

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.6703 OF 2018

Mahadeo Dattaram Warang (decd) through
Parwati Mahadeo Warang and others ... Petitioners
Vs.
Hanumant Jagannath Parab ... Respondent

Mr. Pritesh Vyas for Petitioners.
Mr. Sameer Bhalekar for Respondent.

CORAM : R. G. KETKAR, J.
DATE : JUNE 25, 2018

P.C. :

Heard Mr. Vyas, learned Counsel for the petitioners and
Mr. Bhalekar, learned Counsel for the respondent at length.

2. By this Petition under Article 227 of the Constitution of India, petitioners, hereinafter referred to as 'defendants', have challenged the judgment and order dated 17.02.2017 passed by the learned Judge, Court Room No.8 of the Small Causes Court at Mumbai below exhibit-32 in L.E. Suit No.48 of 2012 as also the judgment and order dated 02.04.2018 passed by the Appellate Bench of the Small Causes Court in Revision Application No.134 of 2017. By these orders, the Courts below dismissed the application exhibit-32 made by the defendant No.4 for recalling the plaintiff's witness P.W.1 - Sandesh Hanumant Parab for cross-examination.

3. In support of this Petition, Mr. Vyas submitted that the Courts below were not justified in rejecting the application exhibit-32 made by the defendant No.4. He heavily relied upon the decision of this Court in ***Shewalkar Developers Pvt. Ltd. Vs. Sidartha Sinha and others, (2018)***

1 Mh.L.J. 346. In this decision, the learned Single Judge of this Court considered the provisions of Order XVIII, Rule 17 of the Code of Civil Procedure, 1908 (for short 'C.P.C.') as also various judgments of the Apex Court and this Court. He submitted that the application exhibit-32 is bonafide and the additional evidence will assist the Court to clarify the evidence on the issues and will assist in rendering justice. Defendant No.4 has given valid and sufficient reasons for not examining P.W.1 on the lines of defence raised in the written statement. Mr. Vyas has taken me through the Suit filed by the respondent-plaintiff as also written statement filed by the defendants. He submitted that the impugned order may be set aside and application exhibit-32 may be allowed.

4. On the other hand, Mr. Bhalekar supported the impugned orders. He has taken me through the application exhibit-32 and the order passed by the trial Court. In paragraph 8, the learned trial Judge referred to the case made out in the application exhibit-32 to the effect that earlier Advocate did not take cross-examination at length. Therefore, it is necessary to recall plaintiff's witness for further cross-examination. The learned trial Judge, therefore, came to the conclusion that no ground was made out for recalling P.W.1. He relied upon the decision of the Apex Court in the case of **K. K. Velusamy Vs. N. Palanisamy, 2011 (11) SCC 6275** and in particular paragraph 16 thereof. He submitted that as the application made by the defendant No.4 was found to be not bonafide, the Courts below rightly rejected the application.

5. I have considered the rival submissions advanced by the learned Counsel appearing for the parties. I have also perused the material on record. In paragraph 1 of the application exhibit-32, defendant No.4 came up with this case:

“... I say that during the cross-examination we are unaware about the same. Not only that it is didn't inform us that he completed the cross-examination of the plaintiff. I say that when we asked the reason about the same is not given a satisfactory answer to that effect. So we shown the papers to our present Advocate and he informed us that it is very much required for the progress of our matter to call the plaintiff in witness box for further cross-examination. I say that it is very much required to cross-examine the plaintiff further in the interest of justice. I say that if the further cross-examination is not allowed then it will be caused great hardship will be caused to us which cannot be compensate in any terms and if the further cross-examination is allowed then no harm or prejudice would be caused to the plaintiff.”

6. A perusal of the above assertions made in the application clearly shows that the defendant No.4 simply asserted that the earlier Advocate did not cross-examine the plaintiff's witness and the present Advocate engaged by the defendants informed them that the cross-examination of P.W.1 is very much required for the progress of matter.

7. In paragraph 16 of **K. K. Velusamy** (*supra*), the Apex Court has observed that power under Section 151 or Order 18 Rule 17 of the Code is not intended to be used routinely, merely for the asking. If so used, it will defeat the very purpose of various amendments to the Code to expedite trials. But where the application is found to be bonafide and where the additional evidence, oral or documentary, will assist the court to clarify the evidence on the issues and will assist in rendering justice, and the court is satisfied that non-production earlier was for valid and sufficient reasons, the court may exercise its discretion to recall the witnesses or permit the fresh evidence. Applying the tests laid down by the Apex Court to the facts of the present case, I do not find that the Courts below committed any error in rejecting the application. Hence, Petition fails and the same is dismissed.

8. It is, however, expressly made clear that where a decree is appealed from by the petitioners, any error, defect or irregularity in the impugned order, affecting the decision of the case, may be set forth as a ground of objection in the memorandum of appeal as contemplated by Section 105(1) of C.P.C.

(R. G. KETKAR, J.)

Minal Parab