

IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
BENCH AT AURANGABAD.

903 WRIT PETITION NO. 9883 OF 2016

URMILABAI LAXMANRAO PAWAR,
THROUGH GPA PURUSHOTTAM LAXMANRAO PAWAR
VERSUS
VIDYA BHAGWANRAO IRALE AND OTHERS

...
Advocate for Petitioner : Mr. Milind K. Deshpande.

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CORAM : **V. L. ACHLIYA, J.**
DATE : 19th April, 2018.

ORDER:

. By this petition filed under Articles 226 and 227 of the Constitution of India, the Petitioner i.e. original Plaintiff has challenged the order dated 5th August, 2016 passed by the 3rd Joint Civil Judge Senior Division, Jalna. By the impugned order, the Trial Court has rejected the application (Exhibit 66) moved by the Petitioner under Order 26 Rules 1 and 2 of the Code of Civil Procedure seeking appointment of the Court Commissioner to record the evidence of Petitioner – Plaintiff. The Trial Court has rejected the application by observing that the power of attorney holder of the Plaintiff can adduce evidence on behalf of Petitioner and even if the Court Commissioner is appointed, the Petitioner may not be able to give proper evidence due to ailment from which the Petitioner is suffering.

2 The notice of petition was issued to the Respondents – Defendants. In spite of service, the Respondents – Defendants fail to appear.

3 Heard the learned counsel for Petitioners – Plaintiffs and perused the impugned order.

4 On due consideration of submissions advanced, I am of the view that the order impugned is not sustainable in law. It is apparent from the face of record that the suit was filed in the year 2011 by the Plaintiff, who was then 70 years of age. The application seeking appointment of Court Commissioner to record the evidence of Plaintiff, was made in the year 2016, while the Petitioner was aged 76 years. In the application made, the Petitioner has set out sufficient reasons to entertain her request. The application filed also supported with medical certificate. The application though opposed by Respondents – Defendants but not contradicted the facts stated in the application as age, illness and ailment of the Petitioner. So also fact relating to her admission in hospital and inability to appear in person before the Court for the purpose of recording the evidence not disputed by the

respondents. It is vaguely stated that the certificate filed is forged and the power of attorney holder of the Petitioner can be examined in support of the case of the Plaintiff. It is very strange to note that in the order passed though the Trial Court has observed that the Petitioner is suffering from serious illness and confined to bed, still rejected the application by observing that she may not be able to give proper evidence before the Court Commissioner. Such observations have been made without any report to that effect produced before the Court.

5 Thus, on consideration of overall facts of the case, I am of the view, the Petitioner has made out a case to appoint Court Commissioner to record her evidence through Court Commissioner. There is no dispute as to the fact that the Petitioner is more than 75 years of age and suffering from various ailments. In absence of any serious challenge to the case put forth by the Petitioner, the Trial Court should not have refused to entertain the request. The reasons assigned to reject the application are unsustainable in law. The reason that the suit being filed through the power of attorney holder no way prevents the Petitioner – Plaintiff to examine her. There was no reason for trial Court to refuse to entertain the application filed under Order 26, Rules 1 and 2 of the Code of Civil Procedure and pass order in favour

of the Petitioner – Plaintiff.

6 Rule 1 of Order 26 of the Code of Civil Procedure reads
as under:

“1. Cases in which Court may issue commission to examine witness.– Any Court may in any suit issue a commission for the examination on interrogatories or otherwise of any person resident within the local limits of its jurisdiction who is exempted under this Code from attending the Court or **who is from sickness or infirmity unable to attend it:**

Provided that a commission for examination on interrogatories shall not be issued unless the Court, for reasons to be recorded, thinks it necessary so to do.

Explanation.– The Court may, for the purpose of this rule, accept a certificate purporting to be signed by a registered medical practitioner as evidence of the sickness or infirmity of any person, without calling the medical practitioner as a witness.”

7 Plain reading of Order 26, Rule 1 of the Code of Civil
Procedure, spell out that when a case is made out on account of

sickness or infirmity of the person to personally attend the Court to examine himself / herself, the Court is supposed to exercise its judicial discretion in favour of such person. As provided under explanation clause to Rule 1 of Order 26, the certificate signed by registered medical practitioner produced in support of such application showing the sickness or infirmity of any person, must be acted upon by the Court without calling such medical practitioner as a witness, which clearly indicate that the Court has to act upon such certificate unless there is reason to discard such certificate. While dealing with the procedural aspect, the Court must adopt practical approach and avoid to adopt too technical approach.

8 In view of the overall facts of the case, age, illness and infirmity with which the Petitioner is suffering, the trial Court ought to have allowed the application to examine Petitioner – Plaintiff by appointing Court Commissioner. In that view, the impugned order is not sustainable in law and liable to be set aside. Accordingly, the writ petition is allowed. The impugned order is set aside. The application moved by the Petitioner seeking examination through Court Commissioner is allowed. The Trial Court is directed to appoint a suitable person as Court Commissioner to record the evidence of

Plaintiff on commission and further ensure such exercise be completed within a period of four weeks from the date of appointment of the Court Commissioner in view of the age and ailment the Petitioner is suffering.

9 Petition is allowed and disposed of in above terms.

[V. L. ACHLIYA, J.]

ndm