

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Writ Petition NO. 8504 OF 2015

MRS. MUKTABEN SHAH

...Petitioner

Versus

SYNDICATE BANK AND ORS.

...Respondents

....

Mr. V.R. Tripathi, Advocate for the Petitioner.

Mr. Sudhakar N. Acharya, Advocate for the respondents.

....

CORAM : R. G. KETKAR, J.

DATE : 9th FEBRUARY, 2016

P.C.

1. Heard Mr. Tripathi, learned Counsel for the petitioner and Mr. Acharya, learned Counsel for the respondent No.1, at length

2. On the oral application made by Mr. Tripathi, leave to delete respondent Nos.2 and 3 is granted. Amendment shall be carried out forthwith.

3. Rule. At the request and by consent of the parties, Rule is made returnable forthwith and the Petition is taken up for final hearing.

4. By this Petition under Article 227 of the Constitution of India, the petitioner, hereinafter referred to as 'defendant No.3' has challenged the judgment and order dated 9.4.2015 passed by learned Judge, presiding over Court Room No.30 of the Bombay City Civil Court, Mumbai in Notice of Motion No.541/2015 in Suit No.8268/1994 (High Court Suit No.1135/1994). By that order, learned trial Judge dismissed the Motion taken out by defendant No.3 for permitting her to file compilation of documents.

5. Mr. Tripathi submitted that respondent No.1, hereinafter referred to as the 'plaintiff' has instituted suit against respondent No.2 (defendant No.1) and respondent No.3 (defendant No.2) and present petitioner (who is impleaded as defendant No.3) for recovery of the amount from the defendants. Defendant No.3 filed written statement wherein she referred to and relied upon certain documents. He submitted that the plaintiff's evidence was over and the matter was posted for recording of evidence of defendants. Defendant Nos.1 and 2 did not participate in the trial and also did not lead any evidence. The matter was thereafter posted for evidence of defendant No.3.

On 29.10.2014 defendant No.3 tendered affidavit of evidence of her constituted attorney at Exhibit-42. However, at that time compilation of documents was not tendered as it was not ready. It appears that on 29.10.2014, learned trial Judge directed suit to proceed without compilation of documents of defendant No.3. Defendant No.3 took out application at Exh.43 on 18.11.2014 for setting aside that order. However, in the application the date of order was wrongly mentioned as 20.10.2014 instead of 29.10.2014. By order dated 15.1.2015, application at Exh.43 was rejected and the matter was adjourned to 4.2.2015 for cross-examination.

6. Defendant No.3 thereafter took out present Motion seeking permission to file compilation of documents. The plaintiff filed reply opposing the Motion. By the impugned order, learned trial Judge rejected the motion principally on the ground that the provisions of Order XVIII Rule 4 of Code of Civil Procedure, 1908 (for short, 'CPC') are mandatory. Learned trial Judge further observed that defendant No.3 could have filed compilation of documents along with written statement or at or before the settlement of issues or along with affidavit of evidence

of examination of chief filed under Order XVIII Rule 4 of CPC. Learned trial Judge rejected the application on the ground that defendant No.3 did not follow three stages and, therefore, no ground is made out for granting leave to produce the documents.

7. Mr. Tripathi submitted that learned trial Judge committed error in holding that the provisions of Order XVIII Rule 4 of CPC are mandatory. He submitted that learned trial Judge ought to have allowed the motion subject to imposing some costs. He submitted that within two weeks from today, he will file compilation of documents after giving advance copy to the other side.

8. On the other hand, Mr. Acharya supported the impugned order. He submitted that defendant No.3 did not file compilation of documents along with written statement or at or before the settlement of issues or along with affidavit of evidence of examination of chief filed under Order XVIII Rule 4 of CPC. He further submitted that the provisions of Order XVIII Rule 4 of CPC are mandatory and, therefore, learned trial Judge rightly rejected the motion.

9. Mr. Acharya further submits that, in case, the Court is inclined to permit defendant No.3 to produce the compilation of documents, defendant No.3 should not be permitted to produce documents which are neither referred to nor relied upon in the written statement.

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

11. As noted earlier, defendant No.3 has filed written statement wherein she has referred to and relied upon certain documents. Mr. Tripathi did not dispute that defendant No.3 did not file compilation of documents along with written statement. He did not dispute that at or before the settlement of issues, defendant No.3 did not file compilation of documents. Compilation of documents was also not filed along with affidavit of evidence. The moot question is whether the provisions of Order XVIII Rule 4 of CPC are mandatory. It is also not in dispute that the suit is instituted in the year 1994 that is to say before amendment to CPC in the year 2002. The unamended provisions of Order XVIII Rule 4 of CPC reads thus :

“4. Witnesses to be examined in open Court. – The evidence of the witnesses in attendance shall be taken orally in open Court in the presence and under the personal direction and superintendence of the Judge.”

12. Learned trial Judge appears to have considered the provisions of Order XVIII Rule 4 of CPC after 2002 amendment. Comparison of the unamended Order XVIII Rule 4 with Order XVIII Rule 4(1) shows that proviso is added in amended Order XVIII Rule 4(1) which was not there. Even otherwise, as the consequences are not provided in the amended Order XVIII Rule 4 of CPC for not filing compilation of documents, in my opinion, it cannot be said that said provisions are mandatory. As defendant No.3 did not file documents along with written statement or at or before framing the issues or along with affidavit of evidence of examination of chief filed under Order XVIII Rule 4 of CPC, in my opinion, learned trial Judge should have allowed the Motion subject to imposing costs. The impugned order cannot be sustained and is liable to be set aside. Hence, the Petition is disposed of in following terms :

- i. Impugned order is set aside and Notice of Motion No.541/2015 is allowed;

ii. Defendant No.3 is permitted to file compilation of documents which are referred to and relied upon by her in the written statement. Let the compilation of documents in the aforesaid terms be filed in the trial Court within two weeks from today subject to costs of Rs.10,000/- to be paid to the plaintiff directly or to be deposited in the trial Court.

iii. Rule is made absolute in aforesaid terms. Order accordingly.

(R. G. KETKAR, J.)

Deshmane (PS)