

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

Writ Petition No. 5955 of 2014

Dattatraya s/o Gokul Jadhav .vs Sushilabai w/o Amabji Kotlapure
and others

Notes, Office Memoranda of Coram, appearances, Court's orders or directions and Registrar's orders.	<u>Court's or Judge's</u> <u>Orders.</u>
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Mr. S.S.Bora, Adv. for petitioner.
Mr. A.V.Patil, Adv. for R- 1 to 4
Mr. D.B.Rode, Adv. for R-5

CORAM : N.W.SAMBRE, J
DATE : 28.4.2015

This petition is filed by defendant no.1 to Regular Civil Suit No. 71/2001 filed by the respondents 1 to 4 for permanent injunction and declaration of ownership.

2. In the said suit, it is claimed by the respondents 1 to 4 in the capacity of plaintiffs that the mother of defendant no.1 Dattatraya executed a power of attorney in favour of defendant no.2, who, in turn, executed the transfer deed in favour of the plaintiffs.
3. It is claimed in the suit that defendant no.1 Dattatraya i.e. the present petitioner, has sought to interfere with the possession.

4. In the suit, no relief was claimed against the defendant no.2 i.e. Shankarrao – the power of attorney holder for the mother of Dattatraya – defendant no.1.

5. During the proceedings, one of the offshoots of the suit, was taken up before the District Judge No.1 Osmanabad in Regular Civil Appeal No. 62 of 2013 and the said Court by its order dated March 19, 2014 framed an issue which reads thus:-

“Whether, plaintiffs prove that Bhamabai Gokul Jadhav (mother of defendant no.1) executed power of attorney in favour of defendant no.2 Shankarrao s/o Ramnathsa Bakale, to sell the suit property?”

6. The said Court further allowed the parties to lead evidence on the above referred issue.

7. The defendant no.2, pursuant to the above referred order, filed his examination-in-chief as a witness of the plaintiffs.

8. By an application Exh. 244, the defendant no.1 i.e. the petitioner herein moved an application for cancellation of the evidence of the said witness in the background of the provisions of Order 16, Rule 20, 21 of the Code of Civil Procedure read with chapter IX, para 229 of the Civil

Manual. The said application was objected by the plaintiffs by its say dated June 14, 2014 pointing out that no relief was claimed against the defendant no.2 in the suit and the defendant no.2 has also not filed any written statement.

9. The Court of Joint Civil Judge, Jr. Dn., Tuljapur, with whom the trial in the suit is pending, rejected the said application Exh. 244. As such the present petition.

10. The learned counsel for the petitioner Shri Bora strenuously urged that the evidence of the defendant no.2 is not permissible to be adduced in support of the claim of the plaintiffs particularly as a witness of the plaintiffs as, according to him, the same may result into spoiling the case of the defendant no. 1. In support of his contention, he has invited my attention to the provisions of the Order 16, Rule 21 of the Code of Civil Procedure so as to canvass that the practice of examining the defendant as plaintiff's witness is condemned since long back particularly by the Judgment of the Privy Council. He would further urge that a party, who intended to prove its case, must enter into the witness box in support of the case and in case, if such party fails to appear/ enter into the witness box, it is open for the Court to draw an adverse inference. In support of his contention, he has placed reliance upon the Judgment of the Bombay High Court reported in AIR

1956 Bombay, 251 in the matter of Pirgonda Hongonda vs. Vishwanath Ganesh and others and also the Judgment of this Court in the matter of Suresh s/o Sahebrao Tawale vs. Uttam s/o Shankar Ghadge and others reported in 2012(6)Mah. L.J.,311.

11. While countering the above referred submissions, the learned counsel for the respondents would urge that the trial court while dealing with the issue under consideration, particularly in the background of the fact of framing of an issue in relation to the proving of the power of attorney, non filing of appearance by defendant no.2 so also written statement, was right in permitting the examination of defendant as witness of the plaintiff. According to him, there is no blanket embargo or bar on the right of a party to call/ summon the witnesses from the other side unless such approach is mala fide or with an ulterior motive. So as to substantiate his contention, he has relied upon the Judgment of this Court in the matter of Chandrabhan R. Singh vs. Prabhakar R. Desai reported in 2009(2) Bom. C.R. 915.

12. He would further urge that the order granting permission to examine such witness depends upon the factual background of each case and would further urge that the present one is a fit case where this Court need not to interfere with the order passed by the learned trial court.

13. Upon considering the respective submissions made by the learned counsel and analyzing the same in the background of the facts of the case in hand, it is required to be noted that it is an admitted position on record that defendant no.2 Shankarrao has executed the sale deed in favour of the plaintiffs. With this background, he was impleaded as defendant no. 2 to the suit. Though the defendant no.2 was served, he has chosen neither to file any written statement nor his appearance.

14. It is also noted that there is no specific relief claimed as against the defendant no.2 in the suit.

15. With the above background, if the claim in the suit is noticed, in my opinion, embargo that is sought to be imposed by the petitioner/ defendant no.1 on the rights of the plaintiffs to examine defendant no.2, is wholly misconceived. It is required to be noted that defendant No.1 has to prove his case as he has come out before the court with a particular pleading which casts burden on him to do so. While doing so, if a party/ defendant, who is a formal party to the suit, and by examining of such witness the rights of the parties could be appropriately established, the bar under Order 16, Rules 20 and 21 of the Code of Civil Procedure, in my opinion, will not be attracted. The reliance placed by the learned counsel for the petitioner on the

Judgment of Pirgonda Hongonda vs. Vishwanath (cited supra) and on the Judgment of Suresh vs. Uttam (cited supra) is concerned, in both these cases it is noted that the witness, who was sought to be examined, had already filed his appearance and resisted the claim in the suit by filing the written statement. In the present case, the defendant no.2 has neither filed his appearance nor any written statement but appears to be a formal party to the present case. There is one more facet to the present matter, as noted hereinabove the lower Appellate Court has framed a specific issue as regard the execution of the power of attorney by the mother of the petitioner/defendant no.1 in favour of the defendant no.2. While proving the said issue, in my opinion, examination of power of attorney holder will be just and proper approach on the part of the plaintiffs as is rightly appreciated by the learned trial court.

16. In view of the above, the law laid down by the court in the matters of Pirgonda vs. Vishwanath and Suresh vs. Uttam (cited supra), has hardly any applicability as the same are distinguishable in terms of the nature of the dispute and the conduct of the party, who is sought to be examined as a witness. In my opinion, appropriate support can be rightly drawn from the Judgment of Chandrabhan Singh (cited supra) wherein for proving the documents this Court has held

that the witness even if is from the other side but still can be examined without any demur.

17. As such the present petition, in my opinion, fails as devoid of merit and stands dismissed.

(N.W.SAMBRE,J)

patle/vvr