

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

WRIT PETITION NO.5361 OF 2016

M/s. Rainbow Real Estates Pvt. Ltd ..petitioners.

Vs

Mr. Damodar Ramchandra Kamble .. Respondent

Mr. Shailendra Singh i/b J.P. Consultia, Advocate for Petitioners.
Mr. Clifford Martis, Advocate for Respondent.

**CORAM : R.G.KETKAR,J.
DATE : 07/06/2016**

PC:

1. Heard Mr.Shailendra Singh, learned counsel for the petitioners and Mr. Clifford Martis, learned counsel for respondent at length. Rule. Mr. Martis 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.

2. By this Petition under Article 227 of the Constitution of India, the petitioners have challenged the Judgment and order dated 27.4.2016 passed by the learned Judge, presiding over Court Room no.20 of the Court of Small Causes, Mumbai, below Exhibit 33 in R.A.E. & R. Suit No. 1425/2103 of 2006. By that order, the learned trial Judge rejected the application made by the petitioners, hereinafter referred to as 'plaintiffs,' under

section 151 of C.P.C. praying for examining a witness from the office of Brihanmumbai Electric Supply and Transport Undertaking (for short, 'BEST') and a witness from Municipal Corporation of Greater Mumbai (for short, 'Corporation') by issuing witness summons.

3. Plaintiffs have instituted suit against the respondent, hereinafter referred to as 'defendant', for recovery of possession of Room no.31 in Parsi/New Parsi Chawl, situate at Dharavi Main Road, Dharavi, Mumbai 400 017 (for short, 'suit premises'), inter alia, on the grounds of (1) arrears of rent, (2) unlawful subletting, (3) carrying out additions and alterations of permanent nature, (4) carrying out unauthorised construction and (5) change of user. In support of his case, the plaintiffs have filed affidavit of examination-in-chief of Harsha R. Shah. In paragraph 10, it is stated that the plaintiffs received a letter dated 19.1.2007 from BEST which shows that the suit premises were used for commercial purposes. The said letter is produced at Exhibit-H. It is not in dispute that the said letter is subsequently marked as Exhibit 27-A.

4. By order dated 27.2.2012, the learned trial Judge has passed order of admissibility of documents. Document at Exh.H is marked as Exhibit-27.

5. The plaintiffs have taken out application at Exh.33 under

section 151 of C.P.C seeking permission to examine a witness from the office of BEST and a witness from the Corporation by issuing witness summons. Defendant filed reply dated 20.4.2016 at Exh.35, inter alia, opposing the application on the ground that suit is at the stage of arguments and the application, so made, is frivolous with a view to delaying the trial. By the impugned order, the learned trial Judge has rejected the application. It is against this order, the plaintiffs have instituted the present petition.

6. Mr. Singh has restricted his challenge only in respect of examining a witness from the office of BEST to prove the contents of letter dated 19.1.2007. He submitted that one of the grounds of eviction is change of user from residential to commercial. The response from BEST dated 19.1.2007 is already produced on record and is marked as Exhibit-27-A. He submitted that through oversight the plaintiffs' Advocate did not examine witness from the office of BEST to prove the contents of letter dated 19.1.2007. If the plaintiffs are precluded from proving the contents of this letter, it will cause serious prejudice to them. The plaintiffs should not suffer because of mistake committed by their Advocate. He further submitted that no prejudice will be caused to the defendant if the witness from BEST is examined to prove the contents of letter dated 19.1.2007 and the defendant will be

in a position to cross examine the said witness. He also relied upon paragraphs 11 and 15 of the decision in the case of K.K.Velusami Vs. N.Palanisamy , (2011) 11 SCC 275.

7. On the other hand, Mr. Martis supported the impugned order. He submitted that the arguments are almost complete and at that stage the plaintiffs have taken out present application. On the basis of evidence already recorded, the defendant has chosen not to lead any evidence. He further relied upon para 19 of K.K.Velusami (supra) to contend that the application is to cover up negligence or lacunae and is, therefore, liable to be rejected. In any case, if the Court is inclined to permit the plaintiffs to examine witness from BEST to prove the contents of letter dated 19.1.2007, liberty may be reserved to the defendant to lead evidence. In that event, the defendant will serve copy in advance of list of witnesses to be examined on their side.

8. I have considered the rival submissions advanced by the learned counsel appearing for the parties. I have also perused the material on record. As noted earlier, the plaintiffs have instituted the suit against the defendant for eviction under various grounds which also includes change of user. The plaintiffs have already produced response dated 19.1.2007 of BEST on record. It is in this circumstance, the explanation given by the

plaintiffs in the application at Exh.33 that through oversight of the plaintiffs' advocate, they did not examine witness from the office of BEST appears to be plausible. Once litigant has handed over relevant document to advocate, it is the duty of advocate to consider relevancy or otherwise of the said document and also to take further steps for proving the contents thereof. In the present case, it cannot be said that the response dated 19.1.2007 is not produced by the plaintiffs in the trial Court. It is found very much part of the record of the trial Court. At the same time, mere marking of the document does not mean that the contents of the said document are proved. It is, therefore, necessary for the plaintiffs to prove the contents of that letter. Understood thus, in my opinion, the learned trial Judge should have allowed the application so as to permit the plaintiffs to examine witness from BEST to prove the contents of letter dated 19.1.2007 as also permitting the defendant to cross examine the said witness.

9. As noted earlier, on the basis of evidence already on record the defendant has chosen not to lead evidence. Since I am permitting the plaintiffs to examine witness from BEST to prove the contents of the letter dated 19.1.2007, it is, in the fitness of things, necessary to give opportunity to the defendant to lead evidence, if so advised, subject to giving list of witnesses in

advance to the plaintiffs. Hence, the following order.

- (i) Impugned order to the extent of declining the request of the plaintiffs to examine witness from BEST to prove the contents of letter dated 19.1.2007 is set aside;
- (ii) The learned trial Judge will issue witness summons to the authorized officer of BEST to be named by the plaintiffs for proving the contents of letter dated 19.1.2007 and also will permit the defendant to cross examine the said witness.
- (iii) The defendant is at liberty to lead evidence, if so advised, subject to giving list of witness in advance on the plaintiffs' Advocate.
- (iv) Rule is made partly absolute in the aforesaid terms with no order as to costs.

(R.G.KETKAR, J.)