

IN THE HIGH COURT OF JUDICATURE AT MUMBAI
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.11483 OF 2015

Jagmohan Ramdattamal Vohra ... Petitioner
Vs.
Municipal Corporation of Greater Mumbai ... Respondent

Mr. Om Prakash Pandey i/b. M/s. Pandey & Co. for Petitioner.
Mr. Vinod Mahadik for Respondent.

CORAM : R. G. KETKAR, J.
DATE : JANUARY 12, 2016

P.C. :

Heard Mr. Pandey, learned Counsel for petitioner and Mr. Mahadik, learned Counsel for respondent at length.

2. By this Petition under Article 227 of the Constitution of India, original plaintiff has challenged the order dated 06.10.2015 passed by the learned Judge, City Civil Court, Bombay below exhibit-35 in S.U. No.884 of 2010. 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 two witnesses mentioned in that application.

3. Mr. Pandey strenuously contended that plaintiff has challenged notice dated 17.11.2009 issued by the respondent, hereinafter referred to as defendant under Section 351 of the Mumbai Municipal Corporation Act, 1888 (for short 'Act') and the order dated 23.03.2010 passed by the Assistant Municipal Commissioner, M-West Ward. He submitted that during the pendency of the Suit, plaintiff filed application exhibit-35 for issuing witness summons to – (1) Mr. Ulhas Harischandra Dhargalkar and (2) Mr. Vinodkumar Hanumanji Varma to prove his case. He submitted that the witnesses which are proposed to be examined are

senior citizens and are visiting suit premises for more than 54 years. They will be in a position to prove the case of plaintiff that the Suit premises is in existence prior to 1960. By the impugned order, the learned trial Judge rejected the application only on the ground that plaintiff did not mention reason for examining those witnesses. On enquiry, it was submitted that to prove when the construction was made, plaintiff wants to examine these witnesses. The learned trial Judge observed that no satisfactory reason to examine the witnesses is given and the existence of the structure can be proved by the documentary evidence. Mr. Pandey invited my attention to Order 16 of the Code of Civil Procedure, 1908 (for short 'C.P.C') as also relied upon the decision of the Apex Court in the case of **Mange Ram Vs. Brij Mohan**, AIR 1983 SC 925. Relying upon this judgment, he submitted that once the witness of the plaintiff is present, the Court cannot decline to examine the witness.

4. On the other hand, Mr. Mahadik supported the impugned order.

5. 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, plaintiff has challenged the notice issued by the defendant under Section 351 of the Act as also the order dated 23.03.2010 passed by the Assistant Municipal Commissioner, M-West Ward. I have also perused the application made by the plaintiff at exhibit-35. In paragraphs 1 and 2, plaintiff has averred thus,

“1. I say that, in the above matter I want to examine following persons as my witnesses in order to prove my case.

- i) Mr. Ulhas Harischandra Dhargalkar,
residing at Flat No.101,
1st floor, Om Shanti Building, Plot No.4,
Kalanagar Co-operative Housing Society Limited,
Bandra (East), Mumbai 400 051

- ii) Mr. Vinodkumar Hanumanji Varma
residing at New Navin Store,
Mahatma Phule Nagar, P. L. Lokhande Marg,
Tilak Nagar, Mumbai 400 089.

2. I say that in order to prove my case, it is therefore, just, necessary and proper to examine both the aforesaid witnesses.”

6. Perusal of paragraphs 1 and 2 extracted hereinabove shows that plaintiff has merely contended that in order to prove his case, he wants to examine two witnesses. In my opinion, the learned trial Judge rightly observed that plaintiff did not mention any reason as to why he wants to examine those witnesses. If the plaintiff wants to establish existence of the structure prior to 1960, he can prove the same by documentary evidence.

7. Mr. Pandey submitted that once the application for issuing witness summons is made, the Court cannot reject the same. The said submission is stated to be rejected. Perusal of Order 16, Rule 1(3) C.P.C. shows that Court may, for reasons to be recorded, permit a party to call any witness other than those whose names appear in the list referred to in sub-rule (1). In other words, it also empowers the Court to reject the application by recording reasons.

8. Mr. Pandey relied upon the decision of the Apex Court in **Mange Ram** (*supra*). In that case, the witness was produced for leading evidence and the said witness was present on the date when evidence was to be recorded. It is in that context, the Apex Court observed that if on the date fixed for recording the evidence in an election petition, the petitioner is able to keep his witnesses present despite the fact that the names of the witnesses are not shown in the list filed under sub-rule (1) of Rule 1, the party would be entitled to examine these witnesses. The Court, in such a situation, cannot decline to examine the witness

produced by the party and kept present when the evidence of the party is being recorded and is not closed. The Court has no jurisdiction to refuse to examine the witnesses who are present in the Court only on the short ground that the names of the witnesses were not mentioned in the list filed under sub-rule (1) of Rule 1 of Order 16 C.P.C. In the present case, the plaintiffs' application for issuing witness summons is rejected. In my opinion, the said decision does not apply to the facts of the present case. 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.

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) C.P.C.

(R. G. KETKAR, J.)

Minal Parab