

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

WRIT PETITION NO. 507 OF 2017

M/s.Galaxy Builders

...Petitioner

Versus

Mr.Suresh Madan Pethe & Ors.

...Respondents

.....

Mr.Sandeep Mishra for the Petitioner.

Mr.Sachindra B. Shetye for Respondent Nos. 1,2 and 4 to 18.

.....

CORAM: Mrs.MRIDULA BHATKAR, J.

DATED: JULY 07, 2017

P.C. :

1. Rule. Rule made returnable forthwith. By consent, petition is heard finally and disposed of at the stage of admission.

2. This petition is directed against the order dated 20.06.2016 passed by the learned Civil Judge, Senior Division, Kalyan below Exhibit 119 in Special Civil No. 3 of 2012 thereby discarding the evidence of PW-5 Sandeep Karnavat of the petitioner/plaintiff.

3. The learned counsel for the petitioner submits that the petitioner/original plaintiff had filed Special Civil Suit No.03 of 2012 for specific performance, declaration and injunction. In the said Suit, the trial Court had recorded the evidence of the petitioner/plaintiff and other

three witnesses. An affidavit-in-chief of PW-5 Sandeep was filed on 05.03.2016. Thereafter, on two dates i.e. on 19.03.2016 and 21.04.2016, PW-5 Sandeep remained absent and an adjournment was sought by the petitioner/plaintiff on 20.06.2016. The witness was required to remain present for the cross examination. However, he remained absent and therefore, on that day, the respondents/defendants made an application that evidence of PW-5 Sandeep be discarded, as he is not available for the cross-examination. The said application was allowed and the evidence of PW-5 of the petitioner/plaintiff was closed. He further submits that evidence of PW-5 Sandeep is important and he is required for adjudication of the issue before the Court. He further submits that he had moved an application for setting aside the order of No Cross. However, the said application was also rejected and therefore, the order dated 20.06.2016 passed by the trial Court be set aside.

4. The learned counsel for the respondents/defendants while opposing the petition has pointed out that the petitioner/plaintiff did not produce any evidence and therefore, on 07.02.2015, the learned Judge had rightly closed the evidence of the petitioner/plaintiff. In fact, the order dated 07.02.2015 of closing the evidence of the petitioner/plaintiff ought to have been challenged because on 13.11.2015, the affidavit-in-

chief of defendant was taken on record. Thus, the evidence of the defendants was also part heard. He submits that the witness of the petitioner/plaintiff i.e. PW-5 was continuously absent. He was not available for the cross-examination and therefore, the order of discarding the evidence of PW-5 of the petitioner/plaintiff and closed down the evidence was rightly passed. He supports the order dated 20.06.2016 passed by the learned Judge and the petition is to be dismissed.

5. Heard submissions, Perused Roznama produced by the petitioner/plaintiff so also perused the impugned order. On perusal of the Roznama, it is found that on 07.02.2015, the learned Judge has passed the order of closure of evidence of the petitioner/plaintiff. On 11.06.2015, the petitioner/plaintiff had filed the application below Exhibit 104 for revocation of the order of closure of the evidence. In fact, the said application was filed by the petitioner/plaintiff on 04.07.2015. On 30.11.2015, the affidavit-in-chief of the respondents/defendants had taken on record, which was marked at Exhibit 109 and thus the evidence of the defendants was part heard as submitted by the learned counsel for the respondents/defendants. However, Roznama dated 05.03.2016 discloses that the affidavit-in-chief of PW-5 Sandeep Karnavat was produced and marked by the trial Court as Exhibit 116.

On that date, the trial Court ought to have passed the order of rejection of the affidavit-in-chief of PW- Sandeep Karnavat, however the Court exhibited the same. The trial Court by allowing this evidence in a way revoked the order of closure of evidence of the petitioner/plaintiff. On 09.03.2016 and 21.04.2016, the adjournments were sought by the petitioner/plaintiff, but the witness remained absent. It was necessary for the witness to remain present on 20.06.2016. However, he did not remain present and therefore, the application below Exhibit 109 was moved by the respondents/defendants for discarding the evidence of PW-5 and the said application was allowed by the trial Court. It appears that the petitioner/plaintiff again moved the application for calling the witness, but it was rejected. From this Roznama, it is apparent that the petitioner/plaintiff was negligent in keeping the witness present on the scheduled dates.

6. This is a Suit for specific performance. The petitioner/plaintiff has tendered evidence of four witnesses and also the affidavit-in-chief of PW 5. Therefore, in all fairness, I am of the view that the order dated 20.06.2016 passed by the trial Court is set aside with following conditions:

ORDER

- (i) Rule made absolute in terms of prayer clause (a), subject to payment of costs of Rs. 10,000/- to respondent no.1/defendant

no.1 in the trial Court on the date of appearance before the trial Court.

- (ii) Parties to appear before the trial Court on 17.07.2017 if no early date is there and on that day the costs is to be paid to defendant no.1.
- (iii) On 17.07.2017, PW-5 Sandeep Karnavat shall remain present in the trial Court and the trial Court as per its convenience shall record the cross –examination of PW-5.
- (iv) Parties to co-operate with the trial Court to proceed with the matter.
- (v) The trial Court is directed to expedite the Suit.

7. In view of the above, Writ Petition is disposed of.

(MRIDULA BHATKAR, J.)