

Niti

IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO.899 OF 2019

Mrs. Janaki Vithoba Gaonkar alias
Janaki Vithoba Gaoncar
Aged 91 years,
widow of Vithoba Gaonkar
Resident of H.No.1390, Tanshi,
Loliem, Canacona, Goa.
(since dec. through LR's)

1. Mrs. Visharanti Damu Naik
daughter of late Vithoba Gaonkar
aged 55 years and her husband

2. Mr. Damu Vatsal Naik
son of late Vatsal Naik
aged 58 years

3. Miss Sugandha Vithoba Gaonkar
daughter of late Vithoba Gaonkar
aged 45 years,

4. Mrs. Sunanda Govind Gaonkar
widow of late Govind Vithoba Gaonkar
aged 58 years

5. Mr. Rishant Govind Gaonkar
son of late Govind Vithoba Gaonkar
aged 25 years

6. Miss Priya Govind Gaonkar
daughter fo late Govind Vithoba Gaonkar
aged 21 years

7. Mrs. Prianka Govind Gaonkar alias
Vini Videsh Shirodkar

daughter of late Govind Vithoba Gaonkar
aged 23 years, and husband

8. Mr. Vidhesh Harichandra Shirodkar
son of Harichandra Shirodkar
aged 28 years,
both residents of Keri Rivona,
Sanguem, Goa.
(The applicants represented by their duly
constituted attorney
Shri Vishnu Chandru Gaonkar)

....Petitioners.

Versus

Mr. Punon Kushali Naik alias
Kishore Kushali Naik,
Aged 46 years,
son of Kushali Naik,
resident of H.No.899,
Sheliem, Loliem, Canacona, Goa.

....Respondent

**Mr R.G. Ramani, Senior Advocate with Mr P. Kakodkar,
Advocate for the Petitioner.**

Mr Gaurish Agni, Advocate for the Respondent.

CORAM : M. S. SONAK, J.

DATE : 16th FEBRUARY 2023

ORAL JUDGMENT :

1. Heard Mr R.G. Ramani, learned Senior Advocate, who appears along with Mr P. Kakodkar for the Petitioner and Mr Gaurish Agni for the respondent.

2. Rule. The rule is made returnable immediately with the consent of and at the request of the learned Counsel for the parties.

3. The Petitioner (original plaintiff) challenges the order below Exhibits 57 & 59, by which the learned Trial Judge has declined to issue a summons to the Income Tax Officer, Vidya Tengse, to produce a document which the defendant filed before the Tax Authorities or a document containing a declaration given by the defendant before the Tax Authorities.

4. The Trial Court, by the impugned order dated 19.09.2019, has dismissed these applications on the following two grounds:

(a) That the name of this witness was not disclosed in the list of witnesses filed by the Petitioner – the plaintiff in the Court;

(b) That a copy of the document, the original of which the Petitioner required the witnesses to produce, was not placed on record by the Petitioner.

5. As far as the first reason is concerned, Mr Ramani, learned Senior Advocate for the Petitioner, is justified in submitting that this was a clear error apparent on the face of the record. Mr Ramani invited my attention to the list of witnesses at Exhibit P-5 in the paper book of this petition. In this list, the name of the first witness is Mrs Vidhya G. Tengse, Income Tax Department, Near Patto Bridge, Panaji, Goa. This was precisely the witness the Petitioner wished to

summon. Therefore, it is quite surprising that the learned Trial Judge should dismiss the application because the name of this witness found no place in the list of witnesses filed by the Petitioner–plaintiff.

6. Mr Ramani pointed out that the third witness in the same list of witnesses was the Branch Manager, Syndicate Bank, Nagarcem, Canacona, Goa. He points out that by acting upon this very list of witnesses, the learned Trial Judge had summoned the Branch Manager of Syndicate Bank to depose in this matter.

7. Therefore, the first reason is factually unsustainable; based on this, the impugned order cannot be sustained.

8. The second reason is also equally unsustainable, and the same is in direct conflict with the law laid down by the Hon'ble Supreme Court in *Ashok Sharma V/s. Ram Adhar Sharma*¹.

9. Firstly, Mr Ramani is justified in submitting that the Petitioner could never have a copy of the response or the declaration made by the respondents before the Tax Authorities. Accordingly, there was no question of insistence that the Petitioner produces such a copy before he seeks to issue of summons to the Officer/Authority in whose possession such a document could legitimately be found. Secondly, the

1 (2009) 11 SCC 47

reason is in direct conflict with the decision of the Hon'ble Supreme Court in *Ashok Sharma* (supra).

10. In *Ashok Sharma* (supra), the party who wanted the President of the Co-operative Society to depose did not have copies of documents showing the completion of the construction of the suit premises. Accordingly, the copies were not placed on record before a summons was sought to require the witness to depose and produce such documents. The Trial Court refused leave to summon the witness to produce such documents on this ground. The High Court, however, reversed the Trial Court and permitted the documents to be produced on record at the instance of the witness. Accordingly, the matter was carried to the Hon'ble Supreme Court.

11. The Hon'ble Supreme Court upheld the view taken by the High Court by making the following observations in paragraphs 14,15 and 16:

"14. As noted hereinafter, the High Court has reversed the order of the trial court and allowed production of the documents produced by PW 3. In our view, there is no ground for which we can hold that the order of the High Court was not properly passed.

15. As noted hereinafter, Order 16 Rules 1 and 1-A of the Code, if read together, would clearly indicate that it is open to a party to summon a witness to the Court or even may, without applying for summons,

*bring a witness to give evidence or to produce documents. Since Rule 1-A is subject to the provisions of sub-rule (3) of Rule 1, all that can be contended is that before proceeding to examine any witness, who might have been brought by a party for the purpose, the leave of the Court may be necessary. This by itself would not mean that Rule 1-A was in derogation to sub-rule (3) of Rule 1. **Such document brought by the said witness can be taken on record and it is not necessary that the plaintiff must have filed on record the copies of the said document earlier.***

16. Be it mentioned herein, the question of filing a copy of the said document by the plaintiff could not also arise in view of the fact that the document was or cannot be in possession of the respondent-plaintiff. Since the respondent-plaintiff was simply a member of the Society, therefore, the record of completion of the construction of the suit premises can only be proved by the respondent-plaintiff by production of documents which were only in possession with the Society."

12. The second reason for dismissing the Petitioner's application is, therefore, in direct conflict with the Hon'ble Supreme Court's reasoning. Accordingly, it is apparent that both reasons for rejecting the Petitioner's applications are unsustainable.

13. Mr Ramani also relied upon the decision of this Court in *Writ Petition No.2070/2011 - Rajendra Mohanlal Rathi V/s. Smt. Shyamabai W²* delivered on 05.07.2011. This decision takes

cognizance of the Bombay High Court Amendment to the provisions of Order XVI of CPC. Considering such amendments, the learned Single Judge of this Court has held that the Court must consider whether the issue of summons is necessary to adjudicate the real controversy between the parties. Therefore, on perusing the application & reply and considering the controversy in the suit, issuing summons to the witnesses proposed for the production of the document was necessary for effective adjudication in the suit. The Court, however, did not advert this crucial aspect, forgetting, perhaps, that form must never take precedence over the substance of the matter. Enabling parties to produce relevant evidence is an essential facet of natural justice.

14. Mr Ramani pointed out that the above decision was cited before the learned Trial Judge and is mentioned in paragraph 6 of the impugned order. However, there is no consideration of this decision in the impugned order. Moreover, the learned Trial Judge has neither bothered to follow the said decision nor attempted to distinguish the same. Therefore, this is yet another ground to set aside the impugned order.

15. For all the above reasons, the impugned order is set aside, and the Petitioner's applications at Exhibit 57 and 59 are hereby allowed.

16. The rule is made absolute in the above terms. However, there shall be no order for costs. All concerned are to act on an authenticated copy of this order.

M. S. SONAK, J.

NITI K
HALDANKAR

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