

IN THE HIGH COURT OF BOMBAY AT GOA**WRIT PETITION NO. 673 2017**

M/s Shree Gajanan Distributors,
R/A House No.4688, BL No.06
Thorane Bichayat Kendra,
Tawakkal Layout, Wadi,
Nagpur-4400023,
Tah, & Dist. Nagpur, Maharashtra
Through its Proprietor Ravindra
S/O Ramankishor Chandak,
Aged about 42 years,
Occ. Business,
R/o 39, "Vaishali", Shastri Layout
Subhash Nagar, Jaitala Road,
Nagpur, Tah, & Dist. Nagpur.

... Petitioner

V e r s u s

Kare Health Specialities Pvt. Ltd.,
Having Registered Office at Kare House,
2nd floor, Near Metropole Cinema,
Margao – 403601, Goa.

..... Respondent.

Shri Anup Lohiya, Advocate for the Petitioner.

Shri Abhay Nachinolkar, Advocate for the Respondent.

CORAM: C. V. BHADANG
DATE: 12TH OCTOBER, 2017.

ORAL JUDGMENT:

Rule, returnable forthwith. The learned counsel for the respondent waives service. Heard finally by consent of parties.

2. By this petition under Article 227 of the Constitution of India, the petitioner is challenging the following orders:

- (i) Order dated 7/7/2017 (below Exhibit 68) rejecting an application for recall and permission to cross examine the witness (DW.1) Mr. Kapil Kare
- (ii) Order dated 14/7/2017 to the similar effect passed below Exhibit 88 refusing the petitioner to cross examine the witness Mr. Kapil Kare
- (iii) the order dated 7/7/2017(below Exhibit 63) thereby rejecting an application under Order 11 Rule 12 of C.P.C. filed by the petitioners for discovery of documents.

3. The brief facts necessary for the disposal of the petition may be stated thus:

That the petitioners have filed R.C.S No.325/10/III against the respondent for recovery of an amount of Rs.7,84,000/- along with interest. The respondent has raised a counter claim in the suit, seeking recovery of Rs.6,90,300.92 along with interest, from the petitioners.

4. It appears that after the petitioners led and closed their evidence, Mr. Kapil Kare, the Director of the defendant was sought to be examined on commission, before the Commissioner Mr. Sachin Kolwalkar. The commissioner filed an application on 1/3/2012 (Exhibit D-59) stating that the advocate for the petitioners sought adjournment on the ground that the order rejecting an application to take the documents on record is subject matter of challenge before the High Court. The Commissioner accordingly informed the Court that he is unable to record the evidence of the said witness (Mr. Kapil Kare) since the petitioner (plaintiff) is not cooperating and therefore sought necessary orders.

5. The learned trial court after noticing that it is a “direction matter” meaning thereby, that the trial of the suit is expedited closed the evidence of the 'respondents' by order dated 1/3/2012. The order sheet dated 1/3/2012 reads as under :

“Called out today,

Adv. T. George present for plaintiff.

Adv. A. Nachinolkar present for the defendant.

Commissioner present.

Commissioner filed application. That the plaintiff is not cooperating since it is a direction matter and the plaintiff is not cooperating to proceed with the evidence, last time commissioner was present but evidence is not recorded, in view of this evidence stands closed however permitted to produce documents on record. Counter claim shall proceed with further evidence if any. Defence evidence closed. Matter is adj. final arguments.”

6. At this stage it will be necessary to go back a little. The petitioner had filed an application (Exhibit 52-C) to grant permission to produce certified copy of the documents, namely, the copy of the order dated 16/9/2010 passed by this Court in Company petition no.30/2008 and the Form No.23 AC of the respondent (filed with the Registrar of Companies) for the years 2006-2007 to 2011-2012. The said application was rejected by the learned trial court by order dated 17/1/2012 inter alia on the ground that the evidence of the petitioner was already closed and the respondent would lose an opportunity to cross examine the petitioner on these documents.

7. The petitioner challenged both these orders, namely, the order

dated 1/3/2012 (below Exhibit D-59) and the order dated 17/1/2017 (below Exhibit 52-C) before this Court in Writ Petition no.271/2012. This Court dismissed the petition on 3.4.2012 with a liberty to the petitioner to challenge the impugned orders in appeal against the final judgment, in case the judgment is adverse to the petitioner. This was carried by the petitioner to the Supreme Court in SLP NO.15719/2012 which was dismissed on 16/1/2015.

8. It appears that after this, the petitioner filed application (Exhibit 68) for recall of witness Mr. Kare and for permission to cross examine him which was rejected on 7/7/2017. Curiously enough this application was filed even before the said witness had entered the witness box. Mr. Kapli was examined as a witness on 14/7/2017 (Exhibit 88) and certain documents were exhibited during his examination in chief. When, the learned counsel for the petitioners sought to cross examine the said witness, the trial court passed the following order (below Exhibit 88) :

“Witness cannot be cross examined by Adv. I. Miranda for the plaintiffs since as per the order dated 01/03/2012 evidence of the defendant was closed, however, defendants were permitted to produce documents on record.”

9. The petitioner filed an application (Exhibit 63) purportedly under Order 11 Rule 12 of C.P.C. seeking discovery of the documents,

namely the Form No.23 AC of the respondent for the year 2006-2007 to 2011-2012 and the copy of the order dated 16/9/2011 in Company petition no.30/2010. The said application has been rejected by order dated 7/7/2017. These are the three orders which are subject matter of challenge in this petition.

10. I have heard Shri Lohiya, the learned counsel for the petitioner and Shri Nachinolkar, learned counsel for the respondent. Perused record.

11. At the outset, it may be mentioned that Advocate Shri Lohiya during the course of his arguments has restricted his challenge to the order dated 14/7/2017 below Exhibit 88, thereby refusing an opportunity to the petitioners to cross-examine (DW1) Mr. Kapil Kare. The challenge to the other orders is given up.

12. The learned counsel for the petitioners submits that the order passed by this Court in Writ petition no.271/2012 cannot come in the way of the trial court in permitting cross examination of DW.1. This is because the trial court by order dated 1/3/2012 had permitted the counter claim to proceed and DW1 is examined only on 14/7/2017. It is submitted that this Court while deciding Writ petition no.271/2012 had refused to interfere with

the order on the ground that the suit was at the stage of final arguments. It is submitted that the order dated 1/3/2012 erroneously mentions that the matter was adjourned for final arguments, inasmuch as the counter claim was directed to be proceeded with. He submits that once the trial court has permitted the respondent to lead evidence, the opportunity of cross examination cannot be denied.

13. On the contrary it is submitted by Shri Nachinolkar, the learned counsel for the respondent that the cross examination on behalf of the petitioner's witness has been closed long back in the year 2012 and this Court had granted liberty to the petitioner to challenge the said order in appeal against final decree if it is adverse and therefore, this Court may not interfere with the impugned order under Article 227 of the Constitution of India.

14. I have given my anxious consideration to the rival circumstances and the submissions made and I find that the entire confusion has been created by the order dated 1/3/2012. As noticed earlier, that order was passed when the Commissioner sent an application to the trial court informing that the petitioner is not cooperating. The letter sent by the Commissioner would clearly show that the witness Mr. Kare along with advocate for the respondent was present and it was the advocate for the petitioner who sought

time to cross examine the witness on the ground that there is some petition pending before this Court. The trial court on the basis of the said application directed the following things:

- (i) Evidence stands closed, however, permitted to produce the documents on record.
- (ii) the counter claim shall proceed with further evidence if any.
- (iii) the defendant's evidence is closed and
- (iv) the matter is adjourned for final arguments.

Each of these parts are either contradictory or not borne out of the circumstances on record. If at all it was the petitioner who had failed to cross examine the witness of the respondent, the order which could have been passed is to close the cross examination of the witness and leave it open to the respondent to examine other witness, if any. The order does not clearly indicate as to whose evidence stood closed and who was permitted to produce documents on record. In the later part of the order, the trial court directed that the counter claim shall proceed (which would mean that the defendant would proceed with the counter claim) and at the same time, stated that the defendant's evidence is closed. Finally when the counter claim was directed to proceed, the matter could not have been fixed for final arguments.

15. Notwithstanding the nature of the order passed it appears that the petitioner took the order as being adverse to him, being in the nature of the closure of his cross examination and hence challenged the same before this Court in Writ petition no.271/2012. The writ petition was not entertained mainly on the ground that the matter was adjourned for final arguments. It is well settled that dismissal of the SLP in limine does not have the effect of the confirmation of the order of this Court (the judgment in the case of **Kunha Yammed and ors. Vs. State of Kerala and anr. (2000) 6 SCC 359**).

16. However it was not disputed during the course of the arguments at bar that the suit was not and could not have been fixed for arguments and the order sheet dated 1/3/2012 pointed out to this Court was patently incorrect.

17. That apart, as indicated above, the trial court had directed the counter claim to proceed and the subsequent proceedings in the suit would indicate that the trial court has even permitted the witnesses of the respondent to be examined along with production of documents. The affidavit in lieu of chief examination of Mr. Kare which is taken on record clearly shows that the entire defence of the respondent is allowed to be placed on record. In such circumstances and particularly in view of the fact that even by the order dated 1/3/2012 the respondents were permitted to proceed with the counter claim, it

cannot be accepted that the petitioner would be foreclosed from cross examining the respondent or their witnesses. The record indicates that the evidence of Mr. Kare (DW1) is recorded more than five years of the passing of the impugned order of the year 2012 i.e. on 14/7/2017. The impugned order dated 14/7/2017 also indicates that the defendants have been permitted to produce documents (which according to the trial court was also permitted by the order dated 1/3/2017). Once the trial court has permitted the production of the documents, it certainly cannot be accepted that the petitioner would be precluded from cross examining the witness so as to question the documents, if any. Even going by the fact that the order dated 1/3/2017 was not interfered with by this Court, even the said order permitted the production of the documents and once that was allowed by the trial court through the evidence of DW1 the cross examination of DW.1 by the petitioner in my considered view has to be allowed. It would be significant to note that the trial court has permitted another witness of the respondent i.e. DW.2 to be cross examined on behalf of the petitioner.

18. It is trite that no part of the statement of any witness can be considered as legal evidence unless it is tested by cross examination, albeit when permitted and availed of. As noticed earlier, even going by the order dated 1/3/2017 the trial court had permitted the counter claim to proceed and

had also permitted the party to produce documents which has now been done. For this reason the order denying the opportunity of the cross examination in my considered view cannot be sustained.

19. The supervisory jurisdiction under Article 227 of the Constitution of India is aimed at ensuring that the Subordinate Courts and Tribunals act within the bounds of their authority and the orders passed do not result into manifest injustice. In the present case, looking to the fact that the trial court has on one hand permitted the respondent to lead evidence on all aspects including production of documents and on the other hand refused the opportunity to cross examine to the petitioner. I find that the order demonstrates a patent error resulting in manifest injustice, requiring interference by this Court. In the result the petition is partly allowed. The impugned order dated 14/7/2017 below (Exhibit 88) is hereby set aside. The petitioner shall be permitted to cross examine DW.1 and any other witness examined. Rule is partly allowed in the aforesaid terms with no order as to costs.

C. V. BHADANG, J.

Ap/