

*IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION*

WRIT PETITION NO. 14237 OF 2017

Shri Mahindra Pinjuma Jasuja & Anr.	.. Petitioners
Vs.	
Shri Laxmandas Waliram Hinduja	.. Respondent
...	

Mr. Chetan G. Patil for the Petitioners.
Mr. Sameer M. Tendulkar for the Respondent.

CORAM : V.L.ACHLIYA, J.

RESERVED FOR ORDER ON	: 19/01/2018
ORDER PRONOUNCED ON	: 21/02/2018

PC. :

1. Petitioners herein (original defendants) have preferred this Writ Petition under Article 227 of Constitution of India challenging the order dated 18.09.2017 passed by 2nd Joint Civil Judge (Sr.Dn.), Kolhapur. By the impugned order, the learned Judge of the Trial Court rejected the application (Exh.108) filed by the petitioners seeking recall of order dated 24.11.2016 passed below Exh.101. By order dated 24.11.2016, the Trial Court pleased to allow the respondent/plaintiff to cite and summon three witnesses. The impugned order dated 18.09.2017 read as under:

“Perused application and say. It appears that plaintiff has examined himself. It further appears that below Exh.101 plaintiff has given list of three witnesses praying to issue summons for the same. It appears that today plaintiff has filed pursis below Exh.109 that apart from the witnesses listed in Exh.101 he is not going to examine any other witnesses. It is a procedure to give list of

witnesses which plaintiff is going to examine. It appears that the list of witnesses of whom to issue summons is given in the application Exh.101. It will not be proper to deprive plaintiff to examine witness because he has failed to give list of witnesses initially as it will take away the opportunity from plaintiff to fight case on merit. Hence, it is not in the interest of justice to allow present application. Hence, following order.

*ORDER
Application is rejected.”*

2. Learned counsel for the petitioners / original defendants assailed the impugned order with contention that order dated 24.11.2016 sought to be recalled being *ex fecie illegal and de hors* the provisions of law, the Trial Court ought to have allowed the application. By referring the provisions of Order XVI Rule 1 of CPC, the learned submits that it was incumbent on the part of plaintiff to have submitted the list of witness to whom plaintiff proposes to call as witness to give evidence within 15 days of settlement of issues. The Respondent-plaintiff has neither submitted the list of witness nor sought permission as contemplated under Order XVI Rule 3 of Code of Civil Procedure. On 24.11.2016 (Exh.101) plaintiff filed application seeking issuance of witness summons to witnesses as named in the application. The Trial Court allowed the application without satisfying itself as to whether any sufficient cause being shown to entertain such requests by allowing the application and directed to issue summons. It is contended that the impugned order passed by the Trial Court is contrary to the provisions of law the impugned order liable to be set aside.

3. On the other hand, the learned counsel representing the respondent supported the order dated 18.09.2017 as well as order dated 24.11.2016 passed by the Trial Court. It is pointed out that the order

dated 24.11.2016 passed by the Trial Court is not challenged by the petitioner. By the present petition, the petitioners have challenged the order dated 18.09.2017 i.e rejection of application seeking recall of order dated 24.11.2016. It is contended that the provisions of Order XVI of Code of Civil Procedure are directory and not mandatory. By allowing the application to cite and examine the witnesses neither any prejudice nor any miscarriage of justice has resulted to petitioners.

4. The provision of Order XVI Rule 1 of Code of Civil Procedure appears to be introduced in Code of Civil Procedure with intention that the parties should take the steps summoning the witness much earlier to date fixed for hearing of the case and further they should know in advance the nature of the evidence intended to be adduced by the other party. In the event, the permission is given at the last moment to examine the witnesses, there is every likelihood that the other side may suffer prejudice. The provision being procedural in nature, the same is directory in nature and in just cases the such requirement can be condoned. In this view, the reference can be made to the decision of the Orissa High Court in Achutanand Sahoo -V- Dhruba Ch. Sahoo and others reported in AIR 1987 Orissa 179 wherein the Hon'ble Orissa High Court has observed in para 3 as under:

“Mr. S.Kr. Mohanty, the learned counsel for the plaintiff-opposite party No.1, submitted that the Parliament by incorporating sub-rule (3) to Rule 1 of Order 16, C.P.C, clearly intended that the parties should take steps for summoning the witnesses much earlier to the date of hearing so that both the parties are able to know the nature of evidence intended to be adduced by the other party. In case permission is given at the last moment to examine witnesses, there is every chance of the parties playing hide and seek

resulting in the real truth being suppressed. There is strong force in the submission of Mr. Mohanty. When list of witnesses is filed by one party the other party should get a chance to know the nature of evidence which would be adduced. There may not be a fair trial in absence of such opportunity. That, however, does not mean that a party submitting the list of witnesses at a belated stage should be prohibited from adducing any evidence. Trial court ought to have considered that procedure laid down in the Code of Civil Procedure is a handmaid of justice. The same is not to be utilised to obstruct the free flow of justice and proper adjudication. Formality, no doubt, is a hallmark of authenticity. That does not mean that a party should suffer merely because he has not adhered to the formalities laid down in the Civil Procedure Code. Procedure is never mandatory in nature. In just cases it can be condoned.”

5. In the present petition, the petitioners have not challenged the order dated 24.11.2016 passed by the Trial Court permitting the Respondent-plaintiff to cite and summon three witnesses as named in application Exh.101. In absence of challenge to order dated 24.11.2016, the petitioner cannot assail the correctness of said order. There is no provision to recall such order. Apart from the fact that the order dated 24.11.2016 is not challenged by the petitioners, even on merit the petitioners have not made out any case of miscarriage of justice being caused to petitioners on account of allowing the respondent to cite and summon the witnesses. It is settled position in law that the powers under Article 227 of Constitution of India being supervisory in nature deserves to be exercise sparingly to keep the subordinate courts within bounds of their authority and not for correcting the errors and so also same cannot act as a substitute for ordinary exercise of power. In this context, the reference can be made to the decision of Apex Court in

Sadhana Lodh Vs. National Insurance Co. Ltd. And another reported in AIR 2003 Supreme Court 1561, wherein in para 7 the Apex Court has observed as under:-

“The supervisory jurisdiction conferred on the High Courts under Article 227 of the Constitution is confined only to see whether an inferior Court or Tribunal has proceeded within its parameters and not to correct an error apparent on the face of the record, much less of an error of law. In exercising the supervisory power under Article 227 of the Constitution, the High Court does not act as an Appellate Court or the Tribunal. It is also not permissible to a High Court on a petition filed under Article 227 of the Constitution to review or re-weight the evidence upon which the inferior Court or Tribunal purports to have passed the order or to correct errors of law in the decision.”

6. In the instant case, though there is some procedural irregularity committed on the part of Trial Court, still no prejudice has been caused to petitioners-defendants. It appears from the Application Exh.101 that after recording of evidence of respondent, the respondent has moved application seeking issuance of witnesses summons to three witnesses which include Photographers, Gram Sevak of the village and official from Department of Land Record. The suit appears to be filed seeking relief to remove encroachment made by petitioners. Thus, the summoning of such witnesses would not cause any prejudice to the defendants/petitioners. In absence of the case of manifest injustice being resulted to the petitioners on account procedural irregularity, I am not

inclined to invoke the supervisory jurisdiction under Article 227 of the Constitution of India to interfere with the impugned order. Accordingly, the petition is dismissed, with no order as to cost.

(V. L. ACHLIYA, J.)