

IN THE HIGH COURT OF JUDICATURE AT MUMBAI
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.2607 OF 2016

Pramod Balkrishna Latane and another ... Petitioners
Vs.
Vilas Gangaram Bilgikar and another ... Respondents

Mr. Prashant P. Kulkarni for Petitioners.

CORAM : R. G. KETKAR, J.
DATE : APRIL 28, 2016

P.C. :

Heard Mr. Kulkarni, learned Counsel for petitioners at length.

2. By this Petition under Article 227 of the Constitution of India, petitioners have challenged the judgment and order dated 15.12.2015 passed by the learned 6th Joint Civil Judge, Junior Division, Ichalkaranji below exhibit-85 in Regular Civil Suit No.299 of 2012. By that order, the learned trial Judge allowed the application made by the respondent No.1, hereinafter referred to as plaintiff, under Order XVIII, Rule 17 read with Section 151 of the Code of Civil Procedure, 1908 (for short 'C.P.C.') for filing additional examination-in-chief in respect of original agreements of sale dated 16.08.2002 and 05.06.2003 subject to payment of costs of Rs.1,000/- to defendants No.1 and 2. The learned trial Judge granted permission to the plaintiff to adduce additional examination-in-chief only in respect of agreements for sale produced at serial No.1 and 2 of list at exhibit-57.

3. Plaintiff has instituted Suit against the petitioners and respondent No.2, hereinafter referred to as defendants, for specific performance of contract dated 16.08.2002. Defendants No.1 and 2 have resisted the Suit

by filing written statement on or about 19.08.2010. Defendant No.3 filed written statement dated 22.07.2010 at exhibit-17. During the pendency of the Suit, plaintiff filed application at exhibits 55 and 56. By application at exhibit-55, plaintiff prayed for marking documents, which were produced at Sr.No.2 to 5, 9 and 14 along with the list at exhibit-3. By application at exhibit-56, plaintiff prayed for marking verified copies at Sr.No.2 and 3 of list at exhibit-3 by taking on record original documents. By order dated 15.11.2014, the learned trial Judge partly allowed the application exhibit-55 and directed the marking of documents produced at Sr.No.5, 10 and 11 of the list at exhibit-3. The learned trial Judge rejected the application at exhibit-56. Plaintiff did not challenge the order dated 15.11.2014.

4. During the pendency of the Suit, plaintiff thereafter filed present application at exhibit-85 on 17.03.2015 under Order XVIII, Rule 17 and 17-A read with Section 151 of C.P.C. for permission to file additional affidavit of examination-in-chief in respect of the original agreements of sale produced at exhibits-57/1 and 57/2. By the impugned order, the learned trial Judge has allowed that application. It is against this order, defendants No.1 and 2 have instituted the present Petition.

5. In support of this Petition, Mr. Kulkarni strenuously contended that the earlier application made by the plaintiff at exhibit-56 was rejected by the learned trial Judge on 15.11.2014. Plaintiff did not challenge that order. In the impugned order, the learned trial Judge has also not considered that the earlier application made by the plaintiff for the identical relief was rejected and the said order was not challenged by the plaintiff.

6. Mr. Kulkarni also invited my attention to the cross-examination

conducted on behalf of the defendant No.3 of plaintiff wherein plaintiff stated that on the agreement for sale, he has not obtained signature of the original owner. He submitted that under the guise of filing additional affidavit of examination-in-chief in pursuance of the impugned order, plaintiff may try to withdraw / explain that admission. He also relied upon the decision of this Court in the case of ***Balkrishna Shivappa Shetty Vs. Mahesh Nenshi Bhakta***, 2003(4) Bom.C.R. 45, and in particular paragraphs 5 to 7 thereof.

7. I have considered the submissions advanced by Mr. Kulkarni. I have also perused the material on record. As noted earlier, plaintiff has instituted Suit for specific performance of agreement of sale dated 16.08.2002 against the defendants. Perusal of the application at exhibit-56 shows that plaintiff had filed verified copies of the agreements for sale at Sr. No.2 and 3 along with the list at exhibit-3 and retained original documents. Plaintiff, therefore, produced original agreement for sale and prayed for marking that document. By order dated 15.11.2014, the learned trial Judge rejected application exhibit-56. In paragraph 7 of that order, the learned trial Judge observed that plaintiff had produced verified copies of agreements of sale at Sr. No.2 and 3 of list at exhibit-3. At the time of final arguments, plaintiff produced original documents at Sr. No.1 and 2 of list at exhibit-57. From this, it can be inferred that at the time of filing affidavit of examination-in-chief, original agreements of sale were not on record and what was produced was the verified copies of the agreements of sale. It is no doubt true that by order dated 15.11.2014, the learned trial Judge rejected application exhibit-56 and it is also equally true that plaintiff did not challenge that order. The moot question is whether the learned trial Judge was justified in refusing to mark as exhibits the original documents. In my opinion, once it is not disputed that the plaintiff had

verified copies of the agreements of sale and that he intended to produce original documents, the learned trial Judge was not justified in refusing to mark them as exhibits. It is settled position in law that mere marking of the documents, that itself does not amount to proof of contents of those documents.

8. Plaintiff thereafter filed application at exhibit-85 seeking permission to file additional affidavit of examination-in-chief so as to produce original agreements of sale at Sr.No.1 and 2 of list at exhibit-57. By the impugned order, the learned trial Judge has allowed the said application. In paragraph 7, the learned trial Judge has observed that in examination-in-chief of the plaintiff, he stated that original agreements of sale are produced on record at exhibits-3/2 and 3/3. Plaintiff had filed verified copies of these agreements at exhibits-3/2 and 3/3 and filed original agreements along with list at exhibit-57. The Suit is instituted for specific performance of agreements of sale dated 16.08.2002 and 05.06.2003. The Suit is based on these agreements of sale itself. In order to adjudicate the Suit effectively, original documents are necessary to be brought on record. Inadvertently, plaintiff failed to produce original agreements on record and the default on the part of the plaintiff is not intentional. Therefore, due to the mistake of earlier advocate, plaintiff should not suffer great loss. The learned trial Judge was also of the view that for the effective adjudication of the Suit on merit, these documents are helpful and are necessary to be produced on record. The learned trial Judge accordingly granted permission to the plaintiff to adduce additional examination-in-chief only in respect of original agreements of sale subject to imposition of costs.

9. Mr. Kulkarni relied upon the decision of this Court in the case of **Balkrishna Shivappa Shetty** (*supra*), and in particular paragraphs 5 to

7 thereof. In the case of ***K. K. Velusamy Vs. N. Palanisamy, (2011) 11 SCC 275***, the Apex Court has considered the nature and scope of powers of the Court under Order XVIII, Rule 17 of C.P.C. In paragraph 10 of that report, the Apex Court observed that Order XVIII, Rule 17 of C.P.C. is not a provision intended to enable the parties to recall any witnesses for their further examination-in-chief or cross-examination or to place additional material or evidence which could not be produced when the evidence was being recorded. Order XVIII, Rule 17 is primarily a provision enabling the court to clarify any issue or doubt, by recalling any witness either suo moto, or at the request of any party, so that the court itself can put questions and elicit answers. Once a witness is recalled for purposes of such clarification, it may, of course, permit the parties to assist it by putting some questions. The inherent power of the Court under Section 151 is not affected by the express power conferred upon the court under Order XVIII, Rule 17 of the C.P.C. to recall any witness to enable the court to put such question to elicit any clarifications.

10. The Apex Court also noted that Order XVIII, Rule 17-A is deleted with effect from 01.07.2002. The deletion of that provision does not mean that no evidence can be received at all, after a party closes his evidence. In paragraph 16, the Apex Court noted that neither the trial court nor the High court considered the question whether it was a fit case for exercise of discretion under Section 151 or Order XVIII, Rule 17 of the C.P.C. and that they have not considered whether the evidence sought to be produced would either assist in clarifying the evidence led on the issues or lead to a just and effective adjudication. In paragraph 19, the Apex Court added a word of caution. It was held that the power under Section 151 or Order 18 Rule 17 of the Code is not intended to be used routinely, merely for the asking. If so used, it will defeat the very

purpose of various amendments to the C.P.C. to expedite trials. But where the application is found to be bonafide and where the additional evidence, oral or documentary, will assist the court to clarify the evidence on the issues and will assist in rendering justice, and the court is satisfied that non-production earlier was for valid and sufficient reasons, the court may exercise its discretion to recall the witnesses or permit the fresh evidence.

11. In the present case, the learned trial Judge has specifically recorded a finding that production of original agreements for sale will assist the Court in effectively adjudicating the Suit on merits and the presence of these original documents is helpful to the Court for deciding the matter on merits. In the light of the decision of the Apex Court in **K. K. Velusamy** (*supra*), I do not find that the decision relied by Mr. Kulkarni on **Balkrishna Shivappa Shetty** (*supra*) advances the case of defendants No.1 and 2. At the same time, the Court will ensure that plaintiff will produce original agreements of sale on record along with the additional affidavit of examination-in-chief and nothing more. Subject to this clarification, Petition fails and the same is dismissed.

12. It is 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.)