

IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
BENCH AT AURANGABAD

WRIT PETITION NO. 4148 OF 2016

Shri Sukhramdas s/o Nichaldas Mandhwani,
age 84 years, through Power of Attorney
Holder Shri Sanmukhdas s/o Sukhramdas
Mandhwani, age 64 years, occupation :
business, r/o "Sukh-Amrut" Aptt.,
Kanwar Nagar, Jalgaon (Address is given
in the plaint as Famous Soda, 18,
Polan Peth, Jalgaon, Dist. Jalgaon

.. Petitioner/
Orig. Defendant

versus

Shri Pritamsing s/o Bhagatsing Arora,
Age 64 years, occup : Business,
R/o Satguru Market, 18, Polan Peth,
Jalgaon, District Jalgaon

.. Respondent/
Orig. Plaintiff

Mr. Kishor C. Sant, Advocate for petitioner
Mr. Shailesh P. Brahme, Advocate for respondent

CORAM : SUNIL P. DESHMUKH, J.
DATE : 13TH APRIL, 2016

ORAL JUDGMENT:

1. Rule. Rule made returnable forthwith.

2. Heard Mr. Sant learned counsel for appearing for petitioner and Mr. Brahme, learned counsel appearing for respondent finally, by consent.

3. Petitioner - original defendant aggrieved by order dated 03-03-2016 passed by the 5th Joint Civil Judge, Junior Division, Jalgaon upon an application – Exhibit-179 moved by respondent - plaintiff in regular civil suit no. 267 of 2016, seeking production of documents appended to Exhibit-179 which was moved during cross examination of petitioner's witness.

4. Learned counsel for the petitioner points out that Exhibit - 179 filed by respondent had been non speaking and does not give any proper explanation worth consideration for production of documents at the time of cross examination of petitioner's witness.

5. Mr. Sant, learned counsel appearing for petitioner purports to refer to a decision in the case of *Vitorino Rodrigues vs. Nirmalabai Shivajirao Desai*, reported in 2010 (7) Mh. L. J. 813, and relies on paragraph no. 25 therein which reads thus;

“ 15. Formerly, prior to the amendment brought about with effect from 1-7-2002, documents which were not produced with the plaint or list along with it or not produced at or before settlement of issues could have been produced, good cause being shown to the satisfaction of the Court, for their non production. Presently, leave of the Court is required to be

taken before a document is received in evidence. Does that mean that the plaintiff can get leave to produce documents which are not produced earlier as a matter of course ? In fact, sub-rule (3) of Rule 14, of Order 7, states that a document which ought to be produced in Court by the plaintiff when the plaint is presented, or to be entered in the list to be added or annexed to the plaint but is not produced or entered accordingly, shall not, without the leave of the Court, be received in evidence on his behalf at the hearing of the suit. Certain observations of the Apex Court, though with reference to Order 8 Rule 1, can be taken note of. Says the Supreme Court, that it would be proper to encourage the belief in litigants that the imperative of Order 8, Rule 1, must be adhered to and that only in rare and exceptional cases, will the breach thereof be condoned. The provisions of sub-rule (3), of Rule 14, of Order 7 is an exception to the provisions of sub-rule (1), of Rule 14, of Order 7 and sub-rule (1), of Rule 1 of Order XIII. The provisions of sub-rule (3), of Rule 14, cannot be followed as a rule. In my humble view Order 13, Rule 1, as well as Order 7, Rule 14, sub-rule (1) and (2) are required to be read together harmoniously so that Rule 14 (1), of Order 7, and rule 1, of Order 13, are not rendered nugatory. Reading together, what leads one to the conclusion is that if the plaintiff applies for seeking for leave to produce documents to be received in evidence at the hearing of the suit which documents were not produced on or before settlement of issue or at the time of production of plaint, the Court will have to exercise sound discretion having regard to the facts and circumstances of each case. True, mere non mention of the documents in the plaint does not affect the power of the Court to grant leave to produce the document/s at the subsequent stage. Leave of the Court is condition precedent under sub-rule (3), of Rule 14, of Order 7 read with sub-rule (1), of Order 13. Order 7, Rule 14 (3) being an exception under order 7, Rule 14 (1) as well as Order 13, Rule 1(1) the powers to grant leave have got to be exercised in rare cases and not in a routine manner, and, that in my view would be correct position of law in the matter of granting leave. "

6. According to learned counsel the order impugned, which is a non speaking order, does not reflect sound exercise of discretion having regard to the facts and circumstances of the present case. Having regard to the background in which the matter is being proceeded with whereunder two suits by present respondent against present petitioner seeking his eviction are consolidated, one on the ground of non user and the other of bonafide requirement of the respondent. The documents have no reference in the pleadings nor purpose is depicted in the application that it is for production of documents during the course of cross examination of the defendant's witnesses.

7. According to learned counsel although the documents appear to have been available with the plaintiff-respondent for quite a while, yet those were not sought to be produced in the proceedings till the date of the impugned order. He, therefore, contends that the order is untenable being deficient in depicting the considerations which have weighed while allowing the application.

8. Learned counsel Mr. Brahme appearing for respondent – plaintiff contends that as a matter of fact application may not ostensibly so represent that, however, *inter alia*, the intention and purpose all along, underlying production of documents, is

for cross examination of the defendant's witnesses. He further submits that even otherwise, the citation relied on by petitioner may not further his case for the reason that merely a production of the documents is allowed and no further orders are passed on the same. He submits that the court has sufficient powers to allow the production.

9. Mr Brahme also purports to rely on section 165 of the Indian Evidence Act, 1872 and, according to him, the order under challenge may also depict exercise of such powers. He further submits that the order impugned may be a brief one, however, the court has referred to that since the cross examination of the witnesses is going on, permission is granted to produce the document as per the list.

10. Without going into the merits or demerits of arguments on either side, it appears that the order impugned is non appellable order and under the circumstances, if the petitioner considers that there is error and/or irregularity in the order affecting decision in the case, such a ground and objection can be taken up in the case of appeal, if it comes to filing the same, having regard to section 105 of the Code Procedure of Civil.

11. As such, writ petition is not being entertained and is disposed of. Rule stands discharged.

12. This order, however, would not be an impediment for the parties to challenge, if they feel aggrieved by any further order of the court.

13. It appears that suits have been pending since 2006-2007. The court may be well to proceed with the same expeditiously.

SUNIL P. DESHMUKH,
JUDGE

pnd