

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 4271 OF 2019

Alimunbee Gulab Pathan

...Petitioner

Versus

Vinay Bhaguram Dhormare & Ors.

...Respondents

.....

Mr. A.N.Sabnis, Advocate holding for Mr. V.D.Gunale,
Advocate for the Petitioner.

Mr. Bapusaheb B.Dahiphale-Patil holding for Mr.
N.P.Patil-Jamalpurkar, Advocate for the Respondent No. 1.

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CORAM : RAVINDRA V. GHUGE, J.

DATE : 04-07-2019.

PER COURT :

01. The petitioner-original plaintiff in R.C.S. No. 389/2011 is aggrieved by the Order dated 5.2.2019 passed by the Trial Court rejecting application Exh. 123 filed by her seeking permission to examine a practicing doctor as a witness.

02. The contention of the plaintiff is that she has purchased the suit property from one Mr. Bhaguram Dhormare vide a registered sale deed. After the demise of Bhaguram, the defendants, who are the legal heirs of Bhaguram, are obstructing the plaintiff in his enjoyment

of the suit property. The plaintiff, therefore, preferred the said suit for seeking declaration of ownership and injunction against the legal heirs of Bhaguram.

03. The plaintiff relies upon the sale deed by virtue of which she has purchased the said land. It was mentioned in the sale deed that Bhaguram is selling the property for his domestic reasons and for the treatment of his wife. In this backdrop, she seeks to produce a medical registration document indicating that Bhagirathibai was admitted in Vivekanand Hospital.

04. I have perused the said document which does not even indicate the place where this hospital is situated. The address of the hospital or telephone numbers are also not mentioned. It is conveyed that Bhagirathibai was suffering from bronchitis. Therefore, she was admitted in Vivekanand Hospital from 1.2.2004 till 11.2.2004 and from 4.3.2004 till 6.3.2004. It was to prove the said illness that the plaintiff sought to examine Dr. GopiKishan Bharadiya, who is said to be associated with Vivekanand Hospital. Contention is that the reference to the fact that Bhagirathibai was taking treatment is found in the sale deed and therefore, the plaintiff would get the right to examine the doctor, who treated Bhagirathibai.

05. The learned Advocate for defendant No. 1 submits that there are several lacunas in the pleadings of the plaintiff. For the treatment of asthma, no person would sell immovable agricultural land. He submits that the plaintiff did not tender the list of witnesses and the reference of Dr. Bharadiya is found nowhere. He then submits that the plaintiff had filed an identical application Exh. 120 seeking issuance of witness summons to Dr. Bharadiya and the said application was rejected by a speaking Order on 14.1.2019. The plaintiff did not challenge the said Order. Immediately thereafter, he moved an application Exh. 123 on 21.1.2019 and the same has been rejected by the Trial Court vide the impugned Order.

06. I am of the view that when it comes to a trial in any suit, the Court has to be cautious about the attempts of litigants of manufacturing witnesses. Order 16 Rule 1 of the Code of Civil Procedure provides for tendering a list of witnesses. Though it is not being strictly followed by the present day lawyers, it does not lose its significance merely because people have started ignoring the said provision. The intent and object of submitting a list of witness is to let all the parties know as to who would be the witnesses and for the Trial

Court to know that the witnesses of each parties have been specified. This eliminates the chance of manufacturing or suddenly introducing new witnesses after the recording of oral evidence has commenced. It can not be ruled out that the litigants would attempt to manufacture witnesses after noting the manner in which the trial is progressing.

07. There is no dispute that the sale deed speaks about Bhagirathibai taking treatment and Bhaguram stating that he is selling a portion of his land for domestic reasons and for the treatment of his wife. However, there is no material before the Trial Court as to whether Bhagirathibai was treated by Dr. Bharadiya. She was purportedly admitted in the Vivekanand Rugnalaya, if the said document is to be believed, from 1.2.2004 to 11.2.2004 and 4.3.2004 to 6.3.2004 due to bronchitis. The issue before the Trial Court is as to whether the reference of Dr. Bharadiya or the hospital has its foundation in the pleadings.

08. I, therefore, called upon the petitioner to show to the Court his deposition before the Trial Court and it is found that the plaintiff has nowhere referred to the ailment of Bhagirathibai and has not even referred to Dr. Bharadiya purportedly treating Bhagirathibai.

09. Order 16 Rule 1 of the Code of Civil Procedure was introduced by way of an amendment w.e.f. 1.2.1977. A list of witnesses is therefore necessary. However, besides such a list, under Rule 3, the Court can, for reasons to be recorded, permit a party to examine a witness other than those mentioned in the list.

10. In my view, this provision can be pressed into service in appropriate cases and only if the Court finds material on record to summon such a witness. The chance of a witness being manufactured has to be eliminated. With nothing on record, the Trial Court has rejected the application Exh. 120 on 14.1.2019. Immediately Exh. 123 is filed on 21.1.2019, which is rejected for the same reason.

11. The Hon'ble Himachal Pradesh High Court had considered a somewhat similar issue in **Sain Dass Vs. Narain Singh [AIR 1977 HP 64]**. The issue was as regards permitting a witness to be examined though the list of witnesses was tendered under Order XVI Rule 1 of the CPC. The Hon'ble Himachal Pradesh High Court observed in paragraph Nos. 3 and 4 as under :-

"3. The learned Subordinate Judge relied on Order 16, Rule 1 of the Code of Civil Procedure, which

provides:

"At any time after the suit is instituted, the parties may obtain, on application to the Court or to such officer as it appoints in this behalf, summonses to persons whose attendance is required either to give evidence or to produce documents:

Provided that no party who has begun to call his witnesses shall be entitled to obtain process to enforce the attendance of any witness against whom process has not previously issued, or to produce any witness not named in a list, which must be filed in Court on or before the date on which the hearing of evidence on his behalf commences and before the actual commencement of the hearing of such evidence, without an order of the Court made in writing and stating the reasons therefor."

On a true understanding of the proviso to Order 16, Rule 1, it is apparent that while a party is not entitled as of right to produce a witness not mentioned in the list filed by him, it is open to the court to entertain an application by such party and consider whether for good reason the witness should not be allowed to be produced. If it decides to allow the party to produce the witness it must pass a written order stating the reasons for its decision, A power has been vested in the court, and that power must be exercised in accordance with sound judicial principle. The court must consider whether the testimony of the witness sought to be produced is material to, and would assist in, the decision of the suit and also whether allowing the witness to be produced without his name being

entered in the list of witnesses already filed would prejudice the rival party on that account (see: Mian Karim Bakhsh v. Firm Thakar Dass Ram Lal, AIR 1941 Lah 38),

4. In the present case, the petitioner has in his application stated that Chuni Lal was the owner of the land in suit and was a material witness for deposing to the creation of the tenancy and the receipt of rent. He has also stated that the omission to include the name of Chuni Lal in the list of witnesses was inadvertent. The learned Subordinate Judge, has dismissed the application on the ground merely that the omission of the name by inadvertence was no reason at all. He should have applied his mind also to the other considerations mentioned above, and then passed an appropriate order disposing of the application. In my opinion, he has committed a material irregularity in the exercise of his jurisdiction. The impugned order must, therefore, be set aside."

12. It was thus concluded that though a witness not included in the list of witnesses, he could be examined. The Court permitting such examination, would have to consider whether the testimony of the witness is material and whether his name was left out of the list due to inadvertence. As such, attending circumstances have to be considered in such situations.

13. The Hon'ble Rajasthan High Court in the matter of **Shimbharam Vs. Lakharam [AIR 1980 Rajasthan 184]** has dealt with a similar issue under Order VI Rules 1 and 1-A (as amended by Rajasthan High Court). The name of the witness was not mentioned in the list of witnesses. He brought a witness to the Court. It was ruled that no sufficient cause for not mentioning the name in the list of witnesses, has been shown and such examination was therefore refused. It would be apposite to reproduce the conclusions of the Hon'ble Rajasthan High Court set out in paragraph Nos.4 and 6, which read as under :-

"4. The contention of the learned counsel for the petitioner is that his witness Ghamandaram was present on April 12, 1979 who was brought by him and, therefore, the learned Munsif ought to have recorded his statement as provided under Order 16, Rule 1-A, Civil P. C. and he is not required to show sufficient cause for omission to mention the name of the witness in the list. It may be stated here that in the affidavit dated May 15, 1979, the petitioner has stated that his witness Bhavdeo was present on March 16, 1979 and March 30, 1979 and the witness Ghamandaram was present in Court on April 12, 1979 for giving statement. The question is, whether under Order 16, Rule 1-A, without showing sufficient cause for the omission to mention the name of any witness in the list, a party is entitled to produce and examine any witness brought by it. The language of Order 16, Rule 1-A (Rajasthan) is similar to that of

Order 16, Rule 1-A, C. P. C., as amended by Act No. CIV of 1976. So, in other words, the question is, whether under Order 16, Rule 1-A (Rajasthan), without obtaining permission from the Court under Order 16, Rule 1 (ii) (Rajasthan), the party is entitled to produce any witness brought by it to give evidence, A list of the witnesses is required to be filed by the parties within the time provided in Sub-rule (1) of Rule 1 of Order 16 which they propose to call and give evidence and the parties have been given right to obtain summonses to such persons for their attendance in the Court. Under the provisions of Order 16, Rule 1 (2), a party desirous of obtaining any summons for the attendance of any person, is required to make an application stating therein the purpose for which the witness is proposed to be summoned by it. The Court has been empowered, as provided in Sub-rule (3) of Rule 1 of Order 16, after recording reasons, to permit a party to produce any witness whose name has not been mentioned in the list referred to in Sub-rule (1) after showing sufficient cause for omission of the name of such witness in the list, In other words, if there is sufficient cause for not mentioning the name of the witness in the list, the Court can allow a party to call either by summoning through Court or otherwise, such witness after recording reasons for it. Under Order 16, Rule 1-A, any party to the suit can bring any witness to give evidence without applying for summons under Rule 1 but this is subject to the provisions of Sub-rule (3) of Rule 1 of Order 16. It, therefore, necessarily implies that.

the party, who wants to produce any witness to give evidence and whose name has not been mentioned in the list under Order 16, Rule 1, is required to show sufficient cause for omission to mention the name of such witness and the Court, after recording reasons, may permit it. From Order 16, Rule 1-A, it cannot be said that if the party has not filed the list under Order 16, Rule 1, C. P. C. and even does not show sufficient cause for the omission to mention the name of such witness in the said list would be entitled as of right to examine such a witness simply for the reason that it has brought the witness with it and has not applied for summons. This would, in my opinion, be putting the party who has not filed the list and who has also not shown sufficient cause for the omission of the name of the witness in the list, in an advantageous position over the one who has filed the list but who has omitted to mention the name of the witness in such a list about which there may be sufficient cause. The words, "subject to the provisions of Sub-rule (3) of Rule 1" occurring in Order 16, Rule 1-A, are of great significance. The right of a party without applying for summons under Rule 1-A of Order 16 to bring any witness to give any evidence has been made subject to the provisions contained in Sub-rule (3) of Rule 1 of Order 16. The only difference between Sub-rule (3) of Rule 1 of Order 16 and Sub-rule (ii) of Rule 1 (Rajasthan) of Order 16 is that in the former, sufficient cause has to be shown for the omission to mention the name of a witness and the Court has to record reasons for permitting a party to call such a

witness by summoning through Court or otherwise while in the latter, permission of the Court is necessary for a party to produce or obtain process to enforce the attendance of witnesses other than those contained in the list referred to in Order 16, Rule 1 (1) (Rajasthan) and the Court, while granting or refusing such permission, has to record reasons for so doing. So, according to Rule 1-A of Order 16, after showing sufficient cause for the omission for not mentioning the name of the witness in the list, the party can bring any witness to give evidence or to produce documents if it does not want to summon him through Court or otherwise. In other words, if the party brings any witness to give evidence or to produce documents, whose name has not been mentioned in the list, it will have to show sufficient cause for the omission of not mentioning the name in the list. Various rules in Order 16 relate to the matter of enforcing the attendance of persons either to give evidence or to produce documents and Rule 1-A of Order 16 only enables the party to bring any witness to give evidence or to produce evidence without obtaining any summons but this is, however, subject to the provisions of Sub-rule (3) of Rule 1 of Order 16. Similarly, Rule 1-A of Order 16, which was added after Rule 1 of Order 16 in Rajasthan, makes provision that subject to the provisions of Sub-rule (ii) of Rule 1 (Rajasthan) of Order 16, after obtaining permission from the Court, a party can produce and examine any witness without applying for summons under Rule 1 (Rajasthan) of Order 16. For granting or refusing permission, the Court is

required to record reasons for so doing.

6. In the case in hand, no list of witnesses was filed under Order 16, Rule 1, C. P. C. No reasons were shown for not filing the list. Learned Munsif was not bound to examine Ghamandaram without showing any sufficient cause for the omission. The fact that witness was brought by the defendant with him for giving evidence, by itself, would not entitle the defendant to examine him either under Order 16, Rule 1-A or under Order 16, Rule 1-A (Rajasthan) because the provisions of Order 16, Rule 1-A and Order 16, Rule 1-A (Rajasthan) are subject to the provisions of Sub-rule (3) of Rule 1 of Order 16 and Sub-rule (ii) of Rule 1 (Rajasthan) of Order 16 respectively. If 'not filing a list is in mathematical terms the same thing as filing a list containing no name of any witness' vide Baxiram's case then sufficient cause was required to be shown in regard to the omission of name of Ghamandaram, Thus, no ground for interference is made out."

[Emphasis supplied]

14. The Hon'ble Gujarat High Court has also dealt with a similar case under Order XVI Rule 1 of the CPC, in **Gujarat Electricity Board Vs. Thakar Hasmukhhai Khelshanker** [AIR 2006 Gujarat 16]. It considered a vague application for summoning a witness, whose name was not mentioned in the list of witnesses. The Trial Court had allowed the examination of such a witness. The Hon'ble Gujarat High Court set aside the said order, firstly on

the ground that an Advocate or a legal adviser enjoys certain privileges and he cannot be summoned as a witness in the matter. Secondly, vague references were made to such a witness and his examination was therefore not found to be necessary.

15. Considering the above, I do not find that the impugned Order dated 5.2.2019 could be termed as being perverse or erroneous. This petition, being devoid of merit is, therefore, dismissed.

[RAVINDRA V. GHUGE]

JUDGE

Dahibhate/-