

Shailaja

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE SIDE JURISDICTION
WRIT PETITION NO.13639 OF 2017**

Dr. Ali Irani & Another] Petitioners

Vs.

Vijay Sunderlal Contractor & Ors.] Respondents

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Mr. G.S. Godbole, Sr. Advocate i/b Mr. Manoj Prajapati i/b Mr. Mohit Gadkari
for Petitioners.

Mr. Atul Damle, Sr. Advocate a/w Mr. S.J. Mishra a/w Ms. Pushpa Tiwari i/b
SRS Legal, for Respondents No.1 to 3.

Mr. Akash Rebello i/b Ravi Thankian, for Respondent No.5.

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CORAM : R.G. KETKAR, J.

DATE : 27TH MARCH, 2018.

P.C.

Heard Mr. Godbole, learned Senior Counsel for the petitioners,
Mr. Damle, learned Senior Counsel for Respondents No.1 to 3 and Mr. Rebello,
learned Counsel for respondent No.5 at length.

2. By this Petition under Article 227 of the Constitution of India, the
petitioners, hereinafter referred to as “defendant No.3 and 3(a)” have
challenged;

[1] the judgment and order dated 8th December, 2015 passed below
Exhibit 60.

[2] the judgment and order dated 8th December, 2015 passed below
Exhibit 81.

passed by the learned Judge, Court Room No.35 of the Small Causes Court

Mumbai at Bandra in L.E & C Suit No.35/53 of 2008.

[3] judgment and order dated 2nd September, 2016 passed in Revision Application No.76 of 2016 [Exhibit 81].

[4] judgment and order dated 2nd September, 2016 passed in Revision Application No.77 of 2016 [Exhibit 60]

passed by the Appellate Bench of Small Causes Court at Mumbai (Bandra Branch). By these orders, the Courts below allowed the applications Exhibit 60 and Exhibit 81 made by respondents No.1 to 3, hereinafter referred to as “plaintiffs” for discarding written statements dated 7th February, 2014 and dated 6th April, 2015 filed by defendants No.3 and 3(a).

3. Plaintiffs have initially instituted L.E & C Suit bearing No.31/34 of 1993 in the Court of Small Causes Court at Mumbai under Section 41 of the Presidency Small Causes Courts Act, 1882 (for short “Act”). For want of jurisdiction, the plaint was returned to the original plaintiff and it was thereafter instituted in the City Civil Court at Mumbai being S.C. Suit No.6170 of 2002. In that suit, defendants No.3 and 3(a) filed written statement dated 2nd September, 2003. The plaint was returned to the original plaintiff for filing it in the Small Causes Court at Mumbai in view of decision of the Apex Court in the case of **Prabhudas Damodar Kotecha and others Vs. Manharbala Jeram Damodar and another**, 2013 AIR (SC) 2959. On 1st April, 2008, the present proceedings were instituted in the Small Causes Court and the suit was re-numbered as L.E. & C Suit No.35/53 of 2008.

4. During pendency of this suit, the plaintiffs took out interim notice on 21st July, 2008 for amending the plaint in terms of schedule annexed to the notice of the proposed amendment. The plaintiffs intended to add respondent No.5 herein M/s. Rizvi Estates and Hotels Pvt. Ltd as defendant No.3 (b). Respondent No.5 filed say on 15th September, 2008 to the effect that without

prejudice to the rights and contentions in the proceedings, they have no objection for impleadment.

5. Defendants No.3 and 3(a) filed reply dated 3rd October, 2008 opposing interim notice. The Interim notice was allowed. On 4th February, 2009, on behalf of defendants No.3 and 3(a) through Advocate puris was filed praying that reply dated 3rd October, 2008 be treated as written statement of defendants No.3 and 3(a).

6. During pendency of the suit, plaintiff No.1 died. Defendants No.3 and 3(a) filed written statement on 7th February, 2014. Plaintiff No.1 (a) also died and defendants No.3 and 3(a) filed additional written statement dated 6th April, 2015.

7. Plaintiffs, therefore, took out application Exhibit 60 for discarding written statement dated 7th February, 2014 filed by defendants No.3 and 3(a). Likewise, plaintiffs filed application Exhibit 81 for discarding written statement dated 6th April, 2015 filed by defendants No.3 and 3(a). By order dated 8th December, 2015 below Exhibit 60, the learned trial Judge allowed the application made by the plaintiffs and discarded written statement dated 7th February, 2014. By another order dated 8th December, 2015, the learned trial Judge allowed application Exhibit 81 made by the plaintiffs and discarded written statement dated 6th April, 2015 filed by defendants No.3 and 3(a).

8. Aggrieved by these decisions, defendants No.3 and 3(a) instituted Revision Application No.76 and 77 of 2016. Defendants No.3 and 3(a) challenged the order passed below Exhibit 60 by Revision Application No.77 of 2016. Defendants No.3 and 3(a) challenged the order passed below Exhibit 81 by Revision Application No.76 of 2016. By orders dated 2nd September, 2016,

the Appellate Court rejected the Revision Applications. It is against these orders, defendants No.3 and 3(a) have instituted the present Writ Petition.

9. In support of this Petition, Mr. Godbole submitted that after return of the plaint from the Small Causes Court at Mumbai to the City Civil Court at Mumbai, the suit instituted by the plaintiffs was numbered as S.C. Suit No.6170 of 2002. Defendants No.3 and 3(a) filed written statement dated 2nd September, 2003 resisting the suit. As the plaint was ordered to be returned to the Small Causes Court, even written statement dated 2nd September, 2003 filed by defendants No.3 and 3(a) was transmitted along with record of the suit to the Small Causes Court. He submitted that assuming that on return of the plaint of S.C. Suit No.6170 of 2002, written statement dated 2nd September, 2003 is not transmitted to the Small Causes Court, no prejudice will be caused to the plaintiffs, if that written statement is taken on record in L.E. & C Suit No.35/53 of 2008. The plaintiffs are not taken by surprise as defendants No.3 and 3(a) had already filed written statement in the City Civil Court opposing S.C. Suit No.6170 of 2002.

10. Mr. Godbole invited my attention to the Interim Notice taken out by the plaintiffs for amending the plaint so as to add respondent No.5 herein as defendant No.3(b) in the suit and reply filed on behalf of defendants No.3 and 3(a). He submitted that the reply was filed only for opposing the proposed amendment. Reply did not deal with the plaint. He submitted that their Advocate committed mistake in filing pursis dated 4th February, 2009 adopting reply dated 3rd October, 2008 as written statement. He submitted that this was a clear mistake committed by Advocate of defendants No.3 and 3(a) for which defendants No.3 and 3(a) should not suffer. He submitted that rules governing pleadings and leading of evidence have been incorporated to advance interest of justice and to avoid multiplicity of the litigation. He submitted that the

Courts below were not justified in allowing applications Exhibit 60 and Exhibit 81 filed by the plaintiffs. In support of this proposition, he relied on decision of the Supreme Court in the case of **Dondapati Narayana Reddy Vs. Duggireddy Venkatnarayana Reddy and others**, (2001) 8 Supreme Court Cases 115 and in particular paragraph 9.

11. Mr. Godbole submitted that in order to compensate the plaintiffs, defendants No.3 and 3(a) are ready to pay interim compensation @ Rs. 2,00,000/- to 2,50,000/- p.m. under Order-XV-A of the Code of Civil Procedure, 1908 (for short 'C.P.C'). In the alternative, defendants No.3 and 3(a) are ready to pay substantial costs of Rs. 4,00,000/- to 4,50,000/- to the plaintiffs. If the plaintiffs are not ready to accept either of the suggestions, defendants No.3 and 3(a) are willing to pay costs of Rs.2,00,000/- to 2,50,000/- to the plaintiffs and in addition to this, the plaintiffs may be permitted to withdraw interim compensation fixed @ of Rs.2,00,000/- to Rs. 2,50,000/- per month under Order-XV-A which may be made subject to the outcome of the suit. He submitted that these suggestions given by defendants No.3 and 3(a) will be adequate to compensate the plaintiffs. He, therefore, submitted that Writ Petition requires consideration and the impugned orders deserve to be set aside, thereby, dismissing applications Exhibit 60 and Exhibit 81 filed by the plaintiffs.

12. On the other hand, Mr. Damle supported the impugned orders. He submitted that on 4th February, 2009, defendants No.3 and 3(a) had filed pursis at Exhibit 15 praying inter alia for treating reply dated 3rd October, 2008 as written statement filed by them opposing application made by the plaintiffs for amending plaint so as to make respondent No.5 party defendant No.3 (b) to the suit. He submitted that thereafter defendants No.3 and 3(a) had filed application Exhibit 36 for taking written statement on record after condoning

delay. By order dated 7th October, 2011, the learned trial Judge rejected the application. Aggrieved by this decision, defendants No.3 and 3(a) filed Revision Application No.216 of 2011 which was dismissed by the Appellate Court on 13th December, 2013. Defendants No.3 and 3(a) did not challenge these orders.

13. Mr. Damle submitted that during pendency of the suit, plaintiff No.1 died and accordingly legal representatives of plaintiff No.1 were brought on record. Defendants No.3 and 3(a) filed written statement dated 7th February, 2014. During pendency of the suit, plaintiff No.1(a) died. Defendants No.3 and 3(a) filed written statement on 6th April, 2015. He submitted that basically defendants No.3 and 3(a) were not justified in filing written statement on 7th February, 2014 and 6th April, 2015. The plaintiffs did not amend the pleadings of L.E & C. Suit No.35/53 of 2008 and merely substituted legal representatives of plaintiff No.1 and plaintiff No.1(a). Despite this position, defendants No.3 and 3(a) filed written statement. Plaintiffs, therefore, took out applications Exhibit 60 and Exhibit 81 for discarding written statements dated 7th February, 2014 and 6th April, 2015. The Courts below, after considering the conduct of defendants No.3 and 3(a) allowed the applications made by the plaintiffs and discarded written statements filed on their behalf. He submitted that suggestions given by defendants No.3 and 3(a) for setting aside the impugned orders are not acceptable to the plaintiffs. The plaintiffs have initiated proceedings for recovery of possession of the suit premises as far back as in the year 1993. Controversy whether the suit against gratuitous licensee lies before the Small Causes Court or in the City Civil Court was not settled by authoritative pronouncement. The plaint was returned from one Court to another on several occasions. Ultimately in view of decision of the Apex Court in the case of **Prabhudas Damodar Kotecha and others Vs. Manharbala Jeram Damodar and another, 2013 AIR (SC) 2959**, the issue

was concluded and it is held that the Small Causes Court has jurisdiction to entertain and try the suit for eviction of gratuitous licensee. The plaint was returned and the suit was re-numbered in the year 2008. Thus, between 1993 and 2008, 15 years have lapsed and still the plaintiffs are at initial stage namely stage of institution of the suit. He, therefore, submitted that compensation suggested by defendants No.3 and 3(a) is not adequate and is illusory. He, therefore, submitted that no case is made out for interfering with the impugned orders.

14. I have considered the rival submissions of learned Counsel for the parties. I have also perused the material on record. As noted earlier, the plaintiffs have instituted the suit on the ground that defendants No.3 and 3(a) are gratuitous licensee. The suit was instituted in the year 1993. As legal position was not settled, plaint was returned from one Court to another. Ultimately, in view of the authoritative pronouncement of the Apex Court in the case of **Prabhudas Damodar Kotecha and others** (supra), now the suit is re-numbered as L.E. & C Suit No.35/53 of 2008.

15. It appears that the suit was pending in the City Civil Court. It was numbered as S.C. Suit No.6170 of 2002 and defendants No.3 and 3(a) filed written statement in that suit on 2nd September, 2003. It is not in dispute that the plaint in that suit was returned by the City Civil Court Mumbai to the Small Causes Court at Mumbai. Mr. Godbole submitted that by virtue of return of the plaint, written statement filed by defendants No.3 and 3(a) on 2nd September, 2003 stood transmitted to the Small Causes Court. It is not possible to accept this submission for more than one reason. In the first place, by virtue of order of return of the plaint, what is returned is plaint instituted in a particular Court and not written statement and other proceedings from one Court to other Court. Secondly, assuming in favour of defendant No.3 that written statement

dated 2nd September, 2003 in S.C. Suit No.6170 of 2002 stood transmitted, there was no necessity to file pursis on 4th February, 2009 adopting reply dated 3rd October, 2008 as written statement. Thirdly, no judgment was cited by Mr. Godbole in support of his submission that after return of plaint, written statement also stands transmitted from the City Civil Court to the Small Causes Court, Mumbai. I, therefore, do not find any merit in the submission of Mr. Godbole that written statement stood transmitted to the Small Causes Court on return of the plaint by the City Civil Court in S.C. Suit No.6170 of 2003.

16. Mr. Godbole relied on decision of the Apex Court in the case of **Dondapati Narayana Reddy** (supra), and in particular paragraph 9 thereof to contend that the rules governing pleadings and leading of evidence have been incorporated to advance interest of justice and to avoid multiplicity of the litigation. The plaintiffs are not taken by surprise as written statements dated 2nd September, 2003 was already on record and no prejudice would be caused to them and in any case, the plaintiffs can be compensated by the costs as suggested by defendants No.3 and 3(a).

17. It has come on record that defendants No.3 and 3(a) had filed application Exhibit 36 for taking written statement on record after condoning the delay. By order dated 7th October, 2011, the learned trial Judge rejected the application. Aggrieved by this decision, defendants No.3 and 3(a) filed Revision Application No.216 of 2011 which was dismissed by the Appellate Court on 13th December, 2013. Defendants No.3 and 3(a) did not challenge these orders and thus attained finality.

18. In the present case, pursis was filed as back as on 4th February, 2009 adopting reply dated 3rd October, 2008 filed to Interim Notice as written statement of defendants No.3 and 3(a). On 18th November, 2010, issues were

framed. On 17th February, 2011, Affidavit of examination-in-chief was filed by the plaintiffs. Defendant No.3 filed application on 5th September, 2011 to bring on record three crucial documents on record by filing written statement Exhibit 36. By order dated 7th October, 2011, the learned trial Judge rejected the application for filing written statement. Defendants No.3 and 3(a) filed Revision Application which was rejected on 13th December, 2013. The defendants did not challenge that order. On 12th January, 2013, the original plaintiff expired. The application to amend the plaint was made on 6th April, 2013. On 12th July, 2013, amendment application was allowed. On 7th February, 2014, defendants No.3 and 3(a) filed written statement. On 7th April, 2014, plaintiffs filed application Exhibit 60 for recalling the written statement as it was beyond the scope of amendment. On 17th November, 2014, plaintiff filed application for deleting the name of plaintiff No.1(a) which was allowed on 24th November, 2014. On 6th April, 2015, defendants No.3 and 3(a) filed written statement. On 17th July, 2015, plaintiffs filed application Exhibit 81 for recalling amended written statement. On 8th December, 2015, learned trial Judge allowed applications Exhibit 60 and 81. Thus, defendants No.3 and 3(a) made attempts for filing written statement at Exhibit 36 on 5th September, 2011 and thereafter, on 7th February, 2014 and 6th April, 2015. Thus, the defendants cannot claim to be innocent litigants and illiterate litigants.

19. That apart as noted earlier, plaintiff No.1 died during pendency of the suit. On 7th February, 2014, defendants No.3 and 3(a) filed written statement. It is material to note that the plaintiffs brought on record legal representatives of plaintiff No.1 and no amendment was carried out in the pleadings. Thereafter, plaintiff No.1 (a) died. Defendants No.3 and 3(a) filed written statement dated 6th April, 2015. Again, it is material to note that the plaintiffs substituted plaintiff No.1 (a) by his legal representatives and did not amend the pleadings. Thus, attempt on the part of the defendants No.3 and

3(a) in filing written statement on 7th February, 2014 and 6th April, 2015 was impermissible. The Courts below have considered this aspect. The learned trial Judge considered this aspect in paragraph 16 of the impugned order. As far as the Appellate Court is concerned, the Appellate Court has considered decision in the case of **Gurdial Singh & Ors Vs. Raj Kumar Aneja & Ors., AIR 2002 Supreme Court 1003** as also decision in the case of **Mangesh Rajaram Wagle & Anr Vs. Suresh D. Naik & Ors, 2008 (2) Bom. C.R. 248** and rejected Revision Application preferred by defendants No.3 and 3(a). I do not find that the Courts below committed any error in passing the impugned orders.

20. Mr. Godbole has given three suggestions indicated hereinabove. Mr. Damle did not accept any of the suggestions. It must be pointed out that during the course of hearing, I also suggested to defendants No.3 and 3(a) that in case, they are willing to hand over possession of the suit premises to the plaintiffs, I will consider appointing the plaintiffs as agent of the Court Receiver who will abide by outcome of the suit. I also indicated that the written statement dated 2nd September, 2003 filed in the City Civil Court resisting S.C. Suit No. 6170 of 2002 shall be treated as written statement in the present suit or defendants No.3 and 3(a) can file fresh written statement. This is because as noted earlier in the year 1993, the plaintiffs have initiated eviction proceedings and because of uncertainty about legal position, namely about appropriate forum for eviction of gratuitous licensee, the suit is effectively instituted in the year 2008. Thus, in the process, the plaintiffs have lost 15 valuable years. It is in that context, I had given suggestion to defendants No.3 and 3(a) about handing over possession and appointing the plaintiff as agent of the suit premises. Upon taking instructions from defendants No.3 and 3(a), Mr. Godbole submitted that defendants No.3 and 3(a) are not willing to accept this suggestion.

21. In the present case, it is not in dispute that defendants No.3 is a physiotherapist. In other words, the defendants are not rustic villagers nor they are innocent, illiterate unaware of the Court procedure. It is the case of these defendants that there was negligence on the part of their Advocate in adopting reply to interim notice for amending the plaint as the written statement. It is difficult to believe that the defendants implicitly believed their Advocate's advice. No Advocate worth his salt would give such advice to his client. The Advocate is agent of the party. His acts and statements, made within the limits of authority given to him, are the acts and statements of the principal i.e the party who engaged him.

22. In the case of **Salil Dutta Vs./ T.M. & M.C. Private Ltd, 1993 SCC (2) 185**, the Apex Court in paragraph 8 has observed thus;

“The advocate is the agent of the party. His acts and statements, made within the limits of authority given to him, are the acts and statements of the principal i.e. the party who engaged him. It is true that in certain situations, the Court may, in the interest of justice, set aside a dismissal order or an ex-parte decree notwithstanding the negligence and/or misdemeanour of the advocate where it finds that the client was an innocent litigant but there is not such absolute rule that a party can disown its advocate at any time and seek relief. No such absolute immunity can be recognised. Such an absolute rule would make the working of the system extremely difficult. The observations made in *Rafiq* must be understood in the facts and circumstances of that case and cannot be understood as an absolute proposition. As we have mentioned hereinabove, this was an on-going suit posted for final hearing after a lapse of seven years of its institution. It was not a second appeal filed by a villager residing away from the city, where the Court is located. The defendant is also not a rustic ignorant villager but a private limited company with its head-office at Calcutta itself and managed by educated businessmen who know where their interest lies. It is evident that when their applications were not disposed of before taking up the suit for final hearing they felt piqued and refused to appear before the court. May be, it was part of their delaying tactics as alleged by the plaintiff. May be

not. But one thing is clear they 'chose to non-cooperate with the court. Having adopted such a stand towards the Court, the defendant has no right to ask its indulgence. Putting the entire blame upon the advocate and trying to make it out as if they were totally unaware of the nature or significance of the proceedings is a theory which cannot be accepted and ought not to have been accepted”.

23. Applying the tests laid down in **Salil Dutta's** case to the facts of the present case, it cannot be said that defendants No.3 and 3(a) are innocent litigants. Defendant No.3 is a physiotherapist. Defendant No.3 (a) is his wife. Applying the tests laid down in the case of Salil Dutta, no case is made out for interfering with the impugned orders. While exercising powers under Article 227 of the Constitution of India, the Court has to consider conduct of the parties. In the present case, defendants No.3 and 3(a) attempted to file written statements when plaintiff No.1 and 1(a) died and their legal representatives were brought on record and no amendment was carried out in the plaint. In view of the conduct of the defendants No.3 and 3(a), no case is made out for interfering with the impugned orders. The Petition fails and the same is dismissed.

24. At this stage, Mr. Prajapati orally applies for stay of this order for a period of 8 weeks. Mr. Damle opposed the same on the ground that the plaintiffs have filed Affidavit of examination-in-chief and matter is kept for cross-examination on 2nd April, 2018. Having regard to the fact that the plaintiffs have initiated the proceedings in the year 1993, I do not find that request made by defendants No.3 and 3(a) is reasonable. Hence, oral application is rejected.

[R.G. KETKAR, J.]