

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Writ Petition No. 109 OF 2017
With
Writ Petition No. 110 OF 2017

Shri. Yusuf Gafar Kachhi

...Petitioner

Versus

Shri. Ravindra Gopal Kundap
And Ors.

...Respondents

....

Mr.Vaibhav R. Gaikwad, Advocate for the Petitioner.
Mr.M.S. Aathalye, Advocate for the Respondent No.1.

....

CORAM : R. G. KETKAR, J.

DATE : 10th JANUARY, 2017

P.C.

1. Heard Mr. Vaibhav Gaikwad, learned Counsel for the petitioner and Mr.M.S. Aathalye, learned Counsel for respondent No.1, at length.

2. Writ Petition No.109/2017 takes exception to the judgment and order dated 28.11.2016 passed by the learned Jt. Civil Judge, Senior Division, Satara below Exhibit-192 in Special Civil Suit No.89/2007. By that order, the learned trial Judge rejected the application made by defendant No.3 for permission to lead additional evidence.

3. Writ Petition No.110/2017 takes exception to the judgment and order dated 28.11.2016 passed by the learned trial Judge below Exhibit-194. By that order, the learned trial Judge rejected the application made by defendant No.3 for production of documents.

4. As the common question of law and facts arise in these petitions, same can conveniently be disposed of by this common order.

5. Respondent No.1, hereinafter referred to as the 'plaintiff', has instituted suit *inter alia* for specific performance of the agreement of sale dated 20.12.2005 executed in his favour by defendants No.1 & 2; for possession of City Survey No.70 admeasuring 255.8 square meters together with building situate within the municipal limits of Satara Municipal Council (for short, 'suit property'); for cancellation of the sale deed dated 2.3.2007 executed by defendants No.1 & 2 in favour of defendant No.3. In the alternative, the plaintiff has prayed for direction to defendants No.1 & 2 to pay Rs.5 Lakhs together with interest @ 12% per annum. Defendants No.1 & 2 filed written statement opposing the suit. Defendant No.3 filed written statement

opposing the suit. In paragraph-5, defendant No.3 contended that he had issued public notice dated 22.12.2006 in daily Lokmat through Advocate Kiran Kantilal Shah, however, nobody raised any objection. Defendant No.3 purchased the suit property from defendants No.1 & 2 by registered sale deed dated 2.3.2007. Before purchasing the suit property, he had also obtained search report which shows that the suit property is free from any encumbrances. Defendant No.3 also pleaded that he is a bonafide purchaser for value without notice.

6. Defendant No.3 filed affidavit of evidence on 11.8.2016. In paragraph-1 of his cross-examination he stated that he is dealing with purchase and sell of lands for last 20 years and that he is a builder and developer. In paragraph-4 he denied that he did not obtain title search report of the suit property through Lawyer. He further denied the suggestion that he did not submit any documents as regards obtaining search report through Lawyer. He thereafter stated that he has not produced any document as regards the search report. He further denied that as he did not obtain search report, he did not place the report on record. The cross-examination was conducted on 17.9.2016.

7. Defendant No.3 thereafter filed application on 23.9.2016 at Exhibit-192 *inter alia* for filing additional evidence. In paragraph-3 of the application, defendant No.3 contended that after his cross-examination was over, while going through the old record, he came across the relevant documents, namely, search report. However, at the time of filing affidavit of evidence, on account of inadvertence, said documents were not shown to his Advocate and, therefore, they were not referred in the evidence. After considering the replies given by defendant No.3 in the cross-examination, it is necessary to file additional affidavit of evidence. Said documents are already referred in the written statement. Along with the application, defendant No.3 also submitted additional affidavit of evidence dated 23.9.2016. Along with that he also filed list of documents. The plaintiff resisted the application by filing reply at Exhibit-195. After considering the material on record, the learned trial Judge rejected the application. It is against this order, defendant No.3 has instituted Writ Petition No.109/2017.

8. Defendant No.3 also filed application Exhibit-194 on 23.9.2016 for production of documents. The plaintiff opposed that application by filing reply at Exhibit-196. By the impugned

order, the learned trial Judge rejected the application Exhibit-194. It is against this order, defendant No.3 has instituted Writ Petition No.110/2017.

9. In support of these petitions, Mr.Gaikwad strenuously contended that the plaintiff has not denied the existence of the search report. In fact defendant No.3 has paid the taxes to the Municipal Council after purchasing the suit property on 2.3.2007. He has taken me through (1) written statement of defendant No.3 and in particular paragraph-5, (2) affidavit in examination-in-chief dated 11.8.2016 submitted by defendant No.3, (3) cross-examination of defendant No.3, as also (3) applications at Exhibit-192 and 194. He submitted that as the plaintiff has not denied the existence of the search report, defendant No.3 should be given an opportunity to lead additional evidence so as to bring on record the search report as also other documents to establish his case that defendant No.3 is a bonafide purchaser for value without notice. Mr. Gaikwad relied upon the following decisions:

- I] *Shantibai K. Vardhan and others v. Meera G. Patel and another, 2008(6) Mh.L.J. 833*, to contend that the purpose

of procedural law is not to frustrate the rights of the parties. The law is primarily to achieve the ends of justice and fully and finally decide the controversy between the parties.

II] *K.K. Velusamy v. N. Palanisamy, (2011) 11 SCC 275.*

III] *Babasaheb Limbaji Mete and another v. Sumanbai Bajarang Saraf and others, 2008(4) Mh.L.J. 502*, to contend that even after deletion of Rule 17A from Order XVIII of C.P.C., the Court is not rendered powerless for calling of witnesses or to admit additional evidence in the interest of justice.

10. Mr. Gaikwad further submitted that under Order XLI Rule 27 of CPC even at appellate stage, a party is entitled to produce additional evidence. In the present case at the trial stage itself, defendant No.3 has filed application on 23.9.2016. It, therefore, cannot be said that the application is filed with a view to protracting the trial. For all these reasons, he submitted that the Petitions deserve to be allowed thereby allowing the applications at Exhibit-192 & 194.

11. On the other hand, Mr. Aathalye supported the

impugned orders. He also relied upon the decision of Apex Court in the case of *K. K. Velusamy* (supra) and following decisions :

- I] *Bagai Construction, through its Proprietor Lalit Bagai v. Gupta Building Material Store, (2013) 14 SCC* to contend that the power to recall witness is not for filling up omissions in already adduced evidence. The power cannot be exercised in a routine manner. Where the application is bonafide and leading of additional evidence would clarify the doubts of the Court and earlier non-production was for valid reasons, then recalling of witness is permissible. He further contended that the party cannot have recourse to Section 151 of C.P.C.
- II] *Ram Rati v. Mange Ram (Dead), through Legal Representatives and others, (2016) 11 SCC 296* to contend that when attempt is to fill up omission/lacunae in evidence already led by witness, the learned trial Judge rightly rejected the application.

12. I have considered the rival submissions advanced by learned Counsel appearing for the parties. I have also perused the material on record. As noted earlier, defendant No.3 has filed written statement resisting the suit. In paragraph-5 of the written

statement, defendant No.3 undoubtedly has referred to notice dated 22.12.2006 issued in daily Lokmat through Advocate Kiran Kantilal Shah. Defendant No.3 has further pleaded that he has obtained search report to find out whether the suit property is encumbered or not. Perusal of paragraph-5, however, does not give details as regards the Advocate through whom search report is taken as also date of search report. In other words, insofar as the averments in respect of search report are concerned, they are bereft of any particulars.

13. Perusal of affidavit of examination-in-chief dated 11.8.2016 filed by defendant No.3 does not show any reference to the public notice issued through Advocate Kiran Kantilal Shah in daily Lokmat on 22.12.2006. Equally, defendant No.3 has not referred to as also produced the search report along with affidavit of evidence. In paragraph-1 of his cross-examination, defendant No.3 admitted that he is a builder and developer. He has several firms. Apart from those firms, he is also carrying on business in his individual name. For last more than 20 years, he is dealing with purchase and sell of the lands.

14. In paragraph-4, he ultimately admitted that he did not

produce the search report on record. The cross-examination was conducted on 17.9.2016. On 23.9.2016 defendant No.3 filed applications at Exhibit-192 and 194. In paragraph-3 of the application Exhibit-192, defendant No.3 contended that after his cross-examination was over, while going through old record he came across the document in respect of which his cross-examination was conducted. He, however, inadvertently did not show this document to his Advocate and, therefore, they are not referred in his evidence. As defendant No.3 has already referred to this document in his written statement, it is necessary to permit him to file additional evidence in terms of Exhibit-192 as also produce documents in terms of Exhibit-194. By the impugned order, the learned trial Judge has rejected the applications.

15. In the case of *K. K. Velusamy* (supra), Apex Court has considered the power of the Court under Order XVIII Rule 17 read with Section 151 of C.P.C. for recalling witness as also for filing further examination-in-chief. In that case, after both the parties adduced the evidence. The matter was at the stage of arguments on 11.11.2008. The appellant before the Apex Court filed application under Section 151 of C.P.C. for reopening of the

evidence on the ground that the conversations were recorded by a digital voice recorder. That conversation with the plaintiff was recorded on 27.10.2008 between 8 a.m. and 9:45 a.m. and another conversation was recorded on 31.10.2008 between 7 a.m. and 9:50 p.m.. The case of the appellant was that the agreement of sale was merely in the nature of security and as he was in need of money, he approached the respondent who was a money lender with a request to advance him amount of loan. The respondent agreed to advance loan but insisted upon execution and registration of agreement to sale . It is in that context, he filed applications to demonstrate that the agreement of sale was only security for the loan.

16. Apex Court observed in paragraph-17 that the appellant had taken consistent stand in his reply, notice, written statement and evidence that the agreement of sale was executed to secure a loan of Rs.1,50,000/-, as the respondent insisted upon execution and registration of such agreement. Said evidence came into existence only on 27.10.2008 and 31.10.2008 and he prepared the applications and filed them at the earliest. The defendant could not produce this material earlier. It is in that context, Apex Court allowed the appeal after observing that the

trial Court as also the High Court did not consider the question whether it was a fit case under Section 151 or under Order XVIII Rule 17 of C.P.C. The Courts below also did not consider whether the evidence sought to be produced would assist in clarifying evidence led on issues or leading to a just and effective adjudication. In paragraph-19, Apex Court has observed thus :

“19. We may add a word of caution. The power under Section 151 or Order 18 Rule 17 of the Code is not intended to be used routinely, merely for the asking. If so used, it will defeat the very purpose of various amendments to the Code to expedite trials. But where the application is found to be bona fide and where the additional evidence, oral or documentary, will assist the court to clarify the evidence on the issues and will assist in rendering justice, and the court is satisfied that non-production earlier was for valid and sufficient reasons, the court may exercise its discretion to recall the witnesses or permit the fresh evidence. But if it does so, it should ensure that the process does not become a protracting tactic. The court should firstly award appropriate costs to the other party to compensate for the delay. Secondly the court should take up and complete the case within a fixed time schedule so that the delay is avoided. Thirdly if the application is found to be

mischievous, or frivolous, or to cover up negligence or lacunae, it should be rejected with heavy costs.”

17. In the case of *Bagai Construction* (supra), Apex Court has observed that the power to recall witness under Order XVIII Rule 17 enables the court to clarify any doubts regarding evidence led by the parties. Said provisions is not meant to fill up omissions in already adduced evidence. The power conferred upon the court under Order XVIII Rule 17 can be used either on application by parties or suo motu but it has to be used sparingly in an appropriate case. Recalling of witness is permissible where the application is bonafide and leading of additional evidence would clarify doubts of the Court and earlier non-production was for valid reasons.

18. In the case of *Ram Rati* (supra), Apex Court has observed that the power under Order XVIII Rule 17 of C.P.C. cannot be invoked to fill up omission in the evidence already led by a witness. It also cannot be used for the purpose of filling up a lacuna in the evidence.

19. Applying the tests laid down by the Apex Court in the cases of *K. K. Velusamy* (supra), *Bagai Construction* (supra) and

Ram Rati (supra) to the facts of the present case, I am more than satisfied that the learned trial Judge was fully justified in rejecting the applications. As noted earlier, defendant No.3 cannot claim to be a lay person or an illiterate person. He is dealing in real estate for more than 20 years. It is only after his cross-examination was conducted on 17.9.2016, he filed application Exhibit-192 on 23.9.2016. The reasons set out in paragraph-3 of the application Exhibit-192 are wholly unacceptable. In my opinion, the application made by defendant No.3 is frivolous to cover up negligence or lacunae and the learned trial Judge has rightly rejected the applications. In view thereof, no case is made out for invocation of powers under Article 227 of the Constitution of India. Hence, the Petitions fail and the same are dismissed.

20. It is made clear that where a decree is challenged 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 the proposed proceedings as contended by section 105(1) C.P.C.

(R. G. KETKAR, J.)