

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Writ Petition NO. 1177 OF 2016

THE WESTERN DISTRICT COUNCIL OF
MAHARASHTRA OF THE SOUTH INDIA
ASSEMBLIES OF GOD

...Petitioner

Versus

SHIRLEY NARESH RAJWANI AND ORS

...Respondents

....

Mr. M.S. Bhandari i/b. Pranjali Bhandari, Advocate for the
Petitioner.

Mr. Farhan Dubhash a/w. L.R. Shukla i/b. Legal Vision, for
Respondent Nos.1 and 2.

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CORAM : R. G. KETKAR, J.

DATE : 23rd FEBRUARY, 2016

P.C.

1. Heard Mr. M. S. Bhandari, learned Counsel for the
petitioner and Mr. Farhan Dubhash, learned Counsel for
respondent Nos.1 and 2, at length.

2. By this Petition under Article 227 of the Constitution of
India, the petitioners, hereinafter referred to as the 'plaintiffs',
have challenged the judgment and order dated 28.9.2015 passed
by learned Judge, presiding over Court room No.1 of Bombay
City Civil Court at Bombay in unregistered Chamber Summons

in S.C. Suit No.8123/1996 (High Court Suit No.3857/1996). By that order, learned trial Judge struck out the portion bracketed and underlined in red and marked as portion 'A' in para-12 of the affidavit/examination-in-chief of Dr. Annie Thomas, Secretary cum Treasurer of Dharavi Educational and Social Service Centre of the plaintiffs.

3. The plaintiffs have instituted suit under Section 6 of the Specific Relief Act, 1963 (for short, 'the Act') *inter alia* contending that respondent No.2, hereinafter referred to as 'defendant No.2' on the midnight of 25.8.1996 at about 2:00 a.m. came along with 30 men and a tempo full of office furniture, broke open the lock of the ground floor as well as the door and forcibly threw out the furniture and belonging of the plaintiff. Thus it is the case of the plaintiffs that it was dispossessed on the midnight of 25.8.1996 and the suit was filed under Section 6 of the Act. The plaintiffs filed affidavit of evidence of Dr. Annie Thomas on 30.7.2014.

4. Defendant No.2 took out Chamber Summons on 7.8.2015 for rejecting / discarding paragraph-12 of the affidavit of evidence of PW-2 of Dr. Annie Thomas dated 30.7.2014 filed

under Order XVIII Rule 4 of Code of Civil Procedure, 1908 (for short, 'CPC'). By the impugned order, learned trial Judge partly allowed the Chamber Summons and struck out the portion bracketed and underlined in red and marked as portion 'A' in para-12 of the affidavit/examination-in-chief of PW-2 Dr. Annie Thomas.

5. Mr. Bhandari submitted that the first sentence of para-12 is about information furnished by the wife of Mr. Mangesh Sonawane. Mr. Bhandari submitted that PW-2 Dr. Annie Thomas heard the information furnished by wife of Mr. Mangesh Sonawane and her evidence amounts to direct oral evidence as contemplated by Section 60 of the Indian Evidence Act, 1872 (for short, "Act"). He further submitted that information in para-12 is a corroborative piece of evidence in support of the plaintiffs' case that it was dispossessed without consent as contemplated by Section 6 of the Act. He submitted that if for any reason, wife of Mr. Mangesh Sonawane is not available for examination, the contents of para-12 being direct oral evidence cannot be struck out. He submitted that at this stage the Court is not justified in deciding the admissibility or otherwise of the evidence and that

stage is at the time of deciding the suit finally.

6. On the other hand Mr. Dubhash supported the impugned order. He submitted that in fact entire para-12 is hear-say evidence and the learned trial Judge ought to have struck out entire para-12. He further submitted that on one hand the plaintiffs allege that it was dispossessed on the midnight of 25.8.1996 and on the other got the conveyance registered on 27.8.1996. He therefore submitted that the case made out by the plaintiffs that on the midnight of 25.8.1996 at 2:00 a.m. defendant No.2 dispossessed the plaintiffs, is an imaginary story.

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

8. As noted earlier, defendant No.2 took out chamber summons for striking out para-12 on the ground that it is a hear-say evidence. In order to appreciate this submission, it is necessary to consider para-12 of the affidavit of PW-2 Dr. Annie Thomas which is to the following effect :

“12. I say that I was informed later in the day by the wife of Mr. Mangesh Sonawane that on the mid-night of 25th August, 1996, at about 2 a.m. defendant No.2 along with about 30 men and a tempo full of office furniture, broke open the lock of the ground floor as well as the doors and forcibly threw out the furniture and belongings of the plaintiffs as mentioned above. The Defendant No.2 also placed 6 to 8 goondas blocking the narrow passage of the property on the North side which is the only entrance to the property and premises belonging to the Plaintiffs thereby completely preventing the Plaintiffs and their office bearers from going up to the ground floor as well as the first floor of the premises and using the same. I say that the said fact of the aforesaid act of vandalism and hooliganism was recorded by the watchmen of the property who was also the watchmen of the Plaintiffs by addressing a letter to the Defendant No.3 recording the aforesaid act of violence whereby the Plaintiffs were dispossessed from the property and premises which was in their possession from 18th August, 1996. I say that the original of the said letter dated 27-8-1996 was handed over to the Defendant No.3, who are hereby called upon to produce the same. I say that the contents of the said letter dated 27-8-1996 are true and correct.”

[Emphasis supplied]

9. Perusal of the first sentence of para-12 shows that PW-2 Dr. Annie Thomas stated that she was informed later in the day by wife of Mr.Mangesh Sonawane that on the mid-night of 25.8.1996 at about 2:00 a.m. defendant No.2 along with about 30 men and a tempo full of office furniture, broke open the lock

of the ground floor as well as the doors and forcibly threw out the furniture and belongings of the plaintiffs as mentioned above.

10. Mr. Bhandari did not contend that actually and factually PW-2 Dr. Annie Thomas was present at 2:00 a.m. on 25.8.1996. In view thereof, it is clear that PW-2 Dr. Annie Thomas was not present at the time when the alleged incident took place. Perusal of first sentence of para-12, as reflected hereinabove, clearly shows that the information is based upon the version of wife of Mr. Mangesh Sonawane.

11. Learned trial Judge has considered this aspect in paras-3 and 4 of the impugned order. Learned trial Judge after considering Sections 59 and 60 of the Act, observed in para-4 that the 1st sentence of para no.12 refers to a incident that occurred after midnight of 25,8.1996 which is alleged to have been seen by wife of Mangesh Sonawane and PW-2 Dr. Annie Thomas says that she got the information of the incident from that lady. Learned trial Judge thereafter observed that this is a fact which was within the direct knowledge of wife of Mangesh Sonawane and PW-2 Dr. Annie Thomas got knowledge of those

facts from said lady. Learned trial Judge, therefore, observed that the first sentence of para-12 is hear-say evidence and, therefore, not admissible in view of Section 60 of the Act.

12. After perusing first sentence of para-12, I do not find that learned trial Judge has committed any error. Mr. Bhandari submitted that the first sentence of para-12 is direct oral evidence as PW-2 Dr. Annie Thomas claims to have heard the information furnished by wife of Mangesh Sonawane. As noted earlier, PW-2 Dr. Annie Thomas was not present. It could be considered as a oral direct evidence provided PW-2 Dr. Annie Thomas was present at the spot when the alleged incident took place and heard the conversation took place during the course of that incident. Section 60 of the Evidence Act so far as the material to the controversy reads thus :

“60. Oral evidence must be direct.—Oral evidence must, in all cases whatever, be direct; that is to say—

If it refers to a fact which could be seen, it must be the evidence of a witness who says he saw it;

If it refers to a fact which could be heard, it must be the evidence of a witness who says he heard it;

.....”

13. In view thereof, in my opinion, the first sentence of para-12 is hear say evidence and, therefore, not admissible in evidence. Learned trial Judge therefore rightly allowed the chamber summons in part. Defendant No.2 has not challenged the impugned order so far as striking out the rest of the portion of para-12 of evidence of PW-2. Hence, no case is made out for invocation of powers under Article 227 of the Constitution of India. Petition fails and the same is dismissed.

14. It is made clear that where a decree is appealed from by the petitioner, any error, defect or irregularity in impugned order, affecting the decision of the case, may be set forth as a ground of objection in the memorandum of appeal as contended by section 105(1) of Civil Procedure Code.

(R. G. KETKAR, J.)

Deshmane (PS)