IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
APPEAL FROM ORDER NO.97 OF 2022

Aero Club & Anr. .. Appellants

Versus

M/s. Putcha Property Pvt. Ltd. .. Respondent

...

Ms.Poonam Lao with Mr.Ajay Sharma, Ms.Geeta Mohanty and Mr.Madhukar Jadhav i/b Mr.Chaitanya Jadhav for the Appellants.

Mr.Prasad P. Pathare for the Respondent.

...

CORAM: BHARATI DANGRE, J.
DATED : 20th APRIL, 2022

ORDER:-

1. The present appeal is filed by the appellants, being aggrieved by the order dated 11/11/2021 passed by the learned Civil Judge, Senior Division, Thane in a Review Application (Exh.66) in Commercial Suit No.2 of 2017. The order is assailed on the ground, of being contrary to the settled position of law, as the trial Judge has seriously erred in law by not considering the letter and spirit of Order 18 Rule 3A of the Code of Civil Procedure (In short, **"the Code"**) and has reviewed it's own order dated 13/02/2020, by which the evidence of the Chairman of the plaintiff company (respondent herein), came to be discarded. The ground in the appeal, the Court failed to consider the principle flowing from Order 18 Rule 3A and has considered the provision to be directory in nature.

2. Before I proceed to deal with the arguments advanced in appeal, in support and in opposition of the impugned order, it would be convenient to refer to the few facts in the background.

3. Civil Suit No.2 of 2017 came to be filed by M/s.Putcha Properties Pvt. Ltd (the respondent, herein) and as the title of the suit indicated, the Private Limited Company, it was represented through it's Executive Assistant to Chairman and Authorised representative Mr.Vikas Vasant Waingnakar. The suit filed by the plaintiff sought for recovery of arrears of revenue share, license fees, compensation and damages.

The plaintiff pleaded that the company had purchased a unit bearing No.G10 and G11, admeasuring about 909 square feet in carpet area on the ground floor of "Glomax Mall", situated at Sector No.2, Plot No.17, 18 and 19, Kharghar Station Road, Kharghar, Navi Mumbai. Defendant No.1, engaged in business of Shoes, Apparels and Accessories Stores under the brand name and style "Woodland/Woods", approached the plaintiff and expressed it's interest in acquiring the premises from the plaintiff on leave and license basis for the purpose of establishing and operating their brand store for selling their goods

Negotiations between the plaintiff and defendant No.1 resulted in the registration of an agreement, captioned as 'Leave and License Agreement' dtd.20/05/2014, between the defendant No.1, the authorised representative of defendant No.1 and the plaintiff. The agreement covered a period of five years commencing from the expiry of 60 days from the date of handing over licensed premises to the defendants as per the terms and conditions set out in the deed.

4. I need not delve further, in other terms of the agreement by referring to the agreement clause-wise or whatsoever, but suffice it to note that the defendants terminated the agreement vide their letter 10/12/2015, by alleging breach of the terms and conditions at the instance of the plaintiff, during the lockdown period. The aforesaid events resulted in the plaintiff instituting the suit, seeking a declaration that the defendants had jointly breached the terms and conditions of the agreement dated 20/05/2014, memorandum of understanding and other documents executed between them. The plaintiff pleaded that there was no fault on their part in compliance of the condition, by taking recourse to which the agreement was terminated. The defendants also demanded from the plaintiff, refund of Rs.7,63,560/- received by way of security deposit alongwith interest @ 8% p.a.. and also claimed damages, but refused to pay the outstanding amount and to hand over the possession of the licensed premises

A declaration was also sought to the effect that the defendants are jointly liable to pay to the plaintiff an amount of Rs.14,07,357.36 alongwith interest. In terms of the agreement in question, a declaration was also sought to the effect that the defendants are jointly liable to pay to the plaintiff an amount of Rs.4,65,51,389.85 by way of liquidated damages.

5. The suit was contested by the defendants and the plaintiff filed a schedule of case management, as per the provision contained in Order XV-A of the Code on 11/04/2018. The schedule set out manner and details the list of 12 witnesses to be examined date-wise and contemplated the examination-in-chief to be filed and, thereafter, the said witnesses to be available for cross-examination. The defendants desired to examine four witnesses. The case management projected conclusion of arguments by 26/10/2018.

6. The controversy between the parties arose out of this case management, as submitted. Pertinent to note that the first witness of the plaintiff was shown as Mr.Vikas Vasant Waingnakar (P.W.1) and Dr.P.V.Ramanna, Chairman of the plaintiff was cited as P.W.11 to be examined, after the cross-examination of P.W.10 was over.

No sooner the affidavit of evidence of P.W.6 was filed and he was in the witness box for cross, the defendants filed an application under Order 18 Rule 3A of the Code praying for a direction to take off from the record, his evidence.

7. Defendants took out the said application by stating that the matter is pending for cross-examination of P.W.6 i.e. Chairman of the plaintiff company and the plaintiff in his capacity as Chairman had already examined one witness, namely, V.V.Waingnakar, through whom the suit was instituted and who have examined himself as a witness, in support of plaintiff's case, since he was duly conversant with the facts and circumstances of the case. It was stated that accordingly he had filed his detailed evidence affidavit and was thoroughly cross-examined, which resulted into certain discrepancies being surfaced on record, which allowed to continue, would have proved detrimental to the interest of the plaintiff in the suit. The defendants pleaded that by duly following the object underlying in Order 18 Rule 3A, though it is a procedural connotation, consistent view has been taken by various High Courts about the manipulation tactics adopted by the parties, where under the garb of filing the evidence, they intend to fill up the lacuna, which the earlier witness had left unattended.

Stating that the defendants had started with the cross-examination of P.W.6 but after 3 to 4 questions it was deferred, realsing that the Chairman of the company is brought only to cover up the lacuna left by PW 1, who is authorised representative.

The application, therefore, sought relief, to take off the evidence of PW 11 Dr.P.V.Ramanna.

8. The said application was opposed by the plaintiff by filing reply and by specifically pointing out to the Court that the plaintiff has already placed on record the list of witnesses, the sequence in which they would be examined and the stage at which they would be examined and, therefore, the defendants had clear notice regarding the names of witnesses as well as their sequence, but there was no objection raised in that regard.

9. The learned Judge, by referring to Order XV-A, dealing with the case management schedule as per Exh.42, was however impressed by the argument of the defendants and arrived at a conclusion that the Chairman was lower down in the sequence of witnesses and it is sufficient to infer that with an ulterior motive of attempt to fill up lacuna, he has been held back, though he should have stepped as plaintiff in witness box, at the beginning. Construing the mandate of the said section to be obtaining permission, the application came to be allowed and the evidence of Mr.Ramanna is discarded.

10. The plaintiff filed an application under Section 114 read with Order 47, seeking review on the ground that there is an error apparent on the face of record and it amounts to miscarriage of justice. According to the plaintiff, the predecessor of the present Court, had granted the permission to examine the witnesses in sequence as referred in the list. It was submitted that the permission cannot be revoked and, therefore, written application as contemplated under Order 14 Rule 3A was not necessary, as sequence of witnesses was predtermined under the orders of the Court. Apart from this, since no-objection was raised by the defendants while the sequence of witnesses was circulated and only after partial cross-examination of the Chairman was over, the evidence is sought to be discarded, was also pressed as a ground in review.

11. Holding that the power of review can be exercised since there is a error apparent on the face of record, the learned Judge entertained the application and was convinced with the argument of the plaintiff, that when the other witnesses of the plaintiff were examined, the defendants did not raise any objection and, therefore, now they are estopped from raising any such objection at a later stage. It was held to be amounting to acquiescence of their right to raise an objection and recording that order below Exh.62 reflected that the rejection was only on the ground that no permission was obtained before changing the sequence of evidence, the learned District Judge, Thane entertained the review application and also held that the plaintiff has succeeded in pointing out the error and non-application of principle of estoppel. The present appellants (original defendants) assail the said order.

12. The question that arises for consideration is whether the provision contained in Order 18 Rule 3A is mandatory. The relevant provision read as under :-

> "**Party to appear before other witnesses.**-Where a party himself wishes to appear as a witness, he shall so appear before any other witness on his behalf has been examined, unless the Court, for reasons to be recorded, permits him to appear as his own witness at a later stage."

The above provision is introduced in the Code w.e.f. 01/04/1997 and the objects and reasons of the same would disclose that in order to curtail unhealthy practice which has developed, which enabled the party to step into the witness box last to fill in the lacuna or loopholes which remained in the deposition, the rule has been introduced in the background of the 14th report of the Law Commission.

The Law Commission in it's report observed thus :-

> "In dealing with the question of oral evidence we wish to refer to an undesirable practise which seems to prevail in certain courts. The plaintiff or the defendant upon whom lies the burden of proving certain issues and who has to give evidence in support of his case is not called as witness before the evidence of the other witnesses is recorded. He is called after all his witnesses have been examined. The underlying purpose of this practise appears to be that the plaintiff or the defendant giving evidence at the end may be able to fill in gaps in the evidence given by his witnesses. We strongly deprecate this practise and recommend that it should be stopped.
>
> The parties to a proceeding should be in a position at the commencement of the proceedings to make up their minds whether they wish to give evidence. If they do wish they

should be required to enter the witness box before any of their witnesses are examined. We recommend that Rule 2 or Rule 3 of Order 18 of the Code of Civil Procedure be suitably amended so as to embody such a provision."

13. However, the subsequent report (27th report) of the Law Commissioner recommended as under :-

> "The Fourteenth Report has recommended that, ordinarily, a party who wishes to be examined as a witness should offer himself first, before the other witnesses are examined. It is however, considered unnecessary to make any such statutory provision. This should be the ordinary rule; but a rigid provision on the subject does not seem to be desirable."

Finally the 54th Report of the Law Commission recommended as under :-

> "We think that the amendment recommended in the 14th Report should be carried out. Since the proposed rule will be confined to ordinary cases, the hardships arising from special features of the case, should not present a problem. Having regard to the persistent and notorious malpractice indulged in by litigants in this respect-malpractice which borders on dishonesty- we think that the time has come to insert a statutory provision."

The provision in form of Order 18 Rule 3A was, therefore, inserted, so as to ensure that the litigant is not permitted to pay tactics and enter in the witness box after all it's witnesses are examined so as to fill the lacuna or cover the loopholes flowing from the evidence of the other witnesses.

14. The requirement to obtain permission of the Court whether is to be construed as mandatory or not is also put to rest by a learned single Judge of this Court in case of ***Sanjay Narayanrao Barde & Anr. Vs. Sou. Vimal Keshaorao Balram & Ors. (AIR 2000 BOMBAY 384)*** where while construing the course to be adopted under Order 18 Rule 3A, it was held as under :-

> "12. Thus, having gone through all these rulings, the following position emerges :
>
> That, Rule 3-A of Order 18 of the Code is directory in nature and that 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. In addition to the aforesaid observations made by the learned judges of different High Courts it can be deduced that, by enacting the provision of Rule 3-A, the Legislature had struck the balance between the right of the party to lead evidence as it wants and the misuse of that right in filling up the lacuna occurring in the evidence already recorded. This balance has been achieved by making it mandatory for the party wanting to deviate from the general rule to obtain permission of the Court which would ensure that the party is not misusing the right and would not

use that right for filling up the lacuna."

15. The object and purpose underlying the provision in question is, when either the plaintiff or defendant does not examine himself as the first witness, but examines himself at a later stage, the Court must for reasons to be recorded in writing permit such person to examine himself at a later stage. It is obligatory on the part of the Court to examine the plaintiff as first witness or if the plaintiff or defendant wants to examine himself at a later stage, reasons must be recorded by the Court as to why he should be examined at a later stage.

16. In the facts of the present suit, which is a commercial one, contemplate management hearing, which is to be adopted in commercial disputes and which has necessarily resulted in amendment in the Code in form of Order XV-A contemplating that the Court shall hold the First Case Management Hearing, not later than four weeks form the date f filing of affidavit of admission or denial of documents by all parties to the suit. After hearing the parties, once the Court finds that there are issues of facts and law which required to be tried, the Court must pass an order framing an issue between the parties, on examining the pleadings and the documents and also about listing of the witnesses to be examined by the parties fixing a date by which the affidavit of evidence is to be filed by th e parties, fixing the date-wise stage of the trial ensuring that the time-limit for completion of a trial do not travel beyond First Case Management Hearing. The said amendment is introduced by Act No.4 of 2016.

The Case Management require early assigning of a case to a Judge, who exercises judicial control over the case immediately after it is filed and keep track of the record at every stage. The judge applies judicial process to the rival contentions at the earliest stage, being filing of the written statement and require and enforce active participation and communication amongst the lawyer and parties for smooth progress of the case. In commercial suits, it mobilizes early preparation of respective cases by the parties and their lawyers by requiring them to identify real controversies. It contemplates submission of separate case statements by which party can enforce the other side to answer any of the requisition, if may be each party and provide sanction for non-compliance.

17. In the suit filed by plaintiff, a list of witness was filed below Exh.42 and the learned Judge endorsed the same as "seen". Assuming it to be an approval from the Court, the plaintiff accepted the sequence of evidence and accordingly, examined the power of attorney holder of the company (P.W.1), which was never objected to by the defendants' Advocate at that stage. The sequence of the witnesses continued as per the list and when the Chairman entered the witness box and he was under cross-examination, the defendants for the first time raised an objection revolving around Order 18 Rule 3A.

Pertinent to note that it has been held that the said provision is a matter of convenience and not mandatory, which will have the effect of vitiating the trial itself.

Adopting this approach, the learned District Judge set aside the earlier order, discarding the evidence of the Chairman and directed the defendants to proceed with the cross-examination of the said witness. Even liberty is granted to the parties to argue the application pending for decision before conducting the cross-examination.

18. In the wake of the above, since no prejudice is caused to the defendants, who have acquiesced their right when plaintiff No.1 was examined and even he was subjected to cross-examination, apart from other witnesses, who were examined in the same sequence as per the Case Management Hearing list, but realizing that the witness No.6 of the plaintiff, who is chairman, has now stepped into the witness box and is supporting the case of the plaintiff, the defendants took cold feat and took out an application for discarding his evidence.

Also pertinent to note that the plaintiff is a Private Limited Company and in order to deal with it's affairs, there may be different persons who may be competent witnesses who would make good the pleadings in the plaint, justifying the relief. The suit is filed by the company through it's Executive Assistant to Chairman and authorised representative, who was given an authority to file the suit. This, however, by no means would be construed to mean that the Chairman of the plaintiff has denuded himself of his capacity to depose as a witness in support of the plaint. The company was represented by the authorised representative of the Chairman, since the suit was filed by him and in the capacity as Chairman, another witness is brought into the witness box by the plaintiff, who was already named as a witness and the defendant never objected about he being cited as a witness in support of the plaintiff's claim.

19. In the light of the aforesaid discussion, since the defendants are in any case, entitled to cross-examine the plaintiff's witness i.e. a Chairman, no prejudice is being caused to the defendants by the sequence in which the witnesses have been brought on record in terms of the Case Management Hearing, which was accepted by the Court and accordingly, the plaintiff proceeded to bring on record his evidence.

Finding no legal infirmity in the impugned order, the appeal is dismissed.

(SMT. BHARATI DANGRE, J.)