

IN THE HIGH COURT OF BOMBAY AT GOA**WRIT PETITION NO. 73 OF 2019**

Shri Gopal Ramjidas Tandon, major of about 71 years of age, son of late Shri R.D. Tandon, resident at H.no. 35, Galaxy Apartments, Near Cine Vishant, Aquem, Alto Margao, Goa.

.... Petitioners

Versus

1. Smt. Muktabhai Prabhu Malkarekar, widow of late Mr. N.P.P. Malkarnekar, major of age, resident at Pulwado, next to Bhandari's workshop, Benaullim, Salcete, Goa.
2. Smt. Nutan Gopal Prabhu Malkarnekar, widow of late Mr. G.K.P. Malkarnekar, major of age, resident at Pulwado, next to Bhandari's workshop, Benaullim, Salcete, Goa.
3. Shri Gopal Krishna Prabhu Malkarnekar, since deceased, represented by LRs,
 - (i) Shri Simran Gopal Malkarnekar, widow of late Mr. G.K.P. Malkarnekar, major of age, resident at H.no. 199, Pulwado, next to Bhandari's workshop, Benaullim, Salcete, Goa.
 - (ii) Shri Manguirish Gopal Prabhu Malkarnekar, major of age, resident at H.no. 199, Pulwado, next to Bhandari's workshop, Benaullim, Salcete, Goa.

.... Respondents

Mr. Jawahar L. Dias, Advocate for the Petitioner.

Mr. Shivan Desai with Mr. Jatin Ramaiya, Advocates for the Respondent No. 2.

CORAM : C.V. BHADANG, J.

DATE : 1st July, 2019

ORAL JUDGMENT:

Rule made returnable forthwith. The learned Counsel for the respondent no. 2, waives service. Heard finally by consent of parties.

2. The challenge in this petition is to the order dated 04.10.2018 and 06.12.2018, passed by the learned Trial Court in Special Civil Suit No. 19/2010/II. That is a suit filed by the petitioner against the respondents, for recovery of possession, damages and injunction. In that suit, the petitioner examined himself as PW-1 and his cross examination was completed on 02.08.2018. On 04.10.2018, the suit was fixed for further evidence of the petitioner. On that day, the learned Trial Court closed the further evidence of the petitioner with the following order:

“The records show that various opportunities have been given to the plaintiff. Today the Advocate and witness are absent even though matter was called out on 3 occasions. Hence evidence stands closed.”

3. The petitioner filed an application Exhibit-78 to set aside the order dated 04.10.2018, thereby permitting the petitioner to lead further evidence. It was contended that the

affidavit in evidence of the witness, Chetan Kumar Joshi was furnished on 27.09.2018 and according to the petitioner, the said witness was present in the Court on 04.10.2018 and no prejudice would be caused to the respondents, if the order dated 04.10.2018 is recalled.

4. The application was opposed on behalf of the respondents, claiming that the affidavit in evidence of Chetan Kumar Joshi was served on them not on 27.09.2018, but, on 06.09.2018. The suit was then fixed on 27.09.2018, on which date, time was sought on behalf of the petitioner, as the witness was absent. It was pointed out that on 04.10.2018, the Advocate for the plaintiff as well as the witness were absent and as such, no case for recall is made out.

5. The learned Trial Court by the impugned order dated 06.09.2018 has dismissed the application, on the ground that the application was filed in a casual manner stating that the affidavit in evidence was given in advance. The learned Trial Court has found that the contention of the petitioner in the application that the witness was present on 04.10.2018 is not correct as the respondents in their reply have claimed that the witness was not present. The learned Trial Court has found

that the application was neither supported by the affidavit of the plaintiff nor of the Advocate and the application was sworn by the witness, which is not permissible.

6. I have heard Mr. Dias, the learned Counsel for the petitioner and Mr. Desai, the learned Counsel for the respondent no. 2. Perused record.

7. According to the petitioner, the affidavit in evidence of Chetan Kumar Joshi was served on 27.09.2018. However, the respondents claim that it was served prior thereto i.e. on 06.09.2018. It can thus be seen that the affidavit in evidence was served in advance. The suit was fixed for cross examination of PW-2 on 27.09.2018, on which date, an application Exhibit-76 came to be filed on behalf of the petitioner, seeking time, as the witness was out of station and was unable to attend the Court, which application was granted, subject to costs and the suit was fixed on 04.10.2018. On that day, the learned Trial Court closed the evidence on account of the absence of the petitioner and his witness. There was some debate during the course of the arguments at bar whether, the witness was indeed present on 04.10.2018 or not. The issue whether, the witness was present before the Court or not,

appears to have weighed with the Trial Court in refusing to recall the order dated 04.10.2018. The second aspect, which weighed with the Trial Court is that the application was not supported with an affidavit of the petitioner or his Advocate. A perusal of the application shows that it is signed by the Advocate for the petitioner. The facts being matters of record, non filing of the affidavit in support thereof, in my considered view, would be inconsequential.

8. It is true that there is a certain lapse on the part of the petitioner in prosecuting the suit with expedition. However, in my considered view, the petitioner needs to be granted an opportunity to lead further evidence in the interest of justice and for fair trial of the suit, subject to costs.

9. In the result, the following order is passed:

ORDER

- (i) The petition is allowed.
- (ii) The impugned orders dated 04.10.2018 and 06.12.2018, are hereby set aside, subject to payment of costs of Rs.5,000/- to the District Legal Services Authority, within two weeks from today.
- (iii) This will be further subject to the petitioner depositing the costs as directed by order dated

27.09.2018, within two weeks from today.

- (iv) Rule is made absolute in the aforesaid terms, with no order as to costs.

C. V. BHADANG, J.

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