

IN THE HIGH COURT OF JUDICATURE AT MUMBAI
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.11339 OF 2015
WITH
CIVIL APPLICATION NO.3178 OF 2015

Mohammed Arif Shafeeq Ahmed Patel ... Petitioner
Vs.
The State of Maharashtra and others ... Respondents

Mr. Mahesh V. Vishwakarma i/b. Vishwakarma & Associates for Petitioner.
Ms Gauri Rao, AGP for Respondent No.1-State.
Mr. Rohit D. Joshi for Respondents No.2 to 5.

CORAM : R. G. KETKAR, J.
DATE : MARCH 16, 2016

P.C. :

Heard Mr. Vishwakarma, learned Counsel for petitioner, Ms Rao, learned AGP for respondent No.1-State and Mr. Joshi, learned Counsel for respondent No.2 at length.

2. Mr. Joshi states that respondent No.3 – Habibbhai Fazalbhoys has expired and his LRs are brought on record in the trial Court. He assures that on or before 18.03.2016, he will give the details of LRs of respondent No.3 to Mr. Vishwakarma. He further states that he has instructions to accept and waive service on behalf of LRs of respondent No.3 as also respondents No.4 and 5. He assures that within one week from today, he will file appearance on their behalf. In view thereof, leave to amend so as to bring LRs of respondent No.3 is granted. Amendment shall be carried out within one week from today. Rule. Learned Counsel for respective respondents waive service. At the request and by consent of the parties, Rule is made returnable forthwith and the Petition is taken up for final hearing.

2. By this Petition under Article 227 of the Constitution of India, petitioner has challenged the order dated 08.10.2015 passed by the learned Civil Judge, Senior Division, Panvel below exhibit-138 in Special Civil Suit No.180 of 2008. By that order, the learned trial Judge rejected the application made by the petitioner, hereinafter referred to as plaintiff, for issuing witness summons to the Competent Authority, ULC., Thane.

3. Mr. Vishwakarma submitted that the plaintiff had filed application exhibit-134 on 08.09.2015 for issuing witness summons to the officer of ULC, Thane for producing - notification / G.R. regarding application and seizing / withdrawal / non-application of ULC Act as also the application, if any filed by defendants, after 15.10.2008 for getting permission for sale of final plot No.8, CTS No.517/b and 518/part at Panve and fees paid, document filed, if any by the defendants. By order dated 08.09.2015, the learned trial Judge issued witness summons as prayed for. In pursuance thereof, Bailiff submitted report dated 05.10.2015 setting out therein that he has served the witness summons on the responsible Inward Clerk, who accepted the original summons and acknowledged the receipt by signing the copy. Plaintiff thereafter filed application exhibit-138 on the ground that though the summons was served on the witness, he did not appear. Plaintiff, therefore, prayed for issuing fresh witness summons to the officers. The learned trial Judge rejected the application by passing following order:

“Summons already served. Hence, rejected.

sd/-
08.10.2015”

4. Mr. Vishwakarma relied upon the decision of this Court in the case of *Dilawarkhan Ahmedkhan Vs. Manbee Ahemad Khan*, 2013 (1) ALL MR 647 to contend that Court is not prevented from issuing the summons to the witness on second occasion, although he has been

served and remained absent. To take a pragmatic view, it must be said that the single absence inspite of service, need not necessarily lead to an inference that the witness has failed to attend without lawful excuse.

5. On the other hand, Mr. Joshi supported the impugned order. He submitted that though witness summons was served, the concerned witness did not appear. Nothing prevented the plaintiff from applying for issuing warrant to secure presence of the witness.

6. I have considered the submissions advanced by the learned Counsel appearing for the parties. I have also perused the material on record. As noted earlier, by order dated 08.09.2015, the learned trial Judge had allowed the application exhibit-134 made by the plaintiff. It also appears that the Bailiff submitted report dated 05.10.2015 about effecting service of witness summons on the ULC office. As the witness did not appear despite service, plaintiff took out application exhibit-138 and by cryptic order, the learned trial Judge rejected the application.

7. In the case of **Dilawarkhan Ahmedkhan** (*supra*), this Court considered the provisions of Order XVI, Rule 10 of C.P.C. In paragraphs 8 and 9, the Court observed thus,

“8. It must be taken into account that the processes empowered by Rule 10, to some extent, are coercive processes and of penal consequences. Naturally, the Court is expected to be slow. The Court could have gone ahead with the coercive process only after satisfying itself that the witnesses have remained absent without lawful excuses.

9. Taking into consideration Rule 10 in its totality, it is not possible to arrive at a conclusion that the Court is prevented from issuing the summons to the witnesses on second occasion, although he has been served and remained absent. To take a pragmatic view, it must be said that the single absence inspite of service, need not necessarily lead to an inference that the witness has failed to attend without lawful excuse.”

8. Perusal of the extracted paragraph 8 shows that this Court observed that the processes empowered by Rule 10, to some extent, are coercive processes and of penal consequences. Naturally, the Court is expected to be slow. The Court could have gone ahead with the coercive process only after satisfying itself that the witnesses have remained absent without lawful excuses. In paragraph 9, it was observed that to take a pragmatic view, it must be said that the single absence inspite of service, need not necessarily lead to an inference that the witness has failed to attend without lawful excuse.

9. Mr. Joshi submitted that plaintiff did not apply for issuing warrant against the concerned witness. In my opinion, the said submission stands replied by paragraph 9 of the decision of this Court in the case of **Dilawarkhan Ahmedkhan** (*supra*).

10. In view thereof, the impugned order is set aside and the learned trial Judge shall issue witness summons to the Competent Authority under the Urban Land (Ceiling and Regulation) Act, 1976. The Bailiff shall serve the summons on the office of the ULC, Thane and also as far as possible, will try to serve witness summons on the Competent Authority. Ms Rao assures that she will communicate this order to the Competent Authority, ULC, Thane and will further instruct to ensure compliance of this order. Rule is made absolute in the aforesaid terms with no order as to cost. In view of the disposal of the Petition, Civil Application No.3178 of 2015 does not survive and the same is disposed of as such.

(R. G. KETKAR, J.)