

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH: NAGPUR**

WRIT PETITION NO. 6969 OF 2019

Smt. Shantabai @ Laxmibai Mahadu Ingole and Ors.

Vs.

Mohd. Javed Haji Umardaraj Malavi

Office notes, Office Memoranda of
Coram, appearances, Court's orders
or directions and Registrar's orders.

Court's or Judge's Orders.

Mr. S.P. Kshirsagar, Advocate for petitioners.

Mr. Sameer Khan, Advocate for respondent.

CORAM : MANISH PITALE J.

DATE : 20.04.2022.

By this writ petition, the petitioners (original defendants) have challenged order dated 24.09.2019 passed by the Court of Civil Judge Junior Division, Malegaon, District – Washim (hereinafter referred to as ‘the trial Court’), whereby an application filed by the respondent (original plaintiff) for leading evidence has been allowed and the objections raised on behalf of the petitioners have been rejected.

2. In the present case, the respondent has filed a suit for specific performance against the petitioners. In the first round of litigation, the matter came up to this Court in the form of Second Appeal No. 478/2004. The said appeal filed by the petitioner was partly allowed by this Court. It was held that while the Courts

below had appreciated the material on record and rendered findings on factors relevant to the prayer for grant of specific performance, one crucial aspect pertaining to 'willingness' of the original plaintiff was not appreciated in the correct perspective. It was held that while the trial Court had considered the aspect of readiness, the aspect of willingness was not touched. On this basis, this Court found it fit to set aside the concurrent orders passed by the two Courts below and remanded the matter to the trial Court. The relevant portion of the judgment and order dated 22.04.2019, passed by this Court in Second Appeal No.478/2004, reads as follows:

“8. It is clear from the observations in paragraph 43 (iii) that one of the aspects which shall have to be considered is whether there was an inordinate delay in filing the suit after the alleged breach / refusal and the effect thereof. The evidence on record shall have to be looked into by the trial Court and a finding on willingness would have to be recorded. It would therefore, be necessary to remand the matter to the trial Court. In this view of the matter, I do not find it necessary to refer to the other decisions cited at the bar.

9. The judgment dated 9.9.2002 in Special Civil Suit 4 of 2002 rendered by the Civil Judge (Senior Division), Washim and the judgment dated 30.4.2004 in Regular Civil Appeal 246 of 2002 rendered by the Adhoc Additional District Judge are set aside.

10. Matter is remitted to the trial Court for fresh decision in the light of the observations in this judgment.”

3. Thereafter, admittedly, the trial Court framed an additional issue after the matter was remanded by this Court. The said issue pertains to the question as to whether there was an inordinate delay in filing of suit after the alleged breach/refusal and if yes, the effect thereof. In the backdrop of the additional issue framed, the respondent moved an application at Exhibit 66 for leading evidence on the said issue. This was objected to by the petitioner by filing objection at Exhibit 67. As noted above, by the impugned order dated 24.09.2019, the trial Court allowed the application filed by the respondent at Exhibit 66, while the objection raised on behalf of the petitioners at Exhibit 67 was rejected.

4. The petitioners filed the present writ petition, wherein notice was issued on 14.10.2019 and stay of further proceedings before the trial Court was granted.

5. Mr. Kshirsagar, learned counsel appearing for the petitioners submitted that a perusal of the order passed by this Court remanding the matter to the trial Court would show that it was incumbent on the trial

Court to have decided the question of willingness on the part of the respondent (original plaintiff) on the basis of the evidence available on record and there was no question of granting opportunity to the respondent to lead further evidence in the matter.

6. The learned counsel for the petitioners placed reliance on the judgments of the Hon'ble Supreme Court in the cases of *Arjun Singh Vs. Kartar Singh and Others, AIR 1951 SC 193* and *Shenbagam and others vs. K K Rathinavel* (judgment and order dated 20.01.2022) passed in Civil Appeal No. 150/2022 and judgment of this Court in the case of *Saranghar Vithal Wadhe vs. Shamrao Govinda Wadhe* (Judgment and order dated 20.12.2019) passed in Appeal From Order No.52/2015.

7. On the other hand, Mr. Khan, learned counsel appearing for the respondent submitted that the order passed by this Court remanding the matter to the trial Court did not specify that the issue pertaining to willingness would have to be decided only on the basis of available evidence.

8. It was further submitted that in the absence of any such specific stipulation, there was no

impediment for leading evidence on the said question, particularly in the light of the aforesaid additional issue No.5A framed by the trial Court after remand of the proceedings.

9. The learned counsel placed reliance on the judgment of the Hon'ble Supreme Court in the case of *United Bank of India Vs. Abhijit Tea Co. Pvt. Ltd. and Ors, Ors., 2000 (4) ALL MR 875*, as also judgment of this Court in the case of *Smt. Sonabai Sahebrao Pathrud Vs. Bhausahab Ganpati Gaikwad and Ors. 2020 (3) ALL MR 496*, to contend that upon setting aside of the concurrent orders and remand of the proceedings to the trial Court, the suit stood revived to be decided afresh. On this basis, it was submitted that the impugned order was justified.

10. This Court has heard the learned counsel for the rival parties and perused the material on record. Before advertng to the judgments relied upon by the learned counsel appearing for the rival parties, it would be appropriate to first refer to the above quoted portion of the order of this Court remanding the matter to the trial Court.

11. Paragraph 8 of the above quoted portion shows that this Court specifically stated that the evidence on record shall have to be looked into by the trial Court and findings on willingness would have to be recorded. It is significant that in paragraph 9, quoted above, both the concurrent orders passed by the Courts below were set aside. Significantly in paragraph 10, this Court specifically recorded that the matter stood remitted to the trial Court for fresh decision in the light of the observations in the said judgment.

12. In these circumstances, it needs to be examined as to whether the trial Court could have passed the impugned order permitting the respondent to lead evidence on the aforesaid issue of willingness, which in the first round of litigation had been ignored by the trial Court as well as the appellate Court.

13. It is an admitted position that upon remand, additional Issue No.5-A was framed specifically in the light of the observations made by this Court in its judgment while remanding the matter to the trial Court. This Court is of the opinion that when the concurrent orders passed by the two Courts below stood set aside and the matter stood remanded to the trial Court, in terms of the law laid down by the Hon'ble Supreme

Court in the case of *United Bank of India Vs. Abhijit Tea Co. Pvt. Ltd. and Ors. (supra)*, proceedings before the trial Court stood revived and the suit was open to be decided afresh by the trial Court. If only there was a specific stipulation in the order passed by this Court remanding the proceedings to the trial Court that only the available evidence would have to be looked into, the contentions raised on behalf of the petitioners could be accepted. In the absence of any such specific stipulation, this Court is of the opinion that the impugned order cannot be interfered with.

14. The whole purpose of the litigation to be decided by the trial Court, which has been revived by the order of remand passed by this Court, is for ascertaining the facts about the truth of the rival claims made by the parties. It is incumbent upon the trial Court, on the proceedings being remanded, to return findings on facts, particularly pertaining to the issue of willingness as indicated by this Court. So long as this Court did not specifically limit the exercise of such jurisdiction by the trial Court to appreciation of only the evidence available on record, it cannot be said that that trial Court in the facts and circumstances of the present case exceeded the scope of exercising its jurisdiction in the light of this Court remanding the proceedings.

15. A perusal of the judgments of the Hon'ble Supreme Court relied upon by the learned counsel appearing for the petitioners i.e. in the cases of *Arjun Singh Vs. Kartar Singh (supra)* and *Shenbagam vs. KK Rathinavel (supra)* would show that they are not applicable to the facts of the present case. In the case of *Arjun Singh Vs. Kartar Singh (supra)*, the Hon'ble Supreme Court was concerned with the extent of jurisdiction that the appellate Court could exercise under Order 41 Rule 27 of the Code of Civil Procedure on the question of permitting additional evidence to be adduced. Such is not the case in the present matter. Insofar as the judgment in the case of *Shenbagam vs. KK Rathinavel (supra)* is concerned, it is more on the merits of the matter, in the context of the question of readiness and willingness concerning a suit filed for specific performance. This Court at the present, is not concerned with the merits of the matter and therefore, the said judgment would not be relevant for deciding the present petition.

16. Insofar as the judgment in the case of *Sarangdhar Vithal Wadhe (supra)* is concerned, it is significant that in paragraph 36, wherein this Court has rendered its final conclusion, it is specifically recorded that this Court was inclined to remand the matter to the

first appellate Court for fresh decision on the basis of available evidence. The present case is distinguishable from the aforesaid case on facts as this Court has not given any specific stipulation that the trial Court would have to decide the question of willingness on the part of the respondent, only on the basis of available evidence. Hence, reliance placed on said judgment would not take the case of the petitioner any further.

17. On the other hand, the judgment of the Hon'ble Supreme Court in the case of *United Bank of India (supra)* and judgment of this Court in the case of *Smt. Sonbai Sahebrao Pathrud (supra)* appear to be relevant. In the case of *Smt. Sonbai Sahebrao Pathrud (supra)*, this Court has affirmed the attempt on the part of the original plaintiff to amend the plaint upon the proceedings being remanded to the trial Court, on the basis that upon remand, the trial Court is to proceed afresh on the basis that the suit stands revived.

18. In view of the above, this Court is of the opinion that no case is made out for interference in the impugned order.

19. Accordingly, the writ petition is dismissed.

20. It is found that in the present case the suit was filed by the respondent, as far back as in the year 2002. Even while remanding the matter, this Court had stipulated a period of six months for disposal of the suit. But, because of the interim order passed in the present writ petition, the suit has remained pending.

21. In this backdrop, the trial Court is directed to expeditiously dispose of the suit and in any case within a period of **three months** from today.

JUDGE

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GABHANE

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by PRITY S
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