

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.3046 OF 2017
(Rishit Pankaj Jobalia Vs.S.R.Constructions and others)

Mr.N.S.Tekale, Advocate for the petitioner.
Mr.R.F.Totala, Advocate for respondent No.1

(CORAM : Ravindra V.Ghuge, J.)

DATE : 29/09/2017

PER COURT :

1. The petitioner is aggrieved by the order dated 14/11/2014 by which application Exh.81 filed by the petitioner/defendant No.1 has been rejected. Reliance has been placed upon the judgment of the Hon'ble Apex Court in the matter of K.K.Velusamy Vs. N.Palanisamy [(2011) 11 SCC 275].

2. I have considered the strenuous submissions of the learned Advocate for the petitioner and respondent Nos.1 and 2. Respondent No.3, though served, has not caused an appearance.

3. Exhibit 81 has been filed by the petitioner for the following two reasons :-

[a] The 'No Evidence' Order dated 10/07/2014 be vacated and defendant No.1 be allowed to lead oral evidence.

[b] The plaintiff may be recalled for further cross-examination by defendant No.1.

4. I have perused Exhibit 81 and I find that the only reason put forth by defendant No.1 is that his Advocate Mr.Sormare, being inexperienced, has not properly cross examined the plaintiff and hence the plaintiff be recalled for further cross examination.

5. The record reveals that the petitioner changed his Advocate and under the advise of a new Advocate, this ground of insufficient cross examination by the earlier Advocate has been raised in Exhibit 81. Contention is that if the Court peruses the written statement of defendant No.1 and the cross examination conducted by the earlier Advocate, it would reveal that the plaintiff was not properly cross-examined.

6. I am unable to accept the submission of the learned Advocate for the petitioner for the reason that there is no yardstick by which it can be concluded as to whether the cross examination was very efficiently conducted or was a bad piece of cross examination.

7. The Hon'ble Apex Court in K.K.Velusamy (supra) has observed

in paragraph No.16 as under :-

“16. 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 bonafide 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. If the application is allowed and the evidence is permitted and ultimately the court finds that evidence was not genuine or relevant and did not warrant the reopening of the case recalling the witnesses, it can be made a ground for awarding exemplary costs apart from ordering prosecution if it involves fabrication of evidence. If the party had an opportunity to produce such evidence earlier but did not do so or if the evidence already led is clear and unambiguous, or if it comes to the conclusion that the object of the application is merely to protract the proceedings, the court should reject the application. If the evidence sought to

be produced is an electronic record, the court may also listen to the recording before granting or rejecting the application.”

8. In K.K.Velusamy (supra), certain documents were not produced and as the Court was convinced of the reasons for such non production, it was observed that the recalling of the witness would be necessary so as to safeguard the interest of justice. In the instant case, the petitioner is not before the Court for the reason that certain documents were not produced and the plaintiff needs to be confronted with the said documents and for which the plaintiff needs to be further cross-examined.

9. In this backdrop, I do not find that the Trial Court has committed any error or the impugned order could be termed as being perverse or erroneous.

10. In so far as the order of closing the evidence of defendant No.1 is concerned, learned Advocate for the original plaintiff submits on instructions that the said order be set aside and the petitioner/ defendant No.1 be permitted to lead his evidence.

11. Considering the above, this petition is partly allowed. The

order of the Trial Court dated 14/11/2014 is set aside only to the extent of permitting the petitioner to lead his evidence. Consequentially, the 'No Evidence' Order dated 10/07/2014 is set aside and Exhibit 81 is partly allowed to this extent.

(Ravindra V.Ghuge, J.)