

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 2437 OF 2018

CHANDA ASHISH MODANI AND OTHERS
VERSUS
CHANDULAL MANIKCHAND GANDHI DIED LRS

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Advocate for Petitioners : Shri Irpatgire A.N.

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CORAM : RAVINDRA V. GHUGE, J.
Dated: March 09, 2018

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PER COURT :-

1. The petitioners are aggrieved by the order dated 28.11.2017 passed by the trial Court in RCS No. 170 of 2005, by which, application Exhibit 197 filed by the petitioners / defendants 3 to 7, has been rejected. These defendants had prayed that the plaintiff should be disallowed from examining defendant No.2 as his witness.

2. The contention of the petitioners is that the plaintiff cannot be allowed to examine a defendant as his witness considering the law laid down by this Court in the matter of Suresh Sahebrao Tawale Vs. Uttam Shankar Ghadge [2012 (6) Mh.L.J. 311]. My attention is drawn specifically to paragraph Nos.3,5 and 6 in which, this Court has held that the trial Court

may draw an adverse inference if any defendant does not appear in the witness box in pursuance to the filing of a Written Statement. However, as the parties had already led evidence in the said case, this Court did not pass any order keeping in view that the recording of evidence has concluded. Thus, the order of the trial Court recalling the order to call defendant No.4 as the witness, was set aside.

3. After considering the strenuous submissions of the learned Advocate for the petitioners, I find that there are peculiar factors in this case. The plaintiff had closed his recording of oral evidence. Defendants 1 and 2 did not choose to lead evidence. These petitioners, who are defendant Nos.3 to 7, filed an affidavit in lieu of examination in chief. By that time, the plaintiff moved an application praying for further evidence to be recorded. The trial Court, therefore, permitted the plaintiff to lead further evidence as the cross-examination of any defendant had not commenced.

4. The plaintiff examined one more witness and then sought summons to bring defendant No.2 as a witness since the said defendant earlier had avoided entering the witness box. The trial Court permitted the plaintiff to examine defendant No.2 as his

third witness and the evidence in lieu of examination in chief has already been filed. It was at this stage, that these petitioners filed an application contending that defendant No.2 cannot be compelled by the petitioners to lead evidence as their witness.

5. It appears from the record that defendant No. 2 was willing to lead evidence as the plaintiff's witness. Normally a plaintiff is prevented from compelling a defendant to step into the witness box on behalf of the plaintiff. No order praying for such compulsion is passed by the Court. In the instant case, defendant No.2 expressed his willingness and has filed an affidavit in lieu of examination in chief. Said defendant No.2 is about 56 years' of age and is a Medical Practitioner.

6. In the above peculiar facts, I do not find that the impugned order could be termed as being perverse or erroneous, merely because, a second view could be possible.

7. This petition being devoid of merits is, therefore, dismissed.

(RAVINDRA V. GHUGE, J.)

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