

Dusane

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO.7471 OF 2023

Laxmikant R. Sawant ...Petitioner

V/s.

Avinash Kesari Mali ...Respondent

Mr. Vishal Thaker a/w Priti Oza i/by V. Thakers'
Advocates for Petitioner.

Mr. G.N. Salunke i/by Makarand V. Raut for
Respondent.

CORAM: MADHAV J. JAMDAR, J.

DATE: 14th July 2023

P.C.:

1. Heard Mr. Thaker, learned Advocate appearing for the Petitioner and Mr. Salunke, learned Advocate appearing for the Respondent.

2. By this Writ Petition filed under Article 227 of the Constitution of India, the Petitioner, who is the original Defendant, has challenged the legality and validity of the order dated 20th April 2023 passed by the learned Small Causes Court, Mumbai (Bandra Branch) below Exhibit 33 in R.A.D. Suit No. 189 of 2018. The said application Exhibit 33 was filed on 27th March 2023. The said Exhibit 33 application reads as under:

"On Cross-examination of Plaintiff on 13.03.2023 at para No.9, **Article-X, the Plaintiff voluntarily referred, the letter, which was not part of question and hence can not be marked exhibited as part of cross-examination.**

I therefore pray that exhibit be removed and obliged."

(Emphasis added)

3. The Plaintiff has filed following reply on 13th April 2023 to the said application.

"It is stated that **the Plaintiff was specifically asked whether he had obtained signature of landlord granting permission for Deed of Assignment. The Plaintiff has stated that the permission is at Article X, which was shown to him and future question was asked that Article X does not form part of Deed of Assignment.**"

It is stated that the Plaintiff though voluntarily referred to the Article X, it was due to the question asked in cross about the document Article X was referred.

Thus as the document was referred in cross-examination, it is rightly marked as Exhibit 32.

It is therefore stated that the document now cannot be de-exhibited or removed as Exhibit as prayed.

Therefore Application be rejected.

(Emphasis added)

4. It is further significant to note that rejoinder was filed on 20th April 2023, by the Defendant, which reads as under:

"1. The handwritten reply that has been tendered on 13-4-2023, has an error in recording the question. **The specific question that was posed to the Plaintiff was "Whether there was any document of the Landlord granting permission in the Deed of Assignment". It is also not correct that any further question has been asked on the document in question or was shown the same.**

2. It is most respectfully submitted that the paragraph 9 of the cross-examination does not shown any question which could allow the Plaintiff to produce any document which was in the inception not allowed to be taken on record.

3. The reply confirms that the document has voluntarily been tendered into record without either been called upon or shown.

4. It is therefore respectfully submitted that the Application be allowed."

(Emphasis added)

5. It is significant to note that it is the contention of the Petitioner that in paragraph 9, certain statements were made by the witness voluntarily and that the questions were not asked about said document i.e. Article 'X'. Therefore, paragraph 9 of oral evidence of the Plaintiff is relevant and the same is reproduced hereinbelow. For the purpose of clarity, relevant sentences of paragraph 9 are numbered separately:

Paragraph 9:

"(1) It is true to say that at the time of entering into Deed of Assignment, Saraswati Gupta assured me that she would bring no objection of landlord.

(2) **It would not be correct to say that no landlord has granted permission for Deed of Assignment.**

(3) **I have annexed one letter of landlord granting permission for Deed of Assignment.**

(4) **"I can show it".**

(5) **It is Article-X. As it referred in cross-examination, it is marked as Exhibit No.32.**

(6) **It is true to say that it is not part of Deed of Assignment.**

(7) Question : **You have no letter granting consent to the Deed of Assignment from Developer also?**

(8) Answer : **There is no letter as Development Agreement is there between Saraswati Gupta and Developer."**

(Emphasis added)

6. A bare perusal of the manner in which the cross-examination is conducted in paragraph 9 particularly sentences marked as Nos. (1), (2), (4) and (6) clearly shows that the suggestion was given during cross-examination or questions were asked and on the basis of said suggestions/questions, certain answers were given by the concerned witness.

7. It is significant to note that the learned Trial Court while rejecting the application of the the Defendant has stated in paragraph 7 as follows:

"This cross-examination is conducted before me. The suggestion was hurled to the effect, 'whether it would be correct to say that no

landlord has granted permission for Deed of Assignment? That suggestion was denied by the witness. The witness voluntarily answered "I have annexed one letter of landlord granting permission for Deed of Assignment." On giving this answer, the cross-examination, it was asked to him, "Whether you can show it? Therefore, witness replied, 'It is Article-'X' and he shown it. Thus, as witness was required to show that Deed of Assignment / Article-X, the witness showed it. Therefore, it was marked as Exhibit No. 32."

(Emphasis added)

8. Thus, it is clear that the learned Trial Court has specifically stated that the cross-examination has been conducted before him and suggestion was given to the effect, 'whether it would be correct to say that, no landlord has granted permission for Deed of Assignment? Said suggestion was denied by the witness and thereafter the witness voluntarily answered "I have annexed one letter of landlord granting permission deed for Deed of Assignment". On giving this answer, it was asked to him whether witness could show that letter and therefore witness replied he can show the same. It is Article 'X' and the same was shown. Thus, as the same was referred in the cross-examination, the same was marked as Exhibit 32. In fact above referred sentence No. (6) in said paragraph No. 9 of the Cross-examination also shows that further question was asked regarding said document. Thus, there is no substance in the contention of the learned Advocate appearing for the Petitioner

that said document was referred voluntarily by the said witness and no question was asked regarding said document.

9. It is also one of the contention raised by learned Advocate of the Petitioner that it is not possible for a judge to remember the exact questions asked. For appreciating said arguments, it is necessary to set out certain dates:-

(i)	13th March 2023	Relevant cross-examination of the witness was conducted.
(ii)	27th March 2023	Application bearing Exhibit 33 was filed by the Petitioner- Defendant.
(iii)	13th April 2023	Reply was filed by the Respondent-Plaintiff.
(iv)	20th April 2023	Rejoinder was filed by the Petitioner
(v)	20th April 2023	Impugned order rejecting Exhibit 33 was passed.

Thus, this is a case where the application was filed immediately within a period of 14 days. It is further significant to note that the Petitioner has not come up with the case that the cross-examination is wrongly recorded, his only contention is that in the cross-examination of the concerned witness, the document in question is not referred on his behalf and therefore the same cannot be exhibited. I have already dealt with the said argument. As in this case, application was filed within 14 days and the same was decided within further period of 23 days, there is no delay so that it can be said that there is no possibility

of the learned Judge remembering the manner in which cross-examination was conducted. Therefore, there is no substance in the said contention. The learned Trial Court judge who has recorded cross-examination has specifically set out the manner in which the cross-examination took place which is in consonance with the cross-examination recorded by the learned Trial Court.

10. Therefore, there is no substance in the present Writ Petition. The Writ Petition is dismissed with costs.

BHALCHANDRA
GOPAL
DUSANE

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(MADHAV J. JAMDAR, J.)