

Shailaja

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE SIDE JURISDICTION
WRIT PETITION NO.2634 OF 2019

Dr. Krishnakumar Ramkrishna Pandit]
(since deceased) through Legal Heirs]
Kamal Krishnakumar Pandit & Ors.] Petitioners
Vs.
Jayashri Jayram Bhawe] Respondent

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Mr. Vishal Kanade a/w Khamish Khan i/b Yasmin Bhansali & Co., Advocate for the Petitioners.
Mr. Satish C. Kekane, Advocate for the Respondent.

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CORAM : R.G. KETKAR, J.

DATE : 19th JUNE, 2019.

P.C.

Heard Mr. Kanade, learned Counsel for the petitioners and Mr. Kekane, learned Counsel for the respondent, at length.

2. By this Petition under Article 227 of the Constitution of India, the petitioners have challenged the order dated 1st November, 2018 passed by the Appellate Bench of the Court of Small Causes at Mumbai below Exhibit 28 in (2a) Appeal No.12 of 2010. By that order, the Appellate Court allowed the application Exhibit 28 filed by the respondent herein under Order-XLI, Rule-27 of the Code of Civil Procedure, 1908 (for short 'C.P.C') for production of additional evidence.

3. It is not necessary to deal with rival submissions advanced by learned Counsel for the parties across the bar. Mr. Kekane submitted that the

Petition has become infructuous. He submitted that by the impugned order, the Appellate Court allowed the application filed by the respondents under Order-XLI, Rule-27 subject to payment of costs of Rs.15,000/- to the petitioners or to be deposited in the Court by 15th November, 2018. In pursuance of the impugned order, respondent deposited costs on 12th November, 2018. The petitioners filed application Exhibit 73 for withdrawal of the amount of Rs.15,000/-. Mr. Kanade, on instructions of Mr. Sanjeev Rajendra Pandit, petitioner No.2, who is present in the Court states that the petitioners have not withdrawn Rs.15,000/- from the Court.

4. Mr. Kekane submitted that on 6th December, 2018, respondent filed affidavit of examination-in-chief. The petitioners have cross-examined the respondent. The petitioners have also adduced evidence and the respondent has cross-examined witness examined by the petitioners. He invited my attention to Roznama dated 2nd March, 2019. He submitted that Roznama shows that after recording evidence of both the parties by the trial Court, Record and Proceeding was sent to the Appellate Court. He, therefore, submitted that the order impugned in the present Petition is implemented and therefore, the Petition is rendered infructuous.

5. Mr. Kanade relied on the decision of this Court in **K.P. Singh Vs. A.G. Thakare, AIR 1991 Bombay 296** and in particular paragraph 6. He submitted that in the present case the petitioners have not withdrawn amount of costs even if, application for withdrawal of the costs is made. The cost was imposed on the respondent as and by way of compensatory costs for causing inconvenience to the petitioners. In view thereof, the petitioners are not legally barred from raising challenge on a point of law to the correctness of the impugned order on merits.

6. Mr. Kanade further submitted that basically the order impugned is legally unsustainable and even if the same is implemented, under Article 227 of the Constitution of India, this Court will exercise its powers and will set aside the impugned order as also discard the evidence recorded by the learned trial Judge in pursuance thereof.

7. I have considered the rival submissions advanced by learned Counsel for the parties. I have also perused the material on record. The respondent had filed application Exhibit 28 under Order-XLI, Rule-27 of the C.P.C for adducing additional evidence. By the impugned order, the Appellate Court allowed the application. Clauses 2 to 5 of the operative part of the order read thus;

- “2. On payment of above stated costs the matter be remanded to the Trial Court under Order-41, Rule-28 of the Code of Civil Procedure for recording of the evidence of the witnesses of the defendant/appellant on document Nos. 2, 3 & 4 filed along list Exh.35 with liberty to the respondents/plaintiffs to cross-examine the witnesses.
3. The defendant/appellant shall record his evidence within three months from receipt of the record in the trial Court of all the witnesses he intends to examine.
4. The respondents/plaintiffs shall also complete the cross-examination within the above stated period.
5. The trial Court shall after recording the evidence within time stated above remit the record to this Court along with the evidence recorded”.

8. From the material on record, it is evident that the respondent had deposited costs of Rs.15,000/- on 12th November, 2018. The petitioners filed application Exhibit 73 for withdrawal of that amount. It appears that the petitioners have not withdrawn that amount till date. Be that as it may, the fact, however, remains that the respondent has filed affidavit of examination-in-chief and he was cross-examined. Even the petitioners have adduced additional evidence and they were cross-examined. Thus, the order impugned

is implemented by the learned trial Judge and as per the order dated 2nd March, 2019, after recording evidence of both the parties, the learned trial Judge has transmitted the same to the Appellate Court. Though the Petition was filed in this Court on 13th February, 2019, it was moved before this Court only on 5th March, 2019. At that time, the Court was not informed about recording of evidence by the trial Court and transmitting the same to the Appellate Court. What was told to this Court was that the Appellate Court had fixed the appeal for final hearing on 20th March, 2019 and accordingly, the Petition was kept for final disposal on 19th March, 2019. Thus, when this Court was moved on 5th March, 2019, by that time itself, the impugned order was implemented.

9. Mr. Kanade submitted that the impugned order is legally unsustainable. He, therefore, submitted that the impugned order may be set aside and the evidence recorded in pursuance of the impugned order may be discarded. It is not possible to accept this submission. It cannot be said that the order impugned is a nullity which can be set aside and the action taken in pursuance thereof namely evidence recorded can be discarded.

10. In view thereof, Petition is disposed as infructuous. It is made clear that I have not examined merits of the case. It is, however, expressly made clear that where a decree is appealed from by the petitioners, any error, defect or irregularity in the impugned order, affecting the decision of the case, may be set forth as a ground of objection in the proceedings as contemplated by Section 105(1) of C.P.C. Order accordingly.

[R.G. KETKAR, J.]