

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 7064 OF 2015

Vishwanath Vasudeo Gavde

Petitioner

Vs

Maruti Dhulaji Thakur and Ors

.. Respondents

Mr. Yashodhan V. Divekar a/w U.M.Mahajan and Ashwini Pawar,
i/b M/s. Divekar & Co., Advocates for the petitioner.

Mr. Rajesh Shah a/w Deepak Shukla i/b Vinod Mistry & Co,
Advocates for respondent no.1.

CORAM : R.G.KETKAR,J.

DATE : 12/08/2015

PC:

1. Heard Mr. Yashodhan Divekar, learned counsel for the petitioner and Mr. Rajesh Shah, learned counsel for respondent no.1 at length.

2. By this Petition under Article 227 of the Constitution of India, original defendant no.3 has challenged the Judgment and order dated 15.4.2015 passed by the learned Judge, City Civil Court, Greater Mumbai, below Exh.21 in Suit No. 7454 of 1983 (High Court Suit No. 1379 of 1983). By that order, the learned trial Judge rejected Application-Exh.21 made by defendant no.3 seeking permission to examine defendant no.2 as his witness to prove his case set out in the written statement. The relevant and material facts are as under.

3. Initially M/s Divekar & Co, Advocates and Solicitors were

representing defendants no.2 to 4. Defendant no.4 expired and his legal representatives were brought on record. However, Vakalatnama on their behalf was not filed by the said firm. Defendant no.2 did not thereafter appear at any point of time. In view thereof, M/s Divekar & Company obtained discharge from defendant no.2. On 2.3.2015, defendant no.3 filed purshis-Exhibit 20 setting out therein that he is not fit to depose and give evidence because of several diseases from which he is suffering. Defendant no.3 is suffering from full loss of hearing and neurological imbalance. He remembers most of the things but not in logical sequence and, therefore, he cannot properly communicate/carry on conversation. Defendant no.3 relied upon medical certificate of Dr. Shetty (ENT Specialist) dated 23.2.2015 and medical certificate of Dr. Rajesh Benny (Neurologist) dated 24.2.2015. Defendant no.3 asserted that he is medically unfit to give evidence and, therefore, no adverse inference be drawn against him because of his inability to give evidence and accordingly filed Purshis. On 2.3.2015, defendant no.2 appeared and filed Vakalatnama and the purshis of defendant no.3 was taken on record and case was adjourned to 9.3.2015 for final argument.

4. On 9.3.2015, defendant no.3 filed application Exh.21 setting out therein that he gave purshis on the ground that he is medically unfit to give evidence. On that date, defendant no.2

appeared through Advocate and filed Vakalatnama and applied for time to file written statement. It is further set out that on 2.3.2015, defendant no.3 came to know that defendant no.2 is available and desires to defend suit and give evidence. Defendant no.2 is fully aware of the facts and circumstances of the case as is evident from paragraph 2 of the written statement of defendant no.3. Prayer was, therefore, made to examine defendant no.2 as his witness. Defendants no. 2 to 4 have common interest.

5. Respondent no.1, hereinafter referred to as plaintiff, filed reply dated 11.3.2015 opposing the application. The plaintiff disputed that defendant no.3 is medically unfit to give evidence. The medical records do not establish that defendant no.3 is medically unfit to give evidence and the same is merely a ruse to introduce defendant no.2 in the present proceedings in illegal and malafide manner. Defendant no.3 has already filed purshis on 2.3.2015 closing his evidence and now when the matter is for final argument, defendant no.3 came with the application to delay the court proceedings. Defendant no.2's appointment as Chief Promoter of the proposed society was cancelled. Though the suit is instituted in the year 1983, defendant no.2 did not file written statement. Once defendant no.3 filed purshis to close evidence, he cannot be permitted to take about turn and seek permission to lead evidence. Lastly, it was contended that

defendant no.3 has not made out sufficient cause for allowing him to lead evidence of defendant no.2 after filing pursis for closing their evidence.

6. In support of this Petition, Mr. Divekar reiterated the submissions made before the trial Court. He submitted that in all civil proceedings the parties to the suit are competent witnesses. Even if the defendant no.2 did not file written statement, being a party to the suit, defendant no.3 can examine him, being a competent witness. Mr Divekar relied upon Section 120 of Indian Evidence Act,1872 (for short, 'Act') as also the decision of Patna High Court in the case of Awadh Kishore Singh Vs Brij Bihari Singh, AIR 1993 Patna 122 and in particular para 16 thereof.

7. He further submitted that defendant no.3 is not medically fit to depose and give evidence because of several diseases from which he is suffering. Defendant no.3 is medically unfit because of loss of hearing capacity and neurological imbalance. He, therefore, submitted that application Exh.21 may be allowed by setting aside the impugned order.

8. On the other hand, Mr. Shah supported the impugned order. He submitted that defendant no.1 is a company incorporated under the Companies Act, 1956. On behalf of defendant no.1, written statement is filed. On 9.2.2015, defendant no.1 closed its evidence as one of the employees of defendant no.1 who filed

affidavit of evidence in lieu of examination-in-chief expired. He submitted that defendant no.1, being a company, could have examined one of the Directors who signed the agreement of sale. Defendant no.1 could have examined the person who had verified written statement of defendant no.1. Defendant no.1 chose not to examine any of these persons and closed evidence on 9.2.2015. He submitted that defendant no.2 did not participate in the suit right from 1983. He did not file written statement. On 2.3.2015, defendant no.3 filed purshis at Exh.20 setting out therein that he is not giving evidence. In other words, defendant no.3 closed his evidence.

9. He submitted that on 2.3.2015, defendant no.2 filed Vakalatnama by engaging Advocate and did not apply for permission to file written statement. He also made submissions based on reply filed by the plaintiff as also reiterated submissions made before the trial Court.

10. I have considered the rival submissions made by the learned counsel appearing for the parties. I have also perused the material on record. The plaintiff has instituted suit for specific performance of contract against respondent no.2 herein (defendant no.1) being vendor, and respondent no.3 (defendant no.2) and petitioner (defendant no.3) and respondent no.4 (defendant no.4, since deceased). Defendant no.1 is a company incorporated under the Companies Act, 1956. On behalf of

defendant no.1, written statement is filed. On 9.2.2015, defendant no.1 closed its evidence as one of its employees who filed affidavit of evidence in lieu of examination-in-chief expired. Defendant no.1 being a company could have examined one of the Directors who signed the agreement of sale. Defendant no.1 could have examined person who had verified written statement of defendant no.1. Defendant no.1 chose not to examine any of these persons and closed evidence on 9.2.2015. It is also evident that defendant no.2 did not participate in the suit right from 1983 and did not file written statement. On 2.3.2015 defendant no.3 filed purshis Exhibit 20 setting out therein that he is not giving his evidence. In other words, defendant no.3 closed his evidence.

11. It is material to note that between 1983 till 2.3.2015, defendant no.2 did not participate in the proceedings and suddenly appears in Court on 2.3.2015. On 2.3.2015, defendant no.2 filed Vakalatnama. On the same day, defendant no.3 filed purshis Exh.20 thereby closing his evidence. Instead of filing purshis closing evidence, defendant no.3 could have filed application to examine defendant no.2 as his witness. On 9.3.2015, defendant no.3 filed application Exhibit - 21 seeking permission to examine defendant no.2 as his witness. It is not in dispute and is rather evident that defendant no.2 filed application on 9.3.2015 for permission to file written statement. The learned

trial Judge rejected the application. It is also a matter of record that aggrieved by that decision, defendant no.2 filed Writ Petition in this Court which was summarily rejected.

12. Defendant no.3 has filed written statement and in paragraph 2 it was asserted thus :

“2. At the outset this defendant further submits that this defendant is not concerned with the said society or the suit property in any manner. This defendant submits that the defendant no.2 was the chief promoter of the society and the defendant no.2 himself was acting on behalf of the society as well on behalf of this defendant and the defendant no.4 . Even the Package Deal Agreements were signed between the plaintiffs and the defendant no.2 on behalf of the said society and this defendant and the defendant no.4 were merely included as co-promoters as we were required for the purpose of formation of a society.”

13. Perusal of paragraph 2 shows that defendant no.3 specifically asserted that he is not concerned with the society or the suit property in any manner. It is defendant no.2 who was acting on behalf of the society as well as on behalf of defendants no.3 and 4. Perusal of application Exhibit-21 shows that defendant no.3 filed purshis Exhibit-20 on 2.3.2015 along with the medical certificate on the ground that he is medically unfit to give evidence because of loss of hearing and neurological imbalance. The plaintiff disputed this claim in paragraph 3 of the reply. I have carefully perused medical certificates annexed by defendant no.3 along with purshis.

14. Perusal of certificate of Gokul Scan Centre shows that defendant no.3 is aged about 62 years as on 5.7.2012.

Impression (1) records “Mild generalized cerebral atrophy” which is age related. Impression (2) records “No other significant abnormality is detected.” MR angiography reveals : (1) Eccentric non obstructive wall plaques in bilateral proximal cervical internal carotid arteries. In the first place, it is non obstructive and is age related. Secondly also, it is at peripheral location and is, therefore, not significant. MR angiography further reveals: (2) A small out pouching noted from distal cavernous segment of right intracranial internal carotid artery, suggestive of aneurysm which is not compressing brain structure. As far as the certificate of Neurocare is concerned, Impression reads thus:

“This is an abnormal NCV study that reveals generalized motor (with some sensory) radiculo-neuropathy”, which is not suggestive of any brain lesion/pathology, otherwise it would have been picked up on MRI. In other words, these certificates do not indicate that there is any neurological imbalance. In fact, in paragraph 2 of the purshis, defendant no.3 asserted that he remembers most of the things but not in logical sequence. I am, therefore, unable to accept that defendant no.3 is not in a position to give evidence as he is medically unfit.

15. Section 118 of the Act lays down that all persons shall be competent to testify **unless the Court considers that they are prevented from understanding the questions put to them**, or from giving rational answers to those questions, by

tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind. Explanation thereto lays down that a lunatic is not incompetent to testify, unless he is prevented by his lunacy from understanding the questions put to him and giving rational answers to them. Perusal of the purshis shows that defendant no.3 asserted that he remembers most of the things but not in logical sequence and, therefore, cannot properly communicate/carry on conversation. Perusal of the purshis does not indicate that any case as contemplated by Section 118 of the Act is made out. Even no attempt was made in the trial Court for invoking Section 118 of the Act. While rejecting the application, the learned trial Judge has observed in paragraph 4 that defendant no.2 did not bother to contest the suit till 9.3.2015 and appeared before the Court only on the date of final arguments. His motion for condoning the delay in filing W.S was rejected as no explanation was given for filing W.S. It is only at that stage defendant no.3 tendered application Exh.21 for permission to examine defendant no.2 as his witness.

16. The learned trial Judge further noted in paragraph 4 that defendant no.3 contended that he has no concern with the society and the suit property in any manner. The learned trial Judge, therefore, held that this is calculated attempt on the part of the defendants to prolong the suit which is more than 30 years old. The learned trial Judge accordingly dismissed the application

by imposing costs of Rs.1000/- payable to Legal Aid Committee.

17. Mr Divekar relied upon Section 120 of the Act as also the decision in the case of Awadh kishore Singh (supra). In that case, question was whether the plaintiffs were debarred from examining defendant no.2 as a witness on their behalf even if he did not file written statement.

18. In paragraph 16, the Division Bench observed thus :

16. Now I proceed to consider the merit of the impugned order. By the impugned order, the plaintiffs have been debarred from examining defendant No. 2 as a witness on their behalf, as no order was passed by trial Court for acceptance of written statement filed by this defendant. No provision could be brought to our notice on behalf of any of the parties to show that a party is debarred from examining its adversary as a witness on his behalf. A plaintiff can examine any witness he so likes -- the witness may be a stranger, may be a man of his own party or party himself or may be a defendant or his man. Therefore, if a plaintiff wants to examine a defendant as a witness on his behalf, he cannot be precluded from examining him on the ground that the said defendant has neither appeared in the suit nor upon appearance filed written statement nor prayer for filing written statement has been rejected. Therefore, in my view, trial Court has committed material irregularity in the exercise of jurisdiction in debarring the plaintiffs from examining defendant No. 2 as a witness on their behalf.

19. I do not find that the learned trial Judge has committed any error in rejecting the application. As noted earlier, defendant no.1 chose to close his evidence though it could have examined its director who had signed the agreement of sale or even a person who had affirmed written statement of defendant no.1. Defendant no.2 did not participate in the suit right from 1983 till

his appearance on 2.3.2015. On that date, he simply filed Vakalatnama and did not apply for permission to file W.S. On 2.3.2015, defendant no.3 filed purshis Ex.20 closing his evidence. On the same day, the matter was adjourned to 9.3.2015 for final arguments. It is only on 9.3.2015 defendant no.2 files motion for permission to file written statement after condoning delay. That motion was rejected on the ground that no sufficient cause is made out. It is only after rejection of defendant no.2's motion, defendant no.3 files application Exh.21. Order dated 9.3.2015 was challenged by defendant no. 2 in this Court by filing writ petition which is also dismissed summarily.

20. Having regard to the conduct of defendant no.3, I do not find that the learned trial Judge has committed any error in observing that this is one more attempt on the part of the defendants to delay the proceedings as the suit was kept for final arguments on 9.3.2015. In view of the conduct of defendant no.3, I am of the opinion that this is not a fit case for exercising powers under Article 227 of the Constitution of India. The reliance placed on the decision of Awadh Kishore Singh case (supra) does not advance the case of defendant no.3 as in the present case, admittedly, defendant no.3 has filed purshis Exh.20 closing his evidence. In view thereof, Petition fails and the same is dismissed. Mr. Divekar submitted that if defendant no.3 is not permitted to lead evidence, the suit will virtually go uncontested.

In view thereof, notwithstanding dismissal of this Petition, defendant no.3 will be at liberty to apply before the trial Court for permission to lead his (defendant no.3's) evidence. All contentions in that regard are expressly kept open. It is also expressly made clear that where a decree is appealed from by the petitioner, any error, defect or irregularity in the impugned order, affecting the decision of the case, may be set forth as a ground of objection in the memorandum of appeal as contemplated by Section 105(1) of C.P.C.

(R.G.KETKAR, J.)