

Ms Bhagyashree Alate a/w. Ms Jaymala Ostwal and Ms Prachi Dodake i/b.
M/s. JJ Associates for Petitioners.
Ms Tejas Kapre i/b. Mr Jayprakash Kapre for Respondents No.1 to 3.

P.C. :

2. By this Petition under Article 227 of the Constitution of India, petitioners have challenged the order dated 17.11.2014 passed by the learned Civil Judge Junior Division, Pimpri below exhibit-33 in Regular Civil Suit No.745 of 2012. By that order, the learned trial Judge rejected the application dated 22.04.2014 at exhibit-33 made by the petitioners, hereinafter referred to as plaintiffs, for removing written statement dated 25.03.2014 at exhibit-28 from record and for passing 'no written statement order' against the defendants.

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4. Ms Alate submitted that respondents were served with the suit summons and respondents No.1 to 3, hereinafter referred to as defendants No.1 to 3, filed their appearance through Advocate Mr. R. J. Kudchadker on 03.01.2012. However, defendants No.1 to 3 thereafter did not file written statement. They presented the written statement only on 25.03.2014 and the same was read and recorded on the same day by the learned trial Judge. She submitted that respondent No.4-defendant No.4 filed Purshis adopting written statement of defendants No.1 to 3. She submitted that the learned trial Judge was not justified in accepting the written statement without there being any application for condonation of delay in filing the written statement and seeking permission to take written statement on record. Plaintiffs, therefore, took out application exhibit-33 for removing written statement marked as exhibit-28 and passing no written statement order. This application was resisted by defendants No.1 to 3 by filing reply dated 25.06.2014 at exhibit-35. She submitted that the learned trial Judge rejected the application by passing the following order:

“ W.S. once accepted i.e. read and recorded cannot be removed. Plaintiff to continue suit on merit (if any) hence application is filed.

17.11.2014

sd/-
C.J.J.D., Pimpri”

5. On the other hand, Ms Kapre supported the impugned order. She invited my attention to the affidavit in reply filed by the defendant No.1, and in particular paragraph 8 wherein it is asserted that after the Suit was transferred to the Court of Civil Judge Junior Division at Pimpri, papers were missing for a considerable period and the concerned Clerk informed defendant No.1 that the Court will issue notice and thereafter, he should remain present. She further submitted that in the meanwhile, Suit was dismissed in default.

6. Ms Alate submitted that the Suit was restored and thereafter on 06.01.2014, notice was issued to the defendants. In paragraph 5 of the affidavit made by defendant No.1, it is stated that on 13.02.2014, application for filing written statement was granted as a last chance. Defendants filed application exhibit-25 for adjournment for filing written statement, which was rejected and thereafter no order as suit to proceed without written statement of defendants was passed on that date. She submitted that on 25.03.2014, defendants No.1 to 3 filed written statement and counter-claim which was read and recorded. She, therefore, submitted that no case is made out for interfering with the impugned order.

7. As noted earlier, defendants No.1 to 3 filed their appearance through Advocate Kudchadker on 03.01.2012. It is not in dispute that on 25.03.2014, defendants No.1 to 3 filed their written statement, which was at exhibit-28. Defendant No.4 filed Purshis adopting the written statement of defendants No.1 to 3. It is not in dispute that along with the written statement dated 25.03.2014, defendants No.1 to 3 did not file application for condoning the delay in filing the written statement as also seeking permission to take written statement on record. On 25.03.2014, the learned trial Judge passed the following order:

“ Read and recorded. Plaintiff to say.

sd/-
25.03.2014”

8. In other words, before accepting the written statement on record, the learned trial Judge did not call for the say of the plaintiffs. In my opinion, the learned trial Judge, before accepting the written statement on record, ought to have called for say of the plaintiffs, and after hearing both sides, decided whether to take written statement on record or not. Even no application for condonation of delay and seeking permission to

file written statement was filed. Apart from that, plaintiffs filed application exhibit-33 for removing written statement from the record as it was not accompanied with application for condonation of delay. By the cryptic order, the learned trial Judge rejected the application on the specious ground that once the written statement is read and recorded, it cannot be removed. The learned trial Judge committed serious error in rejecting the application without assigning any reasons. The learned trial Judge also did not record as to whether any provision is applicable in that regard or not. The learned trial Judge simply observed that once the written statement is accepted i.e. read and recorded, the same cannot be removed. In my opinion, the learned trial Judge was not justified in making these observations, more so when without first condoning the delay in filing the written statement, the learned trial Judge straightway passed order on 25.03.2014 reading and recording the written statement and thereafter calling upon the plaintiffs to file say. Calling upon plaintiffs to file say was meaningless as the written statement was already taken on record. The learned trial Judge also did not consider the decision of this Court in the case of ***Shailaja A. Sawant (Dr.) Vs. Sayajirao Ganpatrao Patil, 2004 (2) Mh.L.J. 419.***

9. In view thereof, the order dated 25.03.2014 reading and recording written statement is required to be set aside as also the impugned order dated 17.11.2014 is also required to be set aside reserving liberty to defendants No.1 to 3 to file application for condonation of delay in filing the written statement dated 25.03.2014 and seeking permission to file that written statement.

10. Hence, the following order:

- a. Order dated 25.03.2014 passed on written statement thereby reading and recording written statement and plaintiff to file say is set aside;

- b. Order dated 17.11.2014 below exhibit-33 is also set aside and application exhibit-33 is restored to the file of the trial Court reserving liberty to the defendants No.1 to 3 to file application for condonation of delay as also permission to file written statement.
- c. Such application shall be filed within 4 weeks from today, failing which, application exhibit-33 filed by the plaintiffs shall stand allowed without further reference to the Court;
- d. If application is filed within 4 weeks from today, the learned trial Judge will permit the plaintiffs to file reply, if so advised and thereafter proceed to decide the same and application exhibit-33 in accordance with law;
- e. All the contentions in that regard are expressly kept open;
- f. Petition is disposed of in the aforesaid terms with no order as to cost.

(R. G. KETKAR, J.)

Minal Parab