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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 3685 OF 2019
IN
SUIT NO. 1767 OF 2008

Mrs. Anju Toshniwal and Ors.Petitioners
V/s.
Expat Properties India Ltd. ...Respondent

* * * *

Mr. S.S. Kanetkar, Advocate for the petitioners.

Mr. Rohan Mirpury i/by. Mr. Abhishek Srinivasan,
Advocate for the respondent.

CORAM : SANDEEP K. SHINDE, J.

RESERVED ON : 9TH AUGUST, 2019.

PRONOUNCED ON : 23RD AUGUST, 2019.

ORAL JUDGEMENT :

1. The petitioners are the defendants in Special Civil Suit No. 1767 of 2008 filed for specific performance of a contract borne out from

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emails exchanged between the parties, instituted by the respondent herein. The subject matter of the suit property is agricultural land bearing Gat Nos.47, 49 and 51 admeasuring around 390 acres of Village-Vegre, Taluka-Mulshi, District-Pune.

2. The plaintiff had filed evidence affidavit of Mr. Vijendra Rao (P.W.1), Constituted Attorney of the respondent-Company. He was cross-examined and thereafter the plaintiff-Company filed evidence Affidavit of Mr. Arvind Gowda who happens to be one of the Directors of the Plaintiff-Company. The defendants objected to the evidence Affidavit of Mr. Gowda who is the Director of the Company on the ground that, if a party himself wishes to be examined as a witness, then party should step into the witness box before other witnesses in terms of the provisions of Order 18 Rule 3A of the Code of Civil Procedure ("CPC" for short). Defendants also objected on the ground

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that the plaintiff, Company did not file list of the witnesses as required under Order 16 Rule 1 of the CPC. The defendants further objected to the evidence affidavit of Mr. Gowda (Director) on the ground that, at no point of time, the plaintiff- Company took permission to examine its Director at a later stage as required under Order 18 Rule 3A of CPC. It is also apprehended that, plaintiffs seek to improve his case which is not permissible as per the object underlying Order 18 Rule 3A of the CPC. Defendants preferred an application dated 3rd April, 2018 before the learned trial Judge raising abovementioned objections.

3. The learned Civil Judge, Senior Division, Pune allowed the said application on 16th July, 2018 and passed the following order :-

“ Affidavit of director of the plaintiff company- Shri. Arvind Gowda cannot be

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considered as evidence unless and until permission under Order 18 Rule 3A of Code of Civil Procedure is obtained by the plaintiff."

4. Thereafter, on 19th November, 2018 the respondent-Company applied for permission under Order 18 Rule 3A CPC to lead the evidence of Mr. Gowda.

5. The trial Court allowed the application by an order dated 2nd January, 2019. It is against this order, the defendants in the subject suit have approached this Court under Article 227 of the Constitution of India.

6. Heard Mr. Kanetkar, learned Counsel appearing for the petitioner and Mr. Mirpury, learned Counsel for the respondent.

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7. Mr. Kanetkar, submits, the provisions of Rule 3A of Order 18 of the Code were inserted by Amending Act No. 104 of 1976 to the Code. The Code lays down a rule of law with regard to the sequence of witnesses to be examined in the Court. He submits that, the amendment was introduced with a view to prevent the persistent and notorious practice indulged by litigants in examining other witnesses first and covering up the gaps and lacunae in such evidence by examination of the party themselves at a later stage. He submits, where the Court comes to a conclusion that a party had deliberately withheld himself to be examined as a witness at a later stage with a view to fill up the lacuna in the evidence, permission cannot be granted to such party to examine himself at a later stage.

8. Mr. Kanetkar, to substantiate his submissions has taken me through the plaint, evidence affidavit of Mr. Vijender Rao, (P.W.1-Power

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of Attorney Holder of the plaintiff) and his evidence in cross-examination. Mr. Kanetkar submits that the plaintiffs are seeking specific performance of oral contract, much less, a contract sought to be discerned from the exchange of emails. On the backdrop of these facts, Mr. Kanetkar has brought to my notice the cross-examination of Mr. Rao, as recorded in paras-8 and 10 wherein he testifies thus :-

"8. The defendant approached to the plaintiff that they are having lands in said area. I cannot be sure that I was not present for first meeting with the defendant. It is true to say that being a company we have our own team lawyers and technical experts. I have no idea when the defendant approached to the plaintiff, whether the plaintiff company verified title and other related matters through lawyers and expert team. I have no idea how many meeting took place between the plaintiff and defendant in respect of suit land. It will be correct to say that I was not present in all the

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meetings. It is true to say that I am not aware about what was transpired in all the meetings. On behalf of the plaintiff company-Arvind Gouda was present. It will be correct to say that Mr. Arvind Gouda will be having better knowledge than me about the terms and conditions of alleged transaction. It is true to say that Mr. Arvind Gouda is still in the plaintiff company and he is director.

Question : Contentions in plaint as well as affidavit about those Meetings, in which you are not present was based on information given by Shri. Arvind Gouda ?

Answer. In some cases, information is taken from Gouda and in some cases it is based of documents available in the office.

10. It is true to say that there was only one deal in respect of 390 acres between the plaintiff and defendant. The transaction of 390 acres was piecemeal delivery and the defendants have to procure the land owners and defendant were partly holding the suit land. It is true to say that there is no agreement in writing between the plaintiff and defendant in respect of entire

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390 acres or part of it. It is true to say that in the email dated 21st May 2006, the terms and conditions as to the when and where the transaction is to be completed and price and period of execution of transaction is not mentioned. Witness volunteers that rate and quantity is mentioned in the email. I am not aware that after email authority was given to Mr. Gouda to complete the deal in respect of the suit land. It is true to say that no such authority is filed on record. It is true to say that there is no agreement between the plaintiff and defendant for sale of 390 acre land."

9. Mr. Kanetkar, has also invited my attention to para-11 wherein Mr. Rao, states " it is true to say that, there is no proper written agreement executed between the parties. It is true to say that, so also in para no.5 of the plaint and para no.6 of affidavit, whatever, contentions are made in respect of agreement to sell is verbal agreement." Mr. Kanatekar, has also taken me through the evidence of Mr. Rao in para-14. Mr. Kanetkar, would submit, it is

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only after the cross-examination of P.W.1-Mr. Rao when it is realised by the Company that the admissions made in the cross-examination may prove to be fatal for the plaintiff-Company's case, hence it decided to examine its Director, Mr. Gouda as P.W.2 to fill up the lacuna or to plug the gaps. Mr. Kanetkar, would therefore submit that, permitting the Company to examine its Director is contrary to the Scheme and the intent of the legislation for introducing the amendment to the Civil Procedure Code. Mr. Kanetkar, submits that the learned Court has committed an error by granting the permission to lead the evidence of Mr. Gowda, though the reasons were neither convincing nor sufficient in nature. In other words, Mr. Kanetkar, submits, the impugned order dated 2nd January, 2019 has been passed in wrong exercise of jurisdiction.

10. On the other hand, Mr. Mirpuray appearing for the respondent-company submits that when evidence

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was required to be led by the plaintiff at a relevant time, the schedule of the Director of plaintiff-Company, Mr. Gowda was very hectic as he was traveling all over India, as well as abroad, and it was very difficult for the plaintiff to ensure the presence of Mr. Gowda in the Court during the relevant period. He therefore submits that, in the given circumstances, the plaintiff preferred to lead evidence initially through Mr. Vijender Rao (P.W.1), its then Financial Controller, who had filed a suit for the plaintiff and his subject evidence affidavit came to be filed on 27th March, 2011. He further submits that, on culmination of evidence of Mr. Vijender Rao, the plaintiff intended to lead the evidence of his Director, Mr. Gowda. He submits that, it is because of unavailability of Mr. Gowda in Pune during the relevant time and due to his frequent travels, he could not be examined as plaintiff's witness.

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11. It appears from para-4 of the application filed by the plaintiff seeking permission under Order 18 Rule 3A CPC, a separate list, producing collectively various air tickets and also a copy of the passport of Mr. Gowda was filed alongwith the application.

12. Rule 3A of Order 18 reads as under :

"Where a party himself wishes to appear as a witness, he shall so appear before any other witness on his behalf has been examined, unless the Court, for reasons to be recorded, permits him to appears as his own witness at a later stage."

Thus, a party examining himself before other witnesses are examined is a rule and a party examining himself after the other witnesses are examined, is an exception. An exception can be made only for valid reasons.

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13. In the case of **Hari Shrawan Sutar Vs. Ramdas Tukaram Patil**, reported in 1985 Mh. L.J. page 197, this Court has held thus :

"4. The provisions of Rule 3-A of Order 18 of the Code were inserted by Amending Act No. 104 of 1976 to the Code. That lays down a Rule of law with regard to the order of witnesses to be examined in the Court. It applied to both the plaintiff as well as the defendant. In cases where a party, either plaintiff or defendant, wishes to appear as a witness, the provisions of this rule require that such a party would appear for giving evidence before any other witness is examined. The Rule has been couched in mandatory terms and would, ordinarily, govern the matter of tendering evidence. When the rule is required to be departed from, the Court has to record the reasons and permit such a party to be kept back for the examination as a witness. The reasons in such matter may be various, including the non-availability of the plaintiff. Though the provisions of Rule 3-A of Order 18 of the Code are salutary and

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intended to be applied as such so as to achieve the object thereof, the Rule itself confers jurisdiction upon to Court to permit such a party to appear and examine himself at a later stage. The purpose of the Rule appears to be to have the evidence of the party first. It is the party who can unfold the case. Such unfolding by other evidence should follow after the party is examined. If party be the witness, the amended provision confers primacy upon it and enacts a priority in that regard. Ordinarily, the same will have to be followed."

. Thus, the provision of Order 18 Rule 3A of the CPC lays down nominal rule that the party as a witness must offer himself as a witness before any other witness is examined. This salutary rule can be departed by leave of the Court for which reasons are required to be recorded. Once such reasoned order is made, the examination of such a party at a later stage would be quite regular and in keeping with the rule.

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It follows from this that but for such leave, the party will not be free to examine, itself as a witness at a later stage.

14. Mr. Kanetkar in support of his submissions has relied on the judgments in the case of (i) **Dr. V.K. Muthusamy v. M/s. U.A. Habeen Firm by Partner, U.A. Habeeb and Others**, reported in AIR 1995 Madras 137; (ii) **Hari Shrawan Sutar Vs. Ramdas Tukaram Patil**, reported in 1985 Mh.L.J. page 197; and (iii) **Kumudini Damodar Magar and Others vs. Bhushan Damodar Magar and Others**, reported in 2004 (3) Mh.L.J. page 214.

15. The learned Counsel for the respondent, on the other hand, relied on the judgment of this Court in the case of **Sanjay Narayanrao Barde and another vs. Vimal Kesharao Bairam and Ors.**, reported in 2000 (2) Mh.L.J. 386 in support of his contention.

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16. I have gone through the judgments in the cited cases and the impugned order. Thus, I am required to answer the following two points :

(i) Whether plaintiff Company deliberately withheld Mr. Gowda, Director, to be examined as witness ?

AND

(ii) Whether it was with a view to fill up the lacuna in the evidence of Mr. Rao ?

17. In this case, the plaintiffs are seeking the enforcement of specific performance of an agreement which is not in writing but which seeks to discern from the e-mail correspondence exchanged between the parties. It is not in dispute that, after framing the issues, the plaintiff did not file the list of witnesses in terms of Order 16 Rule 1 CPC and no explanation is coming forth, for this lapse. It is not in dispute that, only after the conclusion of the evidence of P.W.1, the plaintiff had decided to lead the evidence of its Director, Mr. Arun Gowda. It is

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not in dispute that no permission was sought to lead the evidence of Mr. Gowda on behalf of the Company as a plaintiff, being a Director of the Company as required under Order 18 Rule 3A CPC. It is only after objection to the evidence affidavit of Mr. Gowda by the defendant, the plaintiff company applied for permission as suggested in the order dated 16th July, 2018 passed by the trial Court.

18. I have gone through the cross-examination of P.W.1, Mr. Rao wherein he categorically admits that, he has no idea when the defendant approached to the plaintiff for the suit transaction. He would show his ignorance about the verification of the title of the land and other related matters. He says, he had no idea, how many meetings took place between the plaintiff and the defendant relating to the transaction of the suit land. He admits that, he was not present in all the meetings. He says that, he was

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not aware as to what had transpired in all the meetings. He further says and denies that, there was only one deal in respect of 390 acres between the plaintiff and the defendant. He also says that, there was no agreement in writing between the plaintiff and the defendant in respect of the entire 390 acres or part of it. He also admits that in all emails dated 26th May, 2006 the terms and conditions as to how, when and where the transaction had to be completed and further admits that the price and period of execution of transaction was not mentioned in the email dated 26th May, 2006. He further says that, he was not aware, after the email, the authority was given to Mr. Gowda to complete the transaction of the suit land. He admits that there was no agreement between the plaintiffs and the defendants in respect of the 390 acres of land.

19. It is settled law that, whereby the party

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deliberately withheld himself to be examined as a witness at a later stage after examination of other witnesses, with a view to fill up the lacuna in the evidence. It is a relevant consideration where application is filed seeking permission to examine him at a later stage.

20. Besides, the learned Judge ought to have examined the evidence of Mr. Rao in its entirety to ascertain whether there was an acceptable reason for not examining Mr. Gowda as a witness of the Company before examining Mr. Rao. This exercise was necessary or otherwise it would entirely frustrate the object for introducing the amendment under Order 18 Rule 3A CPC which was introduced pursuant to the recommendations of the 54th Report of the Law Commission.

21. The obvious purpose of the rule is to do away with the practice which had grown in the Indian

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Courts of examining other witnesses first and entering in the witness box to fill up the lacuna later which might have been left or to undo the damage which might have been caused by certain admissions which might have been made by other witnesses which affects the opposite party. It is a normal rule of appreciation of evidence that the substantive evidence in each case is of the party as itself and other witnesses most of the time are treated as witness corroborating the substantive evidence.

22. Thus, on the backdrop of the evidence of P.W.1 and admissions made by him in his cross-examination, in my view, the decision of the Company to examine Mr. Gowda, is afterthought. Nothing prevented the Company from furnishing the list of witnesses after issues were framed. Even before this Court, material has not been placed to show at the relevant time, Mr. Gowda was not available to depose on behalf of the Company. Infact, trial Court ought

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to have scrutinised the travel schedule of Mr. Gowda, before reaching the conclusion about his unavailability and before granting the plaintiff's application under Order 18 Rule 3A of the CPC. The learned trial Court, has to make qualitative assessment of material before exercising the jurisdiction under Order 3A of Rule 18 CPC.

23. Thus, taking into consideration the facts of the case and the law laid down in the aforecited cases, the order impugned dated 2nd January, 2019 is quashed and set aside.

24. The petition is allowed in the aforesaid terms and disposed of accordingly.

25. All concerned to act on authenticated copy of this order.

(SANDEEP K. SHINDE, J)