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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
APPEAL (L)NO.276 OF 2018

Ms Neeru Batra ...Appellant
vs.
1 Jaswinder Paul Batra, USA
2 Ms Brinder Batra, U.S.A.
3 Ms Sunaina Batra, U.S.A.
4 Mr.Baljit Singh, U.S.A.
5 Kotak Mahindra Bank Ltd.
(erstwhile Vysya Bank)
6 Praveen Shetty, Mumbai ...Respondents

Mr.Vibhav Krishna and Mr.Tahir Pande i/b Shorath Pai
for the appellant
Mr.Kamal Khata a/w Aditya Manjrekar i/b Akshay Vani
for the respondent Nos.1 to 3.
Ms Neha M. Shah i/b Ms Bodhanwalla & Co. for the
respondent No.5.

CORAM : A.S.OKA, &
M.S.SONAK,JJ.
DATE : SEPTEMBER 26, 2018

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ORAL JUDGMENT: (PER A.S.OKA,J.)

1 Heard the learned counsel appearing for the appellant and the learned counsel for the respondent Nos.1 to 3 as well as the learned counsel for the respondent No.5. Other respondents are not necessary parties for deciding the controversy which arises in this Appeal. By the order dated 10th September 2018, the parties were put to notice that the Appeal will be taken up for final disposal at admission stage.

2 By this Appeal, the appellant who is the first

defendant has impugned the order dated 19th April 2018 passed by the learned Single Judge. The respondent Nos.1 to 3 are the original plaintiffs. For the sake of convenience, we are referring the parties as plaintiffs and defendants. The impugned order has been passed on Judge's Order taken by the appellant-first defendant. The prayer in the Judge's Order was to issue a direction to the learned Prothonotary and Senior Master to issue witness summons (a letter of request) to one Ms Manjit Ananandani who is a resident of USA. There is an affidavit in support filed by the first defendant in support of the Judge's Order setting out the reasons as to why it is necessary to issue a witness summons/a letter of request to the said witness. By the impugned order, the learned Single Judge dismissed the Judge's Order. The reasons recorded by the learned Single Judge for dismissing the Judge's Order are mainly in paragraphs 3 to 5 which read thus:

"3 The present Judge's order is by Defendant No.1A, and in my view it is not only thoroughly misconceived but a practice of Advocates that has been deprecated time and again, of one party calling as his own a witness of the opposite party.

4 The Judge's Order seeks the issue of a letter of request to Manjit and for directions for her cross-examination by

video conferencing. Even if I was inclined to pass an unguarded order for cross examination by video-conferencing, which I am not and never have been, for I believe that sufficient safeguards and protocols must be put in place to avoid future controversies and a possible disruption of the integrity of the trial, this concept that just because one party has not led evidence of a named witness, therefore it is open to the opposite party to call that very person is entirely incorrect and erroneous. It is a practice that has been deprecated by courts over and over again. If the Plaintiffs listed Manjit as a witness and then did not call her, it is always open to the Defendant No.1A or any of the Defendants to submit that the best evidence was not led, was kept from the Court and that an adverse inference must follow. This is, however, no justification for calling the witness of opposite party whose evidence was not taken. This way lies only complication. I have very little doubt that the moment such an order is passed an application will be made, also incorrectly and without basis in law, that Manjit must technically be declared hostile and, therefore, permission must be granted to the Defendant No.1A to cross-examine the very witness to whom the Defendant No.1A herself

sought to issue a letter of request. This is also an incorrect practice.

5 In my view, this entire practice is untenable and misconceived."

(underline supplied)

3 In paragraph 2, the learned Single Judge noted that during course of the cross examination of the first plaintiff, he stated that he would be leading evidence of the said witness who happens to be his sister. The learned Judge also noted that the name of the same witness appears in the list of witnesses furnished by the plaintiffs but the plaintiffs did not call her as a witness.

4 The submission of the learned counsel for the first defendant in support of the Appeal is based on two decisions of the learned Single Judges of this Court in the case of Ravalnath Builders Vs. Sebastiano Escolastica Beatriz Nunes Mendosa¹ and Chandrabhan R. Singh Vs. Prabhakar R. Desai².

5 His submission is that after the 1976 amendment to the Code of Civil Procedure, 1908 (for short "the said Code"), there is no bar in law even to a party to the suit calling his adversary/opposite party as a witness. He would, therefore, submit that after 1976 amendment to the said Code, the law

1 2012 (2) Bom.Cases Reporter 403

2 2009 (2) Bom.C.R.915

laid down by the learned Single Judge of this Court in the case of Pirgonda Hongonda vs. Vishwanath Ganesh and others³ does not hold good. His submission is that in any event, the law laid down by the learned Single Judge in the case of Pirgonda will not apply to a situation where a party to the suit applies for issuing a witness summons to a witness whose name is included in the witness list of the opposite party but who has not been examined by the opposite party. He submitted that by the order dated 31st July 2017, the learned Single Judge in the suit permitted the examination of a witness by the first defendant through video conferencing.

6 The learned counsel for the plaintiffs first submitted that this Letters Patent Appeal is not maintainable. He relied upon a decision of a Division Bench of this Court in the case of Sarvadaman Mansukhlal Doshi and others vs. Deepak Mansukhlal Doshi and others⁴. He submitted that the impugned order which refuses to issue a witness summons to a witness is not a Judgment within a meaning of clause 15 of the Letters Patent. The learned counsel further submitted that the provisions of Order XVI of the said Code regarding issuing witness summons are not applicable to a witness residing outside India as held by a learned Single Judge of this Court in the case of I.C. Corporation, A Partnership Firm vs. Daewoo

3 AIR 1956 Bom 251

4 2007 (5) Bom.C.R.569

Corporation and others⁵. As far as the order dated 3rd July 2017 issued by the learned Single Judge is concerned, the learned counsel for the plaintiffs submitted as the said order is not an order within the meaning of Letters Patent, the plaintiffs could not challenge the same. He submitted that even assuming that a witness summons or a letter of request can be issued to the witness, the first defendant is not entitled to the directions as sought in the Judge's Order as a matter of right. He has to make out a case for issuing a letter of request or a witness summons to the witness and the Court always retains a discretion to reject the prayer for issue of a witness summons or a letter of request. He submitted that the first defendant did not take out proper proceedings making out a case for issuing a letter of request or a witness summons to the said witness. His submission is that even if it is found that the view taken by the learned Single Judge is not correct, ultimately the issue whether a case is made out for granting a request made by the first defendant will have to be left to the discretion of the learned Single Judge. He also pointed out that the learned Single Judge has observed that the trial has been completed in the sense that recording of oral evidence has been completed.

7 We have given careful consideration to the

5 1989 Mh.L.J 1136

submissions. We have already quoted what is observed by the learned Single Judge in paragraphs 3 to 5 of the impugned order. We have perused the decisions referred by the learned Single Judge in paragraph 4 of the Judgment. We find that none of the said decisions deal with the controversy which arises in this Appeal. The controversy is when a party to the suit includes the name of a witness in his witness list and does not examine him as a witness, whether the rival party can summon the said witness as his or her own witness. Perusal of the said decisions show that the said controversy did not arise for consideration in the said decision. In cases of Pirgonda Vs. Vishwanath (supra) and Kishori Lal vs. Chunni Lal⁶, the Court was considering the issue whether Court has power to issue a witness summons to opposite party to appear as a witness. In the case of Kishori Lal (supra), the Privy Council deprecated the practice of summoning a party to the suit as a witness of the rival party. The learned Single Judge followed the said view in the case of Pirgonda Hongonda (supra). In the case of Suresh Vs. Uttam⁷, the learned Single Judge of this Court extensively referred to the decision in the case of Kishorilal (supra). The learned Single Judge was dealing with the case where the Trial Court directed a summons to be issued to the defendant as a witness of the plaintiffs. The learned Single Judge followed the aforesaid decision of the Privy Council by

6 31 All 116 (PC)

7 (2012) 5 Bom CR 495

proceeding to set aside the order and observed that the Court can always draw an adverse inference. The learned Single Judge in paragraphs 4 and 5 has referred to the practice which has been deprecated by the Privy Council. The said practice is of a party to the suit applying for issue of a witness summons to a rival party. In the case of Mahunt Shatrugan Das vs. Bawa Sham Das⁸, the Privy Council has followed its earlier decision in the case of Kishorilal (supra). None of the decisions relied upon deal with the controversy which arises in this appeal.

8 As far as the view taken by the Privy Council in the case of Kishori Lal (supra) and Mahunt Shatrugan Das (supra) and the learned Single Judges of this Court in the case of Pirgonda Hongonda (supra) and Suresh (supra) is concerned, the same has been the same explained by the learned Single Judge of this Court in the case of Ravalnath Builders (supra) by holding that after considering the provisions of the amended Code, there is no bar for a party to call his opponent as a witness in the suit. A similar view has been taken by a learned Single Judge of this Court in the case of Ramdas Dhondibhau Pokharkar vs. State Bank of India and another⁹. In any case, we are not concerned with the said controversy. Suffice it to say that the view taken in the aforesaid two decisions of the Privy Council and the learned Single Judges of this Court

8 AIR 1938 PC 59

9 2003 (1) All M R 76

will not apply to the factual controversy which arises in this Appeal. In this case, we are not dealing with the issue of the summoning a party to the proceedings.

9 At this stage, we may make useful reference to Rule 1 of Order XVI which reads thus:

"1. List of witnesses and summons to witnesses -

(1) On or before such date as the Court may appoint, and not later than fifteen days after the date on which the issues are settled, the parties shall present in Court a list of witnesses whom they propose to call either to give evidence or produce documents and obtain summonses to such persons for their attendance in Court.

(2) A party desirous of obtaining any summons for the attendance of any person shall file in Court an application stating therein the purpose for which the witness is proposed to be summoned.

(3) The Court may, for reasons to be recorded, permit a party to call, whether by summoning through Court or otherwise, any witness, other than those whose names appear in the list referred to in sub-rule (1), if such party shows sufficient cause for the omission to mention the name of such witness in the said list.

(4) Subject to the provisions of sub-rule (2), summonses referred to in this rule may be obtained by the parties on an application to the Court or to such officer as may be appointed by the Court in this behalf within five days of presenting the list of witnesses under sub-rule (1)."

10 Sub Rule (3) of Rule (1) of Order XVI confers a discretion on the Court to permit a party to call whether by summoning through Court or otherwise, any witnesses other than those whose names appear in the list of witnesses referred to in sub-rule (1). Sub Rule (3) requires that the party has to show sufficient cause for omission to mention the name of such witnesses in the list of witnesses furnished as per Sub Rule (1) of Rule 1. Moreover, the Court is required to record reasons. There is one more aspect. Sub Rule (3) of Rule 1 uses the words "summoning through Court or otherwise.". It not only permits to call a witness by issuing a witness summons through Court, but it permits even other modes such as issue of a letter of request without recording reasons.

11 In the context of the submissions made by the learned counsel for the plaintiffs, what is relevant is Rule 19 of Order XVI which reads thus:

"19. No witness to be ordered to attend in person unless resident within certain limits – No one shall be ordered to attend in person to give evidence unless he resides –

(a) within the local limits of the Court's ordinary original jurisdiction, or

(b) without such limits but at a place less than [one hundred] or (where there is railway or steamer communication or other established public conveyance for five-sixths of the distance between the place where he resides and the place where the Court is situate) less than [five hundred kilometers] distance from the Court house:

[Provided that where transport by air is available between the two places mentioned in this rule and the witness is paid the fare by air, he may be ordered to attend in person]

12 Considering Rule 19, if a witness sought to be examined resides outside India, it is possible to call the said witness by paying him air fare. Therefore, we do not agree with the proposition that Order XVI *per se* does not apply when a witness is residing abroad or that Court is powerless to procure presence of a witness residing abroad. Even assuming that a witness summons cannot be issued to a witness residing

abroad, Sub Rule (3) of Rule (1) of Order XVI does not prohibit a party from calling a witness residing abroad, by issuing a letter of request.

13 Moreover, there is no specific prohibition in the said Code for recording evidence of witnesses through video conferencing. The question, however, is of providing adequate safeguards.

14 As far as the discretion of the Court in the matter of permitting examination of a witness not included in the list of witnesses is concerned, even after 2002 amendment to the said Code, the discretion is retained as observed by the Apex Court in paragraph 32 of its decision in the case of Salem Advocate Bar Association T.N. vs. Union of India¹⁰. Paragraph 32 of the said decision reads thus:

"32 Order 18 Rule 2(4) which was inserted by Act 104 of 1976 has been omitted by Act 46 of 1999. Under the said rule, the court could direct or permit any party, to examine any party or any witness at any stage. The effect of deletion is the restoration of the status quo ante. This means that law that was prevalent prior to

¹⁰ 2005 (6) SCC 344

the 1976 amendment, would govern. The principles as noticed hereinbefore in regard to deletion of Order 18 Rule 17(a) would apply to the deletion of this provision as well. Even prior to the insertion of Order 18 Rule 2(4), such a permission could be granted by the Court in its discretion. The provision was inserted in 1976 by way of caution. The omission of Order 18 Rule 2(4) by the 1999 amendment does not take away the court's inherent power to call for any witness at any stage either suo motu or on the prayer of a party invoking the inherent powers of the court."

(underline added)

15 Hence, the Apex Court has categorically held that notwithstanding amendments, the Court has inherent power to call any witness at any stage either suo motu or on the prayer of a party.

16 At this stage, we may also make a useful reference to the decision of the learned Single Judge in the case of Ramdas Dhondibhau Pokharkar vs. State Bank of India and another, wherein the decision of the learned Single Judge of this Court in the case of Pirgonda Hongonda (supra) was pressed into service. In paragraph 8 of the said decision, the learned Single Judge has observed thus:

"8 The most important provision of law for the decision in the matter is Rule 21 of Order XVI of the C.P.C. which provides that "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." In other words, the said rule clearly indicates that a party to a suit can seek assistance of the Court to examine the opposite party in the same suit as his witness and require such opposite party to produce a document or documents. Apparently, the said rule wipes out the difference between a party and witness in the matter of giving evidence in a suit. For the purpose of giving evidence, the parties to the suit as well as the witnesses in the suit stand on the same footings. Accordingly, the parties to the suit are exposed to all the consequences and penalties those may be faced by or imposed upon the witnesses consequent to issuance of order to give evidence or to produce document and for disobeying the same, apart from additional risk of judgment

being passed against them in exercise of power under Rule 20 of Order XVI of the C.P.C."

17 In paragraph 9, the learned Single Judge reiterated that the law does not prohibit examination of the opposite party as a witness in the suit. In fact, the observation in paragraph 8 is that Rule 21 of Order XVI wipes out the difference between the party and its witness.

18 In any event, we are concerned here with a witness who is not a party. Therefore, even assuming that the decisions of the Privy Council and the decisions of this Court in the case of Pirgonda (supra) and Suresh (supra) continue to hold the field, the said decisions do not deal with witnesses. Therefore, with greatest respect to the learned Single Judge, the proposition of law laid down by him in paragraph 4 of the impugned order is not well supported.

19 The learned counsel for the plaintiffs contended that the impugned order is not a Judgment within the meaning of clause 15 of the Letters Patent. The effect of the impugned order is that the first defendant will be prevented from examining the witness he wants. Moreover, the impugned order lays down as a

matter of law that in the factual controversy which arises in this case, the first defendant is not entitled to examine the witness whose name was included in the list of the witnesses submitted by the plaintiffs though the plaintiffs have not chosen to examine the said witness. According to us, the impugned order finally decides an issue which will materially and directly affects the decision in the suit. Therefore, as held in paragraph 16 of the decision of the Apex Court in the case of Shah Babulal Khimji vs Jayaben D. Kania And Another¹¹, in the present case, the impugned order will have to be held as a Judgment within the meaning clause 15 of the Letters Patent.

20 The learned counsel for the plaintiffs submitted that even if Sub Rule (3) of Rule 1 of Order XVI is applied, there is no proper application made by the first defendant.

21 We find that there is a consistent practice followed for years on the Original Side of this Court wherein such applications for issue of witness summons are made in the form of a Judge's Order. A Judge's Order is required to be supported by an affidavit in support of the party taking out the same. In the affidavit in support, the party applying always can make out a case for exercise of discretion by the Court

11 (1981) 4 SCC 4

in his/her favour. In the present case, there is a detailed affidavit filed by the first defendant in support of the Judge's Order. However, the learned counsel for the plaintiffs is right to the extent that there is no finding in the impugned order whether the first defendant has made out a case for the Court exercising discretion in terms of the prayer made in the Judge's Order. In fact, there was no occasion for the learned Single Judge to go into the issue of exercise of discretion in view of proposition of law laid down by him.

22 Though we do not agree with the proposition of law laid down by the learned Single Judge, the issue whether a case is made out by the first defendant for grant of relief as prayed for in the Judge's Order is a question which will have to be left open to be decided by the learned Single Judge. In the circumstances, the Appeal must succeed in part.

23 Hence, we pass the following order:

(I) For the reasons which are set out above, the impugned order dated 19th April 2018 is modified;

(II) The Judge's Order No.66 of 2017 is restored to the file of the learned Single Judge;

(III) It will be open for the learned Single Judge to pass appropriate order on the Judge's

Order in accordance with law in the light of
what is held in this Judgment;

(IV)Appeal is partly allowed in above terms
with no order as to cost.

(M.S.SONAK,J.)

(A.S.OKA,J.)