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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 711 OF 2021

Mandakini G. Shinde and
Bhagirathi Vithoba Darveshi
(Decd Through LRs)

1(a) Rekha Deepak Shinde and Ors.

.....Petitioners.

V/s

Gopal Ganpatrao Shinde
(Deleted since deceased)

Arvind Gopal Shinde and Ors.

.....Respondents

Mr. Prashant G. Karande for the Petitioners.

Mr. S.R. Paranjape for Respondent No.2.

CORAM: NITIN W. SAMBRE, J.

DATE: MARCH 2, 2021

P.C.:-

1] Heard respective Counsels. It is noticed that the order impugned passed in notice of motion No.456 of 2019 on 4/2/2021 warrants interference for the following reasons.

2] The learned Counsel for Respondent No.2 has invited attention

of this Court to the provisions of Order 18 Rule 3A so as to claim that the order in which the evidence of the parties is to be recorded is settled by the CPC. According to him, contrary to above, witness cannot be examined by upsetting the order of recording of evidence of the witnesses as provided under the aforesaid Rule 3A. Support is drawn from the observations of this Court in its judgment dated 23/8/2019 in Writ Petition No.3685 of 2019 in Suit No.1767 of 2008 in the matter of *Mrs. Anju Toshniwal and Ors. vs. Expat Properties India Ltd.*

3] As far as aforesaid submissions are concerned, it is required to be noted that order 18 Rule 16 appears to be an exception to Rule 3A of Order 18 as same provides that the evidence of witness can be recorded in case if such witness is likely to leave the jurisdiction of the Court or for other sufficient cause as is shown to the satisfaction of the Court as to why recording of evidence of such witness is immediately warranted. The ratio of the judgment of this Court in the matter of *Daulat Jehangir Mehta vs. Miss Piloo Dadabhoy Broacha and others* reported in **2005(1) Mh.L.J. 623** on which reliance is placed by the learned Counsel for the Petitioner, squarely applies to the facts of the

present case. However, ratio of the judgment of this Court in the matter of *Anju Toshniwal*, cited supra, relied on by the learned Counsel for Respondent No.2 is not applicable to the present case.

4] In the notice of motion, it is specifically pleaded by the Petitioner that witness Usha Katke is of advance age and is suffering from various ailments. Even doctor's certificates are already produced on record. Already two parties to the suit have expired because of their advance age.

5] In the aforesaid backdrop, in my opinion, Trial Court has erred in failing to understand very scheme of Rule 3A and 16 of Order 18 of the CPC. In the aforesaid backdrop, the order impugned dated 4/2/2021 passed in Notice of Motion No.456 of 2019 is hereby quashed and set aside. Notice of Motion No.456 of 2019 stands allowed.

6] Objection raised by the learned Counsel for Respondent No.2 that evidence of such witness is required to be restricted to the extent of what has been stated in the examination-in-chief is concerned, at

an appropriate stage, Trial Court has every authority to scrutinize the acceptability of the said evidence.

7] For the reasons stated above, Petition stands allowed in the aforesaid terms.

(NITIN W. SAMBRE, J.)