

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

WRIT PETITION NO. 14180 OF 2023

Vijayshankar Mulchand Mishra .. Petitioner

Versus

Shree Khakidas Baba Maheshwari
Math Trust through its Trustee
and others .. Respondents

Shri Lalitkumar B. Palod, Advocate for the Petitioner.
Shri Nikhil S. Jaju, Advocate for the Respondent No. 9.

**CORAM : SHAILESH P. BRAHME, JJ.
DATE : 07TH NOVEMBER, 2023.**

FINAL ORDER :

. Heard the learned counsels for both sides finally at admission stage.

2. This writ petition is filed against the order dated 11.09.2023 passed below Exhibit 91 in Civil Miscellaneous Application No. 40 of 2014 by learned Civil Judge Senior Division, Ahmednagar. By the impugned order the application of the petitioner seeking recalling of witness on a certificate U/Sec. 65-B of the Indian Evidence Act has been rejected. The petitioner is a occupant of the premises of which the respondent/trust is the owner. His occupation is unlawful and, therefore, suit R.C.S. No. 177 of 2013 for possession was instituted against him. The application for temporary injunction

at Exhibit 05 was allowed. The order passed therein is not on record. The order of injunction has been violated, is the contention of the respondent/trust. Civil M. A. No. 40 of 2014 has been filed under Order IXL Rule 2A of the Code of Civil Procedure to take action against the petitioner. The hearing of the Civil Miscellaneous Application is in progress.

3. The petitioner has already filed affidavit of examination in chief of Mr. Umesh Bhagwandas Tiwari, who happens to be photographer and videographer. He was engaged by the petitioner for the wedding of his son. The petitioner wants to bring on record the structure existing of demised premises at the time of wedding. The witness was cross examined by the respondent. On Second occasion also affidavit of examination in chief of the self same witness was filed and again cross examined by the respondent.

4. The petitioner has filed application Exhibit 91 seeking recalling of the said witness. According to the petitioner in order to prove the electronic record, his evidence is necessary. The petitioner is under obligation to comply the provisions of Section 65-B of the Evidence Act. In the absence of his evidence the petitioner will suffer prejudice. His evidence is corroborative.

5. The respondent No. 9 would support the impugned order. The learned counsel for the respondent No. 9 submits that the petitioner has adopted dilatory tactics. The proceedings of

possession has been initiated in the year 2014 and same has been protracted by the petitioner. He points out the conduct of the petitioner in making unsuccessful applications. He further submits that recalling of witness is for the purpose of filling up the lacunas. This is impermissible due to the judgment rendered by the Supreme Court in the matter of **Vadiraj Nagappa Vernekar (deceased by L. Rs.) Vs. Sharad Chand Prabhakar Gogate** reported in **2009 AIR SCW 2518**.

6. The learned counsel for the respondent has invited my attention to the deposition of the witness concerned from page No. 19, 20 and 21. He submits that the learned Judge is justified in rejecting the application. He submits that it is useful to refer to Order XLVII Rule 1 of the C. P. C. The parameters stipulated therein are applicable. There is no diligence on the part of the petitioner, neither it is case of discovery of new evidence. He therefore prays to dismiss the petition.

7. I have considered the submissions canvassed by the litigating parties. I have also gone through the documents.

8. It is apparent that on two occasions earlier in the same proceedings witness Mr. Umesh Tiwari was cross examined by the respondent. If the present application is to be allowed, then this would be third occasion to call for the same witness. The suit is of the year 2014. The matter is at the stage of consideration of application U/O IXL Rule 2A of the C. P. C.

9. The proceedings U/O 39 Rule 2A of the C. P. C. are summary in nature. They are miscellaneous and ancillary proceedings. The parameters stipulated U/O 39 Rule 1 of the C. P. C. are applicable. The material for consideration for deciding application U/O 39 of the C. P. C. is affidavit or otherwise. The present proceedings fall in the category of otherwise. But its character is of summary proceedings.

10. The learned counsel for the respondent relied upon the judgment rendered by the Supreme Court in the matter of **Vadiraj Nagappa Vernekar (deceased by L. Rs.) Vs. Sharad Chand Prabhakar Gogate** (supra), the scope of Order 18 Rule 17 of the C. P. C. has been discussed. The learned counsel has invited my attention to paragraph 16 of the judgment. I am of the considered view that there cannot be any dispute about the proposition laid down by the Apex Court. However, as the present proceedings are summary in nature, the proposition laid down cannot be made applicable to the matter in hand. The principles laid down by the Apex Court are more applicable to the regular proceedings. The facts of the matter before the Supreme Court reveal that the issue was emanating from the original proceedings.

11. The ends of the justice would be met if the application Exhibit 91 is allowed and the witness concerned is permitted to file his affidavit and permitted to offer himself for cross

examination. However, I propose to impose certain conditions. The parties shall cooperate for expeditious disposal of the Civil Misc. Application No. 40 of 2014 as well as R.C.S. No. 177 of 2013. It is expected that the miscellaneous proceedings are concluded within a period of six weeks from today.

12. For the reasons stated above I pass the following order.

O R D E R

A. The writ petition is allowed.

B. The impugned order dated 11.09.2023 passed below Exhibit 91 in Civil Misc. Application No. 40 of 2014 by the learned Civil Judge Senior Division, Ahmednagar is quashed and set aside.

C. The application Exhibit 91 in Civil M. A. No. 40 of 2014 stands allowed on condition that the petitioner pays cost of Rs. 5,000/- (Rs. Five thousands only) to the respondents.

D. The parties shall cooperate for expeditious disposal of the Civil Misc. Application No. 40 of 2014 as well as R.C.S. No. 177 of 2013.

E. The learned Trial Court shall make an endeavour to decide the Civil M. A. No.40 of 2014 as expeditiously as possible and in

any case within a period of six (06) weeks from the date of this order.

F. The learned Trial Judge shall make an endeavour to decide the suit R.C.S. No. 177 of 2013 as expeditiously as possible and in any case within a period of eight (08) months from the date of this order.

[SHAILESH P. BRAHME, J.]

bsb/Nov. 23