

***IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 2242 OF 2016***

Shri. Vasant Bajirao More ... Petitioner
Vs
Ramesh Kaka Mahar (Gavale) & Ors. ... Respondents

Mr. S.B. Deshpande, Advocate for the Petitioner.
Mr. M.B. Deshmukh, Advocate for Respondents No. 1 to 3 & 5.

CORAM : SANDEEP K. SHINDE J.
DATE : June 18th, 2019

JUDGMENT :

1. Rule. Rule made returnable forthwith. With consent of the parties, petition is taken up for final hearing at the admission stage.
2. Order, rejecting defendant's application under Order 18 Rule 17 of the Civil Procedure Code, for recalling the witness; is under challenge.
3. Respondents No. 1 to 5 ("Plaintiffs", for short) instituted Regular Civil Suit No. 66 of 2009 in the Court of Joint Civil Judge, Junior Division, Kadegaon, District : Sangli, seeking declaration of the title and in alternative for redemption of the mortgage of the suit property, wherein petitioners are defendants. Plaintiffs' case is that the suit property was owned by their grandfather Nana Appa Mahar

and after his demise one of his son's name Mr. Kaka Nana Mahar was entered in the revenue record vide mutation entry no. 1785. It is plaintiff's case that the defendants being from upper class of the society, in collusion with revenue office got their names entered in the revenue record, as owners, on the basis of sale deeds. The cause of action arose, when the defendants obstructed the possession of the plaintiff in the suit land and thus suit was instituted in June, 2009. The petitioner and his father, being defendants in the suit filed a Written Statement on 20.03.2010. They denied the plaintiff's case and would contend that the predecessor-in-title of the plaintiffs had executed deed of a "mortgage by conditional sale" on 22.01.2015 of Survey No. 271/6 on condition that on default in payment of mortgage money, the sale shall become absolute. The defendants would also contend that predecessor-in-title of the plaintiffs had executed another deed of "mortgage by conditional sale" on 01.01.1955 in the suit land bearing Survey No. 272/3 on condition that on default of payment of mortgage money (Rs. 81/-) on certain date (i.e. within five years) the sale shall become absolute.

Petitioner/ defendants would further contend that in terms of both the Deeds, they became absolute owners of the suit property and since 1955 they are in possession of it. It is contended that in the year 1965 there was robbery in their house and since then, these two Deeds were not traceable. The Written Statement was filed in February, 2010.

4. Learned Trial Judge framed the following issues on 09.01.2015, and parties led the evidence.

(i) Does defendant no. 2 prove his title over the suit property by virtue of sale deeds with condition to repurchase dated 22.01.1955 and 01.01.1955?

(ii) Does defendant no. 1 prove that he became owner of suit properties by virtue of adverse possession?

5. On 04.12.2015, defendant no. 2 filed an application under Order 18 Rule 17 of Civil Procedure Code below Exhibit 67 and another application below Exhibit 69 requesting the Court to exhibit these two documents. The first application was for recalling the defendant as a witness to enable him to produce the two sale deeds

and another was for admitting the two sale deeds in the evidence, being thirty years old documents.

6. The Trial Court rejected both the applications by order dated 16.01.2016. So far as an application for recalling the witness is concerned, it may be stated the Trial Court has not addressed it in terms of provision of Order XVIII Rule 17 of Civil Procedure Code. Be that as it may, Provision of order XVIII Rule 17 reads as under :-

“17. Court may recall and examine witness – The Court may at any stage of a suit recall any witness who has been examined and may (subject to the law of evidence for the time being in force) put such questions to him as the Court thinks fit”.

In paragraph number nine of the Written Statement filed by the defendants in March, 2010, it is stated that both 'deeds' were not in their possession, since 1965, when they were robbed and fact of robbery was known to the plaintiffs. They found these two deeds in Trunk-boxes in November, 2018 and soon thereafter defendants requested the Trial Court to recall the witness in exercise of the

powers under Order XVIII Rule 17 of the Civil Procedure Code.

7. Under Order XVIII Rule 17, the Court is empowered at any stage of a suit to recall any witness who has been examined, if it thinks fit. The Court is not powerless to exercise its powers for just and effective adjudication. The Court earlier had a specific provision in Order XVIII Rule 17(A) for production of evidence not previously known or the evidence which could not be produced despite due diligence. It enabled the Court to permit a party to produce evidence even at a later stage, after the conclusion of his evidence if it is satisfied to the Court that even after exercise of due diligence, the evidence was not within his knowledge and could not be produced by him when he was leading the evidence. That provision was repealed with effect from 01.07.2002. In the case of ***K.K. Velusamy Vs. N. Palanisamy in Civil Appeal Nos. 2795-2796 of 2011 decided on 30.03.2011***, the Apex Court has held that, “the deletion of the said provision does not mean that no evidence can be received at all, after a party closes his evidence”. In para no. 14 it is held thus :-

“Neither the trial court nor the High Court considered the question whether it was a fit case for exercise of discretion under Section 151 or Order 18 Rule 17 of the Code. They have not considered whether the evidence sought to be produced would either assist in clarifying the evidence led on the issues or lead to a just and effective adjudication. Both the courts have mechanically dismissed the application only on the ground that the matter was already at the stage of final arguments and the application would have the effect of delaying the proceedings.”

8. In **K.K. Velusamy (Supra)**, the Apex Court has added a word of caution, that the power under Section 151 or Order XVIII Rule 17 of the Code is not intended to be used routinely i.e. merely for asking. If so used, it will defeat the very purpose of various amendments to the Code to expedite trials. But where the application is found to be bonafide and where the additional evidence, oral or documentary, will assist the court to clarify the

evidence on the issues and will assist in rendering justice, and the Court is satisfied that non-production earlier was for valid and sufficient reasons, the Court may exercise its discretion to recall the witnesses or permit the production of fresh evidence.

9. Thus, while exercising the powers under Order XVIII Rule 17 or under Section 151 of Civil Procedure Code, the Court has to ascertain :-

- (i) that application is bofafide;
- (ii) additional evidence shall assist the Court to clarify the evidence of issue which will assist in rendering justice; and
- (iii) non production of evidence was for valid and sufficient reason.

In the case in hand, when the Written Statement was filed in March, 2010, the defendant detailed in para no. 9 of his written statement his defence, his inability to produce these documents due to its non availability, on account of robbery in house. However, he traced these two documents in November, 2015 and immediately thereafter applied for recalling the witness with the permission to

place these documents on record. In the meantime, the parties led the evidence and thereafter upon tracing these two documents, requested the Court to recall the witnesses and admit these two deeds in evidence, being thirty years old documents.

10. So far as the issue of recalling of the witness is concerned, in my view, the chronology of the events and the reasons for not producing these two documents at the time of leading evidence are valid and sufficient. Even otherwise, there is no reason for defendants to suppress the documents when their whole defence is found on those documents. More so for effective adjudication of issue no. (1) (reproduced hereinabove) these two deeds are essential. Therefore, by applying the test laid down in the **K.K. Velusamy (Supra)** by the Apex Court, for effective adjudication of the issue and for arriving at a just decision, it is reasonable, just and proper to allow the application below Exhibit 67 filed in Regular Civil Suit No. 66 of 2009.

11. So far as admission of the documents and exhibiting the same, being thirty years old is concerned, the Trial Court, as it appears has

rejected the same on the ground that the documents were not registered documents as per provision of Section 59 of Transfer of Property Act, 1882 . Section 59 reads as under :-

“ 59 - Mortgage when to be by assurance – Where the principal money secured is one hundred rupees or upwards, a mortgage (other than a mortgage by deposit of title deeds) can be effected only by a registered instrument signed by the mortgagor and attested by at least two witnesses.

Where the principal money secured is less than one hundred rupees, a mortgage may be effected either by (a registered instrument) signed and attested as aforesaid or (except in the case of a simple mortgage) by delivery of the property.”

12. In the case in hand, the mortgage money was less than Rs. 100/- in the deeds dated 22.01.1955 and 01.01.1955. The recitals therein refers to possession, being handed over by the predecessor-in-title of the plaintiffs to the father of the defendant. In the circumstances, though these deeds are unregistered, nevertheless,

the Trial Court can always examine these two deeds and its admissibility in evidence. The rejection of defendant's request to exhibit these documents on the ground that the documents being unregistered and thus cannot be exhibited, is incorrect.

13. Thus, taking into consideration the facts of the case, the impugned order dated 16.01.2016 passed below Exhibit 67 and 69 in Regular Civil Suit No. 66 of 2009 passed by Joint Civil Judge, Junior Division, Kadegaon is hereby quashed and set aside.

14. The application below Exhibit 67 is allowed. Learned Trial Judge shall recall the defendant's witness in terms of Order XVIII Rule 17 r/w/s. 151 of Civil Procedure Code and defendant shall lead additional evidence.

15. Once the additional evidence is led, the admissibility of these two documents i.e. mortgage by conditional sale dated 22.01.1955 and 01.01.1955 shall be examined by the Learned Judge on the basis of the evidence led by the parties and in accordance with law.

16. Petition is allowed in the aforesaid terms and disposed of accordingly.

(SANDEEP K. SHINDE, J.)