

Vidya Amin

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION No. 6602 OF 2017

M/s. Avdhut Plast ... Petitioner
Vs.
The Top Technique Bhagidari Firm & Ors. ... Respondents

Mr. Amit B. Borkar, Advocate for the petitioner.
Mr. Kedar Pralhad Lad, Advocate for respondent nos. 1 to 3.

CORAM: **MRS.MRIDULA BHATKAR, J.**
DATE: **27th July, 2017.**

P.C.:

Rule. Rule made returnable forthwith. By consent, the Writ Petition is heard finally and decided at the stage of admission.

2. This Writ Petition under Article 227 of the Constitution of India is directed against the orders dated 9th February, 2017 and 17th March, 2017 below Exhibits 71, 74, 75, 78 in Regular Civil Suit No. 1186 of 2012 passed by the learned Joint Civil Judge Junior Division, Kolhapur. The plaintiff Mrs. Leela Sahadev Wasgaonkar has filed Suit No. 1186 of 2012 for money recovery. Her husband filed affidavit-in-chief in January 2014 stating that he has been given Power of Attorney by his wife to give evidence. On the basis of that affidavit-in-chief, he was cross-examined in the year 2014. The

affidavit-in-chief is marked as Exhibit 44. The said power of attorney which is referred in affidavit-in-chief (Exhibit 44) was never produced before the trial Court. In the cross-examination also, the plaintiff did not produce the said power of attorney. Subsequent to his evidence, the witness, i.e., her husband filed another power of attorney dated 4th August, 2014. The said power of attorney was executed after completion of the cross-examination of the power of attorney holder, i.e., PW-1. Somehow the trial did not proceed after 2014. The Application Exhibit 71 was filed on 6th February, 2017, which was rejected by the order dated 9th February, 2017, which is also challenged before this Court. In the said order, the trial Court has mentioned that the Application of the plaintiff to produce second power of attorney is already rejected by the Court. In Application Exhibit 71 dated 6th February, 2017, the plaintiff has filed the documents and has given evidence to prove the documents, however, the documents are not numbered and exhibited and therefore, they are to be exhibited. The petitioner/plaintiff referred the documents in the list Exhibit 59. He further specifically prayed that power of attorney which is filed by him along with the list Exhibit 59 is proved and therefore, it is to be exhibited. The said Application was opposed and rejected by the Court. Then the plaintiff filed

Application Exhibit 74 on 8th February, 2017 for exhibiting some other documents and also Application Exhibit 75 wherein he prayed that PW-1 has filed second power of attorney, however, that Application of exhibiting second power of attorney is rejected by the Court, therefore, he sought permission to give evidence to prove the documents.

3. The learned counsel for the petitioner has submitted that PW-1/husband of the original plaintiff in fact was holding power of attorney in his favour when affidavit-in-chief was filed, however, said power of attorney was lost and therefore, details could not be given in affidavit-in-chief. After his cross-examination, it was realized that the power of attorney was not at all traceable and therefore, another power of attorney dated 4th August, 2014 was executed and it was produced before the Court. He submitted that some of the documents are exhibited at the time of examination-in-chief but some documents which were referred in examination-in-chief were not exhibited. Therefore, he submitted that the documents referred in the examination-in-chief which were not exhibited are required to be exhibited and hence, for that limited purpose, have sought permission to enter the witness box as PW-1. In support of his

submissions, the learned counsel relied on **Punjab s/o. Ramrao Ingle & Ors. vs. Himmatrao s/o. Devrao Dhondge & Ors., reported in 2014 (5) Mh.L.J. 815** on the point of admitting the evidence.

4. The learned counsel for the respondents while opposing this Civil Revision Application has argued that initially second power of attorney dated 4th August, 2014 was produced but it was rejected and the learned trial Judge has mentioned about the said rejection in his order. The Application filed by the petitioner can be entertained only under Order 18 Rule 17 of the Code of Civil Procedure. He submitted that though the Court has power to recall and reexamine any witness, such power cannot be used liberally but it is to be used sparingly. In order to substantiate his submissions, he relied on two judgments of the Hon'ble Supreme Court in the case of **Vadiraj Naggappa Vernekar vs. Sharad Chand Prabhakar, reported in AIR (SC) 2009-0-1604 equivalent SCC (Civ) 2009-2-198** and in the case of **Bagai Construction vs. Gupta Building Material Store, reported in (2013) 4 SCC 1.**

5. Heard the arguments. Perused cases referred by the learned

counsel of both the sides. The ratio in the Supreme Court cases is culled out as follows:

In the case of **Punjab Ramarao** (*supra*), the learned Single Judge of this Court has held that the best evidence is required to be produced by the parties in the suit and if Power of Attorney has personal knowledge of the acts done, then such person can certainly step into witness box and depose.

6. In the case of **Vadiraj Naggappa Vernekar** (*supra*) the Supreme Court has held that order under Order 18 Rule 17 of the CPC is to be sparingly exercised and in proper case and not as a general rule merely on the ground that his recall and reexamination would not cause any prejudice to the parties. That is not the scheme or intention of Order 18 Rule 17 of the CPC. The power of the Court is not to be invoked to fill up the lacuna in the evidence of the witness which has already been recorded. However, in the said case, the Hon'ble Supreme Court has also kept a room open by holding that "if evidence on reexamination of the witness has a bearing on the ultimate decision of the suit, it is always within the discretion of the trial Court to permit recall of such witness for reexamination in chief with permission to the defendant to cross-examine the witness

thereafter. Thus, the ratio laid down in the case of **Wadiraj** does not take away the discretion of the Court entirely.

7. In the case of **Bagai Construction** (*supra*), it was reiterated that the plaintiff cannot be permitted to file Application of recall to fill the lacuna in his pleadings and evidence. It is held that the Courts should constantly endeavour to follow the time schedule laid down in the Code of Civil Procedure and only on compelling and acceptable circumstances such applications for recalling and reexamination is to be considered.

8. Two points the trial Court may need to formulate, i.e., firstly, whether evidence given on oath can be ratified by executing power of attorney subsequently when first power of attorney is lost and is not on record; and secondly, whether the case can be proved through the oral evidence of the other witness when party abstains himself/herself from stepping as a witness. These questions are not to be answered at this stage. They may be the issues in the trial. However, at this stage, recalling the power of attorney is to be allowed considering the set of facts. The order passed by the trial Court is set aside. The trial Court to allow the witness to lead

evidence to the limited point and thereafter also allow the cross-examination.

9. Rule is made absolute on above terms.

(MRIDULA BHATKAR, J.)