

IN THE HIGH COURT OF JUDICATURE AT MUMBAI

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.12654 OF 2016

M/s. Supreme Indosaigan Associates ... Petitioner  
Vs.  
Nedumparampil Maideen Bava Rawter Naushad  
through his C.A. Deepak Chhabria and another ... Respondents

Mr. Uday Warunjikar a/w. Ms Tamsin M. i/b. ALJ & Partners for Petitioner.  
Mr. A. A. Kumbhakoni, Senior Advocate a/w. Mr. Rahiv Singh a/w. Mr. Nitesh  
R. Mishra for Respondent No.1.

**CORAM : R. G. KETKAR, J.**  
**DATE : NOVEMBER 16, 2016**

**P.C. :**

Heard Mr. Warunjikar, learned Counsel for the petitioner and  
Mr. Kumbhakoni, learned Senior Counsel for respondent No.1 at length.

2. By this Petition under Article 227 of the Constitution of India, petitioner, hereinafter referred to as 'defendant No.1', has challenged the judgment and order dated 23.09.2016 passed by the learned Ad-hoc Judge, City Civil Court, Borivali Division, Dindoshi, Mumbai in Notice of Motion No.2228 of 2016 in S.C.Suit No.517 of 2006. By that order, the learned trial Judge rejected the Motion taken out by the defendant No.1 praying inter alia to hold that the order dated 22.08.2015 passed on the application made by the plaintiff under Order XVIII, Rule 3-A of the Code of Civil Procedure, 1908 (for short 'C.P.C.') has become nonest and / or redundant in view of the subsequent events mentioned in the affidavit in support of the Notice of Motion.

3. In support of this Petition, Mr. Warunjikar submitted that plaintiff filed application at exhibit-32 on 22.08.2015 inter alia contending that plaintiff had appointed Mr. Deepak Hundraj Chhabria as his Constituted Attorney. He has personal knowledge regarding the entire facts and

circumstances forming the subject matter of the Suit. Plaintiff is presently located at Dubai on account of his employment. Plaintiff will be able to return to Mumbai as and when he is granted leave. The Suit is expedited as per the directions passed by this Court. He, therefore, prayed for granting leave to Mr. Deepak Chhabria being P.W.1 to lead evidence prior to the evidence to be led by the plaintiff.

4. By order dated 22.08.2015, the learned trial Judge, after hearing both sides, allowed plaintiff to examine his own witness at the later stage in terms of Order XVIII, Rule 3-A of C.P.C. Mr. Warunjikar submitted that as per the order dated 22.08.2015, plaintiff has already examined Mr. Deepak Chhabria, his Constituted Attorney. He was also cross-examined by defendant No.1. Mr. Warunjikar submitted that defendant No.1, therefore, took out Notice of Motion praying for holding that order dated 22.08.2015 passed by the learned trial Judge on the application made by the plaintiff under Order XVIII, Rule 3A of C.P.C. has become nonest and redundant in view of the subsequent events. He has taken me through the affidavit of Mr. Jaswant N. Joshi in support of the said Motion, and in particular paragraphs 4 and 5 thereof. He submitted that as plaintiff has examined himself through his Constituted Attorney Mr. Deepak Chhabria, plaintiff is not entitled to avail benefit granted to him by order dated 22.08.2015. He, therefore, submitted that the impugned order is liable to be set aside.

5. On the other hand, Mr. Kumbhakoni supported the impugned order. He submitted that paragraph 3-a of the application exhibit-32 clearly shows that plaintiff intended to examine his Constituted Attorney as P.W.1 and thereafter he intends to examine himself. Even the order dated 22.08.2015 shows that the application was allowed and plaintiff was permitted to examine Mr. Deepak Chhabria prior to examination of

the plaintiff as contemplated by Order XVIII, Rule 3-A of C.P.C. In other words, he submitted that plaintiff did not examine himself through Mr. Deepak Chhabria, and therefore, 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. Paragraph 3-a of the application exhibit-32 reads thus,

“3. It is therefore prayed before this Hon'ble Court in the interest of justice and equity as well as to prevent inordinate delay in the proceeding of the present suit:

a. to grant leave to lead evidence of Mr. Deepak Hundraj Chhabria being P.W.No.1 prior to the evidence to be led by Neduparampil Maideen Bava Ravter Naushad, the Plaintiff herein;”

7. Order dated 22.08.2015 reads thus,

“ORDER:-

Heard both the side. The proposed addl. issues have already framed below Exh.15-A. Hence application Exh.33 is filed.

Perused the contents and say.

Heard the led. adv. for both the parties. On considering the circumstance mentioned in the application order 18 Rule 3-A allow to examine the plaintiff own witness at a later stage. Hence application is permitted to examine the witness prior to examination of plff. Hence the objection raised by the deft. has no forced under the circumstances stands above.

Hence application is allowed and disposed of accordingly, Adjourned for admission and denial of the documents and cross examination of the plff. on 27/08/15.”

8. Perusal of paragraph 3-a of the application exhibit-32 as also order dated 22.08.2015 passed thereon shows that plaintiff is permitted to examine his Constituted Attorney prior to his own examination. In other words, it cannot be said that Constituted Attorney was examined on behalf of the plaintiff and that plaintiff did not intend to examine himself. For the reasons recorded by the learned trial Judge in paragraphs 8, 9 and 12 of the order, I do not find that the learned trial

Judge has committed any error in passing the impugned order. Hence, Petition fails and the same is dismissed.

9. 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.)**

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