

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 97 OF 2016**

Vinod Fauzadar Singh	Vs	Petitioner
Santosh Singh Fauzadar Singh		.. Respondent

Mr. Dharendra D. Singh, Advocate for Petitioner.

Mr. K.S.Tripathi a/w Mr. Shailesh Pal i/b V.R.Gupta, Advocates for Respondent.

CORAM : R.G.KETKAR,J.
DATE : 16/03/2016

PC:

1. Heard Mr. Dharendra Singh, learned counsel for the petitioner and Mr. K. S. Tripathi, learned counsel for the respondent at length.
2. Rule. Mr. Tripathi waives service for the respondent. At the request and by consent of the parties, Rule is made returnable forthwith and petition is taken up for final hearing.
3. By this Petition under Article 227 of the Constitution of India, the petitioner, hereinafter referred to as 'defendant', has challenged the judgment and order dated 30.10.2015 passed by the learned Judge presiding over Court Room No.30 of Bombay City Civil Court at Mumbai in Notice of Motion No.3609 of 2015 in S.C.Suit No.2696 of 2006. By that order, the learned trial Judge rejected the Notice of Motion taken out by the defendant for recalling D.W.4-Ms SurendraH. Rao and declaring her as hostile witness.

4. Mr. Singh submitted that respondent, hereinafter referred to as 'plaintiff', has instituted suit for declaration that the defendant has no right, title and interest in respect of Shop bearing shop No.3 known as 'Singh Flour Mill' along with three commercial Galas on the rear side of the said shop No.3, situate at Near Municipal Hindi School, Municipal Market, Thakkar Bappa Colony, Chembur, Mumbai 400 071 (for short 'suit premises'). He submitted that the Release Deed is purportedly executed on 20.12.2005. There is recital in the Release Deed to the effect that the defendant has relinquished his right, title and interest upon receipt of Rs.9 lacs. He submitted that the said consideration is not received by defendant. The Release Deed is also purportedly notarized by D.W.4-Ms Surinder H. Rao, Advocate, High Court. He submitted that defendant wanted to examine D.W.4-Ms Surinder H. Rao as on 10.12.2006, her statement was recorded in connection with F.I.R. No.272 of 2006 registered on 5.08.2006 under Sections 406, 466, 467, 468, 506 (II) read with Section 34 Indian Penal Code, 1860 at the instance of the defendant. In that statement, she stated that the persons did not sign on the Release Deed in her presence. He submitted that on 28.11.2014, the suit was kept for evidence of witness of defendant. The matter was adjourned to 18.12.2014. The defendant, therefore, left the Court. On the same day i.e. on 28.11.2014 at about 2.00 p.m., D.W.4- Surinder H. Rao along with

the plaintiff appeared and made application Exhibit-69 for taking the matter on board for examining herself as a witness. Accordingly, her affidavit of examination-in-chief dated 28.11.2014 was taken on record and marked as Exhibit-70. He submitted that in paragraph 3 of that affidavit, she stated that Advocate Pratap F. Singh along with his two brothers namely, plaintiff and defendant, came to her with a request to notarize the Release Deed and General Power of Attorney before her and accordingly the said documents were executed in her presence by the plaintiff and defendant along with Advocate Pratap F. Singh and she had put her seal and signature on the said documents. On 22.1.2015, before the learned trial Judge, she confirmed that the contents of affidavit of examination-in-chief are true and correct. She was cross-examined by the Advocate for the plaintiff and the witness was thereafter discharged. He submitted that the defendant, therefore, took out Notice of Motion for recalling D.W.4 and declaring her as hostile. By the impugned order, the learned trial Judge rejected the Motion. Mr. Singh, therefore, submitted that the impugned order deserves to be set aside.

5. On the other hand, Mr. Tripathi supported the impugned order. He submitted that on 11.2.2015 affidavit of examination-in-chief was filed on 28.11.2015 by Ms Surender Rao, practicing Advocate and Notary. The petitioner herein applied for certified

copy of that affidavit on 11.2.2015. Till September, 1915 the petitioner kept quite and did not move the application for declaring Ms Rao as hostile witness. He further submitted that the learned trial Judge rightly rejected the application as said witness cannot be declared as hostile witness. He relied upon Section 154 of the Indian Evidence Act, 1872 (for short, 'Act') as also the decision of the Apex Court in the case of State of Bihar Vs. Laloo Prasad Yadav, (2002) 9 Supreme Court 626 and in particular paragraphs 4 to 6 thereof. He further submitted that in terms of paragraph 6 of the decision of State of Bihar (supra), the petitioner ought to have requested the Court for permission to put cross questions to the said witness. However, no such permission was sought at the time when the affidavit of examination in chief was tendered by the said witness in the court on 28.11.2014. He submitted that at the highest the petitioner may be permitted to put any question in cross examination to the said witness instead of declaring her as hostile witness.

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, the plaintiff has instituted suit for declaration that the defendant has no right, title and interest in respect of the suit premises. The suit is based upon Release Deed executed on 20.12.2005. There is a

recital in the Release Deed to the effect that the defendant has relinquished his rights, title and interest upon receipt of Rs.9 lacs. The Release Deed is also purportedly notarized by D.W.4 - Ms Surinder Rao, Advocate, High Court. Defendant wanted to examine the said witness in lieu of first statement dated 10.12.2006 recorded in connection with F.I.R.No.272 of 2006 registered on 05.08.2006 under Sections 406, 466, 467, 468, 506 (II) read with Section 34 Indian Penal Code, 1860 at the instance of the defendant. Perusal of this statement, prima facie, shows that DW 4 purportedly stated that the persons did not sign on the Release Deed in her presence. On 28.11.2014, the suit was kept for evidence of witness of defendant. The matter was adjourned to 18.12.2014 and, therefore, the defendant left the Court. On the same day, i.e. on 28.11.2014 at about 2.00 p.m., D.W.4 - Surinder Rao along with the plaintiff appeared and made application Exhibit-69 for taking the matter on board for examining herself as a witness. Accordingly, her affidavit of examination-in-chief dated 28.11.2014 was taken on record and marked as Exhibit-70.

7. I have perused paragraph 3 of the affidavit-in-support of Notice of Motion No.3609 of 2015 as also Roznama dated 28.11.2014. Perusal of Roznama dated 28.11.2014 shows that both parties and their Advocates were absent and suit was adjourned to 18.12.2014 for recording of evidence. Later-on, at 2

pm, witness tendered application to take matter on board. It was taken on record and marked as Exhibit-69. Another application was tendered which was marked as Exhibit-70. Witness also tendered affidavit of examination-in-chief. Plaintiff was present and copy of examination-in-chief was served on the plaintiff. However, Roznama does not mention that defendant or his Advocate was present. In other words, witness on her own volition appeared at 2 pm, tendered her application for taking affidavit of evidence on record. That time, the plaintiff was present and examination-in-chief was served on the plaintiff. It was not served on the defendant. Though the plaintiff has denied the assertions made in paragraph 3 of the affidavit-in-support, from Rozanam dated 28.11.2014, I find that the assertions made by the defendant in paragraph 3 of the affidavit-in-support are borne out from Roznama.

8. Perusal of paragraph 3 of the affidavit of evidence, prima facie, shows that Advocate Pratap Singh along with his two brothers namely, plaintiff and defendant, came to her with a request to notarize Release Deed and General Power of Attorney before her and on the same day the said documents were executed in her presence by the plaintiff and the defendant along with Advocate Pratap Singh and that she had put her seal and signature on the said documents. Prima facie, statements made in paragraph 3 of the affidavit dated 28.11.2014 are inconsistent

with the statement of the said witness recorded on 10.12.2006.

9. As noted earlier, the defendant's Advocate was not present when the affidavit of her examination was tendered on 28.11.2014 and on that date he could not request the court to permit him to cross examine the said witness in terms of Section 154 of the Act. Mr. Tripathi relied upon the decision of the Apex Court in the State of Bihar (supra). In paragraph 6 of the report, it was observed thus:

“6. Nonetheless, a discretion has been vested with the court whether to grant the permission or not. Normally, when the public prosecutor request for permission to put cross questions to a witness called by him, the court used to grant it. Here, if the public prosecutor had sought permission at the end of the chief examination itself, the trial court would have no good reason for declining the permission sought for. But the public prosecutor did not do so at that stage. That is precisely the reason why the trial judge declined to exercise his discretion when the permission was sought for after the cross-examination was over. The witness has said only the details in cross-examination regarding the matter which he said in the chief examination itself. It would have been a different position if the witness stuck to his version, he was expected to say by the party who called the witness, in the examination in chief, but he showed propensity to favour the adverse party only in cross-examination. In such case, the party who called him has a legitimate right to put cross question to the witness. But if he resiled from his expected stand even in chief examination, the permission to put cross-questions should have been sought then.”

10. I have already held that Advocate for the defendant was not present when the affidavit of Ms Rao was tendered in court and consequently he had no opportunity to seek permission to cross the said witness. Reliance placed by Mr. Tripathi does not

advance the case of the defendant. Understood thus, I do not find that the learned trial Judge was justified in rejecting the application made by the petitioner to declare her as hostile witness and permit him to cross examine her. Hence, the impugned order stands quashed and set aside and application dated 3.10.2015 is allowed. Rule is made absolute in the aforesaid terms, with no order as to costs.

11. Liberty is reserved to the respondent to apply to the Principal Judge of the City Civil Court for transferring suit to Court Room No.3. It is needless to observe that the learned trial Judge will decide the suit on the basis of evidence on record and in accordance with law and uninfluenced by the observations made in this order. Order accordingly.

(R.G.KETKAR, J.)