

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.4773/2016

Voltas Ltd.

... Petitioner

V/s.

Jehangir Lentin Estates Pvt. Ltd.

... Respondents

Mr. Sanjay Kothari a/w. Mr. Avinash Joshi for the Petitioner
Mr. Sushmit S. Phatale for the Respondent

CORAM: K.K. TATED, J.

DATED : DECEMBER 6, 2018

P.C. :

1 Heard. By this Writ Petition under Article 227 of the Constitution of India, the Petitioner seeks to challenge the order dated 07.01.2016 passed by the learned Adhoc Judge, City Civil Court, Mumbai in Notice of Motion No.3436/2015 in Suit No.9784/1982 (High Court suit No.1991/1982) setting aside the orders dated 23.03.2007 and 09.07.2015 allowing the Respondent Defendant to cross-examine the Petitioner Plaintiff's witness and produce their witness i.e. D.W.1 for cross-examination.

2 The learned counsel for the Petitioner submits that in the present proceedings initially, they filed High Court O.S.Suit No.1991/1982 in this court. He submits that it was transferred to the Bombay City Civil Court because of change in pecuniary jurisdiction and it was renumbered as Suit No.9784/1982. He

submits that when the said suit was pending in this court, this court had framed issues on 10.10.2003. He submits that this court had specifically recorded in order dated 10.10.2003 that burden to prove all those issues lies on the Defendant. He further submits that thereafter this court by order dated 05.12.2003 framed additional two issues and held that burden will lie on the Respondent Defendant to prove the same.

3 The learned counsel for the Petitioner submits that when the court called upon the Defendants to file their affidavit of evidence, same was filed, but the deponent remained absent for cross-examination. Hence, the right of the Defendant to adduce an evidence came to be forfeited. Thereafter, the court permitted the Petitioner to file affidavit of evidence. Though a copy of the affidavit of evidence of P.W.1 was duly served on the Respondents, they failed and neglected to remain present for cross-examination of the Petitioner – Plaintiff's witness, P.W.1.

4 The learned counsel for the Petitioner submits that in order dated 23.03.2007 it is recorded that the Respondent Defendant failed to procure the presence of their witness D.W.1 for cross-examination. That order reads thus:

“The ld. Adv. for the deft. submits that the deft. is no present today in the court for cross-examination and as such the matter be adjourned.

From the record it appears that the deft. was to appear & offer herself for cross-examination. But on previous occasion also she was not present as submitted by the ld. Adv. for the pltf.

Under the circumstances it has to be held that deft. has not adduced any evidence. The pltf. is therefore directed to file affidavit of evidence along with necessary documents on or before 13.04.2007.”

5 The learned counsel for the Petitioner submits that thereafter on 09.07.2015 the matter was adjourned for arguments on 20.08.2015 and thereafter it was again adjourned on behalf of the Defendant, as a last chance. Hence, on 28.08.2015 the court adjourned the matter for arguments on 08.09.2015. He submits that on 08.09.2015 the Respondent preferred Notice of Motion No.3436/2015 for following reliefs:

“a. That the Orders dated 09.07.2015 & 23.03.2007 in the above said suit proceedings be recalled in the interest of justice.

b. That the “orders” dated 09.07.2015 & 23.03.2007 in the above suit proceedings be set aside.”

6 The learned counsel for the Petitioner submits that the said Notice of Motion was vehemently opposed by the Petitioner on the ground that time and again opportunity was granted to the Respondent to procure the presence of their witness for cross-examination, but they failed to do so. Hence, with the permission of the court, the Petitioner Plaintiff filed their affidavit of evidence.

7 The learned counsel for the Petitioner submits that the Trial Court has failed to consider the fact that there was more than 8 years delay on the part of the Respondent to file Notice of Motion. He submits that these facts are recorded by the Trial Court in para 5 of the impugned order. In spite of these facts, the Trial Court allowed the Notice of Motion with permission to the

Respondent to bring their witness for cross-examination. The learned counsel for the Petitioner submits that the Trial Court has acted contrary to the provisions of Order 18 Rule 15 of the Code of Civil Procedure, 1908 which mandates that Court to proceed with the suit from the stage at which his predecessor left it. He submits that the learned Trial Court has failed to appreciate that the order dated 23.03.2007 was in operation for more than 8 years. There was delay on the part of Respondents in preferring Notice of Motion. He submits that Respondents accepted the order dated 23.03.2007 as it is and acted on. They accepted affidavit of evidence of the Petitioner's witness without any objection. He submits that the parties must abide by the procedure prescribed in the Code and if they fail to do so, they have to suffer the consequences. In support of this contention, the learned counsel for the Petitioner relied on the judgment of the Apex Court in the matter of ***Rasiklal Manikchand Dhariwal & Anr. Vs. M.S.S.Food Products (2012) 2 SCC 196.***

8 The learned counsel for the Petitioner submits that in view of the above mentioned facts, this Hon'ble Court be pleased to set aside the order dated 07.01.2016 passed by the Bombay City Civil Court in Notice of Motion No.3436/2015 in Suit No.9784/1982. He submits that the Trial Court may be directed to decide the said suit as early as possible.

9 On the other hand, the learned counsel for Defendants has vehemently opposed the Writ Petition. He submits that the Trial Court, at the time of passing the impugned order considered the fact that the Defendant's Director who used to look after the

entire litigation is of 91 years old and therefore, it remained on her part to remain present before the court for cross-examination. He submits that in the interest of justice, this Hon'ble Court be pleased to dismiss the Writ Petition otherwise irreparable loss will be caused to the Defendants.

10 Heard both sides at length. It is to be noted that in the present proceedings, this court has framed issues in the year 2003 and held that all those issues were required to be proved by Defendants only. Thereafter the Defendants filed their affidavit in lieu of evidence of D.W.1. But none entered into the witness box for allowing the Plaintiff to cross-examine. For that purpose the matter was adjourned from time to time. Thereafter the Trial Court passed order dated 23.03.2007 and 09.07.2015. Thereafter, as per the Court's order, the Defendants filed their affidavit of evidence. After more than 7 years, the Defendants filed Notice of Motion for setting aside the orders dated 23.03.2007 and 09.07.2015. The Trial Court allowed said Notice of Motion on the ground that the Defendants' witness was a senior citizen of 91 years old. It is to be noted that the Defendant is a Private Limited Company. They can depute any Director or Officer in-charge for leading evidence. Apart from that, bare reading of the affidavit in support of the Notice of Motion No.3436/2015 shows that the Defendants have failed and neglected to show any cause for delay of more than 7 years in preferring the Notice of Motion. These facts are recorded by the Trial Court in para 5 of the impugned order which reads thus:

“There is unprecedented delay of more than eight years in taking out the present Notice of Motion. As such, the present Notice of Motion is in fact liable to be dismissed.”

11 It is to be noted that the Apex Court in the matter of **Rasiklal Manikchand Dhariwal (supra)** has specifically held that the parties must abide by the procedure prescribed in the code and if they fail to do so, they have to suffer consequences. Paragraph 93 of the said judgment reads thus:

“93. The doctrine of proportionality has been expanded in recent times and applied to the areas other than administrative law. However, in our view, its applicability to the adjudicatory process for determination of ‘civil disputes’ governed by the procedure prescribed in the Code is not at all necessary. The Code is comprehensive and exhaustive in respect of the matters provided therein. The parties must abide by the procedure prescribed in the Code and if they fail to do so, they have to suffer the consequences. As a matter of fact, the procedure provided in the Code for trial of the suits is extremely rational, reasonable and elaborate. Fair procedure is its hallmark. The courts of civil judicature also have to adhere to the procedure prescribed in the Code and where the Code is silent about something, the court acts according to justice, equity and good conscience. The discretion conferred upon the court by the Code has to be exercised in conformity with settled judicial principles and not in a whimsical or arbitrary or capricious manner. If the trial court commits illegality or irregularity in exercise of its judicial discretion that occasions in failure of justice or results in injustice, such order is always amenable to correction by a higher court in appeal or revision or by a High Court in its supervisory jurisdiction.”

12 As in the case in hand the Defendants have failed and neglected to enter into witness box to prove their case for long time, I am of the opinion that the Trial Court has erred in coming

to the conclusion that the Defendants have proved their case for setting aside orders dated 23.03.2007 and 09.07.2015 allowing them to lead evidence in the present matter.

13 Hence, the following order is passed.

- a. The Writ Petition is allowed.
- b. Order dated 07.01.2016 passed by the Adhoc Judge, City Civil Court, Mumbai in Notice of Motion No.3436/2015 is set aside.
- c. The Trial Court is directed to decide Suit No.9784/1982 (High Court Suit No.1991/1982) on its own merits, as early as possible but in any case by the end of June 2019.
- d. No order as to costs.

(K. K. TATED, J.)