

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.3374 OF 2017

Shivkumar Shankarrao Thakur and Ors. ...Petitioners

vs.

Bajranglal Makhanlal Agarwal ...Respondent

Mr. Tejas Dande a/w. Mr. Bharat Gadhavi i/b. Tejas Dande & Associates, for the Petitioners

Mr. S.S. Kanetkar a/w. Mr. T.P. Hartalkar, for the Respondent.

CORAM : M. S. SONAK, J.

DATE : MAY 02, 2019

P.C.:

. Heard Mr. Dande, learned counsel for the Petitioners and Mr. Kanetkar, learned counsel for the Respondent.

2. The challenge in this Petition is to the orders dated 3rd March, 2017 and 7th March, 2017 made by the learned trial Judge dismissing the Petitioners' application seeking appointment of the Court Commissioner to record the evidence of one Mr. Ramesh Kumar and further seeking the issuance of witness summons to the said witness.

3. Mr. Dande, learned counsel for the Petitioners submit that in terms of the Order 26 of the CPC, the Court has ample power to

issue a commission for examination of witness. He submits that this witness resides at a distance of 800-1000 km and on account of pressure of his business, he is unable to come to depose in the Court. He submits that this witness is hostile to the Petitioners and therefore may not come on his own to depose in the Court. He submits that name of this witness was set out in the list of the witnesses. He relies on the provision of Order 16 of CPC and submits that at least a witness summons ought to have been issued to the witness. For these reasons, he submits that the impugned order warrant interference and may be set aside.

4. Mr. Kanetkar, learned counsel for the Respondent defends the impugned order on the basis of reasoning reflected therein. He points out that the suit has been ordered to be expedited by this Court and the Petitioners by filing such frivolous application ought not to be permitted to delay the suit. He urges for dismissal of the Petition.

5. The record indicates that the Petitioners first took out an application (Exhibit 218) seeking appointment of the Court Commissioner to examine Mr. Ramesh Kumar. In the said

application, there is no whisper that this witness is unlikely to come to the Court on his own or he is a hostile witness. All that is stated in the application is that, that witness is a businessman residing at Bhilwara, Dist. Jalore, M.P. and on account of “pressure of business” he is unable to attend the Court.

6. By the impugned order dated 3rd March, 2017 the learned trial Judge has rightly referred the provision in Order 26 Rule 1 of CPC and held that the Court Commissioner cannot be appointed merely because the witness is a businessman and on account of pressure of business is unable to attend the Court. The reason set out by the Petitioners in the application (Exhibit 218) was absolutely frivolous and was correctly rejected by the learned trial Judge.

7. Soon after the application (Exhibit 218) was rejected by the impugned order, the Petitioners filed another application dated 7th March, 2019 (Exhibit-219) seeking issuance of witness summons in favour of the witness Ramesh Kumar. This application very clearly states that the same is being made as a consequence of learned trial Judge rejecting the application at Exhibit 218 by order

dated 3rd March, 2017. Again in this application also does not stated that the witness Ramesh Kumar is hostile to the Petitioners and therefore may not come to depose in the matter, if requested by the Petitioner. All that is stated is that the said witness is important to the case of the Petitioners and in the interest of justice to issue the witness summons.

8. By an order dated 7th March, 2017 the learned trial Judge has correctly rejected this application as well, but has given opportunity to the Petitioners to procure the attendance of this witness on his own. According to me, in a matter which is already ordered to be expedited by this Court, the Petitioners cannot, treat it so casually. To begin with, the Petitioners applied for appointment of the Court Commissioner on totally frivolous grounds. After this application was rejected, yet another application was made for witness summons without even stated that there is no hostility between the Petitioners and Respondent. This ground is put-forth in the course of submissions before this Court and on that basis liberty is granted to file a fresh application. The Petitioners cannot invent reasons when these reasons do not exists and repeatedly filed the application to delay

the trial in a suit which is already ordered to be expedited. There is no jurisdictional error in the impugned order which warrant interference in the exercise of supervisory jurisdiction under Article 227 of the Constitution of India.

9. At this stage, Mr. Dande interrupt and clarifies that he had not submitted that witness was hostile to the Petitioners but he had only submitted that witnesses “may not support the case of the Petitioners”. Even on the basis of this submission, the conclusion recorded above cannot be varied. If the case of the Petitioners is only that witness “may not support the case of the Petitioners” then, it is quite clear that the Petitioners have no difficulty in procuring the attendance of such witnesses on his own, but the only apprehension is that, if this witnesses is examined, then this witness may not support to the Petitioners. This would have also been the position if the Court Commissioner were to be appointed or even a witnesses summons to be issued. In any case, with the explanation now furnished by Mr. Dande, it is quite clear that there is no case made out to interfere with the impugned order. Merely, because “witness may not support the case of the Petitioners” the Petitioners cannot seek witness

summons for examination of the witness. It is only in a genuine case where the party despite efforts, is unable to procure the attendance of the witness. Accordingly, this is an additional ground to dismiss this Petition.

10. Accordingly this Petition is liable to be dismissed and is hereby dismissed.

11. There shall be no order as to costs.

(M. S. SONAK, J.)