

IN THE HIGH COURT OF JUDICATURE AT MUMBAI
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.11420 OF 2015

Eileen Long and others ... Petitioners
Vs.
M/s. Landeal Corporation and another ... Respondents

Mr. M. L. Palan with Mr. R. Revankar with Mr. Fraser Alexander i/b. M/s.
Majmudar & Partners for Petitioners.
Mr. Suneel D. Mogre for Respondents.

CORAM : R. G. KETKAR, J.
DATE : NOVEMBER 21, 2015

ORDER :

Heard Mr. Palan, learned Counsel for petitioners and Mr. Mogre, learned Counsel for respondents at length. Rule. Mr. Mogre waives service for respondents. At the request and by consent of the parties, Rule is made returnable forthwith and the Petition is taken up for final hearing.

2. By this Petition under Article 227 of the Constitution of India, original defendants have challenged the order dated 16.09.2015 passed by the learned trial Judge. By that order, the learned trial Judge overruled the submission advanced by the defendant that defendant does not want to adopt entire evidence of P.W.1-Ranchoddas Shivaji Joshi, since deceased but wants to adopt his cross-examination only and wants to start cross-examination of P.W.2 Mr. Pravin Keshavji Pethani, partner of plaintiff No.1 from question No.493, which was asked to P.W.1 R. S. Joshi, since deceased, by observing “such procedure is unknown to law and hence cannot be allowed.”.

3. Mr. Palan submitted that P.W.1 Joshi expired on 07.01.2013. In

view thereof, the parties filed joint Purshis on 25.11.2013, which reads thus:

“ IN THE HON'BLE CITY CIVIL COURT AT BOMBAY

SUIT NO.9746 OF 1982

(High Court Suit No.165 of 1982)

M/s. Landeal Corporation and another	...	Plaintiffs
Vs.		
2(a) Eileen Long and others	...	Defendants

JOINT PURSIS

MAY IT PLEASE YOUR HONOUR

1) The parties herein by consent agree to adopt the cross examination of plaintiffs ex-witness Mr. R. S. Joshi conducted before the court commissioner, pursuant to order dated March 7, 2012, cross examined till Q.493, shall be adopted as cross examination of now PW1 Mr. Pravin Pethani. By consent the Defendant shall conduct for the cross-examination of PW1 Mr. Pravin Pethani to be continued from Q.493 onwards.

2) By consent the documents of the Plaintiff which are already marked as exhibits shall be adopted as documents produced as now PW1. The exhibit numbers shall be continued.

The documents of defendants admitted by Mr. R. S. Joshi (now deceased) as witness of Plaintiff and marked as exhibit before the court commissioner shall be adopted as admitted by now PW1 Mr. Pravin Pethani. The exhibit numbers given by the commissioner will be retained.

Dated 25th day of November 2013

xxx
P. K. Pethani
Plaintiff

xxx
Dirk Allams
Defendant

xxx
Sunil Mogre
Advocate for Plaintiff

xxx
F. M. Alexander
Advocate for Defendant”

4. He submitted that the said Purshis is signed by Mr. Pethani as also Advocate appearing for plaintiffs and on behalf of defendants and

their Advocate. He submitted that Roznama of 05.11.2012 recorded that the Commissioner had submitted evidence of P.W.1 Mr. Joshi recorded so far. The said evidence was taken on record. It also recorded that the Commissioner recorded evidence upto 01.09.2012.

5. The matter was thereafter heard before the learned trial Judge on 16.09.2015, when on behalf of the defendant, submission was made to the effect that the petitioner does not want to adopt entire evidence of P.W.1 Mr. Joshi, since deceased, thereby meaning that defendant does not want to adopt the affidavit in examination-in-chief dated 05.03.2007 of P.W.1 Mr. Joshi and wants to adopt his cross-examination only. It appears that P.W.1 was cross-examined upto question No.492 and question No.493 remained to be answered. On the same day, the learned trial Judge overruled that submission by observing thus,

“The Ld. Adv. for Deft has submitted that the defendant does not want to adopt entire evidence of the deceased witness (P.W.1), but he wants to adopt his cross-examination only and wants to start cross-examination of PW-2 from question no.493 which was asked to the deceased witness (PW-1). Such procedure is unknown to law and hence, cannot be allowed.”

6. Mr. Palan relied upon the decision of the Apex Court in the case of **K. P. Co-operative Bank Vs. Dulhanbibi, AIR 1966 SC 1072**, and in particular paragraph 5 thereof to contend that it is settled law that question of mode of proof is a question of procedure and is capable of being waived, and therefore, evidence taken in a previous judicial proceeding can be made admissible in a subsequent proceeding by consent of parties. This applies to proceedings of a civil nature. While what is not relevant under the Evidence Act cannot in proceedings to which Evidence Act applies, made relevant by consent of parties; relevant evidence can be brought on the record for consideration of Court or the Tribunal without following the regular mode, if parties agree. The reason behind this rule is that it would be unfair to ask any

party to prove a particular fact when the other party has already admitted that the way it has been brought before the Court has sufficiently proved it. Mr. Palan submitted that though this decision was specifically cited before the learned trial Judge, the same was not even adverted to.

7. On the other hand, Mr. Mogre relied upon Section 33 of the Indian Evidence Act, 1872 (for short 'Act') and submitted that in view of this Section, the learned trial Judge rightly observed that such procedure is unknown to law. He did not dispute that the ruling of the Apex Court in the case of **K. P. Co. Bank** (*supra*) was cited before the learned trial Judge. As the learned trial Judge has not considered either Section 33 of the Act or the decision of the Apex Court as also has passed a cryptic order, during the course of the arguments, I suggested Mr. Mogre to agree for setting aside the impugned order with direction to the learned trial Judge to consider the contentions that may be advanced before him and pass a reasoned order. Mr. Mogre accepted the suggestion and submitted that the impugned order may be set aside by the consent of the parties.

8. In view thereof, by consent of the parties, Petition is disposed of in the following terms:

- a. The impugned order dated 16.09.2015 is set aside;
- b. The learned trial Judge shall consider Section 33 of the Act as also decision of the Apex Court in the case of **K. P. Co. Bank** (*supra*) as also any other contention that may be advanced before him and shall pass a reasoned order;
- c. Rule is made absolute in the aforesaid terms with no order as to costs.

(R. G. KETKAR, J.)