

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

928 WRIT PETITION NO.8014 OF 2013

VINOD DEVAKINANDAN AGRAWAL
VERSUS
GINYANBAI SONERAO SALUNKE AND OTHERS

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Advocate for Petitioner : Mr. Kedar Balbhim R.
Advocate for Respondent No.3 : Mr. Deshpande Dhananjay P.
Advocate for Respondent Nos.5 & 6 : Mr. M.S.Shaikh h/f Mr.
Deshmukh Sachin S.

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**CORAM : V. K. JADHAV, J.
DATE : 20.02.2020**

PER COURT :-

1. Heard both the sides.
2. It appears that the petitioner – original defendant No.5 has not filed application for setting aside the order dated 04.09.2012 about the closer of the evidence or right to lead evidence of the petitioner – defendant No.5 stands forfeited. It further appears that without getting the order dated 04.09.2012 set aside by filing an application, the petitioner – original defendant No.5 has filed this Writ Petition as against the said order dated 04.09.2012 so also against the order of rejection of the application seeking permission to lead secondary evidence. It appears that the petitioner's evidence

came to be recorded on commission, since he was on bed due to certain ailment. This was precisely done in the month of August 2012. Thereafter, on 04.09.2012 the Trial Court has passed the order forfeiting the right of the petitioner – defendant No.5 to lead the evidence. Though the petitioner – original defendant No.5 has challenged the order dated 04.09.2012 and another order rejecting his application seeking permission to lead secondary evidence by filing this Writ Petition, in the year 2013. However, this Writ Petition remained pending before this Court, till this date. It thus appears that almost the period of seven (7) years has been passed.

3. In view of the same, there is no point in sending the petitioner – defendant No.5 back to the Trial Court to file an application for setting aside the order dated 04.09.2012 forfeiting his right to lead the evidence. The petitioner was suffering from illness and his evidence was recorded when he was lying on bed through the Court Commissioner. The petitioner, in the backdrop of the same, should get one opportunity to lead the evidence further. Thus, considering the entire aspect of the case, I am inclined to set aside the

impugned order dated 04.09.2012 even though the petitioner – defendant has failed to file any application before the Trial Court for setting aside the said order. So far as the second order dated 12.04.2013 pertains to the application filed by the petitioner to lead secondary evidence is concerned, it appears that the Trial Court has rejected the said application mainly on the ground that the right of the petitioner – defendant No.5 to lead evidence has been forfeitted.

4. In view of the same, the impugned order passed below Exh.101, dated 04.09.2012, is required to be quashed and set aside by directing the Trial Court to decide the application Exh.101 afresh after giving an opportunity of being heard to both the sides. Hence, I proceed to pass the following order :

ORDER

- (i) The Writ Petition is hereby partly allowed.
- (ii) The impugned order dated 04.09.2012 passed below Exh.1 in Regular Civil Suit No.142 of 2005 is hereby quashed and set aside.
- (iii) The petitioner – original defendant No.5 is permitted to comply with the order passed below

Exh.97 within four (4) weeks.

- (iv) The order passed below Exh.101, dated 12.04.2013 is hereby quashed and set aside.
- (v) The Trial Court is hereby directed to decide the application Exh.101 afresh on its own merits after giving opportunity of being heard to both the parties.
- (vi) The Writ Petition is accordingly disposed off.

(V. K. JADHAV, J.)

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vmk/-