

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.3125 OF 2015

Tatoba Bhupal Magdum.] ... Petitioner/
 (Original Defendant)

Versus

Swastishri Jinsen Bhattarak Pattacharya]
 Mahaswami Math, Trust and Ors.] ... Respondents/
 (Original Plaintiffs)

Ms. Manjiri S. Parasnis for Petitioner.

Mr. Manoj Patil for Respondent No.1.

CORAM :- M. S. SONAK, J.

DATE :- APRIL 06, 2015

P. C. :-

1. Rule. With the consent of and at the request of the learned Counsel for Respondent No.1, Rule is made returnable forthwith.

2. This petition challenges Order dated 22/08/2014, by which the learned Joint Civil Judge, Junior Division, Jaisingpur, has allowed the application made by the Respondent No.1 (original Plaintiff) for examination of Plaintiff No.1 after the evidence of Plaintiff No.9 for self and as Power of Attorney holder for Plaintiff Nos.1 to 10 was concluded. The application, was made invoking the provisions of Order 18 Rule 3A of the CPC.

3. Order 18 Rule 3A of the CPC provides that where a party himself wishes to appear as a witness, he shall so appear before any other witnesses on his behalf have been examined, unless the Court, for reasons to be recorded, permits him to appear as his own witness at a later stage.

4. In the present case, the suit has been filed by 10 Plaintiffs. The plaint was verified by Power of Attorney holder Shri Bhujgonda Dada Patil as Power of Attorney for Plaintiff Nos.1 and 2. On behalf of Plaintiffs, Raosaheb Siddhappa Suryawanshi, Plaintiff No.9, has deposed, *inter alia*, stating that he holds the Power of Attorney on behalf of the remaining Plaintiffs. Such evidence of Plaintiff No.9 was concluded on 08/04/2008. Thereafter on 28/06/2012, application came to be made invoking the provisions of Order 18 Rule 3A of the CPC seeking leave to examine Plaintiff No.1, who is the Mahaswami of the Math. The reason stated in the application is that the Plaintiff No.9, in the course of his examination, has admitted that there are certain matters of which he has no personal information. Accordingly, it was stated that the Plaintiff No.1, who has been the Mahaswami of the Math for last several years, would be the appropriate person to depose in the matter.

5. The learned Civil Judge, in making the impugned order, has exercised discretion vested in under the provisions of Order 18 Rule 3A of the CPC. The learned Civil Judge has placed reliance upon the decision of this Court in the case of ***Sanjay Narayanrao Barde and another Vs. Sau. Vimal Kesharao Bairam and others***¹.

¹ AIR 2000 Bombay 384

6. Ms.Parasnis, learned Counsel for Petitioner, submitted that the application made by the Respondents under Order 18 Rule 3A of the CPC is totally sketchy and it has no reason whatsoever as to what prevented the Plaintiff No.1 from examining himself before the commencement of the evidence of the Power of Attorney i.e. Plaintiff No.9. Ms.Parasnis submitted that if the deposition of Plaintiff No.9 is perused, then it will be clear that he has made several admissions which support the case of the Petitioner. The entire purpose of seeking leave to examine the Plaintiff No.1 is to nullify the effect of such admissions and to fill in the lacunae which have arisen in the case of the Respondents. By reference to the decision of this Court, in the cases of *Vijaysingh Gordhandas & Ors. Vs. Dwarkadas Mulji*² and *Hari Shrawan Sutar Vs. Ramdas Tukaram Patil*³, the learned Counsel submitted in both these cases, cogent material had been placed on record for satisfying the Civil Court as to the reason which prevented the Plaintiff from examining himself prior to the examination of other witnesses. Such reasons, according to the learned Counsel, do not exist in present case. For these reasons, the learned Counsel submitted that the impugned order warrants interference.

7. Having perused the impugned order and the material on record, although it is true that the application made by the Respondents was, to a certain extent, deficient, there no reason to interfere with the impugned order by which discretion has been

² 2001 (4) ALL MR 629

³ 1985 Mh.L.J. 197

exercised to permit the examination of Plaintiff No.1 after the conclusion of the deposition of Plaintiff No.9. Plaintiff No.9 had examined himself, *inter alia*, as a Power of Attorney on behalf of the rest of the Plaintiffs. The Plaintiff No.9, however, disclaimed personal knowledge of the matter prior to the year 2002. This suit was instituted in the year 1998 and relates, *inter alia*, to matter prior to 2002 as well. In these circumstances, the application under Order 18 Rule 3A came to be made seeking leave to examine Plaintiff No.1, since the Plaintiff No.1 is aware of and is able to depose to the facts and circumstances for the entire period including the period prior to the year 2002.

8. The application dated 28/06/2012 has not directly stated the reason as to why the Plaintiff No.1 could not be examined prior to Plaintiff No.9. However, from the tenor of the application, such reason can be culled out. The main reason being the deposition by the Plaintiff No.9 that he was not personally aware of events prior to the year 2002. In such circumstances, it cannot be said that the learned Civil Judge, in making the impugned order, has exercised discretion in a capricious or an arbitrary manner.

9. Nevertheless, the Respondents have been negligent in the matter. The evidence of Plaintiff No.9, as per the record, concluded on 08/04/2008. The application under Order 18 Rule 3A, however, came to be made only on 28/03/2012. The application was decided on 22/08/2014. Thus, for the reasons attributable to the

Respondents, the trial in the suit has been delayed for over five years. Although, this may not be a ground to interfere with the discretion exercised by the learned Civil Judge, nevertheless, the Respondents are liable to pay costs to the Petitioner for such delay and lack of diligence in the matter.

10. Taking into consideration the delay involved, as also to a certain extent, casualness in the draft of application dated 28/06/2012, interest of justice would be met if the Respondents are directed to pay costs of Rs.50,000/- to the Petitioner.

11. Accordingly, the impugned order, insofar as it allows the Respondents' application dated 28/06/2012, is modified and the Respondents are directed to pay to the Petitioner costs of Rs.50,000/- (Rupees Fifty Thousand Only) within a period of four weeks from today as a pre-condition to avail the benefit of the impugned order dated 22/08/2014. Such costs may be either paid to the Petitioner directly or deposited in the Civil Court, wherefrom the Petitioner shall be at liberty to unconditionally withdraw the same.

12. Rule is made absolute to the aforesaid extent. There shall be no order as to separate costs in the present petition.

13. All parties to act on the basis of authenticated copy of this order.

(M. S. SONAK, J.)