

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.3853 OF 2018

Priyanka Nityanand Myana,
Age-22 years, Occu : House work,
R/o Karachiwala Gas Godown,
Burudgaon Road, Ahmednagar

-- PETITIONER

VERSUS

1. Dr.Rahul Baburao More,
Age-31 years, Occu-Medical Practice,
R/o Samata Colony, Burudgaon Road,
Ahmednagar,

2. Pravina Nityanand Myana,
Age-27 years, Occu-Nil,
R/o Karachiwala Gas Godown,
Burudgaon Road, Ahmednagar

-- RESPONDENTS

Mrs.C.S.Deshmukh, Advocate for the petitioner.
Mr.N.V.Gaware, Advocate for respondent No.1,
Mr.S.V.Hange, Advocate for respondent No.2.

(CORAM : Ravindra V.Ghuge, J.)

DATE : 06/07/2018

ORAL JUDGMENT :

1. Rule. Rule made returnable forthwith and heard finally by the consent of the parties.

2. This matter was heard at length on 03/07/2018 and 05/07/2018.

3. The petitioner who is the original defendant No.2 in SCS No.125/2011 is aggrieved by the order dated 08/02/2018 by which, the application for adjournment was rejected and the order dated 29/03/2018 by which, application Exh.126 has been rejected by the Trial Court.

4. Learned Advocate for the petitioner/defendant No.2 has strenuously contended that the impugned orders would result in an irreparable harm to the petitioner since the evidence of the petitioner has been closed. The issue in the suit is recovery of an amount from the defendants. If her right to lead evidence is taken away, she will be liable to pay an amount of Rs.17,00,000/- which is the claim put forth by the plaintiff. The petitioner would be rendered defenceless.

5. Learned Advocate for the plaintiff submits that the details about the transaction between the plaintiff and the 2 defendants who are real sisters, are set out in the plaint. Both have been paid an amount of Rs.17,00,000/- by the plaintiff towards purchasing of a

property which was held by their deceased father. The portion of the property which the plaintiff has purchased from these 2 sisters is valued at Rs.21,00,000/-, which is more than the market price. The plaintiff agreed to pay a higher price since both these sisters were taking education. Rs.17,00,000/- have already been paid and Rs.4,00,000/- are to be paid so as to complete the transaction.

6. The petitioner had filed an affidavit in lieu of her examination in chief on 17/11/2017. The matter was adjourned on 28/11/2017, 17/12/2017, 21/12/2017 by imposing costs of Rs.200/-, 06/01/2018, 10/01/2018, 21/01/2018 and finally on 08/02/2018, the impugned order has been passed. It is, therefore, submitted that the petitioner has lost her right to lead evidence. The matter has proceeded and all the litigating sides have advanced their oral submissions and the matter is now reserved for pronouncing the judgment.

7. The plaintiff has placed reliance upon the judgment of the Hon'ble Apex Court (3 Judges Bench) in the matter of Arjun Singh Vs. Mohindra Kumar [1964 AIR (SC) 993] and the judgment of this Court in the matter of Wasudeo Sonone and another Vs. Jagannath Ramlalji Jugele [AIR 1986 Bombay 43] and Dinkar s/o Pandhari Gole Vs. Vitthal s/o Namdeo Bobde and others [2010(3) ALL MR 766].

Reliance is also placed upon the Divisions Bench judgment of the Karnataka High Court in the matter of Rabiya Bi Kassim M. Vs. The Country Wide Consumer [ILR 2004 KAR 2215 = 2004(4) Kar.L.J.189].

8. I find from the record that though the Trial Court had passed the order dated 08/02/2018 and 29/03/2018, the defendants have proceeded to advance their final submissions and the Trial Court has closed the matter for delivering its judgment in the said suit. It is also evident that the two defendants are sisters, who are taking education. The case before the Trial Court is that the plaintiff has purchased the property from them by paying Rs.17,00,000/- and the transaction of sale would be complete after Rs.4,00,000/- are paid. Though it would appear that sympathy needs to be shown towards the petitioner, the fact remains that she failed to appear for her cross examination and therefore her evidence was closed after 7 adjournments over a period of 3 months.

9. While hearing this matter, I had called upon the learned Advocate for the plaintiff to submit whether costs could be awarded to the plaintiff so as to balance the equities. He contended that from the view taken by the Hon'ble Apex Court and in the judgments cited supra, it is apparent that once the matter is closed for pronouncing

of the judgment, such applications cannot be entertained. He submits that after the suit is decided, the defendant can raise a comprehensive challenge by filing a Regular Civil Appeal, if the suit is decreed against him.

10. The Hon'ble Apex Court in the matter of Arjun Singh (supra) has taken a view in paragraph No.19, 20 and 21, which read as under :-

“19. On this submission, which we might mention has been urged for the first time in this court, the first question that arises is whether the Court has the inherent jurisdiction which learned counsel contends that it has. For the purpose of the discussion of the question in the context of the relevant provisions of the Code, it is unnecessary to embark on any detailed or exhaustive examination of the circumstances and situations in which it could be predicated that a Court has the inherent jurisdiction which is saved by s. 151 of the Civil Procedure Code. It is sufficient if we proceed on the accepted and admitted limitations to the existence of such a jurisdiction. It is common ground that the inherent power of the Court cannot override the express provisions of the law. In other words, if there are specific provisions of the Code dealing with a Particular topic and they expressly or by necessary implication exhaust the scope of the powers of the Court or the jurisdiction that may be exercised in relation to a matter the inherent power of the Court cannot be invoked in order to cut across the powers conferred by the Code. The prohibition contained in the Code need not be express but may be implied or

be implicit from the very nature of the provisions that it makes for covering the contingencies to which it relates, We shall confine our attention to the topic on hand, namely applications by defendants to set aside ex parte orders passed against them and reopen the proceedings which had been conducted in their absence. Order TX, r. 1 requires the parties to attend on the day fixed for their appearance to answer the claim of the defendant. Rule 2 deals with a case where the defendant is absent but the Court from its own record is apprised of the fact that the summons has not been duly served on the defendant in order to acquaint him with the proceedings before the Court. Rule 2 contains a proviso applicable to cases where notwithstanding the absence of service of summons, the defendant appears. Rule 3 deals with a case where the plaintiff alongwith the defendant is absent when the suit is called on and empowers the Court to dismiss the suit. Rule 5 deals with a case where the defendant is not served properly and there is default on the part of the plaintiff in having this done. Having thus exhausted the cases where the defendant is not properly served, r. 6(1)(a) enables the Court to proceed ex parte where the defendant is absent even after due service. Rule 6 contemplates two cases: (1) The day on which the defendant fails to appear is one of which the defendant has no intimation that the suit will be taken up for final hearing for example, where the hearing is only the first hearing of the suit, and (2) where the stage of the first hearing is passed and the hearing which is fixed is for the disposal of the suit and the defendant is not present on such a day. The effect of proceeding ex parte in the two sets of cases would obviously mean a great

difference in the result. So far as the first type of cases is concerned it has to be adjourned for final disposal and, as already seen, it would be open to the defendant to appear on that date and defend the suit. In the second type of cases, however, one of two things might happen. The evidence of the plaintiff might be taken then and there and judgment might be pronounced. In that case O. IX, r. 13 would come in. The defendant can, besides filing an appeal or an application for review, have recourse to an application under O. IX, r. 13 to set aside the *ex parte* decree. The entirety of the evidence of the plaintiff might not be concluded on the hearing day on which the defendant is absent and something might remain so far as the trial of the suit is concerned for which purpose there might be a hearing on an adjourned date. On the terms of O. IX, r. 7 if the defendant appears on such adjourned date and satisfies the Court by showing good cause for his non-appearance on the previous day or days he might have the earlier proceedings recalled" set the clock back" and have the suit heard in his presence. On the other hand, he might fail in showing good cause. Even in such a case he is not penalised in the sense of being forbidden to take part in the further proceedings of the suit or whatever might still remain of the trial, only he cannot claim to be relegated to the position that he occupied at the commencement of the trial. Thus every contingency which is likely to happen in the trial vis-a-vis the non-appearance of the defendant at the hearing 'of a suit has been provided for and O. IX, r. 7 and O. IX, r. 13 between them exhaust the whole gamut of situations that might arise during the course of the trial. If, thus,

provision has been made for every contingency, it stands to reason that there is no scope for, the invocation of the inherent powers of the Court to make an order necessary for the ends of justice. Mr. Pathak however, strenuously contended that a case of the sort now on hand where a defendant appeared after the conclusion of the hearing but before the pronouncing of the judgment had not been provided for. We consider that the suggestion 'that there is such a stage is, on the scheme of the Code, wholly unrealistic. In the present context when once the hearing starts, the Code contemplates only two stages in the trial of the suit: (1) Where the hearing is adjourned or (2) where the hearing is completed. Where the hearing is completed the parties have no further rights or privileges in the matter and it is only for the convenience of the Court that O. XX, r. 1 permits judgment to be delivered after an interval after the hearing is completed. It would, therefore, follow that after the stage contemplated by O. IX, r. 7 is passed the next stage is only the passing of a decree which on the terms of O. IX, r. 6 the Court is competent to pass. And then follows the remedy of the party to have that decree set aside by application under O. IX, r. 13. There is thus no hiatus between the two stages of reservation of judgment and pronouncing the judgment so as to make it necessary for the Court to afford to the party the remedy of getting orders passed on the lines of O. IX, r. 7. We are, therefore, of the opinion that the Civil Judge was not competent to entertain the application dated May 31, 1958 purporting to be under O. IX, r. 7 and that consequently the reasons given in the order passed would not be res judicata to bar the hearing of the petition under O. IX, r. 13

filed by the appellant.

20. There is one other aspect from which the same question could be viewed. O. IX, r. 7 prescribed the conditions subject to which alone an application competent under the opening, words of that rule ought to be dealt with. Now, the submission of Mr. Pathak if accepted, would mean to ignore the opening words and say that though specific power is conferred when a suit is adjourned for hearing, the Court has an inherent power even when (a) it is not adjourned for that purpose, and (b) and this is of some importance, when the suit is not adjourned at all, having regard to the terms of O. XX, r. 1. The main part of O. IX, r. 7 speaks "of good cause being shown for non-appearance" on a previous day. Now, what are the criteria to be applied by the Court when the supposed inherent jurisdiction of the Court is invoked. Non-constant it need not be identical with what is statutorily provided in r. 7. All this only shows that there is really no scope for invoking the inherent powers of the Court. Lastly, that power is to be exercised to secure the ends of justice. If at the stage of r. 7 power is vested in the Court and after the decree is passed O. IX, r. 13 becomes applicable and the party can avail himself of that remedy, it is very difficult to appreciate the ends of justice which are supposed to be served by the Court being held to have the power which the learned counsel says must inhere in it. In this view it is unnecessary to consider whether to sustain the present submission the respondent must establish that the court was conscious that it lacked specific statutory power and intended to exercise an inherent power that it believed it possessed to make

such orders as may be necessary for the ends of justice.

21. It was next urged that even if the application under O. IX, r. 7 in respect of suit 134 of 1956 was incompetent having regard to the stage which the hearing of that suit reached when that application was made, still the order passed in suit 20 of 1953 in the application made for the restoration of that suit under O. IX, r. 9 was competent and that the order passed on that application operated as res-judicata to the maintainability of the application under O. IX, r. 13 in respect of suit 134 of 1956. We consider that there is no substance in this submission. The ground urged for applying the rule of res judicata was that the Court had, at an earlier stage, ordered the joint trial of the three suits- 1023 of 1951, 20 of 1953 and 134 of 1956 and that as the three suits were thus linked together, the application made for the restoration of suit 20 of 1953 constituted a finding by a competent Court that there was no good or sufficient cause for the non-appearance of the appellant in court for any suit on May 29, 1958. The suits were, no doubt, ordered to be tried jointly in the sense that the evidence recorded in one suit was to be treated as evidence in the other suits also, suit 134 of 1956 being treated as the main suit in which evidence was recorded, but that affords no basis for the contention that every application made in one suit for the relief which is pertinent only to that suit must be treated as an application made in every other suit. Thus, for instance, in the present case if no application were made for the restoration of suit 20 of 1953 which had been dismissed for default it could hardly be contended that because of the application made in suit 134 of 1956 it would serve the purpose of an application for the

restoration of that other suit Similarly, if an application had been made for the restoration of suit 20 of 1953 and the Court found that there was sufficient cause for setting the dismissal aside that would by itself hardly be a ground for setting aside the ex parte decree in suit 134 of 1956. These features are sufficient to demonstrate that the circumstance that the suits were being tried jointly has no bearing on the matter now in controversy and that so far as regards the ex parte orders in the three suits each had to be considered independently and had to be disposed of also independently notwithstanding that the same grounds might have sufficed for the relief prayed for in the independent applications. There is another aspect from which this matter could be viewed. The point at issue in the application under O. IX, r. 9 filed to set aside the dismissal for default in suit 20 of 1953 was whether the plaintiff had sufficient cause for his non-appearance "when the suit was called on for hearing" (vide O. IX, r. 9). 'The suit called on for hearing' in that rule obviously refers to suit 20 of 1953. A decision, therefore, that there was no sufficient cause for the non-appearance of the plaintiff in that suit would not be eadem question with the matter which arose for decision when the application under O. IX, r. 7 was made in suit 134 of 1956 notwithstanding that the facts upon which that issue depended was similar and possibly identical. This is a further reason why we are unable to accept the submission of learned counsel."

11. In Wasudeo Sonone case (supra), this Court relied upon the

judgment in Arjun Singh and concluded in paragraph Nos. 6 and 7 as under :-

“6. The question, therefore, would be whether any stage after the completion of hearing is contemplated by the explanation of R.2 of O. XVIII of the C.P.C. as applicable in the state of Maharashtra. In interpreting the relevant provisions in this regard it would be relevant to notice that O. XVIII deals with the hearing of the suit and the examination of the witnesses. R.2 of O. XVIII deals with the procedure of the statement of the case and production of the evidence. Reference to sub-rule (1) of R.2 would show that on the date fixed for the hearing of the suit or any other day to which the hearing is adjourned the party having a right to begin shall state its case and produce his evidence in support of the issues which he is bound to prove. Sub-rule (2) thereof contemplates the statement of the case on behalf of the opposite party and production of his evidence. Sub-rule (3) deals with the reply to be given on behalf of the plaintiff. It is clear from the subject matter of O. XVIII and in particular R.2 that it deals with the stage of hearing of the suit. The words at any stage occurring in the explanation to R.2 of O. XVIII which is applicable to the State of Maharashtra must, therefore, be construed in the above setting of R.2 and the subject matter of O. XVIII. If so, construct, the stage which is contemplated therein is a stage of hearing of the suit and not the stage thereafter.

7. So far as the stage after completion of the hearing is concerned it is covered by O. XX of the C.P.C.R. 1 of O. XX

provides that the Court after the case has been heard shall pronounce the judgment in the open Court either at once or as soon as thereafter as may be practicable at some future date. The stage of the judgment is the stage after the completion of the hearing. It is expressed that the Court should deliver the judgment immediately after the case is heard. However, as held by the Supreme Court in the case cited supra, O. XX, R.1, however, also contemplates the judgment to be delivered after some interval after hearing is completed only for the convenience of the Court. The material observations of the Supreme Court in this regard that when the hearing is completed the parties have no further rights or privileges in the matter are important. The explanation incorporating the power to examine any witness at any stage it may pertinently be noted is provided not in O. XX, R.1 but in O. XVIII relating to the hearing of the suit. It is, therefore, clear that if any application in regard to the hearing of the suit is to be filed it must be filed before the hearing of the suit is completed and not thereafter. In this view of the matter the view taken by the learned trial Court on the basis of the decision of the Supreme Court cited supra that the instant application on 30-6-1984 by the defendants for permission to cross-examine the plaintiff and to adduce their own evidence was not maintainable is correct and has to be upheld."

12. In Dinkar's Case (supra), this Court adopted a similar view and concluded that when the matter is closed for judgment, an application even for filing a written statement cannot be entertained.

It was observed in paragraph No.5 as under :-

“5] I have considered the submissions made on behalf of the petitioner and have perused the impugned order dated 3.12.2008 along with the reported and unreported judgments. On perusal of the same, it is clear that the trial court was not justified in allowing the application for filing of written statement subject to payment of costs of Rs.1000/-. The case was already closed for judgment and as observed by the Hon. Supreme Court in the case reported in AIR 1964 SC 998, that there is nothing more to be heard in the suit when the matter is fixed for pronouncement of judgment and the court is therefore not entitled to entertain an application or pass any order thereon. Similar view has been reiterated by this court in the judgment reported in 1985 Mh.L.J. Page 565, wherein this court has observed that an application for cross examination is not tenable when the matter is fixed or closed for judgment. By applying the ratio laid down in the aforesaid decisions to the facts of this case, it is clear that the application filed by the respondents for permission to file written statement by setting aside the 'No W.S.' order when the matter was closed for judgment, was not tenable. The trial court committed a serious error in allowing the application filed by the respondents subject to the costs of Rs.1000/-. The order is unsustainable and is liable to be set aside.”

13. Considering the above, I find that this petition cannot be entertained in view of the law laid down by the Hon'ble Apex Court.

Nevertheless, if the suit is decreed against this petitioner, she would be at liberty to raise a comprehensive challenge and also raise a ground with regard to loss of her right to lead evidence. This petition is, therefore, dismissed.

(Ravindra V.Ghuge, J.)