

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

WRIT PETITION NO.505 OF 2017

1. Smt. Leena Nitin Mhapankar ..Petitioners.
and Ors.

Vs

Smt. Vijaya Harischandra .. Respondent
Deokar

Mr. Mahendra M. Agavekar, Advocate for Petitioners.

CORAM : R.G.KETKAR,J.

DATE : 24/01/2017

PC:

1. Heard Mr. Mahendra Agvekar, learned counsel for the petitioners at length.

2. By this Petition under Article 227 of the Constitution of India, the petitioners have challenged the Judgment and order dated 8.11.2016 passed by the learned Civil Judge, Jr. Dn., Guhagar below Exhibit-111 in Regular Civil Suit No. 69 of 2008. By that order, the learned trial Judge rejected the application filed by the defendant under Order XXVI of C.P.C for taking cross examination of the defendant's witness Vishesh Vinayak Kangutkar.

3. In support of this petition, Mr. Agavekar submitted that earlier the defendant filed application Exhibit-109 on 9.8.2016 enclosing therewith medical certificate of witness Vishesh Kangutkar. It was set out therein that the defendant proposed to

examine Vishesh Kangutkar, resident of Mumbai. However, he is suffering from heart related disease and is advised not to undertake long distance journey. He submitted that the learned trial Judge rejected the application Exhibit-111 on the ground that along with the application the defendant did not enclose any document regarding medical condition of witness Vishesh. He submitted that already medical certificate was filed along with application Exhibit-109 and, therefore, the learned trial Judge should have considered that certificate instead of rejecting the application on the ground that no material is produced on record regarding medical condition of the said witness. He submitted that the impugned order may be set aside thereby allowing the application.

4. I have considered the submissions advanced by Mr Agavekar. I have also perused the material on record. As noted earlier, the defendant filed application Exhibit-109 seeking time to file affidavit in examination in chief of witness Vishesh Kangutkar. In that application, the defendant did not pray for appointment of court commissioner for conducting his cross examination. It is material to note that the learned trial Judge rejected that application on the same day on the ground that this was the second application for adjournment. Perusal of the certificate attached to this application also does not indicate any heart related disease suffered by the said witness. Perusal of the

say filed by the plaintiff dated 18.10.2016 shows that they specifically raised objection on the ground that no material is produced in support of the contention raised in the application. Despite that, the defendant did not produce any material in support of the averments made in the application Exhibit-111. The impugned order was passed on 8.11.2016. Nothing prevented the defendant from producing the medical certificate throwing light on the medical condition of the witness.

5. In paragraph 4 of the impugned order, the learned trial Judge also considered application-Exhibit-109 wherein no prayer was made for appointment of court commissioner. The learned trial Judge also considered certificate dated 1.8.2016 enclosed along with that application and observed that said document is completely vague and also does not disclose who has signed the said certificate and also which disease is faced by the said witness is not mentioned. Name of patient is also not completely written. Duration of illness is also not mentioned. The learned trial Judge, therefore, disbelieved the said certificate.

6. For the reasons recorded in paragraphs 3 and 4 of the impugned order, I do not find that the learned trial Judge has committed any error in passing the impugned order. Hence, petition fails and the same is dismissed. 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.)