

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

CIVIL REVISION APPLICATION NO.83 OF 2022

Mr. Apurva Jayantilal Shah

..Applicant

Versus

Mrs. Indumati Jayantilal Shah

Since deceased through legal heirs

Mr. Samir Jayantilal Shah

Since deceased through legal heirs

Mrs. Sunita Wd/o Samir Shah & Ors.

..Respondents

Mr. Sandeep S. Sharma, for the Applicant.

CORAM : NITIN W. SAMBRE, J.

DATE : 11th MARCH, 2022

P.C.

1. Heard.

2. The applicant/plaintiff initiated SC Suit No.1155 of 2014 claiming relief of 1/5th share in the share of the defendants. The plaintiff closed his evidence on 6th March, 2021 and so also, defendant Nos.2 and 4.

3. The suit property, flat is located in the defendant No.5 society. The said defendant has neither filed written statement nor any evidence. As such, the suit has attained the stage of final arguments. At such stage, on 20th March, 2021, the applicant has taken out application Exh.24 under Order XVI claiming issuance of summons to the office

bearers of defendant No.5 society with directions to produce and lead evidence on the following documents :-

- "a) Agreement to sale.
- b) Agreement to purchase of suit premises i.e. flat no.301.
- c) Share certificate no.186 to 190.
- d) Register of members' entry pertaining to the suit flat no.301.
- e) Counter file of share certificate pertaining to share certificate no.186 to 190 of the suit premises i.e. flat no.301.
- f) Register of shareholders, all entry pertaining to the suit premises i.e. flat no.301.
- g) all correspondence pertaining to the suit premises Flat no.301."

4. The said prayer of the applicant came to be rejected order impugned dated 20th March, 2021. As such, this Revision Application.

5. The contentions of counsel for the applicant/plaintiff are, the fact that the defendants have chosen not to lead evidence, came to his knowledge only on 6th March, 2021. As per his strategy, he was to extract certain information during recording of evidence of the defendants. Since the defendants have decided not to lead evidence, the circumstances have prevailed, which prompted him to invoke provisions of Order XVI Rule 1 and 14 of the CPC i.e. for issuance of witness summons to the office bearers of the defendant No.5 society and the Courts power to issue summons. He would urge that the

examination of the said witnesses is necessary for adjudication of the suit claim, as the said evidence is relevant for deciding the *lis* between the parties. His further contentions are, there are good reasons as narrated in the application to summon witnesses. Drawing support from the following judgments :-

- “i) ***Haji Munir Ahmed Mansoori Vs. State of Maharashtra & Ors. [2009(2) Mh.L.J. 26].***
- ii) ***Kenneth Brian Cashmore Vs. Principal Tashi Namgyal Academy [AIR 2012 Sikkim 16].***
- iii) ***Smt. Yasodamma & Anr. Vs. Inderchand Vimalchand Jain & Anr. [AIR 1974 Kar. 100].***”

he would urge that the issue is squarely covered and as such, the Court should allow the application.

6. I have appreciated the said submissions.

7. The fact remains that the defendant No.5 has chosen not to file any written statement was a fact within the knowledge of the applicant/plaintiff. As such, the defendant No.5 is not going to lead any evidence in support of its defence was a fact as could be borne out of the record of the Trial Court.

8. As far as defendant Nos.2 to 4 are concerned, though their written statement is on record, they cannot be

compelled to lead evidence.

9. The grounds in the application Exh.24 for invoking provisions of Order XVI of the CPC are based on the fact that the documents are not in the custody of the plaintiff but are with the defendants, particularly, with defendant No.5.

10. During suggestion in the cross-examination of plaintiff by the defendant, the plaintiff/applicant has admitted that it is not true that he is not in possession of the documents. As such, what can be inferred is the applicant by taking recourse to the provisions of Order XVI of the CPC is trying to cover up the *lacunas*. The application Exh.24 does not as such disclose any convincing reasons. The attempt on the part of the applicant is not bonafide, as could be inferred from the aforesaid observations. In the aforesaid background, the support drawn by the applicant from the above referred judgments, particularly, in the matter of *Haji Munir (cited supra)* of the Apex Court and *Smt. Yashodamma (cited supra)* will be of hardly any assistance.

11. That being so, the revision lacks merits, as no error of exercise of jurisdiction could be noticed in the revision. As such the Revision Application fails, dismissed.

[NITIN W. SAMBRE, J.]