

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO.675 OF 2015

Shri Arun Aloysius Sidharth Alvares	]	
of Bombay, Indian Inhabitant	]	
Residing at `Alvares House', 188, Veer	]	
Savarkar Marg, Mahim	]	... Petitioner
Mumbai 400 016	]	(Orig. Plaintiff)

versus

1]	Shri Subhash John Paul Alvares	]	
		]	
2]	(a) Pamela R Alvares	]	
2]	(b) Binoy Alvares	]	
2]	(c) Rohan Alvares	]	
2]	(d) Deven Alvares	]	
		]	
3]	Shri Santosh Anthony Alvares	]	
		]	
	All residing at "Alvares House"	]	
	188, Veer Savarkar Marg, Mahim	]	... Respondents
	Mumbai – 400 016	]	(Orig. Defendants)

Mr. Denzil D'mello with Ms. Geeta P Sonawane for the Petitioner.
Mr. K H Halai with Mr. P Ranjan i/by M/s. Halai & Co. for the Respondent No.1
Mr. Nitin G Raut for the Respondent Nos.2(a) to 2(d).

CORAM : R. M. SAVANT, J.
DATE : 28th January 2015

ORAL JUDGEMENT

1 Rule, with the consent of the learned counsel for the parties taken up for final hearing. Mr. Halai, the learned counsel appearing for the Respondent No.1 waives notice on behalf of the said Respondent. Mr. Nitin Raut appearing for the Respondent Nos.2(a) to 2(d) waives notice on behalf of

the said Respondent. Respondent No.3 is unrepresented in the suit and also did not contest the Application (Exhibit 7) and hence no notice is required to be issued to the Respondent No.3.

2 The writ jurisdiction of this court is invoked against the order dated 9/12/2014 passed by the learned City Civil Court, Greater Mumbai by which the Application (Exhibit 7) filed by the Plaintiff for issuance of witness summons to the Defendant No.3 came to be rejected.

3 It is not necessary to burden this order with unnecessary details. Suffice it to state that the suit in question being Suit No.8622 of 1992 has been filed by the Petitioner/Plaintiff for partition of the suit property which the Plaintiff claims to be an ancestral property. In so far as the rejection of the Application (Exhibit 7) is concerned, the same has been rejected on two fold grounds viz. that in the Application (Exhibit 7) the Plaintiff has not mentioned the reasons as to why the Defendant No.3 is required to be examined and, secondly that the Defendant No.3 being an opposite party, the Plaintiff could not examine the Defendant No.3.

4 The Trial Court has referred to the judgments which were cited before it by either side. The Petitioner/Plaintiff placed reliance on the judgment of a learned Single Judge of the Chhattisgarh High Court reported in

AIR 2011 Chhattisgarh 120 in the matter of Balram Rathore v/s. The sub-Divisional Officer (Rev.) Bilaspur and ors., the judgment reported in AIR 1993 Patna 122(1) in the matter of Sri Awadh Kishore Singh and another v/s. Sri Brij Bihari Singh and others. and the judgment of the Apex Court reported in AIR 1999 SC 1441(1) in the matter of Vidhyadhar v/s. Mankikrao and another. In so far as the Respondent No.1 is concerned, reliance was placed by him on the judgment of the Division Bench of the Kerala High Court reported in 2000(2) KLJ 297 in the matter of Jortin Antony and ors. v/s. Padmanabha Dasa Marthanda Varma and ors. It is on the consideration of the said judgments and having regard to the fact situation as prevailing in the instant case that the Trial Court rejected the Application (Exhibit 7).

5 In so far as the Defendant No.3 is concerned, whom the Plaintiff wants to examine and in respect of whom the Application (Exhibit 7) was filed, it is required to be noted that the Defendant No.3 has not filed his written statement, he is not represented in the suit and, that he has not cross examined the Plaintiff. It is the Defendant No.1 who is contesting the suit by filing his written statement etc. and also has led evidence. The suit in question is one for partition. In a partition suit the delineation of the parties into Plaintiffs and Defendants is obliterated to the extent that all the parties are in the capacity of Plaintiffs. It is in the said context that the Application (Exhibit 7) was required

to be approached by the Trial Court. However, unfortunately the Trial Court has adopted a too technical approach, and has rejected the Application (Exhibit 7). In so far as the first ground that the reasons have not been mentioned by the Petitioner is concerned, in my view, the said ground is not sustainable as it would amount to approaching the matter in a technical and pedantic manner. The learned counsel for the Respondent No.1 also fairly states that he would not support the said ground. In so far as the second ground is concerned, as indicated above, the suit being one for partition, the parties are virtually similarly situated and therefore in one sense the partition suit cannot be said to be an adversarial litigation. It is also required to be borne in mind that the Defendant No.3 has not filed his written statement and in fact has also not cross examined the Plaintiff. Hence there should have been no impediment for the Trial Court to allow the said Application (Exhibit 7) having regard to the aforesaid facts. However, as indicated above, the Trial Court has rejected the said Application (Exhibit 7) by adopting a technical approach by holding that an opposite party cannot be examined. In that regard a useful reference could be made to the judgment of the Apex Court in *Vidhyadhar's case* (supra). In the said case the Defendant No.2 was examined as a witness by the Plaintiff by having recourse to Order XVI Rule 1A of the Code of Civil Procedure. Recording of the said evidence of the Defendant No.2 was adversely commented upon by the High Court. However, when the matter reached the Apex Court, the Apex Court having regard to the fact situation that was

prevailing in the said case held that the Defendant No.2 could be examined as the Plaintiff's witness. The facts of the instant case are akin to the facts before the Apex Court, as in the instant case the Defendant No.3, whom the Plaintiff wants to examine, has not filed his written statement, in fact, he is not represented in the suit in the Trial Court nor has he cross examined the Plaintiff. In my view, therefore, the interest of justice would be served if the Defendant No.3 is permitted to be examined by the Plaintiff on the witness summons being issued to him. It would be contingent upon the evidence of the Defendant No.3 that would come on record that the parties would decide whether they are required to cross examine him. The impugned order dated 9/12/2014 is therefore required to be quashed and set aside and is accordingly quashed and set aside. The Application (Exhibit 7) would stand allowed. The Trial Court is directed to issue witness summons to the Defendant No.3 asking him to remain present on an appointed date and time. Since the suit is of the year 1992, the evidence of the Defendant No.3 would be completed at one stroke without the matter being unnecessarily adjourned. In the facts and circumstances of the present case, where the suit is of the year 1992, the Trial Court is directed to hear and dispose of the same latest by 31/12/2015. The above Petition is allowed to the aforesaid extent. Rule is accordingly made absolute in the aforesaid terms with parties to bear their respective costs of the Petition.

[R.M.SAVANT, J]