

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 4258 OF 2014

1. Shivraj s/o Makhanna Phapagiri,
Age 66 years, Occu. Service & Agriculture,
R/o. Halni, Tq. Ahmedpur, Dist. Latur
2. Vidya Sagar s/o. Makhanna Phapagiri,
Age 76 years, Occu. Agriculture,
Through its G.P.A.;
Shivaji s/o Makhanna Phapagiri,
Age 66 years, Occu. Service & Agriculture,
R/o. Halni, Tq. Ahmedpur,
Dist. Latur. .. PETITIONERS

VERSUS

1. Ram s/o Sambhaji Gundile,
Age 62 years, Occu. Social Worker,
R/o. Bhagatsinghnagar, Udgir,
Tq. Udgir, Dist. Latur.
2. Sau Shantidevi w/o Ram Gundile,
Age 56 years, Occu. Household,
R/o. As above.
3. Anand s/o Ram Gundile,
Age 32 years, Occu. Education,
R/o. As above. .. RESPONDENTS

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Mr. Anil H. Kasliwal, Advocate for Petitioners
 Mr. V. D. Salunke, Advocate for Respondents

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CORAM : NITIN B. SURYAWANSHI, J.
DATE : 31-01-2022

JUDGMENT :-

Rule. Rule made returnable forthwith. Heard finally with
 the consent of the parties.

2. This petition takes exception to the order below Exhibit-398 dated 13.03.2014 in Regular Civil Suit No. 27 of 2013 passed by learned Joint Civil Judge, Senior Division, Ahmedpur, thereby rejecting the application filed by the plaintiffs for striking of the defence and prohibiting defendant no. 1 from leading evidence.

3. Petitioners-original plaintiffs filed suit for specific performance of agreement of re-convenience of the property and perpetual injunction. In that suit, defendant no.1 appeared on 30.09.2003 and defendants no. 2 and 3 appeared on 24.04.2003. On 30.09.2003, no W.S. order was passed against the defendants. Defendant no. 1 filed his written statement on 11.06.2004, on which, 'R & R' (Read and Record) order is passed. By filing Writ Petition No. 867 of 2005, the plaintiffs challenged the order of "Read and Record" passed in favour of defendant no. 1. The said Writ Petition came to be allowed in terms of prayer clause 'B' which was as follows -

"That, the order under challenge Exh. 27 in a suit filed dated 11/06/2004 regarding written statement of the respondent/defendant No.1 as endorsed R & R (read and recorded) may kindly be quashed & set aside by issuing writ of certiorari or directions in the nature of writ & order dated 29/06/2004."

4. Defendants no. 2 and 3 filed application Exhibit-30 for setting aside 'no W.S. order' on 11.06.2004, which was rejected on 29.11.2004. Defendants No. 2 and 3, thereafter, again filed application Exhibit-107 for setting aside 'no W.S. order' on 16.07.2011, the same was rejected by the trial Court by order dated 02.09.2011. The rejection order of the trial Court was challenged by all the defendants by filing Writ Petition no. 8131 of 2011. In the said writ petition, this Court (Coram : R. M. Borde, J.) held ;

".. .. The effect of the order passed by this Court in Writ Petition No. 867/2005 is referable to defendant nos. 2 and 3 and not to defendant no. 1. Written statement presented by defendant no. 1 has already been accepted and said order accepting his written statement could not have been rejected by trial Court while considering application exh. 107. It is therefore clarified that order of acceptance of written statement tendered by defendant no. 1 is unaffected by order passed by trial Court below exh.107 on 2-9-2011 and it shall be deemed that written statement presented by defendant no.1 is duly and properly accepted and the issues framed on the basis of pleadings by the trial Court are also rightly framed. Order passed by the trial Court below exh. 107 in Special Civil Suit No. 9/2003 therefore deserves to be quashed and set aside so far as presentation of written statement by defendant no. 1 is concerned. So far as order passed by the trial Court rejecting application at exh. 107 presented by defendant nos. 2 and 3 is

concerned, the same stands confirmed so far as it relates to presentation of written statement by concerned defendants i.e. defendant nos. 2 and 3. Rule is accordingly made absolute. In the facts and circumstances of the case, there shall be no order as to costs."

5. This order was subject matter of Letters Patent Appeal No. 187 of 2012 in Writ Petition No. 8131 of 2011, in which, the Division Bench observed thus ;

"6. At the outset, we find that the judgment and order dated 24.11.2008 in Writ Petition No. 867 of 2005 made by this court deals with filing of Written Statement by Defendants No.2 and 3 only and it does not deal with filing of written statement by Defendant No.1. Insofar as Defendant No.1 is concerned, he had filed written statement along with Defendants No. 2 and 3 on 11.6.2004. Defendants No. 2 and 3 had not signed the said written statement, but it was signed only by Defendant No.1. That is why it has to be treated that the said written statement was filed by defendant No.1 alone and the order was made by the trial court upon the said written statement as "Read and Recorded" which the learned Single Judge has found to mean acceptance of written statement on record. We do not want to enter into the said controversy about the order "Read and Recorded", but we would like to agree with the learned Single Judge on the score.

.. .. .

Thus, written statement of Defendant No.1 alone was accepted by the trial Court vide order dated 11.06.2004 and this Court did not disturb the said order with reference to Defendant No.1. We agree with the learned Single Judge that the judgment and order dated 24.11.2008 passed by learned Single Judge in Writ Petition No. 867 of 2005 did not deal with written statement by defendant No.1, in the background of above factual position. We, therefore, do not agree with the learned Counsel for the appellant in that behalf.

7. We further find that the suit is for specific performance of contract in respect of immovable property and merely because some confusion is created due to the order of "R&R" made by the trial Court, no party should suffer due to fault of the court. "

With these observations, the Letters Patent Appeal was dismissed.

6. The order passed by this Court in Writ Petition as well as Letters Patent Appeal were challenged in Special Leave Petition (Civil) No. 8514 of 2013, which was dismissed. In this background, the plaintiffs filed application Exhibit-398 seeking relief that the affidavit-in-chief filed by the defendant No.1 to lead evidence of the defendants may be rejected or excluded from the evidence and the main matter may kindly be fixed for final

argument, in the interest of justice. On rejection of this application, the present writ petition is preferred.

7. I have heard the rival submissions of the learned Advocate for the petitioners and the learned Advocate for the respondents at length. Perused the documents filed on record alongwith Writ petition and reply filed by respondents.

8. In Writ Petition No. 867 of 2005, this Court, in paragraph no. 3 of the order, has considered that the application was filed by the defendants no. 2 and 3 for taking their written statement on record. Though, their application was rejected, the written statement filed by the defendants/respondents was permitted to be taken on record by the learned trial Court.

. In Writ Petition No. 8131 of 2011, this Court, has come to a specific conclusion that the order passed by this Court, in Writ Petition No. 867 of 2005, is referable to defendant nos. 2 and 3 and not to defendant no. 1. Written statement filed by defendant no. 1 has already been accepted and the said order accepting his written statement could not have been rejected by the trial Court while considering the application Exhibit-107. This Court clarified that the order of acceptance of written statement tendered by defendant no. 1 was unaffected by order passed by trial Court

below below Exhibit-107 on 02.09.2011 and it shall be deemed that the written statement presented by defendant no.1 duly and properly accepted and the issues framed on the basis of pleadings by the trial Court are also rightly framed. This Court, therefore, quashed and set aside the order passed below Exhibit-107 to the extent of presentation of written statement by the defendant no. 1, and the said order was confirmed to the extent of defendants no. 2 and 3. This order is confirmed by the Division Bench in Letters Patent Appeal No. 187 of 2012 in Writ Petition No. 8131 of 2011, which also confirmed the findings that the written statement of defendant no. 1 alone was accepted by the trial court vide order dated 11.06.2004 and this Court did not disturb the said order with reference to defendant no. 1.

. The Division Bench agreed with the learned Single Judge that the Judgment and order dated 21.11.2008 passed by learned Single Judge in Writ Petition No. 867 of 2005 did not deal with the written statement of defendant no. 1. The Division Bench, taking into consideration the fact that the suit is for specific performance of contract in respect of immovable property and merely because some confusion is created due to order of "R&R" made by the trial Court, no party should suffer due to fault of the court, observing the Letters Patent Appeal No. 187 of 2012 was dismissed.

. Even the Special Leave Petition No. 8514 of 2013 filed by the petitioners challenging this order is dismissed.

9. In the light of these facts, the application filed by the plaintiffs that the affidavit-in-chief filed by defendant No.1 be rejected and he should not be permitted to lead evidence was misconceived and the same is rightly rejected by the trial Court by giving cogent reasons. Since the written statement of defendant no. 1 was already on record, there was no question for striking of his defence.

10. A well reasoned order is passed by the trial Court and this Court is of the considered view that there is no substance in the challenge raised by the petitioners to the impugned order.

. No case is made out by the petitioners to interfere in the extraordinary writ jurisdiction of this Court.

11. Writ Petition being devoid of merit, is dismissed.

12. Rule is discharged. No order as to costs.

(NITIN B. SURYAWANSHI)
JUDGE