

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

WRIT PETITION NO. 14359 OF 2018

Geetabai w/o Panditrao Aswar
Age: 60 years, Occu: Business & Agriculturel,
R/o: Parijatnagar, N-5 CIDCO,
Aurangabad

... Petitioner
(Ori. Plaintiff)

Versus

- 1) Shashikala wd/o Chandrakant Joshi (Charekar)
Age: 73 years, Occu: Agri. & Household,
R/o: House No.1-29-66, Kachiwada,
Chelipura, Aurangabad
- 2) Chandrahas s/o Chandrakant Joshi (Charekar)
Age: 61 years, Occu: Agri. & Service,
R/o: F-24, Pancha Jyot Society, Sector-29,
Washi, Tq. Washi, Dist. Thane.
- 3) Chandnil s/o Chandrakant Joshi (Charekar)
Age: 59 years, Occu: Agri. & Service,
R/o: Flat No.101, Chandra Ganga Enclave,
Brundavan Colony, Opp. Dr. S.A. Rao,
Hyderabad.
- 4) Rajan s/o Chandrakant Joshi (Charekar)
Age: 54 years, Occu: Agri.,
R/o: Flat No.6, Building No.10,
SBI Staff Quarters, N-7, CIDCO,
Near Ambedkar Chowk, Aurangabad.
- 5) Nitin s/o Chandrakant Joshi (Charekar)
Age: 57 years, Occu: Service,
R/o : C/o M/s Johnson & Johnson,
Medical Division, B-15-1, MIDC, Waluj,
Aurangabad

- 6) Mrs. Rekha w/o Laxmikant Barbind
 Age: 53 years, Occu: Household,
 R/o: Quarter No.3, Type-4, Special
 National Security Guard Campus,
 Manesar, Gurugram, Haryana,
 Pin Code No.122051
- ... Respondents
 (Ori. Defendants)

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Mr. Milind M. Joshi, Advocate for petitioner.

Mr. N. T. Tribhuwan, Advocate h/f Mr. K. B. Deshpande, Advocate for respondent No.1.

Mr. Amit R. Vaidya, Advocate for respondent Nos. 2 and 3.

Mr. N. S. Tekale, Advocate for respondent Nos. 4 and 5.

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CORAM : R. G. AVACHAT, J.

Date of reserving the Judgment : 18th SEPTEMBER, 2019

Date of pronouncing the Judgment : 06th NOVEMBER, 2019

J U D G M E N T :-

1. Heard learned counsel for the parties.
2. The challenge in this writ petition is to the common order dated 13.11.2018, passed by the Court of Civil Judge, Senior Division, Aurangabad, below applications Exh.69 and Exh.72 in a suit, being Special Civil Suit No.172 of 2006, whereby, separate applications filed by respondent Nos. 2 and 3 (defendant Nos. 2 and 3) asking for permission to file additional written statement, has been allowed.

3. Facts :

The petitioner is the plaintiff. The respondents are the defendants. The subject matter of the suit is the agricultural land comprised in *Gut* No. 385, situated at Chikalthana, Tq. Dist. Aurangabad. The suit land originally belonged to late Chandrakant Annaji Joshi. The respondents are the class-I heirs of deceased Chandrakant. It is the case of petitioner that respondent No.1 agreed to sell the entire land *Gut* No.385 to the petitioner for consideration of Rs.49,16,278/-. The agreement of sale came to be executed. Respondent No.1 agreed to ensure the presence of respondent Nos. 2 to 6 for execution of sale-deed before the Sub-Registrar. Since, respondent No.6 did not make himself available at the office of Sub-Registrar, the sale-deed could not be executed. The petitioner, therefore, filed suit for specific performance of the agreement for sale.

4. Respondent Nos. 1, 4 and 5 appeared in the suit in response to the suit summons. The summons of respondent Nos. 2 and 3 was served by paper publication. Pursuant thereto, they marked their appearance through an Advocate. Defendant No.1 filed written statement on behalf of all the respondents in a capacity as their power of attorney. The issues were framed. Suit was fixed for hearing. Since, the petitioner remained absent, the suit came to be dismissed in

default, way back in November-2010. The appeal was preferred against the order of dismissal of the suit. Respondent Nos. 2 and 3 appeared in the appeal. The District Court dismissed the appeal. Therefore, writ petition came to be preferred against the order of dismissal of the appeal. The writ petition was allowed with a direction to the parties to cooperate with the Court for expeditious hearing of the suit. The said order was passed with consent of the parties.

5. Before the trial Court, defendant Nos. 2 and 3 moved applications Exh.69 and Exh.72, seeking permission to file additional written statement. It was the contention of these respondents that their mother (respondent No.1) was not authorised to file written statement on their behalf. Their interest is not being protected properly.

6. Respondent No.1 did not file her reply to these applications. On hearing the other parties to the suit, the trial Court was pleased to allow both the applications. The trial Court, in the impugned order dated 13.11.2018, specifically in paragraphs 3 and 4, has observed thus:

“3. Heard both sides. I have perused the record and proceeding from which, it is to be seen that, summons is duly served on defendant on 23.05.2006 as per Exh.10 and thereafter learned advocate for defendant no.1 filed V.P. at (Exh.15) and learned advocate for

defendant no.4 and 5 filed V.P at (Exh.14). On perusal of Roznama dated 30.06.2006, it is to be seen that Advocate of defendant no.1 filed pursis at (Exh.18) submitting therein that defendant no.1 is holding Power of Attorney on behalf of defendant no. 2 to 6, but it is pertinent to note that the said G.PA is not placed before the court. Record also shows that never defendant no.2 and 3 personally appeared before the court and it is contention of defendants that never they authorized defendant no.1 to file written statement in their behalf. Moreover it is to be seen from the xerox copy of said G.PA which is filed by the defendant no.2 on record that the said G.PA is not having any concern with the disputed property.

4. Considering above aspect I have no hitch to hold that there is no express authorization available on record that would show that defendant no.1 was ever authorized by defendant no.2 & 3 to file a written statement on their behalf. It is also pertinent to note that the orders like exparte or "no w.s." have not been passed against the defendant no.2 & 3. Hence, I am of the opinion that for final adjudication of the matter on merit and in the interest of justice application filed by defendant no.2 & 3 deserves to be allowed, pursuant to which, I proceed to pass following order."

7. Shri Milind Joshi, learned counsel for the petitioner, would submit that the provisions of Order VIII, Rule 10 of the Code of Civil Procedure, would not apply. Respondent Nos. 2 and 3 had already filed the written statement through their power of attorney holder. Respondent Nos. 2 and 3 appeared in the suit through their Advocate. These respondents had also appeared in the proceedings of the appeal from order, preferred against the order of dismissal of the suit in

default. Respondent No.1 did not file her reply to the applications Exh.69 and 72. It was respondent No.1's duty to speak however, she did not. The same indicates collusion between respondent No.1 on one hand and her two sons (respondent Nos. 2 and 3) on the other hand. If respondent Nos. 2 and 3 are allowed to file separate written statement, vital admissions given by them in the earlier written statement, would get withdrawn. This would result prejudice to the petitioner. All the respondents had replied the pre-suit notice issued by the petitioner. The same indicates that respondent Nos. 1 to 6 were together and filed their written statement in one voice. The conduct of respondent No.1 amounts to playing fraud on the Court. Learned counsel, therefore, ultimately urged for allowing of the writ petition.

8. Respondent Nos. 2 and 3 support the impugned order.

9. Respondent No.1 filed her affidavit, stating therein that the petitioner claims specific performance of the agreement for sale of the suit land to the extent of respondent No. 1's 1/6th share therein. In this context, the averments in the written statement need to be read. She denied to have done anything against the interest of respondent Nos. 2 and 3.

10. Admittedly, respondent No.1 entered into an agreement to sell the suit land to the petitioner. Close reading of the plaint with a prayer clause therein would indicate that the petitioner claims specific performance to the extent of respondent No.1's 1/6th share in the suit land. However, the averments in the petition would indicate that the petitioner wants specific performance in respect of entire land comprised in *Gut* No.385.

11. True, the suit dates back to 2006 and respondent Nos. 2 and 3 personally appeared before the trial Court about 10 years after institution of the suit. It is the case of respondent Nos. 2 and 3 that they had been away from Aurangabad when agreement for sale was entered into between the petitioner and respondent No.1. It is their specific case that they had never authorised their mother to appear on their behalf and file written statement. It is true that respondent Nos. 1 to 6 appeared to have replied the pre-suit notice. The reply was given through Advocate. It is, however, not known as to whether the said reply was given only at the instance of respondent No.1. Had really the respondent No.1 authority to appear on behalf of respondent Nos. 2 and 3, she would have appeared on their behalf, and hence, she without service of suit summons to them. Admittedly, the suit summons

was required to be served to respondent Nos. 2 and 3 by paper publication. Thereafter, one Advocate appeared in the suit on their behalf. Admittedly, no Vakalatnama has been filed on behalf of respondent Nos. 2 and 3. On record of the suit, there is no power of attorney indicating respondent Nos. 2 and 3 to have authorised respondent No.1 to appear in the suit and deal with their right, title and interest in the suit land. The power of attorney on record indicates that it does not pertain to the subject matter of the suit. The written statement filed by respondent No.1 for herself and on behalf of other respondents indicate that she was ready and willing to perform her part of the agreement to sell. Admittedly, respondent Nos. 2 and 3 are not parties to the agreement for sale.

12. The main prayer in the suit pertains to the specific performance to the extent of respondent No. 1's 1/6th share in the suit land. On the basis of the written statement filed by respondent No.1, the petitioner submits that the respondents expressed their willingness to sell the land in its entirety. If, this contention is accepted as it is, that would be prejudicial to the interest of respondent Nos. 2 and 3, particularly, when there is nothing on record to indicate that they had expressly authorised their mother to enter into a transaction on their behalf and file written statement for them, as well.

It would be open for the petitioner to prove in the suit that the pre-suit notice replied and the written statement filed by respondent No.1 was, in fact, filed with an authorisation of respondent Nos. 2 and 3. In that case, respondent Nos. 2 and 3 would be bound by whatever admissions given in the written statement. In appeal from order, respondent No.1 had appeared for and on behalf of respondent Nos. 2 and 3 and other respondents, as well. The said fact, however, cannot be taken to be an authorisation given by respondent Nos. 2 and 3 to the respondent No.1 to appear on their behalf in the suit and file common written statement. It is true that there might be a clandestine understanding between respondent No.1 on one hand and respondent Nos. 2 and 3 on the other. The fact, however, remains that there is nothing on record to suggest that respondent Nos. 2 and 3 had, in fact, authorised the first respondent to appear on their behalf and file a common written statement. The averments in the written statement filed by respondent No.1 are necessarily prejudicial to the interest of respondent Nos. 2 and 3. These respondents were required to be served with the suit summons by paper publication. An advocate marked appearance on their behalf. He, however, did not have expressed authorisation in the nature of Vakalatnama. For want of cogent and convincing material, it cannot be said that respondent Nos.

2 and 3 have really authorised their mother to appear on their behalf in the suit and file a common written statement. In this factual backdrop, the impugned common order cannot be faulted with.

13. The writ petition, therefore, fails, the same is dismissed. Rule discharged.

14. In view of dismissal of writ petition, Civil Application No.8009 of 2019 is disposed of.

15. At the request of learned counsel for the petitioner, operation of this order is stayed for a couple of weeks.

[R. G. AVACHAT, J.]

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