

Shailaja

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE SIDE JURISDICTION
WRIT PETITION NO.2858 OF 2019
WITH
WRIT PETITION NO.2863 OF 2019

Mukesh Raishi Chheda	]	Petitioner
Vs.		
Dhirajlal Raishi Chheda	]	Respondent

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Mr. Yahya Ghoghari i/b Jatin Sheth, Advocate for the Petitioner in both the Petitions.

Mr. N.D. Jaywant a/w Leena Shah and Mr. Dipen Furia i/b M/s. Shah & Furia Associates, Advocates for Respondent in Writ Petition No.2858 of 2019.

Mr. Hiralal Thacker, Senior Advocate a/w Leena shah and Mr. Dipen Furia i/b M/s. Shah & Furia Associates, Advocates for Respondent in W.P. No.2863 of 2019.

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CORAM : R.G. KETKAR, J.

DATE : 14th JUNE, 2019.

P.C.

Heard Mr. Ghoghari, learned Counsel for the petitioner in both the Petitions and Mr. Jaywant, learned Counsel for the respondent in Writ Petition No.2858 of 2019 and Mr. Thacker, learned Senior Counsel for the respondent in Writ Petition No.2863 of 2019, at length.

2. Writ Petition No.2858 of 2019 under Article 227 of the Constitution of India is filed by the petitioner, Mukesh Raishi Chheda (for short 'Mukesh'). He has challenged the order dated 11th February, 2019 passed by the learned trial Judge below Exhibit 443 in L.E. Suit No.141/173 of 2008. By that order, the learned trial Judge partly allowed the application made by

Mukesh and ordered issuance of witness summons to the Directorate of Forensic Science Laboratory, Kalina, Mumbai, thereby, directing the concerned to depute a designated officer to appear before the Court along with relevant documents to lead evidence in respect of investigation report dated 27th September, 2018 at the costs of defendants on P.F and depositing witness bhatta as per procedure. In so far as the purported family settlement dated 25th June, 1993 is concerned, the learned trial Judge declined to issue direction as prayed for by Mukesh on the ground that the said report is before this Court in a suit pending on the Original side of this Court and the said report is under consideration before this Court. In such circumstances, the Small Causes Court cannot give direction to the witness in respect of the said report because report is pending before this Court. As the learned trial Judge declined to issue any direction in respect of the report dated 6th February, 2009, Mukhesh has instituted the present Petition.

3. By Writ Petition No.2863 of 2019 under Article 227 of the Constitution of India, the petitioner, Mukesh has challenged the order dated 11th February, 2019 passed by the learned trial Judge below Exhibit 320 in R.A.D & E Suit No.720/1334 of 2004. By that order, the learned trial Judge partly allowed application Exhibit 320 made by Mukesh and issued identical directions contained in order below Exhibit 443 in L.E. Suit No.141/173 of 2008.

4. Rule. Learned Counsel for the respective respondent No.1 waive service. Mr. Ghoghari seeks permission to delete respondents No.2 and 3 in both the Petitions on the ground that they are formal parties. Leave granted. Amendment to be carried out forthwith. In view of 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.

5. In support of these Petitions, Mr. Ghoghari has taken me through copy of the plaint filed in L.E. Suit No.141/173 of 2008 as also copy of the plaint filed in R.A.D. & E Suit No.720/1334 of 2004. In so far as L.E. Suit is concerned, respondent No.1 plaintiff-Dhirajlal Raishi Chheda (for short 'Dhirajlal') has contended that Raishi Shivji Chheda (in short 'Raishi') since deceased is a gratuitous licensee in respect of the residential premises/Flat on the second floor of immovable property known as "Samasaran Building" bearing C.T.S. No.3270 to 3276 situate at M.G. Road, Ghatkopar (West), Mumbai 400 086. Dhirajlal has claimed to be licensor and has alleged that Raishi is a gratuitous licensee. In paragraph 2 of the plaint, Dhirajlal has asserted that the property "Samasaran Building" has vested in him by virtue of the Deed of Family Settlement/Agreement dated 25th June, 1993 as a tenanted property.

6. In so far as R.A.D & E Suit No.720/1334 of 2004 filed by Dhirajlal is concerned, in paragraph 4, he asserted that Raishi expressly admitted in the Family Settlement/Arrangement dated 25th June, 1993 that he (Dhirajlal) is tenant of the suit premises. It was further agreed in the family that entire Samavsaran property has fallen in the share of the plaintiff Dhirajlal alone and the said fact is recorded in the Family Settlement/Agreement dated 25th June, 1993. Dhirajlal has, therefore, prayed for declaration that he is tenant of Raishi in respect of Flat No.1 on the second floor of Samavsaran Building, Mahatma Gandhi Road, Ghatkopar (West), Mumbai 400 086.

7. Mr. Ghoghari submitted that thus the entire thrust of Dhirajlal in both the suits namely L.E Suit and R.A.D & E Suit is on the purported Family Settlement/Arrangement dated 25th June, 1993. He has taken me through the written statements filed by Raishi in both the suits and in particular paragraphs 2.7 and 2.7.4. In these paragraphs, Raishi asserted that the Family Settlement

dated 25th June, 1993 is forged and fabricated document. The defendant and members of his family were made to sign under coercion fraud, misrepresentations, false representations and exercise of undue influence. The said document is voidable at the instance of Raishi and all the concerned family members who have avoided and rescinded the same.

8. Mr. Ghoghare has invited my attention to the application Exhibit 443 filed in L.E. suit No.141/173 of 2008 and application Exhibit 320 in R.A.D Suit No. 720/1334 of 2004 and the replies filed by Dhirajlal. He submitted that in the impugned orders, the only reason given by the learned trial Judge is that the report dated 6th February, 2009 is filed in a suit instituted on the Original Side of this Court. The learned trial Judge did not think it proper to issue the necessary direction. He has also invited my attention to the report dated 6th February, 2009 prepared by Directorate of Forensic Science Laboratory, Home Department, Mumbai and in particular results of analysis. He submitted that the impugned orders to the extent of rejecting the prayer of Mukesh issuing witness to the Directorate of Forensic Science Laboratory, Kalina, Mumbai, thereby, directing them to depute a designated Officer to appear before the Court with all the relevant documents and to lead evidence on their investigation report dated 6th February, 2009 deserves to be set aside.

9. On the other hand, Mr. Thacker supported the impugned orders. He submitted that in fact in R.A.D Suit, no issues are framed pertaining to the Family Settlement/Arrangement dated 25th June, 1993. In fact, Raishi has admitted execution of the Family Settlement dated 25th June, 1993. He submitted that as the said issue is not framed in respect of Family Settlement dated 25th June, 1993 summoning the witness in respect of the Family Settlement is wholly unnecessary. Validity of the said document is not in question in the R.A.D. Suit . He, therefore, submitted that no case is made out

for interfering with the impugned order in exercise of powers under Article 227 of the Constitution of India.

10. Mr. Jaywant while substantially adopting the submission of Mr. Thacker submitted that in the suit filed on the Original Side of this Court, Mukesh was put questions No.263 and 264. Questions No.263 and 264 and the answers given by him are as under:

“Q.263. Is it correct that the Defendant No.1 has filed objection to first part of the Report of Forensic Science Laboratory?

Ans: It is true.

Q.264. Are you going to examine the concerned officer from Forensic Science Laboratory?

A. On that part I will consult with my Advocate after Cross Examination is Over.”

He submitted that though Mukesh had opportunity to examine the concerned officer from Forensic Laboratory in respect of the Family Settlement dated 25th June, 1993, he did not avail that opportunity. He further submitted that as Raishi has admitted execution of Family Settlement, the learned trial Judge was justified in declining the request made by Mukesh for issuing witness summons to Directorate of Forensic Science Laboratory, Kalina, Mumbai, thereby, directing them to depute a designated Officer to appear before the Court with all the relevant documents and to lead evidence on their investigation report dated 6th February, 2009.

11. I have considered the rival submissions advanced by learned Counsel for the parties. I have also perused the material on record. As mentioned earlier, Dhirajlal has instituted L.E. Suit as also R.A.D. Suit. A perusal of the complaints, *prima facie*, indicate that entire thrust in both the complaints

is on Family Settlement dated 25th June, 1993. It is also not in dispute that in pursuance of the order passed by this Court, Family Settlement dated 25th June, 1993 was sent to Forensic Library for its examination. In pursuance thereof, on 6th February, 2009, the report is submitted by the Forensic Laboratory and the same is on record in both the suits. The question is whether the learned trial Judge was justified in declining the prayer made by Mukesh to issue witness summons to Directorate of Forensic Science Laboratory, Kalina, Mumbai, thereby, directing them to depute a designated Officer to appear before the Court with all the relevant documents and to lead evidence on their investigation report dated 6th February, 2009. A perusal of the impugned orders in both the Petitions shows that the learned trial Judge declined to issue witness summons only on the ground that the said report is pending for consideration before this Court. The relevant finding is to the following effect;

“However, so far as the report dated 6th February, 2009 is concerned, I am of the view that the concerned authority have filed said report before the Hon'ble High Court and the said report is pending before the Hon'ble High Court. In such circumstances, this Court cannot give direction to the witness in respect of the said report because report is pending before the Hon'ble High Court. Considering the above discussion, this application deserves to be partly allowed”.

12. In my opinion, the learned trial Judge ought to have appreciated that entire thrust in the suits is on the Family Settlement dated 25th June, 1993. The reliefs claimed by Dhirajlal flow from this document. If that be so, the learned trial Judge erred in declining to issue witness summons to the Directorate of Forensic Science Laboratory, Kalina, Mumbai. The fact that the said report is under consideration of this Court cannot be said to be a valid ground for turning down the request made by Mukesh. Hence, impugned orders deserve to be modified to the extent of declining the request made by

Mukesh for issuing witness summons to the concerned Directorate of Forensic Science Laboratory, Kalina, Mumbai, thereby, directing them to depute a designated Officer to appear before the Court with all the relevant documents and to lead evidence on their investigation report dated 6th February, 2009. Application Exhibit 443 in L.E. Suit No.141/173 of 2008 and application Exhibit 20 in R.A.D & E Suit No.720/1334 of 2004 stand allowed. The learned trial Judge will issue witness summons to the concerned Directorate of Forensic Science Laboratory, Kalina, Mumbai, thereby, directing them to depute a designated Officer to appear before the Court with all the relevant documents and to lead evidence on their investigation report dated 6th February, 2009 subject to payment of costs on P.F and depositing witness bhatta as per procedure.

13. Rule is made absolute in both the Petitions with no order as to costs. At this stage, Mr. Jaywant states that as Dhirajlal has closed evidence in both the suits, he may be permitted to file additional evidence. Liberty is reserved to Dhirajlal to file such application in both the suits. If such applications are filed, the learned trial Judge will pass appropriate orders. Order accordingly.

[R.G. KETKAR, J.]