

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR

WRIT PETITION NO. 741 OF 2016

(M/s Shewalkar Developers Lts., Nagpur Vs. Sidartha Sinha s/o Pratap Sinha & others)

Office Notes, Office Memoranda of Coram,
appearances, Court's orders of directions
and Registrar's orders

Court's or Judge's orders

Shri S. O. Ahmed, Advocate for the petitioner.
Shri P. Deshmukh, Advocate for respondent Nos. 2 and 3.
Shri P. P. Kothari, Advocate for respondent Nos. 4 and 5.

CORAM : S. B. SHUKRE, J.

DATED : APRIL 21, 2016

1. By this petition, the petitioner has challenged the legality and correctness of order dated 29/12/2015, whereby defendant-respondent Nos. 2 and 3 have been permitted to recall first witness of the plaintiff and for the purpose of further cross-examination.

2. It is the contention of learned Counsel for the petitioner that the impugned order is absolutely erroneous and illegal as it does not satisfy the essential conditions for recalling a witness. He submits that the witness can be recalled only for clarification of the defence. He submits that the learned Judge has proceeded on the erroneous assumption that there was no power or authority given to the previous Counsel to cross-examine the plaintiff's witness by original defendant Nos. 2 and 3.

3. Learned Counsel appearing for respondent Nos. 2

and 3 and also respondent Nos. 4 and 5 support the order by relying upon the judgment of the Hon'ble Apex Court in the case of K.K. Vellusamy Vs. N. Palanisamy – (2011) 11 SCC 275.

4. I have gone through the impugned order. It is seen therefrom that the learned Judge has considered all the material aspects of the matter and in particular the law laid down by the Hon'ble Apex Court in the case of *K. K. Vellusamy* (supra), wherein the Apex Court had settled the position of law in this regard. The Hon'ble Apex Court has held that, 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. These conditions, I find, have been fulfilled in the instant case.

5. As regards the contention that learned trial Judge has proceeded on the erroneous assumption that there was no authority in law given by respondent Nos. 2 and 3 to the previous Advocate to conduct cross-examination on their behalf, I find that admittedly original defendant No.3 had not given any authority by filing *Vakalatnama* in favour of the previous Counsel. Of course, there is one *pursis* filed on behalf

of original defendant No.2 authorizing erstwhile Advocate to conduct the cross-examination on his behalf. But, filing of such a *pursis* would not oust the requirement of law regarding filing of *Vakalatnama* as the suit had been restored after its dismissal and it was required to be tried afresh, in accordance with law. In the application filed for recalling of the plaintiff's witness, original defendant Nos. 2 and 3 may have given some admission regarding their previous Counsel and there may also be available on record a certified copy of *Vakalatnama* filed along with *pursis* dated 12/02/2016, showing that the previous Counsel had given his 'No Objection' thereby indicating that he was having apparent authority to conduct the case on behalf of original defendant Nos. 2 and 3. But, these admissions and the said document are no substitute for a proper *Vakalatnama* required to be filed and, therefore, could not be taken as going contrary to the case of these defendants regarding lack of legal authority of previous Advocate to conduct the cross-examination on their behalf.

6. In the circumstances, I do not see any perversity or illegality in the discretion exercised by the learned trial Judge. There is no need to interfere in the impugned order.

The writ petition stands dismissed summarily.

JUDGE