

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 3422 OF 2016**

Jagannath Yashwant Deshmukh Petitioner
Vs
1. Shivaji Yashwant Deshmukh
and Ors. .. Respondents

Mr. S.M.Sabrad i/b Vinod U. Shinde, Advocate for Petitioner.
Mr. Rohit Joshi, Advocate for Respondent no.9.
Mr. Pranav Sampat i/b Khaitan & Co, Advocates for respondent no.11.

CORAM : R.G.KETKAR,J.
DATE : 13/04/2016

PC:

1. Not on Board. At the request of Mr. Sabrad, taken up in production board. Heard Mr. S.M.Sabrad, learned counsel for the petitioner, Mr. Rohit Joshi, learned counsel for respondent no.9 and Mr. Pranav Sampat, learned counsel for respondent no. 11 at length.

2. Mr.Sabrad states that respondent no.11 is the only contesting respondent in this proceedings. In view thereof, Rule. Learned counsel for the respective respondents waive service. Notice on rest of the respondents is dispensed with. At the request and by consent of the parties, Rule is made returnable forthwith and the petition is taken up for final hearing.

3. By this Petition under Article 227 of the Constitution of India, the petitioner has challenged the Judgment and order dated 24.2.2016 passed by the learned Civil judge Sr. Dn., Panvel

below Exh.173 in S.C.Suit No.209 of 2014. By that order, the learned trial Judge partly allowed the application made by the petitioner, hereinafter referred to as 'plaintiff', inter alia, praying for direction to defendants no. 10 and 11 to prosecute the suit through one common advocate; for rejecting two applications for amending common written statement filed by defendants no.10 and 11. The learned trial Judge gave liberty to defendant no.11 to adopt written statement of defendant no.10 or file separate written statement within two weeks. The plaintiff is aggrieved by clause (2) of the operative part of the order which is to the following effect.

“(2) The defendant no.11 is liberty to adopt written statement of the defendant no.10 or file separate written statement within the two weeks.”

4. The plaintiff has instituted suit, inter alia, praying for partition and separate possession of his 1/7th share; for declaration that the lease deed executed in favour of defendant no.1 is illegal and not binding on the plaintiff; the tripartite agreement dated 19.12.2007 entered into between applicant and CIDCO defendant no.1 and defendant no.10 and tripartite agreement dated 7.1.2008 entered into between defendants no.11 and 12 and CIDCO is illegal and not binding on the plaintiff; for perpetual injunction restraining defendants no.1 to 11 for carrying out construction and creating third party interest as

more particularly described in paragraphs 2B and 2C of the plaint. It is not in dispute and is rather matter of record that defendants no 10 and 11 were represented by advocate Y.S. Bhopi. Defendants no. 10 and 11 filed their common written statement. Defendant no.11 thereafter obtained N.O.C from Advocate Y..S. Bhopi and engaged another Advocate Shri Jitendra Sachdev. Defendants no.10 and 11 filed applications Exhibits 161 and 163 for amending the common written statement. Thus, both the defendants want to amend common written statement on the ground that their interests are different. In view thereof, the plaintiff took out application at Exh.173 praying for following reliefs (a) and (b):

“(a) the Hon'ble Court be pleased to direct defendants no.10 and 11 to prosecute the suit through one common advocate.

(b) two application for amending common written statement by defendants no. 10 and 11 may please be rejected.”

5. By the impugned order, the learned trial Judge held that when one common written statement is on record, that cannot be admitted by both the defendants. The learned trial judge, therefore, partly allowed the application. At the same time, the learned trial Judge held that one defendant can amend only one common written statement. Defendant no.11 has also right to amend the written statement but there is no separate written

statement filed by him. Previous written statement is to be treated of defendant no.10 only. The learned trial Judge further noted that defendants no.10 and 11 are represented by two different Advocates and therefore gave liberty to defendant no.11 to adopt written statement of defendant no.10 or file separate written statement within two weeks. Mr. Sabrad submitted that the learned trial Judge has passed order which was not even prayed for either by the plaintiff or defendants no.10 and 11. He, therefore, submitted that clause (2) of the operative part of the order deserves to be set aside.

6. On the other hand, Mr. Sampat submitted that the impugned order was passed on 24.2.2016. In pursuance of the impugned order, defendant no.11 filed written statement on 9.3.2016 and the same has gone on record of the trial Court. The present petition is instituted on 14.3.2016. In other words, he submitted that the present petition is rendered infructuous as the impugned order is implemented and is worked out. In any case, he submitted that if court is inclined to set aside clause (2) of the operative part of the order, defendant no.11 may be permitted to file appropriate application for filing separate/additional written statement on record. Mr. Sabrad submitted that if liberty is given, in that event it may be expressly made clear that defendant no.11 is permitted to file such application, if permissible in law and all contentions of the

plaintiff including objection as regards maintainability of such application may be kept open.

7. I have considered the rival submissions advanced by the learned counsel appearing for the parties. I have also perused the material on record. As noted earlier, defendants no.10 and 11 filed common written statement through Advocate Y.S. Bhopi Defendant no.11 thereafter gave discharge to Advocate Bhopi and engaged another Advocate. Defendants no.10 and 11 filed applications at Exhibits 161 and 163 for amendment of common written statement. In paragraph 8, the learned trial Judge observed that common written statement cannot be amended by both the defendants. It was further observed thus:

“One defendant can amend only old common written statement. The defendant no.11 has also right to amend the written statement but there is no separate written statement for that he may adopt the written statement and file separate copy of the said written statement then and then defendant no.11 has right to amend his written statement. Previous written statement is to be treated of defendant no.10 only. In present suit defendants no. 10 and 11 are presenting two different Advocates.”

8. In my opinion, once the written statement was filed on behalf of defendants no.10 and 11, the learned trial Judge could not have ordered treating common written statement filed earlier as written statement of defendant no.10 only. The learned trial Judge also could not have passed clause (2) of the operative order, more so when neither plaintiff nor defendants no.10 and 11 prayed for that. The said direction was wholly uncalled for.

The learned trial Judge failed to consider prayers made in the application extracted herein above. By prayer clause (a) the plaintiff prayed for direction to defendants no.10 and 11 to prosecute the suit through one Advocate. Mr. Sabrad did not press prayer clause (a) of the application. By prayer clause (b), the plaintiff prayed for rejecting the applications filed by defendants no.10 and 11 (Exh.161 and 163) for amending common written statement. The learned trial Judge accepted this request.

9. In view thereof, there was really speaking no occasion for the learned trial Judge to issue direction contained in clause (2) of the operative part of the order. Hence clause (2) of the operative part of the impugned order is quashed and set aside. Consequently, the written statement filed by defendant no.11 deserved to be discarded. Hence, the following order.

(i) Clause (2) of the operative part of the impugned order is quashed and set aside.

(ii) Defendant no.11 is granted liberty to file application for filing additional/separate written statement, if permissible in law. All contentions of the plaintiff in that regard including objection as regards maintainability of such applications are expressly kept open. Liberty is reserved to defendant no.11 to file reply to Exh.5.

(iii) Written Statement filed by defendant no.11 on

9.3.2016 in pursuance of the impugned order shall be removed/discarded from the record.

- (iv) Rule is made absolute in the aforesaid terms with no order as to costs.

(R.G.KETKAR, J.)