

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 1873 OF 2023

Anant Shahurao Kukade

... Petitioner

Versus

Sharad Nandkumar Thakur and Ors.

... Respondents

— —
Mr. Siddhartha R. Ronghe for the Petitioner.

Mr. Amrut Joshi a/w Ms. Monisha Mane and Ms. Rutu Pawar for
Respondent No.3.

— —
CORAM : SHARMILA U. DESHMUKH, J.

DATE : July 25, 2023.

P. C. :

1. Heard.

2. The challenge in the petition is to the order dated 2nd December, 2022 rejecting the petitioner's application for filing of additional affidavit of evidence. The Petitioner who is the original plaintiff had filed suit seeking specific performance of agreement of sale of the year 1982 and for setting aside the sale deed executed in favour of the Respondent no.3 in the year 1988.

3. In these proceedings, after the plaintiff had led evidence of his witnesses an application came to be filed on 17th October, 2022

below Exh.252 seeking to file additional affidavit of evidence. This was for the reason that list of documents was filed by the Petitioner, which were the payment receipts, which is annexed at page no.120 of the petition. As the documents were not exhibited, the application below Exh.252 came to be filed which has been opposed by the defendant no.3. The contention of the defendant no.3 was that the plaintiff had filed affidavit of evidence of Anant Shahurao Kukde on 11th September, 2019 and the cross-examination was completed on 7th October, 2019. It was contended that the plaintiff was filed an application to adduce additional evidence of Anant Shahurao Kukde, which was after three years from the date of filing of his affidavit of evidence.

4. The trial Court by the impugned order dated 2nd December, 2012 rejected the application. While rejecting the application, the trial Court observed that the documents which were sought to be proved by filing of additional affidavit found place in the affidavit of evidence of the earlier witnesses. The trial Court held that in such a situation, it was expected of the plaintiff to get the documents proved through those witnesses and, as such, the application for filing additional affidavit is for the purpose of filling in

lacuna in the evidence. The trial Court also observed that application below Exh.207 and 238 were filed in respect of the documents below Exh.183 and, as such, the present application was for the purpose of filling in lacuna and rejected the application, giving rise to the present petition.

5. This Court by its order dated 20th February, 2023 has specifically directed the plaintiff to produce on record the application below Exh.207 and 238 and the orders passed therein which has been tendered by the learned counsel appearing for the Petitioner.

6. Heard Mr. Ronghe, learned counsel appearing for the Petitioner and Mr. Joshi, learned counsel appearing for Respondent No.3.

7. Learned counsel appearing for the Petitioner points out that by the order passed below Exh.207, the documents below Exh.183 were given exhibit numbers. He would further contend that for the purpose of proving those documents, the present application had been filed for filing additional affidavit of evidence, which came to be rejected. He would contend that once the documents are permitted to be marked as an exhibit, the responsibility is upon the

plaintiff to lead evidence to prove those exhibits. He would contend that the order which is passed below Exh.238 on 24th June, 2022, in fact, warrants the compliance of the order below Exh.207. As such, he would urge that the documents already been permitted to be exhibited will not take the defendant no.3 has surprised and that he be permitted to lead additional evidence.

8. *Per contra*, learned counsel appearing for the Respondent no.3 submits that in spite of examining the witnesses on behalf of the plaintiff, the documents below Exh.183 were not proved. He would submit that the Court in the application below Exh.183 has noted that the same be filed. He would further contend that after a period of three years, the application in question has been filed and the same is only to fill the lacuna. He would further submit that the plaintiff had already examined his witnesses and in spite of the order permitting the exhibiting of the documents below Exh.207, which was passed on 7th September, 2021, the plaintiff did not take any steps to examine any witnesses, and the evidence has now been completed. He would urge that the plaintiff cannot be permitted to fill the lacuna in the evidence. He would further contend that considering that this Court has been called upon to exercise the powers under Article 227 of the

Constitution of India, this Court may not interfere with the interlocutory orders. In support of his contentions, he relies upon the following decisions of this Court:

- (a) *Waman Khente vs. Sheikh Faheem & Ors in Writ Petition No.4276 of 2017, decided on June 23, 2022 (Nagpur Bench of this Court);*
- (b) *Santosh Babu Tubki and Anr Vs. Raghoba Sawant (Dec.) and 5 Ors. in Writ Petition No.311 of 2022 (Goa Bench of this Court);*
- (c) *Wenceslaus H. Gonsalves Clovis Gonsalves and Ors. Vs. Hill Dream Co-operative Housing Society Ltd. and Ors. in Writ Petition No.4242 of 2016 (Goa Bench of this Court);*

9. Considered the submissions and perused the papers and proceedings.

10. The dispute in the present case centers around exhibiting the documents, a list whereof was tendered below Exh.183. The contention appears to be that the filing of an additional affidavit in order to prove these documents would amount to filling up lacuna in the evidence. In this context, if we peruse the order which has been passed below Exh.207, a peculiar course of action has been adopted by the trial Court. The application below Exh.207 sought the relief

that the documents filed below Exh.183 which are the receipts of payments should be read in evidence. At this stage, if the plaintiff had not proved the documents through the witnesses, who were examined by the plaintiff prior to the filing of the application, the trial Court ought to have rejected the application by stating that the documents are not being proved by the witnesses. Rather doing that the trial Court had permitted the documents to be marked as exhibit. While permitting the said application, the trial Court has held that the responsibility of proving his documents is upon the plaintiff.

11. After the order was passed on 7th September, 2021, another application came to be filed below Exh.238 on 1st April, 2022 seeking the same relief which was sought under Exh.207. Curiously in this application, the trial Court observed that previously an order has been passed as regards Exh.183 and that the same are exhibited. The trial Court further observed that the plaintiff has not yet complied with the order and therefore, the plaintiff should first comply with the order passed below Exh.183 and thereafter, the application would be considered. The order reads that the order below Exh.183 should be first complied with and thereafter, the application filed under Exh.238 will be considered.

12. Perusal of the order also indicates that the plaintiff was required to lead additional evidence to ensure compliance with the order passed below Exh.238. Learned counsel appearing for the Respondent disputes that the said order of 24th June, 2022 refers to the order passed below Exh.207 and would contend that the same refers to the order passed below Exh.183, which is only an order of file. However, considering that a specific reference has been made in the said order that the documents are permitted to be exhibited. It is evident that mention of Exh.183 is an error and in fact the reference in the order is to the order passed below Exh.207. After the said order came to be passed the present application has been filed in October 2022 seeking permission to lead additional evidence.

13. The trial Court has failed to consider the effect of the previous orders which were passed below Exh.207 and 238 which mandated the plaintiff to file additional affidavit as it stated that the responsibility to prove those documents is upon the plaintiff. Considering that the documents are marked as an exhibit in spite of the objection of the defendant and while marking the documents, as such, the Court had considered that the evidence of the plaintiff was not over, it is evident that the plaintiff was required to lead additional

evidence. No doubt that after the passing of the order, an application for filing of an additional evidence should have been filed immediately and there appears to be a delay. However, considering the order which is passed below Exh.238, which requires compliance of the order below Exh.207, the delay is required to be condoned.

14. As far as the decisions which have been relied upon by the learned counsel for the Respondent no.3, it needs to be noted that that what constitutes a binding precedent is the ratio of the decision and not what the court did in a particular matter. Considering that while rejecting the application for leading additional evidence has resulted in miscarriage of justice, in my opinion, the power under Article 227 of the Constitution of India is required to be exercised.

15. In light of the above, the impugned order dated 2nd December, 2022 is hereby quashed and set aside. As the impugned order is quashed and set aside, the plaintiff is permitted to lead additional evidence to prove the documents which were permitted by the trial Court to be marked as exhibits. The writ petition stands allowed.

16. Needless to clarify that the affidavit of evidence which

has been filed alongwith the application below Exh.132 will be construed as the additional affidavit and he cannot be permitted to file further affidavit. Considering that the proceedings are of the year 2013, the trial Court is requested to decide the same as expeditiously as possible and in event within a period of one year from today. Both the learned counsel for the parties assure that full cooperation will be extended to the Trial Court.

(Sharmila U. Deshmukh, J.)