

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

**WRIT PETITION NO. 3456 OF 2005
WITH
CIVIL APPLICATION NO.8401 OF 2018**

**RATNAKAR BABURAO ANNADATE
VERSUS
MUNICIPAL CORPORATION, AURANGABAD**

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Advocate for Petitioner : Shri P. S. Agrawal
Advocate for Respondent No. 2 : Shri P. R. Katneshwarkar and
Shri P.B. Yenge

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**CORAM : RAVINDRA V. GHUGE, J.
DATED : 12th JULY, 2018.**

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PER COURT :

1. The petitioner- original plaintiff in R.C.S. No. 749/2002, is aggrieved by the two orders passed by the Trial Court. Firstly, the order dated 12/04/2005, Exhibit 55, by which, the 'No W.S.' order dated 29/11/2002 passed against defendant No. 2 is set aside and the W.S. is permitted to be filed. Secondly, the order dated 12/04/2005 passed below application Exhibit 59, by which, though the Trial Court has struck off the defence of defendant No.1 for non production of documents which were earlier ordered to be produced on 03/09/2003 by allowing application Exhibit 31, it has rejected

Exhibit 59 against defendant No.2.

2. I have considered the strenuous submissions of the learned Advocates for the respective sides.

3. None appeared for the Municipal Corporation, Aurangabad, though an appearance has been entered through an Advocate.

4. The undisputed sequence of events are as under ;

(a) RCS No. 749/2002 was filed by the petitioner-plaintiff who claims to be a tenant of a shop admeasuring 8' x 7' in CTS No. 4491, situated at Kumbharwada, Aurangabad. He was paying rent at the rate of Rs. 700/- per month to defendant No.2.

(b) Defendant No. 2 applied for a construction permission with the Municipal Corporation, Aurangabad i.e. defendant No.1.

(c) By the suit preferred by this petitioner, it was prayed that the construction permission granted to defendant No.2 by defendant No.1, be declared as null

and void.

(d) 'No W.S.' order against defendant No. 2 was passed on 29/11/2002.

(e) The application for temporary injunction filed by this petitioner was rejected.

(f) He preferred Misc. Civil Appeal No. 5/2004 which was allowed by the Appellate Court.

(g) The litigating sides came up to this Court in Writ Petition No. 5369/2004 and by order dated 21/02/2005, this Court dismissed the Writ Petition.

(h) On 28/01/2005, the petitioner- plaintiff amended his plaint under the order of the Trial Court.

(i) On 04/04/2005, defendant No. 2 filed application Exhibit 55 seeking for leave to file the 'Additional W.S.' by contending that the written say filed to the temporary injunction application be treated as the W.S. and the written say filed to the amendment application be treated as the W.S. to the amended plaint.

(j) By the impugned order dated 12/04/2005, application Exhibit 55 was allowed.

(k) The plaintiff preferred application Exhibit 59

seeking a direction that the defence of both the defendants be struck off as they failed to produce the documents under the directions of the Trial Court dated 03/09/2003.

(l) By order dated 12/04/2005, the defence of defendant No.1 alone was struck off.

5. There is no dispute that an immovable property is the subject of the suit. It is equally undisputed that if defendant No.2 is not permitted to file its W.S., he would suffer an irreparable harm and manifest inconvenience, as he is likely to lose his property in this litigation.

6. After the 'No W.S.' order was passed on 29/11/2002, the litigating sides were engrossed in litigation till this Court when Writ Petition 5369/2004 was dismissed on 21/02/2005. Though this cannot be an excuse for not filing the W.S., the fact remains that these parties were in active litigation against each other. So also, defendant No.1 had prayed vide Exhibit 55 that his written say to the temporary injunction application be treated as a W.S. and his Written Say filed to the

amendment application be treated as the W.S. to the amended plaint. The impugned order dated 12/04/2005, keeping in view that the amendment in the plaint was carried out on 28/01/2005, cannot be faulted and cannot be branded as being perverse or erroneous. This petition is, therefore, rejected to the extent of the order below Exhibit 55.

7. In so far as the order dated 12/04/2005 below Exhibit 59 is concerned, the plaintiff has prayed that the defence of both the defendants be struck off as they have failed to file the three documents as were directed by the Trial Court. The order dated 03/09/2003, allowing an application Exhibit 31 for production of documents filed under Order XI Rules 12 and 14 of the Code of Civil Procedure, is a cryptic order which does not bear any reasons at all. Though the said order is not an issue in this petition, confusion seems to have occurred because of the said order.

8. It is settled law that an application for production of documents under Order XI Rules 12 and 14 of the C.P.C. is not to be mechanically allowed. The Trial Court has to first

conclude whether the documents sought to be filed have any nexus to the cause of action. It is also to be assessed as to who has the exclusive custody of the said documents, since exclusivity of such custody is the reason for directing the production of documents, in view of the judgment delivered by this Court in **20th Century Fox Corporation (India) (P) Ltd. Vs. F.H. Lala (1974) II LLJ 156 (Bom)**. What has been ordered by the Trial Court is, "*Considering the nature of suit and in the interest of justice application is allowed*". The prayer below Exhibit 31 was that the defendants be directed to produce the documents.

9. Defendant No. 2 submits that the three documents sought by the plaintiff are in the custody of defendant No.1. Defendant No. 2 submits that as the third document may be available in his custody, it would be produced within six weeks if it is available.

10. It also cannot be ignored that non production of documents usually leads to an order of drawing an adverse inference. In rarest of rare cases, for strong reasons to be

assigned, the defence of the party could be struck off for non production. Nevertheless, the order dated 03/09/2003 is not questioned by defendant No.1.

11. However, in the light of the above, since I hold that orders striking off the defence are not to be passed in the matters for production of documents unless for strong reasons, this petition seeking an order that the defence of defendant No.2 also be struck off, cannot be entertained.

12. In the light of the above, this petition being devoid of merit is, therefore, dismissed. Rule is discharged.

13. Pending Civil Application does not survive and stands disposed of.

(RAVINDRA V. GHUGE, J.)

shp/-