

Anand

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO.199 OF 2017

Razak Rafique Shaikh

.Petitioner

Vs.

Zakiabi Kadar Mohd. & ors.

.Respondents

Mr.J.N.Jayale, Advocate, for the Petitioner

Mr.V.V.Salunkhe, Advocate, for the Respondents No.1 to 4

Mr.S.P.Thorat, Advocate, for the Respondent No.5

Mr.Sachin Kankal, AGP, for the Respondent No.6 – State

CORAM : R.G.KETKAR, J.

DATE : 15.03.2017

P.C.

. Heard Mr.Jayale, learned counsel for the Petitioner,
Mr. Salunkhe, learned counsel for the Respondents No.1 to 4,
Mr.Thorat, learned counsel for the Respondent No.5 and Mr. Kankal,
learned AGP for the Respondent No.6 – State.

2. By this Petition under Article 227 of the constitution of India, the Petitioner, hereinafter referred to as 'Plaintiff' has challenged the Judgment and Order dated 25.08.2016 passed by the learned Judge, City Civil Court, Borivali Division, Dindoshi, Mumbai in Notice of Motion No.302 of 2016 in S.C.Suit No.82 of 2009. By that Order, the

learned trial Judge rejected the Motion taken out by the Plaintiff for withdrawal of pursis closing the evidence, Exh.15 dated 12.10.2015 and seeking permission to lead additional evidence and additional examination-in-chief of the Plaintiff.

3. In support of this Petition, Mr. Jayale has taken me through the plaint as also list of the documents and Affidavit dated 05.01.1994 and 07.12.2005 as also Affidavit in support of Motion and in particular paragraph 4 thereof. For the reasons set out in paragraph 4 of the Affidavit in support of Motion, he submitted that Plaintiff should be allowed to withdraw closure pursis dated 12.10.2015 as also Plaintiff be allowed to lead additional evidence and Additional examination-in-chief. In support of his submission, he relied upon the decision of this Court in the case of ***SHANTIBAI K. VARDHAN and others Vs. MEERA G. PATEL and another, 2008(6) Mh.L.J.833*** and in particular, paragraph 10 thereof.

4. On the other hand, learned counsel for the Respondents supported the impugned Order. They also invited my attention to paragraph 4 of the Affidavit in support of Motion to contend that no case is made out for allowing the Notice of Motion.

5. I have considered rival submissions advanced by the learned counsel for the parties. I have also perused the material on record. In paragraph 6 of the impugned Order, the learned trial Judge has noted that Defendants have cross examined the Plaintiff and the Plaintiff has closed his evidence. Mr.Salunkhe submitted that on behalf of the Defendants, Affidavit of examination-in-chief is filed.

6. The learned trial Judge while dismissing the Motion observed that the Plaintiff cannot be allowed to file Additional examination-in-chief after completion of evidence. The Plaintiff cannot be permitted to fill up lacuna in the evidence by filing additional Affidavit of evidence only on the ground that his earlier Advocate has failed to mention all the facts in the earlier examination-in-chief.

7. For the reasons recorded in paragraph 6 of the impugned Order, I do not find that the learned trial Judge has committed any error in passing the impugned Order.

8. Mr. Jayale relied upon the decision of this Court in the case of **SHANTIBAI(Supra)**. In that case, Division Bench of this Court considered provisions of Order XVIII and has observed that Court has

power to permit any party to file additional evidence. No body can dispute about the power of the Court. The question is whether the Plaintiff has made out a case for withdrawal of pursis, to lead additional evidence and for filing additional examination-in-chief. In my opinion, no case is made out by the Plaintiff. The said Judgment is not applicable to the facts of the present case.

9. In view thereof, Petition fails and same is dismissed. It is made clear that where a decree is challenged by the petitioner, any error, defect or irregularity in the impugned order, affecting the decision of the case, may be set forth as a ground of objection in the memorandum of the proceedings as contemplated by Section 105(1) of C.P.C.

(R.G.KETKAR, J.)