

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Writ Petition NO. 11729 OF 2016

Mr. Ramesh B. Ahuja And Ors. ...Petitioners

Versus

Mr. Hari Dattatraya Shitole ...Respondent

....

Ms. Anjali Purav Yajurvedi, Advocate for the Petitioners.

Mr. Hari D. Shitole, respondent present in person.

....

CORAM : R. G. KETKAR, J.

DATE : 9th DECEMBER, 2016

P.C.

1. Not on board. At the request of Ms.Purav-Yajurvedi taken up in the production board.
2. Heard Ms.Anjali Purav-Yajurvedi, learned Counsel for the petitioners and Mr. Hari D. Shitole, the respondent appearing in person, at length.
3. By this Petition under article 227 of the Constitution of India, the petitioners, hereinafter referred to as the 'defendants', have challenged the judgment and order dated 17.8.2016 passed by the learned Ad-hoc District Judge-1, Pune below Exhibit-32 in Regular Civil Appeal No.55/2015. By that order, the learned District Judge rejected the application made by the defendants

to treat their say to the temporary injunction application filed in the trial Court as a written statement.

4. The respondent, hereinafter referred to as the 'plaintiff', has instituted suit against the defendants for perpetual injunction restraining the defendants from causing obstruction to his possession and from demolishing the structure as also carrying out new construction in the suit property. It appears that the defendants filed written statement opposing the suit. The plaintiff raised objection that the written statement was not filed within the stipulated period and no prayer was made for condoning the delay in filing the written statement belatedly. By order dated 10.11.2003, as amended on 11.11.2003, the learned trial Judge allowed the application thereby disallowing the written statement filed by the defendants. Aggrieved by that decision, the defendants instituted Writ Petition No.9282/2003 in this Court. On 28.9.2010 as none appeared for the petitioner, the petition was dismissed in default. The defendants took out Civil Application No.1290/2013 for restoration of the said Petition. While dismissing the application, in paragraph-4 this Court observed that after the Petition was dismissed in default on 28.9.2010, stay was vacated and the suit proceeded before the

trial Court. The defendants participated in the trial. Even after taking out Civil Application No.1290/2013, on 29.4.2013, the defendants participated in the trial by cross-examining the witnesses. These facts were suppressed in the Civil Application. This Court also observed that the contentions advanced by the respondents were supported by Rojanama. This Court dismissed the application for restoration by observing that the defendants are guilty of *suppresio veri*. It is only thereafter the defendants have taken out application Exhibit-32 for treating say filed to the temporary injunction as written statement. By the impugned order, the learned trial Judge has rejected the application.

5. In support of this Petition, Ms.Purav relied upon the decision of this Court dated 4.5.2011 in First Appeal No.632/2011 [M/s. B. Jayantilal v. Municipal Corporation of Greater Bombay. In particular she relied upon paragraphs-7, 8, 13, 15 and 16 of the decision.

6. With the assistance of the learned Counsel for the parties, I have perused that decision. In paragraph-17, this Court noted that the defendants did not file any reply to the Notice of Motion for temporary injunction taken out by the

appellant/plaintiff. On 24.10.2007, time was granted to the first respondent/defendant to file written statement. Ultimately on 5.4.2008, the trial Court passed an order to proceed with the suit without written statement. Perusal of clause (ii) of the operative part of that decision shows that this Court gave liberty to the first defendant to file written statement on or before 27.6.2011 subject to paying costs of Rs.7,500/- to the plaintiffs on or before 27.6.2011.

. That apart, in paragraph-7 of the report, after referring to Section 141 of C.P.C., it was observed that it is always open for the parties to file a reply to the Notice of Motion in the form of a pleading as contemplated by Order VI of C.P.C. Such a reply can be always supported by an affidavit. Such a pleading is required to be verified in accordance with Rule 15 of Order VI of C.P.C.

. In paragraph-8 reference was made to the decision of *Kuldeep Umraosingh Ostwal & Anr. v. Chandrakant N. Patel & Ors., 2010 (supp) Bom.C.R. 565*. In that case, this Court held that if a reply to application for interim relief is filed within the period provided under Rule 1 of Order VIII of C.P.C., and after expiry of said period, if said reply is adopted as written statement, the date of filing the reply will be treated as the date of filing the

written statement. It was further observed that it is always open for the parties to adopt reply to the Notice of Motion for interim relief as written statement.

. In paragraph-13 this Court referred to the decision of Apex Court in *Smt. Sudha Devi v. M.P. Narayanan & Ors., (1988) 3 SCC 366*.

7. Now in the present case, defendants No.5 to 8 filed reply to Exhibit-5 injunction application on 20.6.2001 at Exhibit-26, which is Exhibit-B to this Petition (pages-15 to 22). Defendants No.1 to 4 filed reply to Exhibit-5 on 21.6.2001 at Exhibit-33, which is at Exhibit-C to this Petition (pages-23 to 25). Perusal of reply dated 20.6.2001 at Exhibit-26 shows that it is signed by defendant No.5 and Advocate for defendants No.5 to 8. Said reply is not verified as per Order VI Rule 15 of C.P.C. Said reply also does not indicate that separate affidavit in support of this reply is filed. Likewise, perusal of reply of defendants No.1 to 4 dated 21.6.2001 at Exhibit-33 shows that it is signed by defendants No.1 to 4 as also their Advocate. It is not verified in terms of Order VI Rule 15 of C.P.C. There is no assertion in this reply that separate affidavit in support of this reply is filed.

8. Defendant No.2 filed application at Exhibit-32. In paragraph-2 of the application, it is asserted that defendants No.1 to 4 filed their say to application below Exhibit-5 on 21.6.2001 along with affidavit and the same is part of the lower Court record. On 20.6.2001, defendants No.5 & 6 filed their say to the application below Exhibit-5 along with affidavit and the same is part of the lower Court record. In paragraph-3 of the petition, reference is made to reply at Exhibit-26 of defendants No.5 to 8 to injunction application Exhibit-5. Reference is also made to reply Exhibit-33 of defendants No.1 to 4 to injunction application Exhibit-5. However no averment is made that affidavits in support of replies Exhibit-26 & 33 were separately filed. In paragraph-3 of application Exhibit-32, following prayers are made :

- “ 3) It is therefore prayed that :-
- a) Application to take say Exhibit-21 on record as W.S. of the defendants being legal mistake as referred in Col.2 of the application be please allowed and the W.S. of the Defendants be ordered to take on record.
 - b) If lacunae any in compliance of Order VI Rule 15 defendants be permitted to correct the same**
 - c) Any other just and equitable orders to meet the ends of justice be passed.

**An affidavit in support is filed
herewith.”**

(Emphasis supplied)

9. Perusal of prayer clause (a) shows that by that prayer the defendant prayed for taking Exhibit-21 on record as written statement of the defendants being legal mistake as referred in Column No.2 of the application. By prayer clause (b), prayer was made for correcting the lacunae, if any in compliance of Order VI rule 15. Affidavit in support of this application was filed. However, as noted earlier the replies at Exhibits-26 & 33 are not verified in pursuance of Order VI Rule 15 of C.P.C. That apart, these replies also do not show that affidavit in support of these replies are filed. In fact, precisely, for that reason, by prayer clause (b), lacunae in compliance of Order VI Rule 15 was sought to be corrected. In paragraph-3 of the petition, reference is made to reply at Exhibit-26 of defendants No.5 to 8 to injunction application Exhibit-5. Reference is also made to reply Exhibit-33 of defendants No.1 to 4 to injunction application Exhibit-5. However no averment is made that affidavits in support of replies Exhibit-26 & 33 were separately filed. In other words, replies at Exhibits-26 and 33 cannot be treated as pleadings. In view

thereof, the decision in **B. Jayantilal** (supra) is not applicable to the present case.

10. In the present case, the defendants filed their written statement in the trial Court, *albeit* belatedly. By order dated 10/11.11.2003, written statement was removed from the record. The defendants thereafter participated in the trial and also cross-examined the plaintiffs witness. Not only that they challenged the order disallowing the written statement by instituting Writ Petition in this Court which was dismissed in default. Application for restoration of the Writ Petition was dismissed. One of the grounds of the dismissal of Civil Application was that the defendants have suppressed the material facts in Civil Application, as recorded in paragraph-4 of that order. After the suit was decided, the defendants, who are respondents in the appeal, filed application for treating the reply to the injunction application as written statement. The learned Judge has rejected that application by referring to the order passed by this Court. In paragraph-6, the learned District Judge observed that once the defendants prayer for accepting W.S. is negatived upto the High Court, then such prayer cannot be allowed by the District Court. In paragraph-7, the learned

Judge further observed that the period for filing written statement by adopting say as written statement has also expired long back and the Hon'ble High Court also turned down the request earlier. In my opinion, this is an attempt on the part of the defendants to nullify the earlier order passed by this Court. In view thereof as also for the reasons recorded in paragraph-4 of the order dated 3.7.2014 passed by this Court in Civil Application No.1290/2013, this is not a fit case for invocation of powers under Article 227 of the Constitution of India. The conduct of the defendants disentitles them from getting any discretionary relief. Hence, the Petition fails and the same is dismissed.

(R. G. KETKAR, J.)

Deshmane (PS)