

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.5932 OF 2022

Tejpal Harakchand Jain

.... Petitioner

Versus

Sau. Sunanda Sureshbhai Salunke

.... Respondent

.....
Mr. Anand P. Bhandari, Advocate for the Petitioner

.....

[CORAM : NITIN B. SURYAWANSHI, J.]

DATE : 25th JULY, 2023

ORDER :

1. Advocate Mr. Muthiyan, on earlier occasion made a statement that the respondent has not given him *Vakalatnama*, therefore, final disposal notice was issued to the respondent, which is duly served. None appears for the respondent. Advocate Mr. Muthiyan is discharged from the matter.

2. By this petition, filed under Article 227 of the Constitution of India, orders passed by the learned Civil Judge, Senior Division, Aurangabad, below Exhibits-57 and 59 in Special Civil Suit No.324 of 2014 are challenged.

3. Suit filed by the petitioner/plaintiff for specific performance came to be decreed *ex parte*. In appeal, the *ex parte* judgment and decree is set aside, and the matter is remanded back to the Trial Court with following direction;

"3. Special Civil Suit No.324/2014 is restored on original file to decide the same afresh by giving opportunities to both the parties to record their evidence according to law."

4. After remand, the respondent/defendant filed written statement. The petitioner/plaintiff, thereafter, amended the plaint. The Trial Court is framed issues at Exhibit-49. The petitioner/plaintiff then filed application Exhibit-57 seeking permission to file additional evidence affidavit as the respondent/defendant has filed written statement and as the issues are framed. The respondent/defendant opposed the said application by filing a detail say at Exhibit-58, contending that the petitioner/plaintiff is trying to fill up lacunas in his earlier evidence affidavit by filing evidence affidavit.

5. The Trial Court has allowed the application Exhibit-57 and permitted the petitioner to file additional evidence affidavit, in view of amendment made in the plaint.

6. The respondent/defendant then filed application Exhibit-59, contending that the petitioner/plaintiff should have filed his additional evidence affidavit confined to the amendment made in the plaint, however, he has also incorporated other contentions in the additional evidence affidavit, and therefore, except para 10 of examination-in-chief dated 07/08/2021, all other paras from the additional evidence affidavit of the petitioner/plaintiff be deleted. The petitioner/plaintiff opposed the application. The Trial Court has rejected the application with direction to the petitioner/plaintiff to submit his additional evidence affidavit, in conformity with the order below Exhibit-57. The petitioner is aggrieved by the orders passed below Exhibits-57 and 59.

7. Heard the learned advocate for the Petitioner. Perused the writ petition memo, annexures thereto and the impugned orders. Though the respondent is duly served none appears on her behalf.

8. Admittedly, while remanding the matter, the Appellate Court has directed the Trial Court to decide Special Civil Suit No.324 of 2014 afresh by giving opportunity to both the parties to record their evidence according to law.

9. Record further indicates that after remand, the respondent/defendant filed written statement and the petitioner/plaintiff amended the plaint and issues are framed. In the light of these facts, the petitioner is entitled to file additional evidence affidavit denying the contentions raised by the respondent/defendant in the written statement, and he is entitled to give reply to the defence raised by the respondent/defendant in the additional evidence affidavit of examination-in-chief. This would amount to denial of fair opportunity to the petitioner/plaintiff to contest the suit on merits. By the impugned orders, the Trial Court has denied reasonable and fair opportunity to the petitioner/plaintiff. The Trial Court has erred in directing the petitioner/plaintiff to file additional evidence affidavit restricted to the amendment in the plaint. Right of the petitioner/plaintiff to file additional affidavit of evidence cannot be curtailed in such a manner. The impugned orders are therefore unsustainable in law and facts of the present case. Hence, the following order:

ORDER

(I) The writ petition is allowed.

- (II) Impugned orders passed by learned Joint Civil Judge, Senior Division, Aurangabad, below Exhibits-57 and 59 in Special Civil Suit No.324 of 2014 are hereby quashed and set aside.
- (III) The petitioner is permitted to file his additional evidence affidavit.
- (IV) Relevancy and admissibility of the same shall be considered by the Trial Court at the time of final adjudication of the suit.

[NITIN B. SURYAWANSHI]
JUDGE

S.P. Rane