

Shailaja

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE SIDE JURISDICTION
WRIT PETITION NO.13319 OF 2018
WITH
WRIT PETITION NO.288 OF 2019
WITH
WRIT PETITION NO.289 OF 2019
WITH
WRIT PETITION NO.290 OF 2019
WITH
WRIT PETITION NO.291 OF 2019
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WRIT PETITION NO.292 OF 2019
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WRIT PETITION NO.293 OF 2019
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WRIT PETITION NO.294 OF 2019
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WRIT PETITION NO.295 OF 2019
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WRIT PETITION NO.296 OF 2019
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WRIT PETITION NO.297 OF 2019
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WRIT PETITION NO.298 OF 2019
WITH
WRIT PETITION NO.299 OF 2019
WITH

WRIT PETITION NO.300 OF 2019

WITH

WRIT PETITION NO.301 OF 2019

Sharad Prabhakar Nileshwar	]	Petitioner
Vs.		
Rajesh Gulabchand Bhansali	]	Respondent

.....
Mr. V.Y. Sanglikar, learned Counsel for the petitioner.
Mr. Sanjeev Sawant i/b Abhishek P. Deshmukh, for Respondent No.1.
.....

CORAM : R.G. KETKAR, J.

DATE : 23RD JANUARY, 2019.

P.C:

Heard Mr. Sanglikar, learned Counsel for the petitioner and Mr. Sawant, learned Counsel for respondent No.1 at length.

2. These Petitions are instituted by the petitioner, hereinafter referred to as 'defendant'. The defendant has challenged the common order dated 10th October, 2018 passed by the learned trial Judge below Exhibits No. 175, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211 and 212 in R.A.E. Suit No.363/743 of 1997. By these orders, the learned trial Judge rejected the applications filed by the defendant for issuing witness summons.

3. Rule. Mr. Deshmukh waives service on behalf of respondent No.1. Having regard to the narrow controversy raised in these Petitions as also at the request and by consent of learned Counsel for the parties, Rule is made returnable forthwith and the Petitions are taken up for final hearing.

4. The respondent, hereinafter referred to as 'plaintiff' has instituted suit against the defendant for recovery of possession of Flat No.6 on the ground floor of 'Bhansali Bhavan' situate at N.S. Road No.10, J.V.P.D Scheme, Vile Parle (West), Mumbai 400 049 (for short 'suit premises') invoking ground of permanent additions and alternations without written permission of the plaintiff as contemplated by section 16 (1) (b) of the Maharashtra Rent Control Act, 1999 (for short 'Act') as also on the ground of change of user from residential to commercial. The suit is instituted on or about 16th September, 1997. The defendant filed written statement in August, 2007. On 16th September, 2008 and 18th September, 2013, the learned trial Judge framed issues and additional issues respectively. On 7th March, 2015, the plaintiff's evidence was over. Initially, the order of admissibility of documents was passed on 3rd October, 2015. The defendant filed affidavit of his wife dated 8th March, 2017 as he proposed to examine her as D.W.2. On 19th April, 2017, the learned trial Judge passed the order of admissibility of documents. The defendant thereafter filed applications Exhibit No. 175, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211 and 212 for issuing witness summons for establishing their case that change of user took place in the year 1985 and the suit instituted in the year 1997 is liable to be dismissed on two grounds namely; (a) waiver on the part of the plaintiff and (b) that the said claim is barred by limitation. By the impugned orders, the learned trial Judge has rejected the applications.

5. Upon query made to Mr. Sanglikar during the course of hearing, he submitted that the defendant wants to examine these witnesses to substantiate his case that wife of the defendant has started her Dental Clinic from the suit premises in the year 1985. Plaintiff's father had in fact inaugurated the Dental Clinic of defendant's wife. The plaintiff's father died on 1st January, 1989 and the present suit is instituted in the year 1997. By

examining the witnesses, the defendant wants to establish that there is waiver on the part of the plaintiff in respect of alleged ground of change of user as also the said ground is barred by limitation.

6. As the defendant has filed similar Petitions for the same purpose, it was suggested to Mr. Sanglikar to select the best documents which he considers to establish the case of waiver as also dismissal of the suit on the ground that the suit is barred by limitation. Ms. Sanglikar states that defendant is present in the Court. He has tendered photo copy of his Driving Licence which is taken on record and marked 'X' for identification. Upon taking instructions from him, he states that the defendant restricts his challenge in the present Petitions only in respect of Writ Petition No.301 of 2019, Writ Petition No.289 of 2019 and Writ Petition No.300 of 2019. Statement made on instructions is recorded.

7. In Writ Petition No.301 of 2019, the defendant filed application at Exhibit 212 sometime in August, 2018 for issuing witness summons to Mr. Pinkin Khantilal Shah or authorized representative of firm C. Bhogilal & Co. for producing and giving evidence in respect of Cash Memo No.3598 dated 12th September, 1985 and Cash Memo No.3603 dated 13th September, 1985. Along with application, photo copies of cash memos have been enclosed. Cash Memo No.3598 dated 12th September, 1985 shows purchase of oval wash basin and soap dish. Cash Memo No.3603 dated 13th September, 1985 shows purchase of swan neck pillar tap from C. Bhogilal & Co. The plaintiff resisted the application by filing reply in September, 2018. By the impugned order, the learned trial Judge rejected the application Exhibit 212 for the reasons recorded in paragraph 4 of the order.

8. In Writ Petition No.289 of 2019, the defendant filed application in August, 2018 at Exhibit 200 for issuing witness summons to the Director/s or authorized representative/or person of the Sale Department and Dispatch and Delivery of goods and storekeeper and Accountant of Electropnumatics and Hydraulics (I) Pvt Ltd for producing and giving evidence in respect of EPN 7292 dated 9th November, 1985 showing purchase of;

- (1) Orifice N.C Mini Valve, 230V AC Coil S. No. 51151
- (2) Direct Acting Sol. Valve, 230V AC Coil S. No.50402 for
Rs.726.88 paise

along with challan No.1591 dated 9th November, 1985 and Invoice No. PNU/PRO/0305/85-86 dated 9th November, 1985 and Central Excise Receipt No.1361 dated 9th November, 1985.

The plaintiff resisted the application by filing reply in September, 2018. By the impugned order, the learned trial Judge rejected the application Exhibit 200 for the reasons recorded in paragraph 4 of the order.

9. In Writ Petition No.300 of 2019, the defendant filed application Exhibit 211 in August, 2018 for issuing witness summons to the Officer In-charge of commercial offices new line MTNL (Bombay Telephones) for producing and giving evidence in respect of registration No. N/ADR/Gen/SP/P/3050 dated 16th August, 1985 issued in the name of wife of the defendant for allotting Telephone No.578350 (old) by Bombay Telephones and New Telephone No.26207779 by MTNL. Along with application, photo copies of record of old and new telephone number were enclosed. The plaintiff resisted the application by filing reply in September, 2018. By the impugned order, the learned trial Judge rejected the application Exhibit 211 for the reasons recorded in paragraph 4 of the order.

10. In paragraph 4 of the common order, the learned trial Judge observed that the defendant did not point out the name of the witness. He has also not specified whether the proposed witness is the author or witness to the documents which are supposed to be proved by him. The defendant has not clarified relevancy of the documents along with issues on record. In such eventuality, it will be the blanket order for issuance of summons without knowing the competent person who is supposed to prove the documents relied on by the defendant. The learned trial Judge accordingly rejected the application. It is against these orders, the defendant has instituted the present Petitions.

11. In support of these Petitions, Mr. Sanglikar submitted that the learned trial Judge committed serious error in rejecting the applications for issuing witness summons. He submitted that where the party to the suit applies for issuing summons to the witness, the Court cannot reject the application on the ground that such application is belatedly filed. He submitted that Order XVI, Rule-1 of the Code of Civil Procedure, 1908 lays down that the Court is bound to issue witness summons where the application is made for issuing witness summons. In support of this proposition, he relied on the decision of this Court in **Saibai Govind Lavlekar Vs. Balkrishna Pandurang Ban, A.I.R 1925 Bombay 368**. He submitted that the said decision is consistently followed by the various High Courts.

12. Mr. Sanglikar also relied on decision of this Court in **Om Prakash Berlia Vs. Unit Trust of India, AIR 1983 Bombay, 1**. In this case, the learned Single Judge (S.P. Bharucha, as the Hon'ble Chief Justice of India then was) considered sections 61, 63, 65, 67, 74, 90 and 114 of the Indian Evidence Act, 1872. It was held that the writer of a document is required to depose truth of its contents. He submitted that the learned trial Judge erroneously held that

relevancy of documents is not clarified by the defendant. He, therefore, submitted that the impugned orders deserve to be set aside thereby allowing the applications for issuing witness summons to;

- [1] Mr. Pinkin Khantilal Shah or authorized representative of firm C. Bhogilal & Co. for producing and giving evidence in respect of Cash Memo No.3598 dated 12th September, 1985 and Cash Memo No.3603 dated 13th September, 1985.
- [2] Director/s or authorized representative/or person of the Sale Department and Dispatch and Delivery of goods and storekeeper and Accountant of Electropnumatics and Hydraulics (I) Pvt Ltd for producing and giving evidence in respect of EPN 7292 dated 9th November, 1985 showing purchase of;
 - (1) orifice N.C Mini Valve, 230V AC Coil S. No. 51151
 - (2)Direct Acting Sol. Valve, 230V AC Coil S. No.50402 for Rs.726.88 paise along with challan No.1591 dated 9th November, 1985 and Invoice No.PNU/PRO/0305/85-86 dated 9th November, 1985 and Central Excise Receipt No.1361 dated 9th November, 1985.
- [3] Officer In-charge of commercial offices new line MTNL (Bombay Telephones) for producing and giving evidence in respect of registration No. N/ADR/Gen/SP/P/3050 dated 16th August, 1985 issued in the name of wife of the defendant for allotting Telephone No.578350 (old) by Bombay Telephones and New Telephone No.26207779 by MTNL.

13. On the other hand, Mr. Sawant submitted that the present proceedings are nothing but abuse of process of Court as also abuse of process of law. He submitted that the suit was instituted in the year 1997. The defendant filed written statement in August, 2007. Issues were framed on 16th September, 2008. Evidence of the plaintiff was over on 7th March, 2015. Even evidence of defendant was over in August, 2018 and the application is made in August, 2018 when the suit is fixed for final arguments. He further submitted that earlier the defendant had filed similar application for proving contents of 16 documents by issuing witness summons. The application was rejected by the learned trial Judge which was carried in Revision Application. Revision Application was also dismissed. The defendant filed Writ Petition in this Court which was withdrawn. He has invited my attention to the order dated 3rd October, 2015 passed by the learned trial Judge on admissibility of documents produced by the defendant with list at Exhibit 111. He has also invited my attention to the order dated 3rd May, 2016 passed by the learned trial Judge below Exhibit 129. By that order, the learned trial Judge rejected the application filed by the defendant seeking permission to file additional affidavit of evidence. The defendant thereafter filed application Exhibit 136 for review of the order dated 3rd May, 2016 below Exhibit 129. Application Exhibit 136 was rejected by the learned trial Judge on 2nd September, 2016. In paragraph 13, the learned trial Judge observed thus;

“13.The question before the Hon'ble Lordship was in context with the withdrawal of an affidavit of evidence once it is filed in view of examination-in-chief under Order XVIII Rule 4. It was in context with a witness not being able to appear for cross examination after having tendered his affidavit of evidence and whether an evidence affidavit already filed could be permitted to be withdrawn. The rest of observation once are ancillary and is not a law laid down. In each case the circumstances are different. It is discretion of the Court whether in a set of circumstances further evidence should be allowed. Tactics to delay the Trial cannot be facilitate with the facts that order XVIII Rule 4 does not limit itself to a single affidavit. The Hon'ble Lordship has also

simultaneously observed that the witness may not file fresh affidavit to improve his case and present situation falls under this criteria.

14. Aggrieved by this decision, the defendant filed Revision Application No.115 of 2016 before the Appellate Bench which was dismissed on 19th October, 2016. In paragraph 13, the Appellate Court observed that once the documents are referred to the witness and not exhibited and the other recourse is available to prove the documents, the practice of filing affidavit in addition as further evidence cannot be allowed. It is the situation like insisting to exhibit the documents by the same witness while the Court has already passed orders and not exhibited the same and already marked them Articles. The plaintiff has to lead evidence i.e direct evidence on the documents to prove the same or to bring the circumstances which makes him enable to produce direct evidence enabling him to file further evidence by way of additional affidavit. In spite of doing the same, the defendant wants to prove the documents i.e exhibit the documents by the same witness by filing additional affidavit without challenging the order passed by the trial Court for not exhibiting the documents. The defendant also filed application Exhibit 11 before the Appellate Court for staying the order which was rejected.

15. Mr. Vaidya submitted that the defendant filed Writ Petition No.1034 of 2018 in this Court challenging these orders. After hearing the Petition for sometime, learned Counsel for the defendant sought leave to withdraw the Petition with liberty to raise all the contentions during the course of evidence in the adjudication of the suit. Writ Petition was accordingly allowed to be withdrawn with liberty as prayed for and the Petition was dismissed as withdrawn. He submitted that in stead of raising contentions during the course of evidence, the defendant has filed application for issuing witness summons in respect of the selfsame 16 documents. The defendant

having failed in the earlier attempt when evidence of the defendant was going on he has filed affidavit of evidence of his wife proposing to examine her as D.W.2. Defendant has filed similar applications for issuing witness summons. He submitted that the defendant is adopting dilatory tactics. The defendant has not even furnished list of witnesses as also indicated the purpose for summoning the particular persons as witnesses.

16. In support of his submissions, he relied upon the decision of **Kokkanda B. Poondacha VS. K.D. Ganapati, 2011 (12) SCC 600**. He has also relied on the decision of **Kumar Basant Narain Singh Vs. The State, AIR 1958 Patna 458** to contend that the Court is not entitled to refuse to issue summonses to the witnesses on the ground that the application was made at a very late stage. But, there is an exception to this general rule and that exception is that where the Court thinks that the prayer to issue witness summons is not bona fide or has been made as an abuse to the process of the Court or the prayer is vexatious, it has inherent jurisdiction to refuse the prayer.

17. In rejoinder, Mr. Sanglikar has invited my attention to the order dated 14th October, 2014 passed by this Court in Writ Petition No.7388 of 2014 Sharad Prabhakar Nileshwar (defendant herein) and Rajesh Gulabchand Bhansali (plaintiff herein). He submitted that in paragraph 15, this Court categorically recorded a finding that delay caused in the trial is not attributable to the defendant.

18. I have considered the rival submissions advanced by learned Counsel for the parties. I have also perused the material on record. Order-XVI, Rule-1 of the C.P.C 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 to produce documents and obtain summonses to such persons for their attendance in Court”.

In the case of **Saibai** (supra), the Division Bench of this Court held that where the party has filed application for issuance of summons to witness, the same cannot be dismissed on the ground that the application is made belatedly. The Division Bench referred to the decision in **Bai Kali Vs Alarakh Phirbai, (1890) 15 Bom. 86** where it was held that under section 159 of the Civil Procedure Code (XIV of 1882) a party to a suit was entitled as of right to obtain summonses any time before the date fixed for the disposal of the suit. Section 159 of the Old Code is now Order XVI, rule-1 of the Code of Civil Procedure, 1908 and the Court was bound to issue summonses to the witnesses according to the application. In view thereof as also in view of the order dated 14th October, 2014 passed by this Court in Writ Petition No.7388 of 2014, the application for issuing witness summons cannot be rejected solely on the ground that such application was made belatedly.

19. A perusal of the impugned order and in particular paragraph 4 shows that the learned trial Judge has rejected the applications on the ground that the defendant has not clarified relevancy of the documents along with issues on record. Mr. Sanglikar submitted that the defendant wants to examine witnesses to substantiate that his wife is running Dental Clinic from the suit premises from 1985. The defendant wants to establish waiver on the part of the plaintiff while filing the suit in the year 1997 as also the suit is barred by limitation. The said ground is, therefore, not valid for rejecting the applications for issuing witness summons. He further submitted that the learned trial Judge

held that the applications are vague as names of the witnesses are not specified. It is also not specified whether proposed witnesses are authors or witnesses to the documents. It was submitted that the defendant wants to examine In-charge of the partnership firm or Company. It is, therefore, not necessary to specifically give names of the proposed witnesses. I find merit in the submissions of Mr. Sanglikar.

20. As mentioned earlier, controversy in these Petitions is only restricted to issuing witness to;

- [1] Mr. Pinkin Khantilal Shah or authorized representative of firm C. Bhogilal & Co. for producing and giving evidence in respect of Cash Memo No.3598 dated 12th September, 1985 and Cash Memo No.3603 dated 13th September, 1985.
- [2] Director/s or authorized representative/or person of the Sale Department and Dispatch and Delivery of goods and storekeeper and Accountant of Electropnumatics and Hydraulics (I) Pvt Ltd for producing and giving evidence in respect of EPN 7292 dated 9th November, 1985 showing purchase of;
 - (1)Orifice N.C Mini Valve, 230V AC Coil S. No. 51151.
 - (2)Direct Acting Sol. Valve, 230V AC Coil S. No.50402 for Rs.726.88 paise along with challan No.1591 dated 9th November, 1985 and Invoice No.PNU/PRO/0305/85-86 dated 9th November, 1985 and Central Excise Receipt No.1361 dated 9th November, 1985.
- [3] Officer In-charge of commercial offices new line MTNL (Bombay Telephones) for producing and giving evidence in respect of registration No. N/ADR/Gen/SP/P/3050 dated 16th August, 1985 issued in the name of wife of the

defendant for allotting Telephone No.578350 (old) by
Bombay Telephones and New Telephone No.26207779 by
MTNL.

In view thereof, it will be responsibility of the defendant to ensure presence of the witnesses for examination. In view thereof, Writ Petitions No.289 of 2019, 300 of 2019 and 301 of 2019 are allowed. Applications at Exhibit 212, Exhibit 200 and Exhibit 211 are allowed. To that extent only, impugned orders are modified. Rule is made absolute in these Petitions with no order as to costs.

21. In view of decision in Writ Petitions No.289 of 2019, 300 of 2019 and 301 of 2019, Writ Petition No.13319 of 2018, Writ Petition No.288 of 2018, Writ Petition No.290 of 2019, Writ Petition No.291 of 2019, Writ Petition No.292 of 2019, Writ Petition No.293 of 2019, Writ Petition No.294 of 2019, Writ Petition No.295 of 2019, Writ Petition No.296 of 2019, Writ Petition No.297 of 2019, Writ Petition No.298 of 2019 and Writ Petition No.299 of 2019 are disposed of as not pressed. Rule is discharged in these Petitions with no order as to costs.

22. The learned trial Judge is requested to dispose of the suit as expeditiously as possible, in any case, within six months from today.

23. All the parties including the trial Court to act upon the authenticated copy of this order.

[R.G. KETKAR, J.]