

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Writ Petition (ST) NO. 10823 OF 2016

Prasad Gurjar ...Petitioner
Versus
Prakash Shiveshwarkar and Anr ...Respondents

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Mr.Nikunj Mehta a/w. Premlata Yadav and Divika Nigde i/b.
Divya Shah Associates, Advocate for the Petitioner.

Mr. Vikram Walawalkar i/b. Gajanan D. Shinde, Advocate for the
Respondents.

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CORAM : R. G. KETKAR, J.

DATE : 29th APRIL, 2016

P.C.

1. Not on board. At the request of Mr. Mehta, taken up for admission.
2. Heard Mr. Nikunj Mehta, learned Counsel for the petitioner and Mr. Vikram Walawalkar, learned Counsel for respondent No.1. On the oral application by Mr.Mehta, respondent No.2 is allowed to be deleted as relief is claimed only against respondent No.1. Leave to amend is granted. Amendment shall be carried out forthwith.

3. Rule. Mr. Walawalkar, waives service on behalf of the respondent. At the request and by consent of the parties, Rule is made returnable forthwith and petition is taken up for final hearing.

4. By this Petition under Article 227 of the Constitution of India, the petitioner has challenged the judgment and order dated 9.3.2016 passed by learned Judge, presiding over Court room No.14 of the Bombay City Civil Court at Greater Bombay in Chamber Summons No.13/2016 in Suit No.4394/2007. By that order, learned trial Judge rejected the Chamber Summons taken out by the plaintiff's witness for leading secondary evidence under Section 65 of the Indian Evidence Act, 1872 (for short, 'Act').

5. After arguing the petition for quite some time, Mr.Mehta seeks permission to withdraw this Petition with liberty to the plaintiff to take out Chamber Summons for permission to lead secondary evidence under Section 65 of the Act. He submits that the secondary evidence may be permitted to be proved through the witness as the plaintiff's evidence is over.

6. Mr. Walawalkar submitted that in fact the plaintiff has filed affidavit of evidence. In paragraphs-2 and 3, he has referred to the photo copy of the application/transfer form dated 8.1.1980 at sr. No.1 of compilation of documents as also share certificate No.4 dated 21.4.1971 at Sr. No.2 and photo copy of the application for membership at Sr. No.3 of the compilation of documents. He submitted that by order dated 12.8.2015, learned trial Judge admitted documents at Sr. No.8 to 10 as defendant No.1 admitted the documents and marked them as exhibits. Learned trial Judge also marked agreement at Sr. No.4 as exhibit on the ground that witness has proved that document. He further submits that documents at 1, 2 and 3 referred in affidavit of evidence of pw-1 were not marked as exhibits. He therefore submits that as these documents are not marked as exhibits plaintiff is precluded from filing proceeding seeking permission to lead secondary evidence.

7. I have considered the rival submissions advanced by learned Counsel appearing for the parties. I have also perused the material on record.

8. Perusal of the impugned order shows that learned trial

Judge has rejected the Chamber Summons only on the ground that Chamber Summons is taken out by the plaintiff's witness which is not permissible. In view thereof, on the motion made by Mr. Mehta, petition is allowed to be withdrawn with liberty as prayed for. It is made clear that I have not examined the merits of the proposed Chamber Summons. All contentions of the respondent are expressly kept open.

9. Mr. Mehta states that he will take out Chamber Summons duly affirmed by the plaintiff and liberty may be reserved to the plaintiff for proving the contents of the document sought to be proved by way of secondary evidence through his witness. Liberty as prayed for is granted. He assures that he will tender chamber summons on 5.5.2016 when the matter is fixed before the learned trial Court with advance copy to the other side. Rule is made absolute with no order as to costs. Order accordingly.

(R. G. KETKAR, J.)