeared and prosecuted the said application. The said application came to be allowed by the Trial Court by order dated 12/01/2004 and the suit came to be restored. The said order dated 12/01/2004 passed by the Trial Court came to be challenged by the Defendant No.1 Sudama Jodharam Hanswani by filing Civil Revision Application No.84 of 2004. In the said Civil Revision Application also the Defendant No.2 appeared and was represented by an independent advocate. As indicated above, the Civil Revision Application was filed by the Defendant

No.1 and the Defendant No.2 had appeared in the said Civil Revision Application represented by an independent advocate. The order passed by the Trial Court restoring the suit as indicated above came to be modified only to the extent of imposing costs on the Plaintiff to be payable to the Revision Applicant. The aforesaid facts therefore belie the case of the Petitioners that the Defendant No.2 was not aware of the suit being filed and was also not aware of the joint written statement being filed and therefore falsifies the case of the Petitioners that the signature of the Defendant No.2 was forged by the Defendant No.1. The Petitioners as rightly contended on behalf of the Respondents are seeking to take advantage of the fact that some part of the record has been destroyed in accordance with the Civil Manual after the suit was dismissed for non-prosecution. The upshot of the above discussion would be that no enquiry is necessitated into the allegation made by the Petitioners against the Defendant No.1. If that be so, the filing of the written statement by the Petitioners who are the legal representatives of the Defendant No.2 would be governed by Order XXII Rule 4(2) of the Code of Civil Procedure and the Petitioners i.e. the Defendant Nos.2A to 2D would therefore not be entitled to take a stand which is divergent to the stand which was taken by the original Defendant No.2.

12 In so far as the judgment in *Sumtibai's* case (supra) is concerned, in my view, the said judgment would not further the case of the Petitioners in

so far as their claim for being entitled to take a divergent stand to the stand taken by the Defendant No.2 is concerned. The said case before the Apex Court concerned the claim of the legal representatives of the original Defendant to put in an additional written statement. The Apex Court in the said case was concerned with the issue as to whether the legal representatives are entitled to file their written statement and was not concerned with the issue as to whether the legal representatives are entitled to take a divergent stand to the stand taken by the Defendant No.2. It is in the said context that the observations made in paragraph 7 of the said judgment would have to be construed. The said observations cannot be stretched to mean that the legal representatives of the Defendant No.2 in the instant case would be entitled to file written statement taking a stand contrary to the stand taken by the original Defendant No.2.

13 In my view, therefore, the order passed by the Trial Court rejecting the application (Exhibit 117) does not suffer from any error of jurisdiction or any other illegality or infirmity for this Court to exercise its writ jurisdiction under Article 227 of the Constitution of India. The above Writ Petition is accordingly dismissed. Rule discharged. Since the R & P has been called for by this Court, the same is directed to be sent back forthwith.

14 At this stage the learned counsel for the Petitioners seeks stay of

the instant order. The same is opposed by the learned counsel appearing for the Respondent No.1 and the Respondent No.2 In the facts and circumstances of the present case, the said prayer is rejected.

[R.M.SAVANT, J]

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