

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.11640 OF 2021

Nemichand Hukumchand Tathed

...Petitioner

VERSUS

Jotsnyaben Kantilal Shah Died Thr
Legal Heirs Sangita Kantilal Shah
And Others

...Respondents

...

Mr. Vinesh Solshe h/f Mr. Mahesh Patil, Advocate for the
Petitioner.

Mr. M.S. Kulkarni, Advocate for Respondent No. 2.

Mr. A.T. Jadhavar, Advocate for Respondent No. 4.

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[CORAM : NITIN B. SURYAWANSHI, J.]

DATE : 17th AUGUST, 2022

ORDER :

1. The challenge in this petition is to the order passed by the learned 3rd Joint Civil Judge, Junior Division, Dhule, below Exhibit-90 in Regular Darkhast No. 22 of 2017.

2. Respondent No. 1 being the original landlord filed Regular Civil Suit No. 76/2015 for recovery of rent and vacant possession of the suit property from one Mr. Paras Tathed. A compromise decree was passed in the said suit on 02.01.2017. By the said compromise decree Mr. Paras Tathed agreed to give

possession of the suit property to Respondent No. 1. Since the possession was not handed over in terms of compromise decree, respondent No. 1 filed Regular Darkhast No. 22/2017 in the Court of Civil Judge, Junior Division.

3. The petitioner who is real brother of the Judgment Debtor/tenant resisted the execution of the decree and filed objection under Order XXI Rule 97. Said objection was resisted by the decree holders by filing a detail say.

4. During the course of hearing of the objection, respondents examined bailiff Sharad Ajalkar as PW1 on 04.12.2019, he deposed before the Court that when he went to execute the possession warrant, the petitioner and his family members resisted, so the possession could not be obtained. He placed on record a bailiff report Exhibit-8 to that effect. The bailiff was cross examined on behalf of the petitioner on the same day.

5. Respondent No. 2 being the decree holder thereafter filed her evidence affidavit on 06.01.2020, on which, on the same day, the Executing Court passed order "read and recorded."

6. On 17.01.2020, the petitioner filed application Exhibit-90 contending that the petitioner has led his evidence and thereafter the matter was fixed for evidence of the decree holders. The decree holders have examined their witness Sharad Ajalkar. Thereafter, on the last date decree holder No. 2 filed her evidence affidavit at Exhibit-89, however, for that the decree holder No. 2 has not obtained prior permission of the Court under Order 18 Rule 3-A, therefore, the objector has taken the said objection on that day and has not taken a copy of evidence affidavit of decree holder. Since the decree holders have examined their witness before entering into the witness box, they have lost their right to examine themselves. Therefore, evidence affidavit Exhibit-89 is inadmissible and illegal. The decree holders have deliberately deceived the Court, hence, the petitioner prayed that evidence affidavit Exhibit-89 be filed and instead of keeping the matter for cross examination of decree holders, it be posted for further evidence on behalf of decree holders. Said application was resisted by the respondents/decreed holders by filing a written say. The Executing Court rejected the application. This order is challenged in the present petition filed under Article 227 of the Constitution of India.

7. Heard the learned advocate for the petitioner and learned advocate for the respondents.

8. The learned advocate for the petitioner assailed the impugned order by relying on *Sanj Dainik Lokopchar & Ors. Vs. Gokulchand Govindlal Sananda* [2018 (6) ALL MR 393] and *Hari Shrawan Sutar Vs. Ramdas Tukaram Patil* [(1985) 2 BCR 290], contending that in absence of prior permission of the Court, the respondents could not have examined bailiff as their witness. According to him, provisions of Rule 3-A of Order XVIII are mandatory and for violation of the same, the Executing Court ought to have allowed the application filed by the petitioner.

9. Per contra, the learned advocate for the respondents/decree holders by relying on *Devkabai Chudaman Patil Vs. Santosh Supadu Patil* [2013 (3) Mh.L.J. 945], would urge that Rule 3-A of Order XVIII is directory in nature. He submits that application Exhibit-90 itself is not maintainable and the same was filed belatedly.

10. I have given due consideration to the rival submissions. I have gone through the pleadings in the petition,

annexures thereto, impugned order passed by the Executing Court and the judgments of this court cited by the learned advocate for the respective parties and I am of the opinion that the impugned order does not warrant any interference.

11. Apparently, the objection filed by the petitioner is in collusion with the tenant, his real brother. In spite of compromise decree having been passed in the year 2017, the same is yet to be executed after a lapse of almost five years.

12. By examining bailiff PW1 decree holders have brought on record the fact that when the bailiff went along with the possession warrant, the petitioner and family members offered resistance. The bailiff was driven out of the house. The bailiff report Exhibit-8 to that effect is brought on record in the evidence of the bailiff. The bailiff is cross examined by the petitioner on the same day i.e. on 04.12.2019. Thereafter, respondent No. 2/decreed holder No. 2 filed her evidence affidavit on 06.01.2020. On that day no objection whatsoever was taken by the petitioner. On the same day, the Executing Court has passed order on the evidence affidavit "read and recorded", on the same day.

13. On 17.01.2020, application Exhibit-90 is filed by the petitioner taking an after thought stand that when the evidence affidavit was filed by Respondent No. 2, it was objected by the petitioner on the same day. A totally unreasonable stand is adopted by the petitioner that since the bailiff is examined earlier without obtaining permission of the Court under Rule 3-A of Order XVIII, respondent No. 2 has lost right to examine herself and therefore Exhibit-89 is inadmissible and illegal. An untenable prayer is made by the petitioner to the effect that evidence affidavit be filed and instead of keeping the matter for cross examination of respondent No. 2, it may be posted for further evidence of decree holders.

14. The Executing Court has rightly rejected application Exhibit-90 holding that after the evidence of objectors the evidence of decree holder is essential in the proceeding.

15. It is a settled legal position that rules of procedure are handmaids of justice. In Sangram Singh Vs. Election Tribunal, Kotah and Anr. [AIR 1955 SC 425], the Hon'ble Apex Court held:

"16. Now a code of procedure must be regarded as such. It is procedure, something

designed to facilitate justice and further its ends: not a penal enactment for punishment and penalties; not a thing designed to trip people up. Too technical a construction of sections that leaves no room for reasonable elasticity of interpretation should therefore be guarded against (provided always that justice is done to both sides) lest the very means designed or the furtherance of justice be used to frustrate it.

17. Next, there must be ever present to the mind the fact that our laws of procedure are grounded on a principle of natural justice which requires that men should not be condemned unheard, that decisions should not be reached behind their backs, that proceedings that affect their lives and property should not continue in their absence and that they should not be precluded from participating in them. Of course, there must be exceptions and where they are clearly defined they must be given effect to. But taken by and large, and subject to that proviso, our laws of procedure should be construed, wherever that is reasonably possible, in the light of that principle.

18. The existence of such a principle has been doubted and in any even was condemned as unworkable and impractical by O'sullivan J. in Hariram v. Pribhdas. He regarded it as an

indeterminate term "liable to cause misconception" and his views were shared by Wanchoo, C.J. and Bapna, J. in Rajasthan: Sewa Ram v. Misrimal. But that a law of natural justice exists in the sense that a party must be heard in a court of law, or at any rate be afforded an opportunity to appear and defend himself, unless there is express provision to the contrary, is, we thin, beyond dispute. See the observations of the Privy Council in Balakrishna Udayar v. Vasudeva Ayyar and especially in T.M. Barret v. African Products Ltd. where Lord Buckmaster said- "no forms or procedure should ever be permitted to exclude the presentation of a litigant's defence".

Also Hari Vishnu case which we have just quoted.

In our opinion, Wallace, J. was right in Venkatasubbiah v. Lakshminarasimham in holding that-

"One cardinal principle to be observed in trials by a court obviously is that a party has a right to appear and plead his cause on all occasions when that cause comes on for hearing,"

and that-

"It follows that a party should not be deprived of that right and in fact the court has no option to refuse that right, unless the Code of Civil Procedure deprives him of it."

16. Applying above ratio to the case in hand, if the application Exhibit-90 filed by the petitioner is allowed, the respondents/decreed holders will be deprived of their right to lead evidence opposing the objection, which would not be in the interest of justice. A fair opportunity to oppose the objection needs to be given to respondent No. 2, which can only be done by leading her own evidence. The respondents should not be deprived of their right to plead their cause by leading evidence.

17. In *Sanj Dainik Lokpchar* (supra), this Court held: *"legislative object of bringing of statute Rule 3-A is to ensure that a litigant should not be permitted to bide his time and to fill in the lacuna or cover the loopholes after the other witnesses are examined."* Of course, this decision is in respect of trial of a suit. In the case in hand, there is no question of filling up lacunae or covering loopholes by the respondent No. 2.

18. In *Kumudini Magar* (supra), this Court held *"Rule 3-A of Order 18 is directory in nature and the only mandatory provision it incorporates is to the extent of obtaining permission of the Court. The normal rule laid down is that the party wanting to examine himself should examine first before any witness is*

examined. This rule can be deviated only with the permission of the Court. Such permission of the Court, it is desirable, should be obtained before any witness is examined, but such is not the mandate. Such permission can be obtained even at a later stage."

19. In *Devkabai* (supra), this Court has held that "*provisions of Order 18, Rule 3-A are directory in nature.*"

20. In *Shah Industries* (supra) this Court has held "*the object and purpose of Order 18, Rule 3-A cannot be interpreted to restrict the rights of the parties to lead evidence of his witnesses. This provision is directory. In a given case Court may pass appropriate order. After examining the other witnesses especially when plaintiffs or party desire and wants to lead the evidence to support of his case. There is no total prohibition or a bar that Court should not grant such permission. On the contrary, it is desirable that full opportunity should be given to the parties to the proceedings to put their evidence at the earliest possible stage.*"

21. This Court while exercising jurisdiction under Article 227 is not sitting in a Court of appeal. The order impugned in the present petition is reasoned order and this Court is not inclined to interfere in the discretion exercised by the Executing Court, which is in consonance with the principles of natural justice. There is no illegality or perversity in the order impugned in the present petition. The writ petition being devoid of merit is dismissed. No costs.

22. In the facts of the present case, for procedural compliance of provisions of Rule 3-A, Order 18, the decree holders shall obtain post *facto* permission of the Executing Court by filing application to that effect.

23. At this stage, the learned advocate for the petitioner seeks continuation of stay to the further proceeding before the Executing Court granted on 22.10.2021. The stay shall continue to operate for a period of four weeks from today.

[NITIN B. SURYAWANSHI, J.]