

+IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.1576 OF 2019

WITH

WRIT PETITION NO.1428 OF 2019

1. Pereirawadi Education Society,
A Society duly registered with
the charity Commissioner,
Bombay, Having office at
Pereirawadi, Theresa High School,
Mohili Village, Sakinaka,
Mumbai – 400072.
2. Theresa High School,
Situated at Pereirawadi,
Mohili Village, Sakinaka,
Mumbai – 400 072.
(Original Plaintiffs) ... **Petitioners**

Versus

1. Mr. Sunny Correia,
Aged 74 years, Occu.: Retired
- 2 Mrs.Fatima Sunny Corriea,
Age 69 years, Occu.:Retired,
Both are Indian Inhabitants of
Mumbai, residing at Room No.1
and 2, Theresa High School,
Pereirawadi, Mohili Village,
Sakinaka, Mumbai – 400 072.
(Original Defendants) ... **Respondents**

.....

Adv.Rajesh Singh with Adv.Priti R. Mahajan with Adv.Iftekhar

Sayed, Advocate for the Petitioners.

Adv.Sana Y. Baugwala, Advocate for the Respondent Nos.1 and 2.

....

CORAM : A.M.BADAR J.

DATED : 14th NOVEMBER 2019.

ORAL JUDGMENT :

1 Heard.

2 Rule. Rule is made returnable forthwith. Heard finally by consent of parties.

3 By these petitions, identical Orders passed by the learned Judge of the City Civil Court, Mumbai on notices of motion bearing No.3796 and 3797 of 2018 respectively filed in Suit No.643 of 2009 and 641 of 2009 by petitioners/plaintiffs are impugned. By those Orders dated 25th October 2018, the learned trial Court was pleased to reject Notices of Motion bearing Nos.3796 and 3797 of 2018 in those suits. Those notices of motion were taken out by petitioners/original plaintiffs for condonation of delay for taking out the notices setting aside the Order dated 03/11/2012 passed in those suits regarding closure of cross-examination of Defendant Witness No.1 with a further prayer to allow the petitioners/original plaintiffs to further cross-examine the Defendant Witness No.1.

4 Heard the learned Counsel appearing for the petitioners/original plaintiffs. He drew my attention to cross-examine of Defendant Witness No.1 namely Fatima wife of Sunny Correia, who is defendant in both the suits. The learned Counsel urged that both the suits are under Section 6 of the Specific Relief Act, 1963 and in the written statement filed on behalf of the respondents/original defendants, no defence is taken that the defendants are occupying the suit premises under valid letter of allotment issued by the petitioners/original plaintiffs. Witnesses of plaintiffs were not confronted with any such allotment letter and during her cross-examination, respondent herein/original defendant Fatima wife of Sunny had produced purported Allotment Letter which is marked as Exhibit 50. It is submitted that after asking few questions on that purported Allotment Letter in cross-examination, the learned Counsel for the petitioners/original plaintiffs subsequently took out a motion for sending the said letter for examination by Handwriting Expert. It was presumed that further cross-examination of the Defendant Witness No.1 is deferred. First report came inconclusive and, therefore, that letter was again sent to a private Handwriting Expert and ultimately, on 08/08/2014 fresh report of the private Handwriting Expert came, wherein it is stated that the signature at Exhibit 50 is not the signature of the Trustee of the plaintiff-Society. Therefore, according to the learned Counsel for the petitioners/original plaintiffs, two separate notices of motion were

moved in both suits praying for recall of the Defendant Witness No.1 for further cross-examination. However, those notices of motion came to be rejected by erroneous observations by the learned trial Court. The learned Counsel for the petitioners/original plaintiffs argued that all the while parties as well as the learned trial Court were under the belief that the suits are pending for further cross-examination of the Defendant Witness No.1. However, despite this fact, prayer for recalling of witness No.1 for the defendant came to be rejected. My attention is drawn to the plaint as well as written statement so also observation of the learned trial Court in rejecting the prayer made for recalling the witness. My attention is also drawn to Notice of Motion bearing No.69 of 2015 and the Order passed thereon and the application at Exhibit 51 filed by the defendants for sending the letter at Exhibit 50 to Handwriting Expert. It is urged that even the defendants in their affidavit in support of notice of motion have stated that the suit is pending for cross-examination of defendant's witness. It is also argued that the learned trial Court has ample powers to recall a witness at any point of time even when the case is fixed for judgment. Reliance is placed on Judgment of the Honourable Supreme Court in the matter of *K.K.Velusamy Versus Palanisamy*¹

5 As against this, the learned Counsel appearing for respondent/original defendants argued that the defendant No.2 is

1 2011 AIR SCW 2296.

co-owner of the suit property and her husband has retired from the school in the year 2001, whereas she has retired from the school in the year 2007. The suit premises were in possession of the defendants and after demolition of those premises in the year 2007, they shifted in Room No.1 and Room No.2. The learned Counsel for respondents/defendants further argued that the letter at Exhibit 50 was elicited by plaintiffs while defendant Fatima was under cross-examination. It was never relied on by defendants. It is also urged that cross-examination of the defendant Fatima was over in the year 2012 itself and there was no reason for the plaintiffs to presume that it is not over. Notice of motion was moved subsequent to closure of evidence of defendant's witness No.1 Fataima. Her evidence was not deferred. In fact, if plaintiffs were to cross-examine this witness subsequently on receipt of opinion of Handwriting Expert, then they ought to have made specific prayer for deferring cross-examination of Defendant Witness No.1 Fatima. This was not done and belatedly, after a lapse of period of five years, applications were moved for recalling Defendant Witness No.1 Fatima. It is argued that no case for recall of witness of the defendant is made out by plaintiffs and, therefore, the learned trial Court rightly rejected notice of motion in both the suits.

6 As facts of both these cases are identical and impugned Orders passed are also identical, both these petitions are being

disposed of by common Order by considering Writ Petition No.1576 of 2019 as a lead petition for incorporation of facts.

7 It is not in dispute that petitioners/plaintiffs have filed two suits against defendants, who happens to be husband and wife. Suits are under Section 6 of the Specific Relief Act, 1963, wherein following prayers are made.

“(a) this Hon’ble Court be pleased to declare that the Defendants illegally and unauthorisedly entered into the suit premises i.e. Room No.1 admeasuring about 250 Sq.Ft. Situated on the Ground Floor situated at Survey No.30. Hissa No.10 C.T.S.No.124, Theresa High School, Mohili Village, Sakinaka, Mumbai 400 072 by dispossessing the Plaintiffs ;

(b) this Hon’ble Court be pleased to pass a decree directing the Defendants to quit, vacate and handover vacant, peaceful possession of the suit premises i.e. Room No.1 admeasuring about 250 Sq.Ft. Situated on the ground Floor situated at Survey No.30, Hissa No.10 C.T.S.No.124, Theresa High School, Mohili Village, Sakinaka, Mumbai 400 072 to the Plaintiffs ;”

8 After examining three witnesses, plaintiffs closed their evidence and thereafter defendants had chosen to adduce evidence of defendant Fatima wife of Sunny. After filing of her evidence on affidavit, she was subjected to cross-examine by petitioners/plaintiffs.

9 According to case of plaintiffs they are running a school named Theresa High School in Mohili village of Sakinaka and they are dispossessed of room Nos.1 and 2 in the building of the school by defendants by unauthorizedly taking possession of those rooms.

10 During the course of cross-examination of defendant Fatima, she had stated that she has been given a letter of allotment from Peter Anthony Pereira and then she produced the said letter which is marked at Exhibit 50. This witness was then cross-examined further and then the learned trial Court noted that cross-examination of this witness is over. The witness was then discharged on 03/11/2012 itself, as seen from the evidence of Defendant Witness No.1 Fatima recorded by the learned Judge of the City Civil Court.

11 Subsequently, plaintiffs took out notice of motion with a prayer to send the letter at Exhibit 50 for examination by the Government Handwriting Expert. That motion came to be allowed and the letter at Exhibit 50 was sent to the Government Examiner of Handwriting. Ultimately, the report came, but it was inconclusive. Then, undisputedly application at Exhibit 51 came to be moved by plaintiffs for sending the letter at Exhibit 50 to the private Handwriting Expert. That application came to be allowed by the learned trial Court and that is how the letter at Exhibit 50

along with specimen signature of Peter Anthony Pereira – Trustee of the plaintiff Education Society were sent to Hiral A. Mehta, Forensic Document Examiner. Accordingly on 08/08/2014, report of this Handwriting Expert was received by the Court. Following is the opinion expressed by this Handwriting Expert :

“ 1. The Disputed Signature, marked Ds, written as ‘Pereira’ on a document purported to be a Note dated 4/9/2007, as described above, has not been written by the writer of the Admitted Signatures marked A-1 to A-28 and Specimen Signatures marked S-1 to S-42 of one purported to be Mr. Peter Anthony Pereira.

2. The Disputed Handwriting, marked Dh, written in Marathi on a document purported to be a Note dated 4/9/2007 as also containing Ds above, as described above has not been written by the writer of the Specimen Handwriting marked Sh-1 to Sh-8 of one purported to be Mr. Peter Anthony Pereira.”

Thus, the Handwriting Expert opined that the disputed signature of Peter Anthony Pereira found on letter at Exhibit 50 is not matching the specimen signatures of Peter Anthony Pereira.

12 On this backdrop, plaintiffs moved notice of motion bearing 3796 of 2018 for recalling Defendant Witness No.1 Fatima for further cross-examination. One of the ground stated in the notice of motion is to the effect that plaintiffs were under

impression that the suit is pending for cross-examination of Defendant Witness No.1 Fatima. By the impugned Order dated 25th October 2018 in Notice of Motion No.3796 of 2018, the learned trial Court was pleased to reject the request of the plaintiffs for recalling defendant Fatima for further cross-examination. At this juncture, it is apposite to quote observations of the learned trial Court while rejecting the said notice of motion. It is observed thus in paragraph 4 of the impugned Order by the learned trial Court.

“4.....On 04.08.2017, also the matter was adjourned, but on the caption cross-examination of defendant. This went on up to 26.09.2018. However, on 26.09.2018, when the matter was adjourned examined in presence of the parties, it is revealed that on 03.11.2012, the proceedings show that the cross-examination of DW-1 was already over and completed and the defendants had also closed their evidence on very same day. Considering this, the Court observed on 26.09.2018 that the matter should be taken up for hearing arguments. Therefore, the matter was adjourned to 09.10.2018 for arguments, when the instant Notice of Motion has been taken out by the plaintiffs.

5 From the aforesaid circumstances, it does not appear that the parties had any occasion or reason to remain under impression that the matter is for cross-examination of DW-1. Therefore, the contention of the

plaintiffs that the matter should have been for cross-examination of DW-1 practically cannot be accepted in view of the roznama dated 03.11.2012 and the cross-examination of DW-1 recorded on that date. The record of the said cross-examination shows that the plaintiffs have cross-examined the witness on the document exhibit-50. Therefore, for these reasons, I do not find that the witness can be recalled on the ground that the case should have been for cross-examination of D.W.No.1.”

Perusal of observations of the learned trial Court, as such, goes to show that even as per the record of the trial Court, the suit was adjourned under caption of cross-examination of the defendant. This is continued up to 26/09/2018 and then immediately on 09/10/2018, plaintiffs moved notice of motion for recalling the witness examined by defendants namely Fatima.

13 Record shows that even defendants were under impression that the suit is for cross-examination of defendant Fatima. This is clear from affidavit in support of notice of motion bearing No.69 of 2015 taken out by defendants. In paragraph 1 of her affidavit, defendant Fatima in terms had stated that pending her cross-examination, plaintiffs have taken out notice of motion bearing No.3108 of 2014 along with report dated 08/08/2014. It is thus clear that plaintiffs, defendants and even the Court was under impression that the suit is for cross-examination of the defendants. Record of the suit was also pointing out this fact and that is how after detecting the fact that there is endorsement to

the effect that evidence of Defendant Witness No.1 Fatima is closed, plaintiffs have moved Notice of Motion bearing No.3796 of 2018 for her recall.

14 At this juncture, it is apposite to note that as per provisions of Order XIV Rule 3 of the Code of Civil Procedure, issues are required to be settled even by perusing documents produced by parties. Order XIII Rule 1 requires that prior to settlement of issues, parties should place documents in original before the Court. In the case in hand, defence of defendants being legal Allottee of suit premises was not set up in the written statement. However, the purported Allotment Letter (Exhibit 50) came on record during cross-examination of defendant Fatima. Thus, the plaintiffs were required to meet out the defence of defendants being legal Allottee of the suit premises. On this backdrop, request of the plaintiffs for sending the purported Allotment Letter for examination by Handwriting Expert was accepted by the learned trial Court and accordingly, the report is also received. On this backdrop, for just, fair and final decision on the disputed question of fact, it was incumbent on the part of the learned trial Court to permit plaintiffs to cross-examine Defendant Witness No.1 Fatima further. Order XVIII Rule 17 of the Code of Civil Procedure gives plenary powers to the Court to recall the witness if such contingencies arises. Paragraph 12 of Judgment of the Honourable Supreme Court in the matter of *K.K.Velusamy (supra)* reads thus :

“12. The amended provisions of the Code contemplate and expect a trial court to hear the arguments immediately after the completion of evidence and then proceed to judgment. Therefore, it was unnecessary to have an express provision for re-opening the evidence to examine a fresh witness or for recalling any witness for further examination. But if there is a time gap between the completion of evidence and hearing of the arguments, for whatsoever reason, and if in that interregnum, a party comes across some evidence which he could not lay his hands earlier, or some evidence in regard to the conduct or action of the other party comes into existence, the court may in exercise of its inherent power under section 151 of the Code, permit the production of such evidence if it is relevant and necessary in the interest of justice, subject to such terms as the court may deem fit to impose.”

15 In this view of the matter, it is not possible to endorse the hyper-technical view taken by the learned trial Court for rejecting the prayer for recall of Defendant Witness No.1. Ultimately, it is the duty of the Court to adjudicate and decide the disputes between the parties on their own merits rather than adhering to technicality of law and procedure. Therefore, the Order :

ORDER

- (i) Both the Writ Petitions are allowed.

- (ii) Rule is made absolute in terms of prayer clause (a) to (c).

(A.M.BADAR, J.)