

Vinita

**IN THE HIGH COURT OF BOMBAY AT GOA
WRIT PETITION NO. 423 OF 2023**

ABHAY RAMCHANDRA NAIK GANTHE ... Petitioner.
VS
JAYMALA ALIAS MITILA MAHESH NAIK ...Respondent.

Mr. Rohit Bras Desa and Mr. P. Naik, Advocate for the petitioner.
Mr. Arjun Naik, Advocate for the respondent.

CORAM: PRAKASH D. NAIK, J

DATED: 10TH OCTOBER 2023

ORAL ORDER

1. Petitioner challenges order dated 06.7.2023 passed by learned Civil Judge, Junior Division "E" Court Panaji Goa rejecting the application Exh.D-33 seeking permission of the Court to allow the examination of the witness through commissioner.
2. The petitioner is original plaintiff and the respondent is the original defendant in Regular Civil Suit No.70/2014/C. The suit is filed for declaration, permanent injunction. The Court allowed the application for temporary injunction vide order dated 6.5.2015, restraining respondent from interfering or encroaching upon the property of the petitioner bearing survey no. 22/5 of village Mandur. The respondent has committed breach of order. The petitioner initiated proceedings under the Contempt of Courts Act. The respondent trespassed into land. The petitioner filed application under Rule 2(A) of Order XXXIX of the Code of Civil Procedure 1908

read with Section 2(b) of Contempt of Courts Act, 1971.

3. The petitioner preferred Civil Misc. Application No.111/2018/C for examination of witness Shri S. N. Bhobe through a commission in accordance with Rule 1 and 2 of the Order XXVI of the CPC. The said witness had submitted Inspection report after inspecting the site of suit property on 8.12.2018 and on 10.12.2018 and enclosed Inspection report and Sketch and photographs. It was contended that, Mr. Bhobe is to be examined as expert witness. The Architect Shri S. N. Bhobe is a senior citizen and aged about 86 years. He has physical disability to walk and climb stairs and wishes to be examined through commission.

4. The application was rejected on the ground that the petitioner has not placed on record any document about physical disability.

5. Learned Advocate for the petitioner submitted that there were pleadings in the application that witness was aged 86 years which was not controverted in any manner by the respondent. Merely for non production of the document, the learned Judge ought not to have rejected the application.

6. Reliance is placed on the decision of this Court in the case of ***Harish Vithal Kulkarni and anr. Vs Pradeep Mahadev Sabnis and anr. Reported in 2011(1) CTC 133.***

7. Learned Advocate for the respondent submitted that Order 26 Rule 2 of CPC stipulates that the application for examination of

witness through commissioner should be supported by affidavit of the witness or any other person concerning the proceedings or atleast by a document, which was not done by the petitioner in the present case and hence, Court has rightly rejected the application preferred by the petitioner. Decision relied upon by the learned Counsel for the petitioner is not applicable in the present case.

8. It is pertinent to note that in the application preferred by the petitioner there was clear averment that witness is aged around 86 years and he is not in a position to walk and climb the steps.

9. Order XXVI Rule 2 of CPC read as follows:

“2. Order for commission: An order for the issue of a commission for the examination of a witness may be made by the Court either of its own motion or on the application, supported by affidavit or otherwise, of any party to the suit or of the witness to be examined.”

10. The witness is aged around 86 years having physical disability to walk and climb the steps. The application preferred by the petitioner could be allowed. The contents of application preferred by petitioner were not disputed. Hence, the impugned order is required to be set aside.

ORDER

- (i) Writ Petition is allowed.
- (ii) Impugned order dated 06.7.2023 passed by learned Civil Judge, Junior Division “E” Court , Panaji at Exh. D-33 is set aside.

- (iii) Application at Exh. D-33 stands allowed by permitting examination of the witness Shri S. N. Bhobe through commissioner.
- (iv) Fees of commissioner to be borne by petitioner.
- (v) Writ Petition stands disposed of.

PRAKASH D NAIK, J.

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