

IN THE HIGH COURT OF JUDICATURE AT MUMBAI
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.5366 OF 2015

Nakhuda Mohammed Ali Rogay, trustee of Fatmabai
Binte Nakhuda Mohammed Ameen Rogay Religious
& Charitable Trust ... Petitioner
Vs.
Ibrahim Gulab Shaikh ... Respondent

Mr. Ghanshyam R. Mishra for Petitioner.
Mr. Prem S. Gidwani for Respondent.

CORAM : R. G. KETKAR, J.
DATE : FEBRUARY 25, 2016

P.C. :

Heard Mr. Mishra, learned Counsel for petitioner and
Mr. Gidwani, learned Counsel for respondent at length.

2. By this Petition under Article 227 of the Constitution of India, petitioner has challenged the judgment and order dated 24.03.2015 passed by the learned Judge, City Civil Court, Mumbai below exhibit-33 in Suit No.2757 of 2010. By that order, the learned trial Judge rejected the application made by the plaintiff for recalling D.W.1 for further cross-examination thereby giving opportunity to the petitioner, hereinafter referred to as plaintiff, to cross-examine the said witness.

3. Mr. Mishra submitted that on 27.01.2015, plaintiff cross-examined D.W.2 as regards Deed of Assignment tendered in the list below exhibit-16. On 02.03.2015, defendant produced documents vide list exhibit-16. As per the order dated 09.07.2014 passed in Chamber Summons No.1100 of 2014, documents at Sr.No.2, 4, 5 and 6 were produced as secondary evidence. Documents at Sr. No.1, 4, 5 and 6 i.e. affidavit-cum-joint declaration, declaration dated 18.11.2005 executed

by Lawrence Martis, affidavit-cum-indemnity and copy of letter dated 18.11.2005 addressed to the trustees of the plaintiff's Trust were marked as exhibits-26 to 29 respectively. Letter at Sr. No.7 was marked exhibit-30 on the ground that original possession letter is duly proved by D.W.3 in examination-in-chief. Accordingly, photocopy of affidavit-cum-joint declaration dated 24.10.2001 was marked as exhibit-26, photocopy of declaration dated 18.11.2005 was marked as exhibit-27, photocopy of affidavit-cum-indemnity dated 18.11.2005 was marked as exhibit-28 and copy of letter dated 18.11.2005 was marked as exhibit-29 and possession letter dated 18.11.2005 was marked as exhibit-30.

4. Mr. Mishra submitted that all these documents were marked after the evidence of D.W.1 was over. Plaintiff had no opportunity to cross-examine D.W.1 on these documents. He, therefore, submitted that application exhibit-33 was made for recalling D.W.1 for cross-examination so as to put questions to D.W.1 on documents produced at exhibits 26 to 31. He submitted that in fact the decision of the Apex Court in the case of ***K. K. Velusamy Vs. N. Palanisamy***, (2011) 11 SCC 275 was specifically relied in support of the plaintiff's case. In particular, he relied upon head note (C) to contend that if party comes across some evidence after completion of evidence and before hearing of arguments, Court may permit production of such evidence in its discretion. It can do so even after trial or hearing is completed to meet ends of justice and to prevent abuse of the process of Court in exercise of inherent powers under Section 151 of the Code of Civil Procedure, 1908.

5. On the other hand, Mr. Gidwani supported the impugned order. He submitted that Chamber Summons No.1100 of 2014 was allowed on 09.07.2014 whereby defendant No.1 was permitted to produce secondary evidence. Plaintiff was well aware of the order passed

permitting production of secondary evidence. He further submitted that documents exhibits 26 to 31 are referred in examination-in-chief by all the witnesses of defendants, namely, D.W.1, D.W.2 and D.W.3. Submission of the plaintiff that these documents were not marked as exhibits during the course of evidence of D.W.1 and D.W.2, is wholly misconceived as plaintiff did not apply to the trial Court for striking out the portion of the evidence of D.W.1 and D.W.2 which made reference to these documents. In any case, D.W.3 was cross-examined on all the documents, namely exhibits-26 to 31. He submitted that the application exhibit-33 is taken out when the matter was posted for final arguments on 02.03.2015, after defendant filed evidence close purshis. He, therefore, submitted that no case is made out for invocation of powers under Article 227 of the Constitution of India.

6. 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 Chamber Summons No.1100 of 2014 was allowed on 09.07.2014 permitting defendant to produce secondary evidence. Mr. Mishra did not dispute that D.W.1, D.W.2 referred to documents at exhibits 26 to 31. It is no doubt true that the learned trial Judge did not mark these documents as exhibits though they were specifically referred in evidence of D.W.1 and D.W.2. This, however, did not preclude plaintiff from cross-examining D.W.1 and D.W.2 as these documents were specifically referred in their evidence and production was allowed. No explanation worth the name is coming from the plaintiff's side. That apart, even if it is accepted that these documents were not marked exhibits by the learned trial Judge, nothing prevented plaintiff from applying to the trial Court to strike out portion of the evidence which referred to documents at exhibits-26 to 31. Even that course was not adopted by the plaintiff. It is also not in dispute that

D.W.3 is cross-examined on documents at exhibits-26 to 31. Reliance placed by Mr. Mishra on the decision in the case of **K. K. Velusamy** (*supra*) does not advance the case of the petitioner.

7. In view thereof and for the reasons stated in paragraph 5 of the impugned order, I do not find that the learned trial Judge has committed any error in rejecting the application. The learned trial Judge has observed that the application is made at belated stage as an attempt to cover the lacuna in the cross-examination. I, therefore, do not find that any case is made out for invocation of powers under Article 227 of the Constitution of India. Hence, Petition fails and the same is dismissed.

8. It is, however, 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.)

Minal Parab