

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

WRIT PETITION NO.7955 OF 2015

**Karmayog Cooperative Housing Society Ltd : Petitioner.
Versus
M/s. Sunrise Builders : Respondent.**

**Mr. Shreepad S Murthy a/w Mr. Abhishek Patil for the Petitioner.
Mr. Prasad Dani, Senior Advocate with Mr. D U Deokar, Mr. Dhanesh
Parikh and Ms. Jaylakshmi Gaud i/by Parimal K Shroff & Co. for the
Respondent.**

**CORAM : R. M. SAVANT, J.
DATE : 21st August 2015**

P.C.

1 The writ jurisdiction of this Court is invoked against the order dated 24/07/2015 passed by the learned Judge City Civil Court, Mumbai by which order the application filed by the original Plaintiff i.e. the Respondent herein came to be allowed and the Plaintiff was permitted to adduce evidence of one Shri Ramesh Patel – the partner of the Plaintiff-firm, and Shri Ashok Gandhi – the Architect, after completion of the cross examination of P.W.No.1 Shriniwas Gadiyal who is the another partner of the Plaintiff-firm.

2 It is required to be noted that the instant application was filed when the witness of the Plaintiff Shri Shriniwas Gadiyal, who is a partner of the Plaintiff firm, was under cross examination. It is further required to be noted that the Plaintiff had not filed the list of witnesses and it is pursuant to a

question which was posed in the cross examination that the Plaintiff filed the instant application wherein it indicated the further witnesses it desired to examine.

3 The said application was objected to on behalf of the Defendant as filed at a belated stage as the cross examination of the Plaintiff witness Shriniwas Gadiyal had already started.

4 The said application was considered by the Trial Court and as indicated above the Trial Court has by the impugned order dated 24/07/2015 has allowed the same. The Trial Court accepted the case of the Plaintiff that it is on account of inadvertence that the list of witnesses was not filed by the Plaintiff before beginning of the cross examination of its witness. The Trial Court was of the view that the provisions of Order XVI of the Code of Civil Procedure have to be construed liberally and that the evidence of a party should not normally be shut unless the Court comes to a conclusion that the party is grossly negligent and there are serious laches on its part. The Trial Court has referred to the judgment of Rajasthan High Court reported in *AIR 1981 Rajasthan 75* in the matter of *Satnam Transport Co. vs. Prakash Mal Surana*. In the said judgment it has been held that if the intention of the legislature was not to deprive the Court from the important power of examining the evidence at the instance of a party without which no justice can

be administered and that if sufficient cause is shown for not filing the list or for omission of the names of the witnesses in the list, the Court is not without power to permit the party to examine the witnesses even if the list is not filed. The Trial Court has lastly observed that no prejudice would be caused to the Defendant as the Defendant would get ample opportunity to cross examine the witnesses which are proposed to be examined on behalf of the Plaintiff.

5 The learned counsel for the Petitioner Shri Shreepad Murthy would by placing a reliance on Order XVI (Rules 1, 2 and 3) of the Code of Civil Procedure contend that unless sufficient cause is shown and reasons are recorded by the Trial Court the witnesses cannot be examined. The learned counsel would contend that the said principle would apply more so in a case where another partner of the partnership firm is sought to be examined. Reliance is sought to be placed on the judgment of a learned Single Judge of this Court reported in 2014(5) Mh. L.J. 792 in the matter of Anil Ramesh Bhusari vs Bhaskar Ramesh Bhusari and others. The learned counsel would contend that the least that was expected from the Plaintiff was to disclose as to on what point the 2nd partner was to be examined.

6 In my view, it is not possible to accept the said contention urged by the learned counsel for the Petitioner Shri Murthy. It is required to be noted that in the instant suit the application has been filed at the stage when the

cross examination of the Plaintiff's first witness was hardly started. As indicated above, it is at the said stage that the names of subsequent witnesses which the Plaintiff desires to examine was filed. Hence this is not a case where the evidence of the Plaintiff is complete and thereafter the application for examination of the further witnesses was filed. It is well settled that the rules of procedure are the handmaid of justice and are to be used to see to it that substantial justice is done to the parties. In the instant case, the Plaintiff desires to examine two more witnesses and the stage of the suit is not such so as to deprive the Plaintiff from adducing such evidence as it deems appropriate. The appreciation of the evidence which would come on record is another matter which the Trial Court is required to consider at the appropriate time. However, there is no prohibition in law for examining another partner as a witness in a suit filed by a firm. As rightly held by the Trial Court the Defendant would be at liberty to cross examine the said partner and the other witness. The learned counsel for the petitioner Shri Murthy in fact however fairly conceded that he has no objection to Shri Ashok Gandhi the other witness being examined, however, his objection is only to Shri Ramesh Patel who is the partner of the Plaintiff's firm being examined as witness. In my view, for the reasons afore stated the said contention of the learned counsel for the Petitioner Shri Murthy cannot be accepted. The judgment of a learned single Judge in *Anil Ramesh Bhusari's* case would have no application considering the stage at which the recording of evidence is at present.

7 With a view to see to it that there is a fair trial and on the ground that equal opportunity is required to be granted to the parties, the instant order cannot be faulted with. Hence no case for interference is made out in the writ jurisdiction of this Court. The above Writ Petition is accordingly dismissed.

[R.M.SAVANT, J]