

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
AURANGABAD BENCH, AT AURANGABAD.**

Writ Petition No. 06959 of 2017

District : Ahmednagar

1. Shrimant Amrut Rohokale,
Age : 80 years,
Occupation : Agriculture.
2. Sou. Tuljabai Shrimant Rohokale,
Age : 75 years,
Occupation : Household.
3. Dinkar Shrimant rohokale,
Age : 47 years,
Occupation : Agriculture.
4. Ravindra Shrimant Rohokale,
Age : 44 years,
Occupation : Agriculture.

All above R/o. Shiradhon,
Taluka & Dist. Ahmednagar.

5. Sou. Kavarabai Madhavrao Kale,
Age : 65 years,
Occupation : Agriculture,
R/o. Plot No.92,
Survey No. 33/2,
Tingarenagar, Pune - 32.

.. Petitioners
(Original defendants)

versus

Bhaskar Shrimant Rohokale,
Age : 50 years,
Occupation : Agriculture &
Service,
R/o. Shiradhon,
Taluka & Dist. Ahmednagar.
At present R/o. Amrutvel
Bungalow,
Champanagari,
Near Suyognagar,
Canal road, Jail Road,
Nashik Road, Nashik.

.. Respondent
(Original plaintiff)

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Mr. N.V. Gaware, Advocate, for petitioners.

Mr. N.C. Garud, Advocate, for the respondent.

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CORAM : SMT. VIBHA KANKANWADI, J.

DATE : 29TH NOVEMBER 2017

ORAL JUDGMENT :

01. Rule. Rule made returnable forthwith. Taken up forthwith for final disposal with the consent of both the parties.

02. The petitioners are original defendants. Respondent - original plaintiff has filed Regular Civil Suit No. 256 of 2012 for partition and separate possession before learned Civil Judge (Senior Division), Ahmednagar. It appears that defendant no.04 before the trial court had filed his affidavit in chief at Exhibit 48. It was read and recorded on 22.06.2016, thereby his verification has been taken on the same date by the learned trial court. Thereafter, an application was filed by the respondent at Exhibit 49, contending that defendant nos.01 to 04 have filed joint written statement at Exhibit 18. Defendant no.05 has adopted the said written statement by giving *Pursis* at Exhibit 27. They all have engaged common Advocate. The evidence of defendant no.01 has been recorded wherein he has

specifically stated that he is deposing on behalf of himself as well as defendant nos.02 to 04. The said fact was also admitted in his cross examination. It is contended that at the time when the cross examination of defendant no.01 was in progress, defendant no.04 was present in the court hall. Now, defendant no.04 has filed affidavit in examination, which he cannot submit as per the law because defendant no.01 has already deposed for him. It was, therefore, prayed that the said affidavit in chief be discarded.

03. The application was objected stating that one of the prayer of the plaintiff is to cancel the sale deed executed by defendant no.01 in favour of defendant no.04. Though defendant no.01 has been examined, yet, in order to prove his own case, evidence of defendant no.04 is necessary. Defendant no.04 has not given any power of attorney to defendant no.01. It is denied that defendant no.04 was present in the court hall when cross examination of defendant no.01 was in progress.

04. After hearing both sides, the learned trial court has allowed the application on the ground that defendant no.01 has deposed on behalf of defendant no.04 also and defendant nos.01 to 04 are conjointly acting. The affidavit in chief of defendant no.04 was rejected also on the count that he was present in the court hall. This order is challenged in this writ petition by invoking Articles 226 and 227 of the

Constitution of India.

05. It has been submitted on behalf of the petitioners, that defendant no.04 has his own independent right to meet out the case, though a formal written statement was filed by him with other defendants. The burden of issue no.03 though on the plaintiff, it was in pursuance to the prayer of the plaintiff to cancel the sale deed dated 06.02.2010 executed by defendant no.01 in favour of defendant no.04. Taking into consideration the said specific issue, it is necessary for defendant no.04 to clarify his stand. He filed his affidavit in chief and it was read and recorded but later on application to discard the same has been filed for which there is no provision in law. He has relied on the decision of this Court delivered in Writ Petition No. 01539 of 2016 (Digambar Ramchandra Bawaskar Vs. Soma Prabhu Pawar & others) on 19th July 2017, wherein the petitioner was not permitted to withdraw his affidavit filed before the court.

06. Per contra, it has been submitted that since a joint written statement has been filed and there are specific averments in the plaint, that defendant nos.01 to 04 are acting in conspiracy in order to give up the legal right of the plaintiff, defendant no.04 cannot have any independent right to lead evidence. It was specifically stated by defendant no.01 when his evidence was recorded, that he was deposing on behalf of himself and other defendants.

The conspiracy between the defendants has been demonstrated. At the most, the share of defendant no.01 would be given to defendant no.04 in pursuance to the sale deed, however, that sale deed cannot be said to be binding on the plaintiff. He submitted that the application was rightly submitted and it has been rightly allowed.

07. As aforesaid, the suit is for partition and separate possession. A common written statement has been filed by defendant nos.01 to 04 at Exhibit 18. Pursuant to the averments in the plaint and the contentions in the written statement, issues have been framed. The burden of issue no.03 is on plaintiff. He should prove that the sale deed dated 06.02.2010 executed by defendant no.01 in favour of defendant no.04 is illegal and not binding on the share of the plaintiff. At this stage itself, I would like to say that though the burden is on the plaintiff, as and when the evidence proceeds, shifting of onus on the defendants cannot be ruled out. Every defendant has right to defend himself or herself. Filing of common written statement does not take away the right of each of the defendants to lead evidence, oral as well as documentary. Though it has been stated by defendant no.01, that he was deposing for himself as well as defendant nos.02 to 04, yet, it cannot be said that the statutory right which is in favour of defendant no.04 to lead evidence can be taken away in such a fashion.

08. Defendant no.04 filed his affidavit in chief and in fact, it was read and recorded after verification by the trial court. Therefore, when it has become part of evidence, it cannot be so discarded for which there is no specific provision. When it was enquired with the learned Counsel for the respondent, as to under which provisions of law said application Exhibit 49 has been submitted, initially he pointed out Order XVIII of the Code of Civil Procedure [**For short, "C.P.C."**] and then submitted that if there is no specific provision, then it should be considered under Section 151 of the C.P.C. I do not agree with this submission. Order XVIII of the C.P.C. deals with hearing of the suit and examination of witnesses. The provision is made in respect of right to begin, statement to be made, order of recording evidence and how evidence shall be in appealable cases, etc. There is absolutely no provision to discard a piece of evidence which has been admitted. The respondent cannot lay his hand on Section 151 of the C.P.C. which is in respect of inherent powers of the court. In fact, the said section can be invoked in order to prevent abuse of process of the court and not to abuse it. After the affidavit of examination in chief of defendant no.04 was read and recorded, it had become part of the evidence and, therefore, such part of the evidence cannot be discarded. In **Banganga Co-operative Housing Society Vs. Vasanti Gajanan Nerurkar & others [2015 (5) Bom.C.R. 813]**, this Court has held that the affidavit

cannot be withdrawn as it has become part of the record. Similarly, it cannot be discarded when it has become part of the record.

09. As regards presence of defendant no.04 at the time of cross examination of defendant no.01 is concerned, it is the matter of appreciation of evidence and on that count, his affidavit in chief cannot be discarded. The learned trial court, it appears, that got swayed away because of the joint written statement and the presence of defendant no.04 in the court hall. In fact, the learned trial court ought to have avoided making any statement in respect of alleged collusion between defendant nos.01 to 04. The learned trial court failed to see that there was no legal basis for the plaintiff to make such an application and, therefore, on that count alone, ought to have thrashed out the application. Since the learned trial court has not exercised its jurisdiction, it can be exercised by this Court under Articles 226 and 227 of the Constitution of India. The writ petition, therefore, deserves to be allowed.

10. In the result, the writ petition is allowed.

(a) The order passed below Exhibit 49 in Regular Civil Suit No. 256 of 2012 by 4th Joint Civil Judge (Senior Division), Ahmednagar, on 29th August 2016, is hereby set aside.

(b) It is clarified that the affidavit in chief of

defendant no.04 shall be taken on record and from that stage, the suit should proceed.

(c) Rule made absolute in the above terms. There shall be no order as to costs.

(Smt. Vibha Kankanwadi)
JUDGE

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