

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO. 6102 OF 2021

Kishor s/o Bhabutmal Shah,
Age 58 years, Occ. Business,
R/o. Flat No. 02, K. Sana Apartment,
Plot No. 16, Bhoite Nagar, Pimprala
Road, Tq. & Dist. Jalgaon.

... **Petitioner.**

VERSUS

- 1) Vinod Sukhdeo Patil,
Age Major, Occ. Service & Money lending,
R/o. House No.133, Shanipeth, Ridhurwada,
Tq. and Dist. Jalgaon.
- 2) Vilas Narayan Sonawne,
Age Major, Occ. Money Lending,
R/o. Shanipeth, Rath Chowk,
Tq. & Dist. Jalgaon.
- 3) Sau. Lata Kishor Shah,
Age 57 years, Occ. Household &
Business, r/o. Flat No. 02, K. Sana
Apartment, Plot No. 16, Bhoite Nagar,
Pimprala Road, Tq. & Dist. Jalgaon.

... **Respondents.**

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Advocate for the Petitioner : Mr. Jitendra V. Patil.
Advocate for the respondent Nos. 1 & 2 : Mr. S. H. Tripathi.

CORAM : **MANGESH S. PATIL, J.**
DATE : **26.11.2021.**

ORAL JUDGMENT :

Heard. Rule. The Rule is made returnable forthwith. Issue notice to the respondents. Learned advocate Mr. Tripathi submits that he has instructions to appear on behalf of the respondent Nos. 1 and 2 who are the contesting respondents and the original defendants. Office to accept his

Vakalatnama. At the joint request of the parties the matter is heard finally at the stage of admission.

2. The petitioner and the respondent No. 3 are the original plaintiffs seeking a declaration that sale-deed dated 11.12.2008 got executed by the respondent Nos. 1 and 2 from them is sham and illegal. They have also prayed for possession of the property under sale as also mesne profits. The petitioner is aggrieved by the rejection of the application (Exh. 141) whereby his request to issue witness summons to the persons named therein has been rejected.

3. The application was opposed by the respondent Nos. 1 and 2 on the ground that the petitioner had already examined couple of witnesses. No list of witnesses was ever furnished. The application was moved ex tempore. The relevance of the facts to be proved through the proposed witnesses was also not stated.

4. The learned advocates make submission commensurate with their stand before the Trial Court.

5. True it is that admittedly, no list of witnesses was ever furnished by the petitioner at the trial and the application (Exh. 141) was moved ex tempore after couple of witnesses were examined.

6. However, as can be noticed from the application (Exh. 141) the relevance or the points on which the witnesses were to be examined were specifically spelt out in respect of the witness No. 1, 2, 3 and 8. It was a specific stand of the petitioner that it was a money lending transaction and the sale-deed was got executed only by way of a security. To substantiate such stand about filing of complaints with the police against the respondent Nos. 1 and 2 the witness Nos. 1, 2 and 3 were sought to be called. The witness No. 8 is stated to be a photographer who video recorded the marriage ceremony of petitioner's daughter, probably to demonstrate that he was in

need of money which was borrowed from the respondent Nos. 1 and 2, as a security for which the sale-deed was executed. Perhaps oblivious of the factual background and the stand of the parties, the learned Judge has outrightly rejected the application even to the extent of these witness No. 1, 2, 3 and 8 by holding that they are not necessary and relevant persons to be called as witnesses.

7. True it is that nothing has been mentioned in the application (Exh. 141) as to why and on what point the other persons namely the witnesses at Sr. No. 4 to 7 were to be called. Therefore to this extent, there is no error in the observation of the Trial Court in holding that in the absence of any specific stand being taken by the petitioner while moving this application to demonstrate as to on what point these witnesses were to be examined. No error is committed by the Judge in refusing to issue witness summons to them.

8. It is trite that procedure is hand maid of justice. Though it is equally true that no prejudice can be allowed to be caused to the other side, mere filing of the application for witness summons ex tempore cannot be the sole ground for rejection of a request albeit there can be insistence for disclosing as to on what point/s the witnesses are to be called.

9. Bearing in mind this proposition the impugned order which outrightly denies the petitioner an opportunity to lead evidence is certainly perverse, arbitrary and illegal.

10. In view of above, the Writ Petition is partly allowed. The impugned order, to the extent it refuses an opportunity to the petitioner to call the witnesses at Sr. No. 1, 2, 3 and 8 is quashed and set aside. The Trial Court shall now allow the application to that extent.

11. The Writ Petition to the extent it challenges the impugned order refusing to issue witness summons to the witnesses Nos. 4 to 7 is dismissed,

however, keeping open an opportunity to the petitioner and the respondent No. 3 to make a fresh application by disclosing the facts on which they wish to examine these witness Nos. 4 to 7. The Trial Court shall permit them to move such an application and shall decide it on its own merits.

12. The suit is expedited.

13. The Rule is made absolute in above terms.

(MANGESH S. PATIL, J.)

mkd/-