

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

WRIT PETITION NO. 10816 OF 2024

Qamber N Masjide

... Petitioner

Versus

Rajan Topandas Chugani (Decd.) Thr Lrs

Sheela Rajan Chugani And Ors

... Respondents

Mr. Ketan Parekh *i/b K. R. Parekh & Co. for Petitioner.*

Mr. Javed Akhtar Khan *a/w Inayat Ali Qureshi i/b M/s K. K. Associates for Respondent.*

CORAM : SANDEEP V. MARNE, J.

DATE : 26 AUGUST 2024.

P.C. :

1) The Petitioner has filed this Petition challenging the Order dated 26 June 2024 passed by the learned Judge of the Small Causes Court rejecting the Application at Exhibit 84 by which the Petitioner/Defendant No.3 sought recall of Order dated 11 February 2020. By Order dated 11 February 2020 the learned Judge of the Small Causes Court had refused to mark four documents of which notarized copies were filed by Defendant No.3. It is the case of Defendant No. 3 that he is in possession of originals of the said four documents, but since the originals are needed in other proceedings, he produced notarized photocopies in the suit. In ordinary course, the photocopies could have been compared with the originals and accordingly marked in

evidence. It appears that the Petitioner inadvertently did not produce the originals of the said four documents when the hearing took place on 25 September 2019 and the Trial Court thereafter passed Order dated 11 February 2020 marking various documents and not marking the said four documents.

2) It appears that, after Order dated 2 March 2020 the suit proceeded in absence of evidence of the Defendant No.3. It appears that final arguments on behalf of Plaintiff had begun. At this stage Defendant No.3 filed Application at Exhibit 84 for recall of Order dated 21 March 2023 forfeiting his right of evidence. The said Application came to be allowed by the learned Judge on 8 November 2023 and evidence of Defendant was restored. It appears that the Defendant No.3 is now recalled to be cross-examined by Plaintiff and at this stage the Application at Exhibit 84 came to be filed by Defendant No.3 seeking recall of the Order dated 11 February 2020.

3) Passing of various Orders by learned Judge from time to time would *prima facie* indicate that the Defendant has been slightly negligent in defending the suit. Initially he committed mistake of non production of originals at the time of marking of the documents. Later he remained absent in the suit and invited Order dated 21 March 2023, forfeiting his right of evidence. Though his right of evidence was restored by Order dated 8 November 2023 he did not take immediate steps for marking of the four documents and filed the application at Exhibit 84 only in January 2024.

4) The learned counsel appearing for original Plaintiffs would highlight averment made in the Application at Exhibit 84 to the effect that the suit was taken up on 11 February 2020 in absence of the parties and inviting my attention orders of 25 September 2019 and 11 February 2020, he would submit that on both the dates Defendant No.3 was represented by his advocate. He would submit that since the application proceeded on erroneous statement made on oath, the Application ought to have been rejected considering the law expounded by the Apex Court in ***New Okhla Industrial Development Authority Vs. Ravindra Kumar Singhvi (Dead) Through Legal Representatives.***¹

5) No doubt there appears to be an error on the part of Defendant No. 3 in raising averment in the Application at Exhibit 84 about matter being taken up by the Court in absence of parties on 11 February 2020. At the same time, it must be noticed that the right of Defendant No. 3 to lead evidence has now been restored and the witness of Defendant No.3 is still in the box. Since Plaintiff is yet to commence his cross-examination, therefore, though Defendant No. 3 has been negligent in defending the suit, in my view he needs to be granted an opportunity to get the four documents marked in evidence, if he produces originals thereof for comparison before the learned Court. At the same time, this Court cannot turn blind eye to the negligent manner in which Defendant No. 3 has been defending the suit and the conduct of the Defendant No. 3 deserves imposition of some costs. The suit is pending since the year 2009 and if the learned

1 (2022) 5 SCC 591

counsel for the Plaintiffs is to be believed, the arguments in the suit had commenced on 21 July and 2 August 2023.

6) Accordingly I proceed to pass the following Order:

a) Order dated 26 June 2024 passed by the learned Judge of the Small Causes Court is set aside and Application at Exhibit 84 filed by the Defendant No. 3 is made absolute in terms of prayers (c).

b) Petitioner shall pay to the original Plaintiffs costs of Rs.50,000/- within a period of two weeks from today. The amount of costs shall be deposited before the Small Causes Court, Mumbai with liberty to the Plaintiff to withdraw the same.

c) It is made clear that the payment of costs shall be a condition precedent for implementing the prayer made by Defendant No. 3 in application at Exhibit 84.

7) With the above directions the Writ Petition is partly allowed and disposed of.

8) Considering the fact that the suit is pending since the year 2009, the learned Judge shall accord due priority for its expeditious disposal.

[SANDEEP V. MARNE, J.]