

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 13982 OF 2021

Girish Pravin Joshi

.... Petitioner

Versus

1. Mahesh Tolaram Hemnani

2. Khilchand Dagdu Rote

.... Respondents

.....

Mr. L.V. Sangeet, Advocate h/f Ms. M.L. Sangeet, Advocate for
the Petitioner

.....

[CORAM : NITIN B. SURYAWANSHI, J.]

DATE : 27th JUNE, 2023

ORDER :

1. The petitioner is aggrieved by the order passed by the 4th Joint Civil Judge, Senior Division, Jalgaon, below Exhibit-39 in Special Civil Suit No.25 of 2018, thereby allowing the application filed by the plaintiff to issue witness summons to defendant No.1 to appear and produce deed of cancellation of agreement to sell dated 08/01/2013.

2. Suit is filed by plaintiff/respondent No.1 for declaration that *ex parte* decree passed in favour of defendant No.2/petitioner in Regular Civil Suit No.181 of 2014 be declared null and void, and for declaration that agreement of sale is not binding on the plaintiff/respondent No.1. Petitioner/

defendant No.2 appeared and resisted the suit by filing written statement. The plaintiff/respondent No.2, at the stage of recording his evidence, filed application Exhibit-39 for issuing witness summons to defendant No.1, to appear and produce deed of cancellation of agreement to sell dated 08/01/2013. Defendant No.2/petitioner strongly objected the application. The Trial Court has allowed the application. Hence, the present petition.

3. Heard the learned advocate for the petitioner. Perused the writ petition memo, annexures thereto, impugned order and citation relied upon the learned advocate for the petitioner. Though the respondents are duly served none appears for them.

4. Learned advocate for the petitioner, by relying on decision in ***Suresh Sahebrao Tawale Vs. Uttam Shankar Ghadge and others, 2012 (6) Mh.L.J. 311***, submits that the plaintiff cannot insist and/or call upon the defendant to appear as his witness, it is not permissible in law. He further submits that, in fact, the registered sale deed of the suit property is executed in his favour, therefore, there is no propriety to call defendant No.1 as a witness to prove the cancellation deed dated 08.01.2013.

5. Perusal of the record indicates that the direction is issued by the Trial Court to issue witness summons to defendant No.1 to produce deed of cancellation of agreement to sell dated 08/01/2013 and to depose before the Court. It is observed by the Trial Court that the said agreement to sell appears to be relevant and connected with the fact in issue. To decide the matter on merit and for final adjudication of the matter, it is necessary to issue witness summons to defendant No.1. While passing the impugned order, the Trial Court has placed reliance in ***Vashram Daya Harjian Vs. Bijal Deva Harjian and others, (1971) 12 GLR 40***, wherein it is held that, "*it is well settled rule of justice that a party can prove his case even by the evidence of his adversary and in the circumstances of the case the plaintiffs should not be deprived of this material right. To summon or not a party as a witness of another party is a matter of discretion and the discretion is a judicial discretion and if ends of justice require to utilise such discretion, the Court must utilise the discretion.*"

6. The above observations are squarely applicable to the present case. The Trial Court is justified in passing the impugned order. No prejudice is likely to be caused to the petitioner if defendant No.1 is called upon to produce the said

deed of cancellation of agreement to sell dated 08/01/2013 and to depose before the Court.

7. In ***Vashram Daya Harjian*** (supra), the facts are that after the parties led their evidence, and evidence close *purshis* was filed, the application for summoning the defendant as a witness was filed. In this ruling following paragraph from Privy Council's decision in ***Kishori Lal Vs. Chunni Lal***, 31 All 116 is quoted;

" 'Such a practice', said their Lordships "ought never to be permitted in the result to embarrass judicial investigation as it is sometimes allowed to be done". Normally a party to the suit is expected to step into the witness box in support of his case and if a party does not appear in the witness box it would be open to the trial Court to draw an inference against him. If a party fails to appear in the witness box, it should normally not be open to his opponent to compel his presence by the issue of a witness summons."

8. From the above observation, it is clear that, sometimes calling the defendant as a witness is allowed and if a party fails to appear in the witness box, it should normally not be open to his opponent to compel his presence by the issue of a witness summons. This stage in the present case is

yet to come. There is no illegality or perversity in the order impugned in the present petition.

9. The writ petition being devoid merit is dismissed.

[NITIN B. SURYAWANSHI]
JUDGE

S.P. Rane