

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD
WRIT PETITION NO.355 OF 2017

Krushni Utpanna Bazar Samiti
Dondaicha, Branch at Dondaicha
Tal.Shindkheda, Dist.Dhule
Through its Secretary

-- PETITIONER

VERSUS

1. Vijaysing Nathesing Rajput,
Age-60 years, Occu-Social work,
Ro Thanasingh Jibhau Chowk,
At/Post Shindkheda, Tal.Shindkheda,
Dist.Dhule,
2. Pramod Bhika Gurav,
Age-35 years, Occu-Social work,
R/o Gurav Galli, At/Post Shindkheda,
Tal.Shindkheda, Dist.Dhule,
3. Laxmikant Ramrao Thakur,
Age-35 years, Occu-Agriculturist,
R/o Thakur Galli, Shindkheda,
Tal.Shindkheda, Dist.Dhule
4. Musa Salluddin Usmanoddin,
Age-37 years, Occu-Business,
R/o 13 House Area, Shindekheda,
Tal.Shindkheda, Dist.Dhule,
5. S.Kumar Construction,
Amalner, Opp. Vijay Maruti Temple,
Dhule Road, Amalner,
Tal.Amalner, Dist.Jalgaon
6. Assistant Engineer Class-1,
P.W.D.Department,
Panchayat Samiti Vibhag,
Shindkheda, Tal.Shindkheda,
Dist.Dhule

-- RESPONDENTS

Mr.S.P.Brahme, Advocate for the petitioner.
Mr.B.R.Warma, Advocate for respondent Nos. 1 and 2.
Mr.Paresh B.Patil, Advocate for respondent Nos. 3 and 4.
Mr.R.S.Devdhe, Advocate for respondent No.5.

(CORAM : Ravindra V.Ghuge, J.)

DATE : 29/08/2017

ORAL JUDGMENT :

1. Rule. Rule made returnable forthwith and heard finally by the consent of the parties.

2. The petitioner is aggrieved by the order dated 20/10/2016 by which application Exh.103 filed by the plaintiffs has been allowed under Order 18 Rule 3-A of the CPC. The petitioner is also aggrieved by the order dated 20/10/2016, by which application Exh.107 seeking issuance of summons to the T.I.L.R., Shindkheda has been allowed.

3. I have considered the submissions of the learned Advocates for the respective sides at length.

4. Order 18 Rule 3 and Rule 3-A of the CPC read as under :-

"3. Evidence where several issues :-Where there are several issues, the burden of proving some of which lies on the other party, the party beginning may, at his option, either produce his evidence on those issues or reserve it by way of answer to the

evidence produced by the other party; and, in the latter case, the party beginning may produce evidence on those issues after the other party has produced all his evidence, and the other party may then reply specially on the evidence so produced by the party beginning; but the party beginning will then be entitled to reply generally on the whole case.

3-A. Party to appear before other witnesses :- Where a party himself wishes to appear as a witness, he shall so appear before any other witness on his behalf has been examined, unless the Court, for reasons to be recorded, permits him to appear as his own witness at a later stage."

5. Rules 251 and 252 of the Civil Manual issued by this Court for the guidance of the Civil Courts read as under :-

"251. (1) The Court should enforce the rule as to "opening" a case. When the parties have their oral evidence ready, the law directs (Order XVIII, Rule 2) that the party having the right to begin should state his case, and produce his evidence in support of the issues which he is bound to prove. The other party has then to state his case, and produce his evidence, if any, and may then address the Court generally on the whole case, the party beginning being permitted to reply generally.

(2) It is absolutely necessary that the case should be opened in order that time may be saved. It is essential that the evidence of each side should be preceded by a brief and clear statement of the case to be made out, showing the exact nature of the claim, the facts to be established by the evidence

which will be adduced, the general character and bearing of that evidence, the names of witnesses to be examined and a clear statement of any proposition of law involved. The case stated in the opening must be in accordance with the party's pleadings, for no litigant can be allowed to make at the trial a case different from that which he has pleaded and of which only his adversary has notice.

(3) In complicated suits, the Judge should make brief notes of the case stated in the opening and keep them on the record.

252. (i) According to Rule 2 of Order SVIII, Civil Procedure Code, the parties shall produce their evidence, if any, on the day fixed for hearing of the suit. The Court may, for the reasons to be recorded, direct or permit any party to examine a witness at any stage.

(ii) While issuing commissions for the examination of witnesses, the Courts should see that a direction is given to ensure that the work of recording and certifying evidence of the parties concerned is done within the time which should be fixed or prescribed by the Court according to requirements.

(iii) The attention of the Civil Courts is invited to Rule 3-A of Order XVIII of the Civil Procedure Code, according to which where a party himself wishes to appear as a witness, he shall so appear before any other witness on his behalf has been examined, unless the Court, for the reasons to be recorded permits him to appear as his own witness at a later stage.

(iv) All witnesses should give their evidence from the witness box. A witness should normally stand when giving evidence,

but a chair should be provided in the witness-box, upon which the witness may sit on receiving permission of the presiding Judge. The permission should be given on valid grounds, such as the witness's health or the likelihood that his evidence will occupy a long time etc."

6. Mr. Brahme, learned Advocate for the petitioner/APMC, which is the original defendant in RCS No.102/2012, submits that the petitioner is the owner and title holder of the suit property. There is no dispute as regards the ownership and title of the petitioner. The application seeking injunction under Order 39 Rule 2 of the CPC filed by the plaintiff has also been rejected.

7. Grievance is that the petitioner is constructing on its own land and the objection of the plaintiffs, which is in the form of a grievance raised in public interest, is totally misplaced. The construction of the complex/building has been completed and without there being any restraining order by the Court, the said construction is ready for occupation and use.

8. He draws my attention to the issues framed on 26/11/2015 and submits that the petitioner has also challenged the order dated 20/10/2016 passed below application Exh.102 thereby striking down

the first issue pertaining to the maintainability of the suit under Section 19(1)(a) and (b) of the CPC. However, as the plaintiffs have obtained the required permission from the Trial Court to institute the suit, the order below Exh.102 may not be termed as being perverse or erroneous. Having given a thought to this aspect, I am of the view that since the Trial Court has granted permission and has entertained the suit, the striking down of the first issue regarding the maintainability of the suit, does not deserve to be interfered with.

9. Mr.Brahme submits that the petitioner is seriously aggrieved by the fact that the plaintiffs have avoided stepping into the witness box in the light of Order 18 Rule 1 and 2 and has sought to examine the T.I.L.R. who was a Court Commissioner under Order 18 Rule 3(A). He relies upon the judgment of this Court in the matter of Kumudini Damodar Magar and others Vs. Bhushan Damodar Magar (2004 (3) Mh.L.J. 214). His contention is that it is only in rare situations that the plaintiff may first examine his witness without he himself stepping into the witness box.

10. Reliance is placed upon paragraph No.14, 15, 16 and 18 of the said judgment which reads as under :-

"14. With the above dissection of Rule 1, if one has to understand the legislative intent behind Rule 3A of the said Order 18, which was introduced by the Act 104 of 1976 into Civil Procedure Code, it is necessary to look into the recommendations of the Law Commission. In the 54th report with an intention to prevent the notorious practice indulged 'in by litigants in examining other witnesses first and later covering up the gaps by the examination of the parties themselves later, to substantiate their case, the Law Commission recommended introduction of Rule 3-A in Order 18 of Civil Procedure Code. If that is the mischief sought to be remedied by the amended Rule 3-A of Order 18 of Civil Procedure Code, the order of the examination of such of the defendants who wish to examine themselves as witnesses in support of their defence cannot be left to the choice of the plaintiff. Rule 3-A of Order 18 is directory in nature and the only mandatory provision it incorporates is to the extent of obtaining permission of the Court. The normal rule laid down is that the party wanting to examine himself should examine first before any witness is examined. This rule can be deviated only with the permission of the Court. Such permission of the Court, it is desirable, should be obtained before any witness is examined, but such is not the mandate. Such permission can be obtained even at a later stage.

15. So far as Rule 16 of Order 18 is concerned, the scope of this rule is very wide and orders can be passed "at any time after the institution of the suit". This means that an application, in appropriate facts and circumstances, may be moved by the

plaintiff even where the defendant has not filed his written statement and issues have not been framed. The fact that the application of the rule is not confined to cases ready for hearing also indicates that by examination of special witnesses it cannot be suggested that the hearing of the suit starts. The rights given to the parties under Order 18, Rule 3-A of Civil Procedure Code is left intact despite a witness having come to be examined long before the commencement of the evidence on either side of the parties to the suit. Order 18, Rule 16 provides for examination of witnesses at the instance of any party at any time after the institution of the suit, which means even before the stage of examination of the witnesses commence in the usual course, as provided for under Order 18, Rules 1 to 3-A of Civil Procedure Code.

16. With the above understanding of the scheme of Order 18 of Civil Procedure Code in general and Rules 1, 3-A and 16 thereof in particular; if one turns to the facts of the case in hand, it would be clear that defendant No. 2 is not being examined as witness of the plaintiffs. She is being examined as party-defendant. She has admitted all the allegations or the case pleaded by the plaintiffs. She did not contend that either in point of law or on some additional facts that the plaintiffs are not entitled to any part of relief which they seek. Had it been so, she would have got a right to begin, with the permission of the Court. However, this is not the case. In this view of the matter, it was not open for the Court to permit examination of

defendant No. 2 prior to the commencement of the evidence of the plaintiffs.

18. It is needless to mention that if the plaintiffs desire to examine defendant No. 2 as their witness, then, the plaintiffs shall be at liberty to move proper application before the trial Court. In that event, it would be open for the trial Court to consider such application on its own merits in accordance with law. In that event, plaintiffs shall neither be entitled to use examination-in-chief of defendant No. 2 already recorded by the Court nor shall they be entitled to cross-examine defendant No. 2."

11. Mr.Warma, learned Advocate for the plaintiffs submits that the plaintiffs do not have any personal interest in this matter. Their contention is that the construction erected by the petitioner is affecting the Warul-Dondaicha road which is in between the Civil Court, Panchayat Samiti on one side and the establishment of the petitioner on the opposite side. If the construction of the petitioner obstructs the public road, the said construction would then tantamount to be erected on the Government property.

12. He further submits that there is no dispute as regards the boundaries of the suit property. The ownership of the petitioner on the

suit land is also not at issue. In the backdrop of this admitted position, the T.I.L.R. could be the best witness whose examination-in-chief prior to the plaintiffs stepping into the witness box, would not only assist the Court, but would also save the valuable time of the Court.

13. It requires no debate that one who plead and alleges has to prove. If the plaintiffs are holding the view that the construction of the petitioner would obstruct a public road, the onus and burden would lie on the plaintiffs to establish this fact. However, there is neither any dispute about the boundaries of the suit property nor the title of the petitioner over the suit land. It, therefore, pre-supposes that the petitioner, after following the due procedure laid down in law for seeking a building permission, is at liberty to construct a structure of its choice on its own land as long as it does not encroach either on any individual's property or the public property.

14. In the backdrop of these admitted factors, the examination of the TILR and his evidence would assist the Court to a large extent as he is an independent person and has no reason to take sides in the said matter. If, by his evidence, the basic issue of encroachment is clear, it may so happen that the plaintiffs as well as the defendants

may ponder as to whether there is any necessity for leading their evidence.

15. Considering the peculiarity of the matter, though the Trial Court has passed a cryptic order and has very casually allowed Exh.103, the conclusion of the Trial Court cannot be faulted in the light of the above factors. The observation of the Trial Court that examining the TILR first, would not prejudice the defendant, is not the decisive factor which should have weighed on the mind of the Trial Court. The fact of admitted boundaries and undisputed title over the suit land are some of the factors which have to be considered and especially in the peculiarity of the litigation on hand wherein the plaintiffs are prosecuting a cause in public interest.

16. Considering the above, I do not find any reason to interfere with the leave granted by the Trial Court to the plaintiffs to examine the Court Commissioner first. Consequentially, the impugned orders to the extent of the operative part below Exh.103 and the direction to issue summons to the TILR with the concerned records/documents, calls for no interference.

17. As such, this petition is dismissed. Needless to state, after the recording of the evidence of the TILR is complete, the plaintiffs may choose to step into the witness box and shall not introduce any other witness prior to their leading evidence in the suit.

18. Rule is discharged.

(Ravindra V.Ghuge, J.)