

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

**WRIT PETITION NO. 1085 OF 2017**

Prashant Raosaheb Kathale

..Petitioner.

Vs

Salim Jamalkha Pathan

.. Respondent

Mr. Samir Kumbhakoni, Advocate for Petitioner.

**CORAM : R.G.KETKAR,J.**

**DATE : 03/03/2017**

**PC:**

1. Heard Mr.Samir Kumbhakoni, learned counsel for the petitioner at length.
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 15.6.2016 passed by the learned Jt. Civil judge Junior Division, Barshi, below Exhibit 58 in Regular Civil Suit No. 497 of 2009. By that order, the learned trial Judge rejected the application made by the plaintiff for setting aside order dated 17.3.2015 below Exhibit-1 whereby the evidence of the plaintiff was closed.
3. in support of this petition, Mr. Kumbhakoni has taken me through the application Exhibit-58 filed by the plaintiff. He submitted that certain important documents were not available at the time of recording of evidence of the plaintiff. Even the address of some of the witnesses were not available. The plaintiff, therefore, could not take steps for examining these

witnesses. The suit is instituted for recovery of money. Plaintiff is an agriculturist and is facing famine. It is, therefore, necessary to give an opportunity to the plaintiff to lead evidence by setting aside order dated 17.3.2015. He relied upon the decision in Salem Advocate Bar Association Vs. Union of India, (2005) 6 Supreme Court Cases 344 and in particular paragraph 13 thereof. In paragraph 32 thereof, the Apex Court referred to Order XVIII, Rule 2(4) which was inserted by Act 104 of 1976. This was omitted by Act 46 of 1999. Under that Rule, the Court could direct or permit any party, to examine any party or any witness at any stage. The effect of deletion is the restoration of the status quo ante. This means that law that was prevalent prior to the 1976 amendment would govern. The omission of Order XVIII, Rule 2(4) by the 1999 Amendment does not take away the court's inherent power to call for any witness at any stage either suo motu or on the prayer of a party invoking the inherent powers of the Court. He also relied upon decision of this Court in Sunil Chhatrapal Kedar Vs. Y.S.Bagde, 2004 (4) Mh.I.J. 620 and in particular paragraph 4 thereof. The learned Single Judge referred to provision of Order XVIII, Rule 2(4) which lays down that notwithstanding anything contained in this Rule, the Court may for reasons to be recorded, direct or permit any party to examine any witness at any stage.

4. Lastly he submitted that the plaintiff will take out fresh

application for the reliefs claimed in the application at Exhibit 58.

5. I have considered the submissions advanced by Mr. Kumbhakoni. I have also perused the material on record. In paragraph 5 of the impugned order, the learned trial Judge noted that the issues were framed at Exhibit-16 on 1.7.2011. The plaintiff submitted his affidavit in lieu of examination-in-chief Exhibit-19 on 30.8.2012. He was cross examined on 16.2.2015. On 17.3.2015, the Court passed order closing evidence of the plaintiff. The defendant submitted his affidavit in lieu of examination-in-chief Exhibit 42 on 23.6.2015. He was cross examined on 5.9.2015. The defendant thereafter submitted affidavit in lieu of examination-in-chief of other witness on 31.12.2015. That witness was cross examined on 6.1.2016. The defendant filed pursuant Exhibit 57 closing his evidence. On 18.4.2016, suit was listed for final argument and at that stage the plaintiff has filed application Exhibit 58.

6. In paragraph 6, the learned trial Judge observed that the plaintiff could have moved application earlier. He, however, actively participated in the trial and conducted cross examination of the defendant and his witness. The reasons given in the application cannot be accepted. He has also not specified information which was not available as also not stated the names of witnesses whose addresses were not available. The application is vague.

7. For the reasons recorded in paragraphs 5 and 6 of the impugned order, I do not find any error committed by the learned trial Judge. A perusal of the application Exhibit 58 shows that it is bereft of particulars. Reliance placed by Mr. Kumbhakoni on the decision referred herein above does not advance the case of the plaintiff, as basically the application filed by the plaintiff is rightly held to be vague by the learned trial Judge. Hence, petition fails and the same is dismissed.

8. Mr. Kumbhakoni submitted that the plaintiff will file fresh application for the same relief. Statement made by Mr Kumbhakoni is recorded. All contentions of the respondent in the proposed application including maintainability of such application are expressly kept open. It is, however, expressly made clear that where a decree is appealed from 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 appeal as contemplated by Section 105(1) of C.P.C.

(R.G.KETKAR, J.)