

Vidya Amin

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION No. 9157 OF 2016

Suresh Dashrath Lokhande ... Petitioner
Vs.
Bapu Motiram Lokhande & Ors. ... Respondents

Mr. Vinayak B. Gadekar, Advocate for the petitioner.
Ms. Bhagyashri Mangale, Advocate for respondent no. 1.

CORAM: MRS.MRIDULA BHATKAR, J.
DATE: 15th June, 2018.

P.C.:

Rule. Rule made returnable forthwith. By consent, the Writ Petition is disposed of at the stage of admission.

2. This Writ Petition is directed against the order dated 8th January, 2016 below Exhibit 195 thereby rejecting the application filed by the petitioner/plaintiff seeking permission to examine defendant no. 1A to prove one affidavit dated 2nd August, 2001 sworn by defendant no. 1A.

3. The learned counsel for the petitioner has submitted that the petitioner's application was rejected because the learned Judge did not find the said application within the corners of law. The learned counsel has submitted that the petitioner/plaintiff can examine the

defendant as his own witness if it is required. In support of his submissions, the learned counsel relied on the following judgments:

- (i) Judgment of Division Bench of High Court of Patna in the case of **Awadh Kishore Singh vs. Brij Bihari Singh**, reported in Lex(Pat) 1993 3 5.
- (ii) Judgment of Single Judge of Bombay High Court at Aurangabad in the case of **Suresh s/o. Sahebrao Tawale vs. Uttam s/o. Shankar Ghadge**, reported in **Lex (Bom) 2012 8 86**.
- (iii) Judgment of Single Judge of Gujarat High Court in the case of **Vashram Daya Harijan vs. Bijal Deva Harijan**, reported in **Lex(GJH) 1969 12 8**.

He has submitted that the plaintiff has closed the evidence and now the trial Court is insisting that he should file the pursis of closure of evidence. However, the proof of the said affidavit is required in support of the plaintiff's case and so defendant no. 1A is required to be examined.

4. The learned counsel for defendant no. 1/respondent no. 1 submitted that the defendant yet to open the evidence and that can be done only after pursis for closure of evidence is given by the

plaintiff. The learned counsel submitted that defendant no. 1 wants to enter the witness box.

5. None present for other respondents. Perused the judgments cited by the learned counsel for the petitioner. The Hon'ble Judges of three High Courts had dealt with similar issue as to whether the party can summon the adversal party as his own witness. The Judgment in the case of **Lal Kunwar vs. Chiranji Lal, 32 Indian Law Reports (Allahabad) 104** holding that calling such witness and issuance of summons to the adversal witness as his own witness is practice unworthy of a high toned or reputable system of advocacy as embarrassing and perplexing judicial investigation and it was to be feared too often enabling fraud falsehood or chicane to baffle justice.

6. In the case of **Vashram Daya Harijan (supra)** and in the case of **Suresh s/o. Sahebrao Tawale (supra)**, the ratio laid down in the case of **Pirgonda vs. Vishwanath Ganesh, reported in AIR 1956 Bom. 251** is relied upon and it is held that if the party fails to appear in the witness box, it should normally not be open to his opponent to compel his presence by the issue of a witness summons. Reliance was placed on Order 16 Rule 21 of Code of Civil Procedure that

states as follows:

“Where any party to a suit is required to give evidence or to produce a document the provisions as to witnesses shall apply to him so far as they are applicable. It is thus evident that ordinarily the provisions regarding the witnesses shall apply when a party to a suit is required to give evidence or to produce a document. There is nothing in this Order 16 to indicate that the Legislature has put any prohibition from examining the opposite party as a witness by its adversary.”

7. In the case of **Ismail H. Mohammed vs. The State of Bombay (now Gujarat)**, **VII Gujarat Law Reporter 209**, the Judge has held that summons is not issued to the opposite party to examine as a witness of his own to avoid certain inconvenient positions in view of the previous admissions, however, for good reasons, there can be departure from this normal rule.

8. In the case of **Pirgonda** (*supra*), the learned Single Judge of Bombay High Court has observed that:

“Normally a party to the suit is expected to step into the witness box in support of his own case and if a party does not appear in the witness box, it would be open to the trial Court to draw an

inference against him. If a party fails to appear in the witness box it should normally not be open to his opponent to compel his presence by the issue of a witness summons. That appears to be the effect of circular no. 161 issued by the High Court also. It is significant to note that in this decision also it has been observed that if a party fails to appear in the witness box it should normally not be open to the opponent to compel his presence by the issue of summons. It does not lay down that rule is invariable and the opponent can never be compelled to be examined as a witness by the other side by the issue of a witness summons. Normally no doubt that would be the position.”

9. Thus normal practice of not calling the witness of the opposite side as own witness is to be followed, however there is no absolute bar. The learned Judge ought to have considered the legal position and should have passed a reasoned order accordingly. Considering the status of the case, the defendants have not given the pursis for closing evidence. It is premature for the plaintiff to anticipate that defendant will not step in the witness box and he will not have any opportunity to show the impugned affidavit to defendant no. 1A. If

defendant no. 1A steps in the witness box, then this document can be proved through him.

10. With this discussion, Writ Petition is disposed of giving liberty to the petitioner to move the similar application, if required with good sound reasons at proper stage.

(MRIDULA BHATKAR, J.)