

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

CIVIL REVISION APPLICATION NO.392 OF 2015

Rambrikhs Rajnath Mishra .. Applicant/Petitioner
-Versus-
Naharmal Mehta ..Respondent

Mr.B.R.Singh i/b. R.B.Singh & Associates for applicant/petitioner
Mr.Shreepad Murthy with Abhishek Patil for respondent No.1

CORAM : M.S.SONAK, J.

DATE : 23rd July 2015.

P.C.

1] Leave granted to convert this civil revision application into writ petition. Amendments to be carried out forthwith.

2] Rule. With the consent and on the request of learned Counsel for the parties, rule is made returnable forthwith.

3] This petition challenges the order dated 29th July 2015 made by the Small Causes Court at Mumbai declining leave to the petitioner to lead further evidence of plaintiff No.5(a), in R.A.D.Suit No.1012 of 1995.

4] The record reveals that the examination and cross examination of P.W.1 concluded on 11/2/2015 and the matter was adjourned for further evidence on 20/2/2015. On the said date, the petitioners - plaintiffs applied for time and the same was granted. On the adjourned date i.e. 2nd March 2015, the petitioners applied for further time on the ground that the affidavit in evidence of plaintiff No.5(a) was not ready due to some technical problem in the computer at the office of petitioner's Advocate. The trial court, rejected the motion for adjournment and even ordered closure of the evidence of the petitioners.

5] On the said date, the respondents - defendants, tendered purshis to the trial court that they seek to rely upon the evidence led in some other suit and that the same be admitted as evidence in the present suit.

6] On 16th March 2015, the petitioners applied for recall of order dated 2/3/2015 and applied for leave to lead further evidence of plaintiff No.5(a). By impugned order dated 29th June 2015, said

application, marked as Exh.72 , came to be rejected.

7] Mr.B.R.Singh, learned Counsel for the petitioners submitted that the learned trial court has adopted an hyper technical approach in the matter. The reasoning that no list of witnesses had been submitted by the petitioners is totally fallacious, because in this case, the petitioner was not requesting issue of any summons to any witnesses. Besides, the statements in the cross examination that P.W.-1 had deposed on behalf of all the remaining plaintiffs as well was a qualified statement and in any case, the same would not deter the learned trial court from permitting the petitioners from leading further evidence in the matter. The reason stated for failure to tender affidavit in evidence on 2nd March 2015 was genuine and the same was incorrectly rejected.

8] On the other hand, Mr.Shripad Murthy learned Counsel appearing for the respondents defended the impugned order by submitting that the entire attempt of the petitioner was to fill in the lacunae. Once the P.W.-1 had made a clear statement that he was deposing on behalf of all the plaintiffs, there was no question of

plaintiff No.5(a) seeking to examine himself once again. Relying upon the decision of this Court in the case of Anil Bhusari Vs. Bhaskar Bhusari, reported in 2014 (5) Mh.L.J. 792, Mr.Murthy submitted that there was no compliance of provisions contained in Order XVI Rule 1, 2 and 3 of the Code of Civil Procedure, 1908 in the present case and, therefore, leave to examine the plaintiff No.5(a) was rightly declined. Finally, Mr.Murthy submitted that the suit is of the year 1995 and the petitioners are adopting dilatory tactics.

9] Having considered the submissions of the learned Counsel for the parties and perused the records, in my judgement, the impugned order is required to be set aside. The reasoning that the petitioners have not furnished the list of witnesses and, therefore, leave has to be declined, is not correct. In this case, the petitioners do not seek issuance of summons to any witnesses. The petitioners seek to examine plaintiff No.5(a). In such circumstances, there was no necessity of filing any list of witnesses. For the same reason, the decision in the case of Bhusari (supra) is also distinguishable.

10] True in the present case, P.W.-1 in his cross examination has stated that his examination in chief had been filed on behalf of all the plaintiffs and that he had also taken their consent for filing the same. However, notwithstanding such a statement, the learned Small Causes Court on 11th February 2015 had adjourned the matter for further evidence of plaintiffs. Besides, on 2nd March 2015 adjournment was not declined on the ground that P.W.-1 had already deposed on behalf of the plaintiffs. The statement of P.W.-1 was indeed qualified. P.W.-1, had stated that other plaintiffs had neither executed any power of attorney in his favour nor had the family members. In fact, P.W.-1 had stated that plaintiff Nos. 4 to 6, which obviously include the plaintiff No.5(a), may come in the witness box. All this vital material appears to have been overlooked by the trial court.

11] Some element of prejudice to the respondents cannot be ruled out. Particularly on account of delay which has caused in the meantime. However, this prejudice can easily be compensated in terms of costs.

12] For the aforesaid reasons, the impugned order dated 29th June 2015 is set aside. Petitioners' application Exh.72 is made absolute in terms of prayer clauses (a) and (b). This shall be subject to the petitioners paying costs of Rs.10,000/- in favour of respondent No.5 who is stated to be main contesting party. Such costs may be directly paid or deposited before the trial court within two weeks from today. Once the costs are deposited, the respondent No.5(a) shall be at liberty to withdraw the same unconditionally. In case no costs are deposited, this petition shall be deemed to have been dismissed.

13] Further, in view of setting aside of the impugned order as also recalling of order dated on 2nd March 2015, the respondents shall be at liberty, if they so desire, to withdraw the purshis filed by them on 2nd March 2015. Mr.Murthy, learned Counsel for the respondents submits that leave be granted to withdraw the said purshis here and now. Accordingly, leave is granted and upon conclusion of the evidence on behalf of the plaintiffs, the respondents shall be at liberty to lead their evidence in the matter.

14] However, considering that the suit is of the year 1994, the trial court is directed to dispose of the same as expeditiously as possible and in any case within a period of eight months from today.

15] Rule is made absolutely in the aforesaid terms. There shall be no separate orders as to costs. All concerned to act on an authenticated copy of this order.

(M.S.SONAK, J.)