



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

986 WRIT PETITION NO. 2822 OF 2024

BURHAN KHAN NANEKHAN AND OTHERS
VERSUS
SHAKILA BEE ABDUL RAUF PATEL AND OTHERS

Mr. T. M. Shaikh, Advocate for the petitioners
Mr. P. P. Patni h/f Mr. P. F. Patni, Advocate for the respondents

CORAM : R. M. JOSHI, J.
DATE : 27th NOVEMBER, 2024

PER COURT :-

1. This petition takes exception to the order passed below Exhibit 63 in R.C.S. No. 78/2011, whereby the application filed by defendant nos.1 to 4 for setting aside no written statement order dated 22/11/2011 was dismissed.

2. The petitioners are defendants in above suit. Record indicates that R.C.S. No. 78/2011 was decreed initially on 01/04/2013. This judgment and decree passed by the Trial Court was assailed in R.C.A. No. 116/2013 successfully. The Appellate Court relegated the matter back to the Trial Court for decision afresh by issuing certain directions. After remand the learned Trial Court decided the suit afresh and it has resulted in dismissal thereof. The plaintiffs-respondents therefore, filed R.C.A. No. 225/2019 taking exception to the judgment and decree dated

02/11/2022. The appeal came to be allowed with following directions:

"1. Appeal is hereby allowed.

2. Judgment and decree passed in Regular Civil Suit No. 78 of 2011, dated 17.07.2019, passed by learned Civil Judge Junior Division, Khultabad, Dist. Aurangabad is hereby set aside.

3. Suit is remanded for fresh adjudication with directions to comply the directions issued in R.C.A. No. 116/2013, decided on 01.04.2013, by the then learned District Judge No.1, Aurangabad, by depositing the measurement charges at the first instance by the defendant nos.1 to 6, within four weeks from the date of this judgment. In case of failure of defendants no.1 to 6 to deposit the said charges within four weeks, the plaintiffs are permitted to provisionally deposit the said charges with liberty to recover the same in accordance with law. Irrespective of the final decision of the suit.

4. The learned trial Court shall issue directions to T.I.L.R. Khultabad, to appoint it the cadestral surveyor to conduct the measurement of the suit property Block No. 33 and 17, 35, 36 of the defendant, as per the law and to decide suit afresh without being influenced by any observations made in the aforesaid judgment.

5. The parties are directed to appear before the learned trial Court on 01.12.2022, at 11.00 a.m.,

6. The learned trial court is directed to expedite the hearing of the suit and shall make an endeavor to decide the same within a period of six months from the date of appearance of the parties.

7. The learned trial court shall explore all the provisions of C.P.C. and shall not grant any adjournment of flimsy and casual grounds to the parties.

8. The parties as well as learned advocate for the rival parties are requested to cooperate the learned trial Court in expeditious disposal of the suit within the time frame as directed herein above."

3. It is after the remand of the suit for decision afresh application (Exhibit 63) came to be moved for seeking permission to file written statement. It was contended therein that though the defendants appeared through their Advocate in the suit on 07/10/2011, an order of no written statement, came to be passed against them. It is claimed that defendant no.1 is old aged person and now aged about 104 years and for last 15 years he is suffering from urinal disease. It is claimed that for the treatment of the said disease other defendants are engaged and therefore, they were not in a position to file written statement.

4. Learned counsel for the petitioners submits that there is no embargo created by the order of judgment of the First Appellate Court in R.C.A. No. 225/2019 from filing written statement by the defendants. It is his submission that since the suit is remanded for afresh adjudication, it is the right of the defendants to file written statement. It is his submission that though observations are made by the First Appellate Court with regard to the written statement not being filed by the petitioners and the Court having shown disinclination to issue any directions for admission of any written statement, in view of the operative part of the order clause No.4, the Trial Court was directed not to be influenced by any observations made in this judgment. It is therefore, his contention that the said observations would not become an

impediment for the petitioner to file application for setting aside order of no written statement.

5. Learned counsel for the respondents opposed the petition on the ground that the written statement sought to be taken on record after the period of 13 years cannot be permitted. It is his submission that in any case any reason stated for not filing written statement is also not acceptable for the reason that the very same petitioners / original defendants have contested R.C.A. No. 116/2013 and 225/2019. He also argued that with the observations made in paragraph 22 of the judgment, non issuing of directions to accept the written statement amounts to denial of the same. It is contended that this order has not been challenged by the petitioners and as such they are bound by the said judgment.

6. Perusal of the record indicates that the defendants were duly served with the summons in R.C.S. No. 78/2011. Though they appeared in the said suit failed to file written statement. The Trial Court passed order dated 22/11/2011 proceeding the said without the written statement of these defendants. Initially the said suit is decreed. The present petitioners/original defendants was filed R.C.A. 116/2013. This appeal was allowed with following directions:

"1) The appeal is partly allowed.

2) The judgment and decree passed by C.J.J.D., Khulatabad in Regular Civil Suit No. 78/2011, dated 01.04.2013, is set aside and the suit is remanded back to the court of C.J.J.D., Khulatabad for fresh trial.

3) The plaintiffs, as well as defendants are directed to appear before the learned trial Court on 01.03.2018.

4) After appearance of plaintiffs and defendants the plaintiffs shall file application for joint measurement of land Gut No.33, 17, 35 and 36.

5) The plaintiffs shall deposit the measurement fees of Gut No.33 whereas the defendants shall deposit the measurement fees of their respective Guts.

6) If the plaintiffs failed to file application within one month from the date of appearance for the joint measurement of the gut no. 33, 17, 35 and 36 the suit filed by plaintiffs deemed to be automatically dismissed.

7) Both sides to bear their own costs.

8) Decree be drawn up accordingly."

7. Perusal of this order shows that though the suit is remitted back to the Trial Court for decision afresh, the scope of the suit trial was determined and fixed by this order. This order clearly shows that the Trial was relegated back for the purpose of measurements of land bearing Gat Nos.33, 17, 35 and 36.

8. After remand the said suit came to be dismissed and hence the respondents/ original plaintiffs filed R.C.A. No. 225/2019. In the said appeal the learned First Appellate Court has taken into consideration the issue of non filing of written statement by the defendants even after the remand of suit in R.C.A. No. 116/2013. In the light of these facts it was observed that even in the appeal no such prayer was made and therefore, the Court has shown disinclination to issue any direction for the admission of written statement at the instance of these defendants. In the light of these observations, since no permission is granted by the First Appellate Court by the defendants to file written statement, it should be taken as denial thereof.

9. In any case, in order to enable the defendants to file written statement after lapse of 13 years, there has to be substantial/sufficient reason made out for the same. Application filed by the defendants indicates that only for the reason that one of the defendant is old aged person and suffering from urinal disease, all defendants could not file written statement. This Court finds substance in the contention of the learned counsel for the respondents that during this period of 13 years these very defendants/petitioners have participated in two different appeals as well as the proceedings before the Trial Court after first remand. This shows that there was no impediment for them to prosecute

their cases all this time. For the condonation of delay, genuine reason could be considered and not made up one. It is thus clear that there is no substance in the defence sought taken by the defendants for not filing written statement in time.

10. Thus, on both counts the defendants have failed to make out any case for filing written statement. In the peculiar facts of the case, this Court finds no perversity in the impugned order of rejecting the written statement sought to be filed by the petitioners. Hence, petition stands dismissed.

(R. M. JOSHI, J.)

ssp