

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**  
**BENCH AT AURANGABAD**

**WRIT PETITION NO. 7078 OF 2022**

Ramakant s/o Dhamraj Bhurevar  
and others

.... Petitioners

Versus

Omprakash s/o Champalal Ostwal  
and another

.... Respondents

.....

Mr. Namit S. Muthiyan, Advocate for the petitioners

Mr. U.A. Bhadgaonkar, Advocate for respondent nos. 1 and 2

.....

**[CORAM : NITIN B. SURYAWANSHI, J.]**

**DATE : 29<sup>th</sup> MARCH, 2023**

**ORDER :**

1. This Petition challenges the common order passed by the learned 9<sup>th</sup> Joint Civil Judge, Senior Division, Aurangabad, below Exhibits-85 and 89 in Rent Suit No.200007 of 2015.

2. Suit is filed by the petitioners/plaintiffs for eviction of respondents/defendants and for possession on the ground of *bona fide* requirement. Defendants filed their written statement on 16/12/2015 and opposed the suit. On 07/07/2019, plaintiffs evidence was closed. The defendants closed their evidence on 30/09/2021. Defendants completed their arguments on 29/11/2021. Thereafter, plaintiffs filed application Exhibit-85 praying for exhibiting a letter issued by

the Aurangabad Municipal Corporation on 29/02/2012 (for short, 'said letter'), and admitting the same in evidence. Defendants objected the said application. Plaintiffs moved application Exhibit-89 for seeking permission to lead secondary evidence in respect of the said letter. The same is also objected by the defendants. By common order, both the applications are rejected. Hence, the present petition.

3. Heard both the sides. Perused the memo of writ petition, annexures, impugned order and the citations relied upon by the learned counsel for the petitioners and the respondents.

4. It is the contention of the petitioners that vide order passed below Exhibit-72, production of the said notice dated 29.02.2012 was allowed. The learned advocate for the petitioner by placing reliance upon the judgment in the case of **K. K. Velusamy Vs. N. Palanisamy** reported in (2011) 11 SCC 275, submits that the Trial Court ought to have exhibited the said document being a public document and the reasons given by the Trial Court about non laying of foundation in respect of the said document is contrary to the record. He further submits that though there is apparently lack of due diligence

on the part of the petitioners, in the interest of justice and for the just decision of the case, the said document is required to be exhibited and/or the plaintiffs be permitted to lead secondary evidence to prove the same.

5. The learned counsel for the respondents, on the other hand, strongly opposed the petition. He submits that, at the fag end of the trial, the said application is moved which has been rightly rejected by the Trial Court. He supports the impugned order by placing reliance upon the judgment in the case of **Dhanpat Versus Sheo Ram (Deceased) through Legal Representatives and others** reported in (2020) 6 SCC 209, wherein the observations in **Bipin Shantilal Panchal v. State of Gujarat** reported in (2001) 3 SCC 1 are reproduced.

6. The learned counsel for the respondents further submits that the notice was issued to the petitioners way back in the year 2012 referring therein the acquisition of the petitioners' another shop pursuant to the sanctioned development plan. In view of the lapse of more than ten years, even if the said notice is produced, it would not help the case of the plaintiffs before the Trial Court.

7. It is a matter of record that after the defendants led their evidence on or about 04/02/2021, plaintiffs produced letter dated 29/02/2012. It appears that at the time of preparation of final arguments, the plaintiffs realized that the document produced along with Exhibit-72 remained to be exhibited. Therefore, he has moved application Exhibit-85.

8. The Trial Court has rejected the application Exhibit-85, holding that the pleading in respect of acquisition and the said letter is not appearing in the plaint, and the plaintiff has not laid foundation of the leading of secondary evidence either in the plaint or in his evidence. When the matter is posted for final argument, and while closing evidence, the plaintiff has not reserved his right to adduce evidence by way of answer to the evidence produced by the other side.

9. Indisputably, letter dated 29/02/2012 is filed along with list of documents Exhibit-72 has remained to be exhibited. In the cross-examination, suggestion is given to the defendants by the plaintiffs that another shop owned by the plaintiffs is likely to be acquired in the road widening. The said letter is in respect of acquisition of the petitioners another shop, because of the availability of which the defendants have questioned the *bona fide* requirement of the plaintiffs. Thus, it

cannot be said that there is no foundation laid by the plaintiffs. It is also not in dispute that the said document is a public document, and to prove the same, the plaintiffs may lead secondary evidence. Since the said letter has bearing on the fact in issue as to the *bona fide* requirement of the plaintiffs, the Trial Court ought to have favourably considered the application because the same would assist the Trial Court in rendering justice. With a view to give fair opportunity to the plaintiff to prove his case, the application of the plaintiff ought to have been allowed. For not being diligent and/or belatedly filed the application, the defendant can be compensated.

10. In the case of *K. K. Velusamy* (supra), the Apex Court has observed thus :

*"9. There is no specific provision in the Code enabling the parties to re-open the evidence for the purpose of further examination-in-chief or cross-examination. Section 151 of the Code provides that nothing in the Code shall be deemed to limit or otherwise affect the inherent powers of the Code to make such orders as may be necessary for the ends of justice or to prevent the abuse of the process of the court. In the absence of any provision providing for re-opening of evidence or recall of any witness for further examination or cross-examination, for purposes other than securing clarification required by the court, the inherent power under section 151 of the Code, subject to its limitations, can be invoked in appropriate cases to re-open the*

*evidence and/or recall witnesses for further examination. This inherent power of the court is not affected by the express power conferred upon the court under Order 18 Rule 17 of the Code to recall any witness to enable the court to put such question to elicit any clarifications.*

*15. The appellant - defendant has taken a consistent stand in his reply notice, written statement and evidence that the agreement of sale was executed to secure a loan of Rs.150,000, as the Respondent insisted upon execution and registration of such agreement. If after the completion of recording of evidence, PW1 and PW2 had admitted during conversations that the amount paid was not advance towards sale price, but only a loan and the agreement of sale was obtained to secure the loan, that would be material evidence which came into existence subsequent to the recording of the depositions, having a bearing on the decision and will also clarify the evidence already led on the issues. According to the appellant, the said evidence came into existence only on 27.10.2008 and 31.10.2008, and he prepared the applications and filed them at the earliest, that is on 11.11.2008. As defendant could not have produced this material earlier and if the said evidence, if found valid and admissible, would assist the court to consider the evidence in the correct perspective or to render justice, it was a fit case for exercising the discretion under section 151 of the Code. The courts below have not applied their minds to the question whether such evidence will be relevant and whether the ends of justice require permission to let in such evidence. Therefore the order calls for interference.*

16. We may add a word of caution. The power under section 151 or Order 18 Rule 17 of the Code is not intended to be used routinely, merely for the asking. If so used, it will defeat the very purpose of various amendments to the Code to expedite trials. But where the application is found to be bona fide and where the additional evidence, oral or documentary, will assist the court to clarify the evidence on the issues and will assist in rendering justice, and the court is satisfied that non-production earlier was for valid and sufficient reasons, the court may exercise its discretion to recall the witnesses or permit the fresh evidence. But if it does so, it should ensure that the process does not become a protracting tactic. The court should firstly award appropriate costs to the other party to compensate for the delay. Secondly the court should take up and complete the case within a fixed time schedule so that the delay is avoided. Thirdly if the application is found to be mischievous, or frivolous, or to cover up negligence or lacunae, it should be rejected with heavy costs. If the application is allowed and the evidence is permitted and ultimately the court finds that evidence was not genuine or relevant and did not warrant the reopening of the case recalling the witnesses, it can be made a ground for awarding exemplary costs apart from ordering prosecution if it involves fabrication of evidence. If the party had an opportunity to produce such evidence earlier but did not do so or if the evidence already led is clear and unambiguous, or if it comes to the conclusion that the object of the application is merely to protract the proceedings, the court should reject the application. If the evidence sought to be produced is an electronic record, the court may also listen to the recording before granting or rejecting the application.

*17. Ideally, the recording of evidence should be continuous, followed by arguments, without any gap. Courts should constantly endeavour to follow such a time schedule. The amended Code expects them to do so. If that is done, applications for adjournments, re-opening, recalling, or interim measures could be avoided. The more the period of pendency, the more the number of interlocutory applications which in turn add to the period of pendency.*

*18. In this case, we are satisfied that in the interests of justice and to prevent abuse of the process of court, the trial court ought to have considered whether it was necessary to re-open the evidence and if so, in what manner and to what extent further evidence should be permitted in exercise of its power under section 151 of the Code. The court ought to have also considered whether it should straightway recall PW1 and PW2 and permit the appellant to confront the said recorded evidence to the said witnesses or whether it should first receive such evidence by requiring its proof of its authenticity and only then permit it to be confronted to the witnesses (PW1 and PW2).*

11. The above ratio supports the case of the plaintiffs.

12. For aforesaid reasons and in the peculiar facts of the present case, the writ petition deserves to be allowed. Hence, the following order:

**ORDER**

- [I] Writ Petition is allowed.
- [II] The impugned order dated 07/04/2021 is quashed and set aside.
- (III) Applications Exhibits-85 and 89 are allowed.
- (IV) The issue of relevancy, admissibility, and proof of letter dated 29/02/2012 is kept open for decision of the Trial Court on merits at the time of final hearing of the matter.
- [V] The petitioners shall pay costs of Rs.10,000/- to the Respondents in the Trial Court.

**[ NITIN B. SURYAWANSHI ]**  
**JUDGE**

S.P Rane