

Jos A. Kulangara ... Plaintiff
versus
M/s. Aria Infra and Ors. ... Defendants

Mr. Ashish Kamat I/by Mr. Omprakash Pandey, for Plaintiff.
Mr. Kirti Hakani, for Defendant No.1.
Ms. Niyati Hakani, for Defendant Nos.2 to 7.

CORAM: S.J. KATHAWALLA, J.

DATE: 27th JUNE, 2018

P.C.:

1. By this Notice of Motion, the Plaintiff seeks leave of this Court to take his additional evidence viz., Affidavit of Examination in Chief along with additional documents, on record (hereinafter 'the additional affidavit' and 'the additional documents') respectively. This is in support of the evidence which is presently led on the issue of limitation, which has already been framed by this Court vide its order dated 11th January 2017 and in exercise of powers under Section 9A of the Code of Civil Procedure, 1908 (**'the CPC'**).

2. In support of the Plaintiff's application, Mr. Kamat submits that the present suit has been filed seeking *inter alia*, cancellation of a registered Deed of Conveyance dated 6th July 2017 executed between Defendant Nos. 1 and 2 and Defendant No. 7; for specific

performance of the Agreement dated 29th March 1969 and Memorandum of Understanding dated 15th December 2015 executed in favour of the Plaintiff; and for permanent injunction and damages in the sum of Rs. 15,00,00,000/-. Mr. Kamat submits that pursuant to the order dated 11th January 2017, *inter alia*, framing the issue of limitation, the Plaintiff had filed its Affidavit in lieu of Examination in Chief along with the affidavit of documents and the matter was referred for recording of evidence (cross examination) to the Commissioner. It is an undisputed position that on this evidence, cross examination has been conducted and completed.

3. Mr. Kamat however, submits that certain crucial documents that are relevant and admissible for adjudication of issue of limitation have been inadvertently left out, and it is these documents and oral evidence in respect thereof that is sought to be introduced as and by way of the additional affidavit and the additional documents. Mr. Kamat has drawn my attention to paragraphs 5 to 8 of the Affidavit in support of the Notice of Motion, and on the basis thereof, he submits that the documents sought to be introduced were already made available by the Plaintiff to his erstwhile Advocate; these documents are relevant and germane for deciding the issue of limitation; and the Plaintiff being a senior citizen and a lay person did not realize that these documents had not been introduced in evidence. Further, he realized so, upon engaging his new Advocate.

4. Mr. Kamat further submits that as regards the Memorandum of Understanding dated 15th December 2015, the same was even annexed to the Plaint it is therefore, plain that the non-production thereof in evidence is an inadvertent error. Further, as regards, the other documents these are also relevant and germane for deciding the issue of limitation. In support

of his submissions, Mr. Kamat relies on the Supreme Court decision in the matter of *K. K. Velusamy v. N. Palanisamy* reported in (2011) 11 SCC 275 [paras 12 to 15 and 19] and the decision of this Court in the matter of *Mukund Iron Staff Association Co-op. Housing Society Ltd., Bombay v. Vasant Ramchandra Patil (since deceased) through Legal heirs Mrs. Sandhya Prashant Koli and Others* reported in 2015 (4) Mh. L.J. [paras 13 and 14]. Relying on these decisions, Mr. Kamat submits that relevant and germane evidence ought not to be shut out, and the consequence of shutting it out would jeopardize the Plaintiff and may non-suit him. As against this, no prejudice would be occasioned to the Defendants who have not yet commenced evidence and would have a full opportunity to cross examine the Plaintiff on the additional affidavit and the additional documents sought to be introduced in evidence. It would therefore, be in the interest of justice to allow the Notice of Motion.

5. In reply, Mr. Hakani, counsel for Defendant No. 1 opposes the Notice of Motion. Consistent with his Affidavit in Reply, Mr. Hakani urges that the Notice of Motion is not maintainable and contrary to the provisions of CPC and the Indian Evidence Act, 1872. He submits that the Notice of Motion is a malafide attempt to cover up lacunae in evidence. In this context, he has invited my attention to paragraph 5 of the reply where Q. Nos. 145 and 146 put to the Plaintiff in cross examination have been reproduced. He also submits that in view of completion of cross examination of the Plaintiff, the Notice of Motion is not maintainable. Mr. Hakani also relies on the order dated 18th January 2017 to submit that the Memorandum of Understanding dated 15th December 2015, has already been held as prima facie an unacceptable document. In support of his submission, Mr. Hakani has also relied on the decisions of the Hon'ble Apex Court.

6. With assistance of counsel on both sides, I have perused the record. I have also heard the oral submissions made on behalf of the rival sides. I have also considered the pleadings as well as the case law relied upon by the parties.

7. From a perusal of the documents enlisted at paragraph 6 of the Affidavit in support of the Notice of Motion, it prima facie appears that these documents would be relevant and germane for adjudication of the issue of limitation. It is a settled principle of law that ordinarily courts will not shut out relevant and germane evidence. It is in this light, that the submissions made on behalf of the Plaintiff are to be viewed and considered. I find the reliance placed by Mr. Kamat on the decisions in the matters of K.K. Velusamy and Mukund Iron (*supra*) well founded. In K. K. Velusamy's case, the party was permitted to lead additional evidence even after commencement of arguments.

8. Coming to the case at hand, the Plaintiff's cross examination on the earlier affidavit is completed. The filing of the additional evidence, would of course be subject to a full right to the Defendants to cross examine the Plaintiff on the additional evidence (both oral and documentary). As such, I am of view, that no prejudice would be suffered by the Defendants if the additional evidence is permitted to be introduced and led. As against this, severe prejudice would be occasioned to the Plaintiff if the additional evidence is rejected. This is more so, since, this additional evidence would otherwise prima facie appear to be relevant and there is a foundation in respect thereof in the pleadings. I therefore, find merit in Mr. Kamat's contention that the additional evidence should be permitted to be led.

9. As regards Mr. Hakani's contention that the present Notice of Motion is an attempt to cover lacunae in evidence; I have given due consideration to paragraph 5 of the Reply. I do not

find the contents thereof as being good enough reason to decline the Notice of Motion. In response to Q. 145, the Plaintiff has clearly stated that for his erstwhile Advocate's inadvertence, he has taken away the papers and engaged the present Advocate. This is consistent with the Plaintiff's present case. As regards the answer to Q. 146, this is a response to the Defendants putting up case and the question is not in relation to evidence but to 'the case'. Furthermore, this answer per se would not be sufficient justification to disentitle the Plaintiff to lead evidence, and more so, when there is otherwise nothing on record to disbelieve his case that the additional evidence was available with erstwhile Advocate, and was inadvertently not cited. This is, in fact, believable in view of the fact that the Memorandum of Understanding dated 15th December 2015 was in fact annexed to the Plaint, and despite this was not introduced in the earlier evidence.

10. Mr. Hakani has placed reliance on the judgment in the matter of *Ram Rati v. Mange Ram and Ors.* reported in AIR 2016 SC 1343. In that case, the trial court had allowed an Application for examining afresh of a witness on the ground that “*it was for further elaboration on the left out points by the parties*”. This was found to be a basis which was wholly impermissible in law, and therefore, the order was set aside. This is completely distinguishable, for the matter at hand.

11. The next decision relied upon by Mr. Hakani is in the matter of *Bagai Construction v. Gupta Building Material Store*, reported in AIR 2013 SC 1849. By this decision, the Supreme Court has held that the Application was made at a belated stage, after conclusion of arguments and after reserving the matter for pronouncement of judgment [para 11]. Equally the Supreme Court found against the Plaintiff that there was no reason made out for non-

filing of these documents and the application to lead additional evidence, was to cover up the lacunae. This is clearly, not the case here, where the Application has been made after the cross examination on the earlier evidence and arguments have not commenced. Further, inadvertence of an advocate cannot be equated to an attempt to cover lacunae. The decision in the matter of Vadiraj Naggapa Vernekar (D) through Lrs. v. Sharad Chand Prabhakar Gogate reported in AIR 2009 SC 1604, is yet another authority which states that resort to powers to recall a witness ought not to be invoked to cover up lacunae in the evidence of a witness. As already held by me, this case does not appear to be an attempt to lead additional evidence to cover up the lacunae, but has been occasioned on account of inadvertence in not bringing on record the entirety of evidence.

12. The decision relied upon by Mr. Hakani, in the matter of *Om Health Centres Pvt. Ltd. v. Vijay Gangan* reported in 2015 SC Online Bom 7260, in fact, supports the Plaintiff. In that matter, this court has held that in matters of leading further evidence this court ought not to take a pedantic, strict or restricted view.

13. Mr. Hakani's has relied on the observations made by this Court in the order dated 18th January 2017 vis-à-vis the Memorandum of Understanding dated 15th December 2015. These observations are in relation to the ad-interim hearing on the Notice of Motion. These are of no avail in matters of admissibility of evidence.

14. In the above circumstances, I am of the considered view that a case has been made out for allowing the Notice of Motion. However, considering the belated stage at which the present application is moved, costs deserves to be imposed. The opposition

to this Motion has essentially come from Defendant No. 1. The Notice of Motion is therefore, allowed in terms of prayer clause (a) subject to payment of costs of Rs. 1,00,000/- to Defendant No. 1 within a period of two weeks from the date of uploading of this order.

15. The Notice of Motion is accordingly disposed of.

(S.J.KATHAWALLA,J.)

Swaroop
Sharad
Phadke

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by Swaroop
Sharad Phadke
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