

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.15454 OF 2023

Pralhad Balu Bhosale

...Petitioner

VS.

Tanaji Kisan Bhosale and Ors.

...Respondents

Mr. Ajit Kenjale a/w. Mr. Sai Kadam, for the Petitioner.

Mr. Kirankumar Phakade, for the Respondents.

CORAM : N. J. JAMADAR, J.

DATE : JANUARY 09, 2025

ORDER

1. Rule. Rule made returnable forthwith and, with the consent of the counsel for the parties, heard finally.

2. This petition under Article 227 of the Constitution of India takes exception to an order passed by the learned Civil Judge, Junior Division, Koregaon on an application to summon Anjana Kisan Bhosale, the plaintiff No. 3 as the witness for the defendant.

3. The respondents have instituted a suit, being RCS No. 323 of 2012, for a decree of redemption of mortgage of the suit lands. In defence, the petitioner/defendant has contended, inter alia, that after the execution of Deed of mortgage there was an alteration in the jural relationship between the parties. The predecessor in title of the plaintiffs executed an Agreement for Sale of the suit properties and accepted consideration of Rs. 40,000/- thereunder.

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Anjana Bhosale, the plaintiff No. 3, has witnessed the execution of the said Agreement to Sale. The defendants thus sought to summon the plaintiff No. 3 Anjana Bhosale as a witness for the defendant. The application was resisted by the plaintiffs.

4. By the impugned order, the learned Civil Judge was persuaded to reject the application, placing reliance upon a decision of this Court in the case of **Suresh Tawale vs. Uttam Ghadge**¹ wherein it was, inter alia, observed as under:-

'Such a practice', said their Lordships "ought never to be permitted in the result to embarrass judicial investigation as it is sometimes allowed to be done". Normally a party to the suit is expected to step into the witness box in support of his own case and if a party does not appear in the witnessbox it would be open to the trial Court to draw an inference against him. If a party fails to appear in the witness box, it should normally not be open to his opponent to compel his presence by the issue of a witness summons."

5. Mr. Kenjale, the learned counsel for the petitioner, submitted that there is no absolute prohibition against summoning the opponent as a witness. The learned Civil Judge has incorrectly proceeded on the premise that there is a complete and absolute prohibition and under no circumstances the adversary can be summoned as a witness. Reliance was placed on a Division Bench judgment of this Court in the case of **Neeru Batra vs. Jaswinder Paul Batra, USA & Ors.**² wherein reference was made to the

¹ WPN0.1673/2011 Dt.06-08-2012.

² [2018] 0 Supreme (Bom) 1269.

decisions of the Privy Council and this Court to the effect that there is no bar for a party to call his opponent as a witness in the suit. The observations of the Division Bench in paragraph 8 of the said judgment, read as under:-

8] As far as the view taken by the Privy Council in the case of Kishori Lal (supra) and Mahunt Shatrugan Das (supra) and the learned Single Judges of this Court in the case of Pirgonda Hongonda (supra) and Suresh (supra) is concerned, the same has been the same explained by the learned Single Judge of this Court in the case of Ravalnath Builders (supra) by holding that after considering the provisions of the amended Code, there is no bar for a party to call his opponent as a witness in the suit. A similar view has been taken by a learned Single Judge of this Court in the case of Ramdas Dhondibhau Pokharkar vs. State Bank of India and another, 2003 (1) All MR 76. In any case, we are not concerned with the said controversy.

(emphasis supplied)

6. The learned counsel for the respondents/plaintiff countered the submissions on behalf of the petitioner/defendant. It was urged that in the circumstances of the case, the view taken by the learned Civil Judge cannot be said to be so perverse or unreasonable as to warrant interference in exercise of the extraordinary writ jurisdiction.

7. At the outset, it is necessary to note that the defendant categorically claimed that the predecessor in title of the plaintiff had executed an Agreement for Sale and the plaintiff No. 3 had signed the same as a witness thereto. In that context, the Court had called the respondents/plaintiff to apprise the Court as to whether the respondents/plaintiffs are disputing the execution of the said

Agreement for Sale in the pleadings as well as during the course of evidence. The Court was informed that the plaintiffs have disputed the execution of the document.

8. Thus, the situation which emerges is that, executant of the Agreement for Sale relied upon by the defendant, is not available. The plaintiff No. 3 appears to be a witness to the said agreement for sale. To prove the due execution of the document as well as contents thereof, the defendant is duty bound to examine either the executant or the witness to the said document. Thus, the relevancy of evidence of PW. 3 can hardly be disputed.

9. The learned Civil Judge has proceeded on the premise that the practice of summoning the opposite party as a witness has been frowned upon. However, the learned Civil Judge failed to appreciate that it is not an immutable rule of law that, under no circumstances, the opposite party can be summoned as a witness. In a situation of the present nature, where the execution of the Agreement for Sale can only be proved by examining the witness to the said agreement, the bar to summon the opposite party does not operate inexorably.

10. It is true in the case of **Suresh Tawale vs. Uttam Ghadge** (supra), a learned single judge of this Court has observed that the practice of calling defendant as a witness on behalf of the plaintiff is condemnable. However, I am not inclined to agree with the

submission on behalf of respondents/plaintiff that there is a complete bar to summon the opponent as a witness. In the case of **M/s. Ravalnath Builders vs. Sebastiana Escolastica Beatriz Nunes Mendonsa @ Beatriz Mendonca**³ another learned single Judge, has in terms enunciated that “there is no bar for a party to call his opponent as a witness in the suit. As such, the Judge was not justified to refuse the application filed by the petitioner on the sole ground that such practice is to be condemned. As such the Judge fell in error in rejecting the application of the petitioner. As noted above, the Division Bench of this Court in the case of **Neeru Batra** (supra) has adverted to the cases in which such a view has been recorded.

11. In a recent pronouncement in the case of **Mohammed Abdul Wahid vs. Nilofer and Anr.**⁴, on which reliance was placed by Mr. Kenjale, the Supreme Court held that under the Code of Civil Procedure Code, 1908 there is no differentiation between a party to the suit and a witness and thus the submission that the law differentiates between the party to the suit and the witness, for the purpose of evidence, was negated.

12. The learned Civil Judge, in the face of the fact that the plaintiff disputed the execution of the Agreement for Sale, could not

3 [2012] 2 MhLJ 292.

4 [2024] 1 BLJ (SC) 194.

have declined to summon the plaintiff No. 3 as a witness for defendant since the plaintiff No. 3 Anjana Bhosale has purportedly signed the said agreement for sale as a witness thereto.

13. I am, therefore, persuaded to set aside the impugned order and permit the defendant to examine the plaintiff No. 3 as his witness. Thus, the petition deserves to be allowed.

Hence, the following order.

ORDER

- 1] The petition stands allowed.
- 2] The impugned order stands quashed and set aside.
- 3] The application to summon the plaintiff No. 3 as defendant's witness stands allowed.
- 4] The trial Court shall summon the plaintiff No. 3 as a witness for the defendant.
- 5] As the suit has been instituted in the year 2012, the trial Court is requested to hear and decide the suit in accordance with law as expeditiously as possible.
- 6] Rule made absolute in the aforesaid terms.
- 7] No costs.

(N. J. JAMADAR, J.)