

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.4021 OF 2018

Anant Ganpat Mhatre .. Petitioner

Vs.

Elben Prabhakar Dharkar & Ors. .. Respondents

...

Mr. Sanjiv Sawant with Mr. Abhishek Matkar i/b Mr. Abhishek Deshmukh for the petitioner.

Mr. Rohit Joshi for respondent No.3.

...

CORAM : SMT. BHARATI DANGRE, J.

DATED : 06TH OCTOBER, 2021.

P.C:-

1. Rule. Rule made returnable forthwith. By consent of the parties, taken up for final hearing.
2. Heard Mr. Sawant, learned counsel for the petitioner and Mr. Joshi, learned counsel for respondent No.3.
3. The petitioner, who is the original plaintiff had instituted Special Civil Suit No.145 of 2013 in the Court of Civil Judge,

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This order stands corrected as per speaking to the minutes order dated 14.10.2021.

Senior Division, Alibaug, seeking recovery of an amount of Rs.79,80,800/- with interest at 12% per annum from May, 2011 till its realization. The aforesaid relief was sought in the backdrop of the pleading that the plaintiff was appointed by the defendant as a contractor for constructing a building on the suit property bearing City Survey Nos.1521 and 1522, situated at Pen, Pen Nagarparishad, District Raigad. The understanding between the parties was that the plaintiff will construct the building from its own spending and the defendants will pay an amount of Rs.79,80,800/- as consideration. The plaint averred that on 12/03/2009, the contract was executed between the plaintiff and one Prabhakar Narayan Dharkar, who is the husband of respondent No.1. Prabhakar Dharkar expired on 27/12/2011. Respondent Nos.2, 3, 4 and 5 are his progenies. The agreement, to the effect that the amount as agreed would be paid on completion of construction of the building, was breached by the respondents on the pretext that the premises in the building constructed by the petitioner could not be sold out. The plaintiff, however, completed his part of the contract by completing the construction of the building in May, 2011 and since the amount towards the construction was due and payable to the plaintiff, he instituted a suit for recovery of the said amount.

4. In the said suit, the plaintiff led evidence and the Chief Officer of the Pen Nagarparishad was asked to remain present in

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the court along with papers in pursuance of an application moved by the plaintiff. The court issued summons on 06/01/2017 and directed him to remain present with the necessary papers. The cross-examination of the petitioner was completed on 02/01/2017 and witness summons was issued to Pen Nagarparishad on 06/01/2017. The witness remained present before the court on 02/03/2017 when the respondents to the suit preferred an application, Ex-53, praying that the Chief Officer, Pen Nagarparishad should not be examined as a witness. The witness again presented himself in the court on 02/04/2017, but could not be examined, pending the application filed by the defendants vide Ex-53. The application being allowed by the impugned order, constrained the petitioner to approach this court.

5. When the application at Ex-53 is perused, it only discloses the following reasons:

“Defendant Nos.1, 3, 4 and 5 state that the Chief Officer, Pen Nagarparishad cannot be examined by the plaintiff as a witness as the same would amount to evidence beyond pleadings and the same is against the provisions of law”.

6. The said application of respondent No.2 was opposed by the plaintiff/petitioner by recording the following objections:

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“(1) The present application is not tenable as it does not disclose as to under which provision the same is filed.

(2) The contents of Para 4 are ridiculous. Evidence is always given in support of the pleading. Evidence is not to be pleaded. The objection taken is devoid of merits.

(3) A party cannot be precluded from leading evidence in support of his case and in rebuttal of defence and the same will be against the principles of natural justice. As such, there is no express provision in Law as stated by Defendants”.

7. The Civil Judge, Senior Division, Alibaug proceeded to decide the said application and heard the respective counsel. What the court recorded while allowing the application is as under:

“In case of The National Textile Corporation Limited v. Nareshkumar Badrikumar Jagad & Ors. in Civil Appeal No.7448 of 2011, the Supreme Court took reference of ruling in Syed and Company & Ors. v. State of Jammu & Kashmir & Ors. reported in 1995 Supp. (4) 422, in which it is held that without amendment of the pleading, trying to lead evidence is not permissible. As per this law, the plaintiff cannot lead evidence in respect of construction of 4th floor of the building. It is held that no evidence can be permitted to be adduced on an issue unless factual foundation has been laid down in

respect of the same. Recording that there is no issue about construction of 4th floor, it is held that the plaintiff cannot be permitted to examine such witness.”

8. In the suit, the following issues are framed as Issue Nos.1, 3 and 5, which are reproduced below:

“1.Whether the plaintiff proves that he has completed the construction of building as stipulated in the agreement dt. 12/03/2009?

3. Whether the defendants No.1 and 3 to 5 prove that the plaintiff has failed to complete the construction work and deliver possession to their predecessor in title as per the terms of agreement?

5. Is plaintiff entitled to recover the amount of Rs.79,80,800/- from the defendants? If yes, what should be the rate of interest?”

9. When the plaintiff is called upon to discharge the burden of proving that he has completed the construction of the building in terms of the agreement and whether he is entitled for recovery of amount to the tune of Rs.79,80,800/-, it is incumbent upon the plaintiff to discharge the said burden and through what evidence, he will discharge the burden is his prerogative. In support of his claim that the construction of the building was complete in terms of the agreement and since the plaintiff had exhibited the documents in the form of the permission for construction and

commencement certificate for construction on City Survey Nos.1521 and 1522, he moved an application before the court to issue summons to the Chief Executive Officer, who was requested to produce the said permissions as well a sanction plan and, pursuant to the said application, the summons was issued and the witness also remained present in the court to depose.

10. Ultimately, the plaintiff is a navigator of his suit, who has to steer his suit and when he made a request to the court to issue summons to the Chief Executive Officer of Pen Nagarparishad, the said request was granted. At this stage, the defendants prayed for disallowing the examination of Chief Executive Officer. The application has been entertained without referring to any provisions contained in the Civil Procedure Code, which would have permitted the court to decline the examination of the plaintiff's witness. The impugned order has wrongly construed the decision of the Apex Court, to which it had made a reference. True it is, that in absence of pleadings, the evidence cannot be led, however, the same is not the case here. The suit for recovery by the plaintiff is based on a pleading to the effect that the plaintiff had completed the construction of ground plus two floors of a building, in accordance with the building plans and, the commencement certificate being issued in his favour. For this completed construction, he is seeking recovery of the amount from the defendants under the agreement reached between them.

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The learned Judge in passing the order impugned has completely misguided himself. The impugned order, therefore, cannot be sustained and is liable to be quashed and set aside. Resultantly, the writ petition is allowed in terms of prayer clause (a). Since the suit for recovery of the amount is pending from 2013, the Civil Judge, Senior Division, Alibaug is requested to expedite the hearing of Special Civil Suit No.145 of 2013 and preferably conclude it within a period of six months.

[SMT. BHARATI DANGRE, J.]