

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

Writ Petition No. 9158/2021

Shankar s/o Bhimrao Gaikwad,
Died through L.Rs.

1. Smt. Parubai w/o Shankar Gaikwad,
Age : 78 years, Occ.: Agril.
2. Angad s/o Shankar Gaikwad,
Age : 58 years, Occ.: Agril.
3. Hari s/o Shankar Gaikwad,
Age : 52 years, Occ.: Agril.
4. Rangnath s/o Shankar Gaikwad,
Age : 52 years, Occ.: Agril.
5. Bhagwan s/o Shankar Gaikwad,
Age : 43 years, Occ.: Agril.
All R/o Hadoli, Tq. Loha,
Dist. Nanded.
6. Sow. Jaishri w/o Uttam Telang
Age : 40 years, Occ.: Household,
R/o CIDCO, Nanded.
7. Sow. Rukhminibai w/o Ram Ankade,
Age : 33 years, Occ.: Household,
R/o Hipparga, Tq. Loha, Dist. Nanded.
8. Triveni w/o Murlidhar Gire,
Age : 30 years, Occ.: Household,
R/o Gaul, Tq. Kandhar,
Dist. Nanded.

...Petitioners

VERSUS

1. Shivaji s/o Kamaji Shrirame,
Age : 54 years, Occu.: Agril,
R/o Hadoli, Tq. Loha,
Dist. Nanded.
2. Virbhadra s/o Raghunath Menkudale,
Age : 49 years, Occu.: Business,
R/o Kalyannagar Taroda (Bk)
Tq. & Dist. Nanded.

...Respondents

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Advocate for Petitioners : Mr. V. P. Golewar
Advocate for Respondent No.1 & 2 : Mr. V. S. Kadam

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CORAM : SHAILESH P. BRAHME, J.
DATE : 25th OCTOBER 2023

ORAL JUDGMENT :

- . Rule. Rule is made returnable forthwith. Heard both the sides finally at the admission stage.
2. The petitioners are original defendants who are assailing the order dated 30.07.2021 passed below Exhibit-111 in Regular Civil Suit No.329/2012 by the learned Joint Civil Judge, Junior Division, Nanded, thereby permitting the respondents/plaintiffs to examine a witness namely Mr. Laxman Mohan Mahabale.
3. RCS No.329/2012 is filed by the respondents for possession and

damages. It is contended by them that the document purchase deed re-written on 11.09.1999 is forged and bogus. The claim of the respondents is contested by the petitioners.

4. Oral evidence was led by the respondents and evidence closure pursis was submitted. Thereafter the petitioners led their evidence and filed pursis. The matter was posted for arguments. At that stage, the respondents submitted application (Exhibit-111) for leading additional oral evidence. The application is contested by the petitioners. By the impugned order, it stands allowed holding that in order to decide controversy between the parties and to have fair opportunity, the application deserves to be allowed.

5. The learned Counsel for the petitioners submits that the respondents protracted the matter for three years. Both the parties led evidence and the matter was posted for arguments. He submits that the impugned order is without jurisdiction because the powers under Section 18 or under Section 151 could not have been invoked. He would submit that the contentions of pressure and threats being exerted on the witness concerned are baseless and not substantiated. He further submits that it is not necessary to examine the witness and application is submitted with an oblique motive to fill up the lacuna.

6. The learned Counsel for the petitioners has vehemently submitted that recalling of the witness at such a stage is impermissible. For that purpose, he relies upon the following judgments :

- (i) Ashok Lalta Pandey and Another Vs. Zarina Abdullah Janai and Others in Writ Petition No.8808/2015 dated 30.01.2018.
- (ii) Bagai Construction Vs. Gupta Building Material Store, reported in (2013) 14 SCC 1.

7. Per contra, the learned Counsel for the respondents submits that there is specific issue no.3 framed in the suit and the burden is cast upon the plaintiff to prove that the document in question is forged. He further submits that due to compelling circumstances the witness concerned could not be offered for cross-examination. The petitioners have constantly exerted pressure not only on one Mr. Laxman Mahabale but also on Pundlik Bhusawale. According to him despite due diligence, the witness concerned could not be brought in the witness box. He would submit that it is not a case of recalling of witness or producing any documentary evidence at the fag end of the trial.

8. The learned Counsel for the respondents relies upon the judgment in the matter of Salem Advocate Bar Association, T.N. Vs. Union of India, reported in (2005) 6 SCC 344.

9. I have considered rival submissions of the parties. My attention is drawn to issue no.3 which is as follows.

“03. Do plaintiffs prove that the defendant in collusion with Uttam Dhondiba Telang has prepared bogus, forged and manipulated purchased deed on 11.09.1999 of suit house in his favour?”

. The burden is upon the respondents to prove the purchase deed re-written on 11.09.1999. I have carefully gone through the application (Exhibit-111) which is for permission to examine Mr. Laxman Mahabale. A prayer is not for either recalling of any witness or for producing documents on record.

10. It is an admitted position that both the parties have adduced evidence and evidence closure pursis are filed on record. At the fag end of the trial., application (Exhibit-111) appears to have been presented. It is relevant to notice that Rule 17A of Order XVIII stands omitted.

11. It has been brought on record by way of affidavit-in-reply by the respondents that the witness concerned was also examined in the criminal proceeding. The judgments rendered in a criminal proceeding are the brought on record by way of affidavit-in-reply. The respondents have placed on record the judgment of the criminal proceeding bearing RCS No.509/1999. Mr. Laxman was a witness in those proceedings. A

conviction was recorded against few persons including Shankar Bhimrao Gaikwad of which the petitioners are the legal heirs. The conviction dated 16.10.2016 is confirmed in an appeal bearing no. 27/2006 by judgment and order dated 23.08.2019. A revision against the same is subjudiced in the High Court.

12. I find substance in the submissions of the learned Counsel for the respondents. Mr. Laxman is a scribe of the document in question. The respondents are under obligation to discharge the burden as per issue at serial no.3 referred above. Considering the criminal prosecution and the judgments rendered therein, I am of the considered view that the respondents have made out a case of not examining witness concerned despite due diligence. This aspect of the matter has been rightly appreciated in the impugned order.

13. The respondents are not seeking recalling of any witness who has been examined earlier. Neither production of additional documentary evidence is sought for. It is a case that a particular witness was not available at the relevant time and could not be offered for cross-examination. Therefore, in order to extent opportunity of hearing, the learned trial Judge has rightly allowed the application (Exhibit-111).

14. It is submitted by the learned Counsel for the respondents that

one Mr. Pundlik Bhusawale had filed affidavit of examination in chief but due to the threats exerted by the opponents could not be cross-examined. Considering the criminal history placed on record, the submissions of the learned Counsel for the respondents cannot be said to be misplaced.

15. I have gone through the judgments rendered in the matter of Ashok Lalta Pandey in Writ Petition No. 8808/2015 (supra) by the learned Single Judge. In that matter, the application for re-examination of defendant no.2 was submitted which was rejected. In the facts and circumstances of the case which are cited in paragraph no.12, it was recorded that the witness concerned could have been examined and the steps could have been taken. The facts of that case and the matter in hand are clearly distinguishable. It is reiterated that the present case is that of permission to examine a witness.

16. In the matter of Bagai Construction (supra), from the paragraph no.3 of the judgment, it can be seen that two applications were moved, one for placing on record certain documents and another to recall PW-1 in the matter. In that context, the Hon'ble Apex Court recorded finding in paragraph no.14 and 15. Law laid down by the Hon'ble Apex Court is not applicable to facts of the present matter.

17. The learned Counsel for the respondents has placed on record

the judgment of the Supreme Court in the matter of Salem Advocate Bar Association Tamil Nadu (supra) and invited my attention to paragraph no.13. The same is reproduced herein below :

"13. In Salem Advocates Bar Association's case, it has been clarified that on deletion of Order XVIII Rule 17-A which provided for leading of additional evidence, the law existing before the introduction of the amendment, i.e., 1st July, 2002, would stand restored. The Rule was deleted by Amendment Act of 2002. Even before insertion of Order XVIII Rule 17-A, the Court had inbuilt power to permit parties to produce evidence not known to them earlier or which could not be produced in spite of due diligence. Order XVIII Rule 17-A did not create any new right but only clarified the position. Therefore, deletion of Order XVIII Rule 17-A does not disentitle production of evidence at a later stage. On a party satisfying the Court that after exercise of due diligence that evidence was not within his knowledge or could not be produced at the time the party was leading evidence, the Court may permit leading of such evidence at a later stage on such terms as may appear to be just."

18. I find support from above stated paragraph. Despite due diligence, the witness concerned could not be offered for cross-examination. The trial Court has inherent power to extent opportunity by permitting party to offer a witness for cross-examination. I find that the trial Court is justified in allowing application (Exhibit-111).

19. The Civil Court has inherent power to permit the party to adduce the evidence which could not be produced at earlier point of time. If the party seeking such a permission, makes out a case by bringing on

record the compelling circumstances which prevented it from adducing the evidence, it is obligatory on the part of the court hearing the matter to permit leading of such an evidence. The respondents have successfully brought on record the criminal antecedents of the petitioners. It can be safely inferred that despite due diligence, the witness could not be offered for cross-examination.

20. It is useful to refer to the obiter of the Supreme Court in the matter of **Maria Margarida Sequeria Fernandes and Ors. Vs. Erasmo Jack de Sequeria (Dead) through L.Rs. (2012) 5 SCC 360** as followed :

31. In this unfortunate litigation, the Court's serious endeavour has to be to find out where in fact the truth lies. The truth should be the guiding star in the entire judicial process.

32. Truth alone has to be the foundation of justice. The entire judicial system has been created only to discern and find out the real truth. Judges at all levels have to seriously engage themselves in the journey of discovering the truth. That is their mandate, obligation and bounden duty.

33. Justice system will acquire credibility only when people will be convinced that justice is based on the foundation of the truth.

34. In **Mohanlal Shamji Soni v. Union of India MANU/SC/0318/1991 : 1991 Supp(1) SCC 271**, this Court observed that in such a situation a question that arises for consideration is whether the presiding officer of a Court should simply sit as a mere umpire at a contest between two parties and declare at the

end of the combat who has won and who has lost or is there not any legal duty of his own, independent of the parties, to take an active role in the proceedings in finding the truth and administering justice? It is a well accepted and settled principle that a Court must discharge its statutory functions-whether discretionary or obligatory-according to law in dispensing justice because it is the duty of a Court not only to do justice but also to ensure that justice is being done.

35. What people expect is that the Court should discharge its obligation to find out where in fact the truth lies. Right from inception of the judicial system it has been accepted that discovery, vindication and establishment of truth are the main purposes underlying the existence of the courts of justice.

36. I n Ritesh Tewari and Anr. v. State of U.P. and Ors. MANU/SC/0742/2010 : (2010) 10 SCC 677 this Court reproduced often quoted quotation which reads as under:

Every trial is voyage of discovery in which truth is the quest.

37. This Court observed that the power is to be exercised with an object to subserve the cause of justice and public interest and for getting the evidence in aid of a just decision and to uphold the truth.

38. Lord Denning, in the case of Jones v. National Coal Board (1957) 2 QB 55 has observed that:

In the system of trial that we evolved in this country, the Judge sits to hear and determine the issues raised by the parties, not to conduct an investigation or examination on behalf of the society at large, as happens, we believe, in some foreign countries.

39. Certainly, the above, is not true of the Indian Judicial

system. A judge in the Indian System has to be regarded as failing to exercise its jurisdiction and thereby discharging its judicial duty, if in the guise of remaining neutral, he opts to remain passive to the proceedings before him. He has to always keep in mind that "every trial is a voyage of discovery in which truth is the quest". In order to bring on record the relevant fact, he has to play an active role; no doubt within the bounds of the statutorily defined procedural law.

21. I find it appropriate to uphold the impugned order. There is no merit in the writ petition. Therefore it is dismissed. Rule is discharged.

22. After pronouncement of order in the open Court, learned Counsel for the petitioners prays for continuation of the interim order dated 22.09.2021 for further period to approach the Apex Court. The proceeding of Civil Suit No.329/2021 is stayed by the order dated 22.09.2021. As the suit was initially filed in the year 2007 is very old, I am not inclined to grant stay. The request is rejected.

[SHAILESH P. BRAHME, J.]

Najeeb.