

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

WRIT PETITION NO. 12067 OF 2024

Hemchandra Bhaskar Vaidya

...Petitioner

Versus

1. Snehalata Sadashiv Kanade
2. Vijay Shankar Mainkar
3. Sudha Rajaram Khade
4. Vandana Subhash Mainkar
5. Kamal Vamanrao Kanade

...Respondents

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Mr. Jayesh Joshi, a/w Mitali Dhoble, for the Petitioner.

Mr. Krunal Thakkar, for the Respondents.

CORAM: N. J. JAMADAR, J.

DATED: 6th FEBRUARY, 2025

JUDGMENT:-

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

2. The petitioner – plaintiff takes exception to an order passed by the learned Civil Judge, Senior Division, Thane, on an application (Exhibit-67) dated 1st August, 2024, whereby the prayer of the plaintiff seeking a direction to the defendant to produce the original Will dated 24th December, 1996 and Codicil dated 23rd September, 2002 of Shankar Dhondur Mainkar, the predecessor-in-title of the defendants, and in the alternative to read the copies of the said Will and Codicil which were already

on record as the secondary evidence and, in the further alternative, to issue the witness summons to the Registrar of Assurances, Thane, before whom those Will and Codicil were registered to produce the certified copies thereof and depose before the Court, came to be rejected.

3. The plaintiff instituted the suit for specific performance of a Memorandum of Understanding (MoU) dated 28th May, 2009 executed by Ashok Shankar Mainkar, conferring rights on the plaintiff to develop the suit property on 'as is where is basis' and the consequential reliefs. The said MoU *inter alia* contained a recital that late Shankar Mainkar, the holder of the suit property, had left behind registered Will and Testament dated 24th December, 1996 and Codicil dated 23rd September, 2002, whereunder the property was bequeathed to all his legal heirs equally i.e. 1/6th share each, and Ashok Mainkar was authorised to manage the suit property and enter into transactions with persons to develop the suit property.

4. The plaintiff led his evidence. As the defendants did not lead their evidence, the trial court closed the evidence of the defendants and the suit came to be posted for arguments. On 30th July, 2024 the plaintiff filed instant application (Exhibit-67) seeking aboveresferred reliefs.

5. The defendants resisted the application on the ground that despite ample opportunity the plaintiff did not seek the production of the original Will and Codicil or make any effort to prove those documents in evidence. At the belated stage, when the suit was posted for final argument, the plaintiff filed the application to fill in the lacuna.

6. By the impugned order, the learned Civil Judge was persuaded to reject the application observing that the plaintiff had sufficient opportunity to prove his case but the plaintiff slept over his rights. Since the suit was posted for final argument the trial court agreed with the contentions on behalf of the defendants that the application was filed to fill in the lacuna in the plaintiff's case.

7. Mr. Joshi, the learned Counsel for the petitioner, submitted that there is no dispute about the execution of the said Will and Codicil. In the written statement, the defendants have specifically referred to the execution of the Will and Codicil by late Shankar and an endeavour was made to contend that since Probate has not been obtained the said Will cannot affect the subject property. The petitioner had placed copy of the Will of the deceased Shankar alongwith list of the documents filed in the year 2018 itself. Since there was no contest on the point of

the execution of the Will and the Codicil and the defendants had also relied upon the said documents, no prejudice would be caused to the defendants by placing the original documents on record, and in the alternative, by providing an opportunity to the plaintiff to adduce evidence with regard to those documents. The learned Civil Judge took a hypertechnical view of the matter, urged Mr. Joshi.

8. Mr. Thakkar, the learned Counsel for the respondents, supported the impugned order. It was submitted that no cause, much less justifiable one, was ascribed to permit the plaintiff to reopen the evidence. The Will and Codicil were exclusively referred to in the MoU on the strength of which the suit has been filed. The plaintiff had more than adequate opportunity to prove the said documents. In substance, the plaintiff cannot contend that despite exercising due diligence the said evidence could not be produced at an earlier point of time.

9. Mr. Thakkar placed reliance on a judgment of this Court in the case of *Pralhad Chavatrao Lawand vs. Parvati Gramin Bigar Sheti Sahakari Pathsanstha Maryadit and ors.*¹, wherein after advertng to the decision of the Supreme Court in the case of *K. K. Velusamy vs. N. Palanisamy*², this Court enunciated

1 WP/15440/2023, dtd.11.12.2023.

2 (2011) 11 Supreme Court Cases 275.

that in the absence of material to show that despite due diligence the party could not have produced the evidence earlier, it was not permissible to adduce the evidence after conclusion of the trial.

10. I have carefully perused the material on record and given anxious consideration to the rival submissions canvassed across the bar. The legal position, post the deletion of Order XVIII Rule 17-A by Civil Procedure Code (Amendment) Act, 1999, was expounded by the Supreme Court in the case of *Velusamy* (supra). The observations of the Supreme Court in paragraph 13, 14 and 19 are instructive and hence extracted below:

“13. The Code earlier had a specific provision in Order 18 Rule 17A for production of evidence not previously known or the evidence which could not be produced despite due diligence. It enabled the court to permit a party to produce any evidence even at a late stage, after the conclusion of his evidence if he satisfied the court that even after the exercise of due diligence, the evidence was not within his knowledge and could not be produced by him when he was leading the evidence. That provision was deleted with effect from 1.7.2002. The deletion of the said provision does not mean that no evidence can be received at all, after a party closes his evidence. It only means that the amended structure of the Code found no need for such a provision, as the amended Code contemplated little or no time gap between completion of evidence and commencement and conclusion of arguments. Another reason for its deletion was the misuse thereof by the parties to prolong the proceedings under the pretext of discovery of new evidence.

14. The amended provisions of the Code contemplate and expect a trial court to hear the arguments immediately after the completion of evidence and then proceed to judgment. Therefore, it was unnecessary to have an express provision for re-opening the evidence to examine a fresh witness or for recalling any witness for further examination. But if there is

a time gap between the completion of evidence and hearing of the arguments, for whatsoever reason, and if in that interregnum, a party comes across some evidence which he could not lay his hands earlier, or some evidence in regard to the conduct or action of the other party comes into existence, the court may in exercise of its inherent power under Section 151 of the Code, permit the production of such evidence if it is relevant and necessary in the interest of justice, subject to such terms as the court may deem fit to impose.

.....

19. We may add a word of caution. The power under Section 151 or Order 18 Rule 17 of the Code is not intended to be used routinely, merely for the asking. If so used, it will defeat the very purpose of various amendments to the Code to expedite trials. But where the application is found to be bona fide and where the additional evidence, oral or documentary, will assist the court to clarify the evidence on the issues and will assist in rendering justice, and the court is satisfied that non-production earlier was for valid and sufficient reasons, the court may exercise its discretion to recall the witnesses or permit the fresh evidence. But if it does so, it should ensure that the process does not become a protracting tactic. The court should firstly award appropriate costs to the other party to compensate for the delay. Secondly the court should take up and complete the case within a fixed time schedule so that the delay is avoided. Thirdly if the application is found to be mischievous, or frivolous, or to cover up negligence or lacunae, it should be rejected with heavy costs. If the application is allowed and the evidence is permitted and ultimately the court finds that evidence was not genuine or relevant and did not warrant the reopening of the case recalling the witnesses, it can be made a ground for awarding exemplary costs apart from ordering prosecution if it involves fabrication of evidence. If the party had an opportunity to produce such evidence earlier but did not do so or if the evidence already led is clear and unambiguous, or if it comes to the conclusion that the object of the application is merely to protract the proceedings, the court should reject the application. If the evidence sought to be produced is an electronic record, the court may also listen to the recording before granting or rejecting the application.”

(emphasis supplied)

11. A useful reference can also be made to a three Judge Bench judgment of the Supreme Court in the case of *Salem*

*Advocate Bar Association Vs Union of India*³. The observations of the Supreme Court in the case of *Salem Association* (supra) with regard to the impact of deletion of Sub-Rule (4) of Rule 2 and Rule 17-A of Order XVIII underscore the principle that the Civil Courts inherent power to call for any witness or permit a party to adduce evidence at any stage, is not taken away. The observations in paragraphs 13 and 32 are material and hence extracted below:

“Additional Evidence

13. In *Salem Advocates Bar Assn. case*, it has been clarified that on deletion of Order XVIII Rule 17-A which provided for leading of additional evidence, the law existing before the introduction of the amendment, i.e., 1st July, 2002, would stand restored. The Rule was deleted by Amendment Act of 2002. Even before insertion of Order XVIII Rule 17-A, the Court had inbuilt power to permit parties to produce evidence not known to them earlier or which could not be produced in spite of due diligence. Order XVIII Rule 17-A did not create any new right but only clarified the position. Therefore, deletion of Order 18 Rule 17-A does not disentitle production of evidence at a later stage. On a party satisfying the Court that after exercise of due diligence that evidence was not within his knowledge or could not be produced at the time the party was leading evidence, the Court may permit leading of such evidence at a later stage on such terms as may appear to be just.

Order 18 Rule 2

32. Order 18 Rule 2(4) which was inserted by Act 104 of 1976 has been omitted by Act 46 of 1999. Under the said rule, the Court could direct or permit any party, to examine any party or any witness at any stage. The effect of deletion is the restoration of the *status quo ante*. This means that law that was prevalent prior to 1976 amendment, would govern. The principles as noticed hereinbefore in regard to deletion of Order 18 Rule 17(a) would apply to the deletion of this provision as well. Even prior to insertion of Order 18 Rule 2(4), such a permission could be granted by the court in its discretion. The provision was inserted in 1976 by way of

3 (2005) 6 SCC 344.

caution. The omission of Order 18 Rule 2(4) by the 1999 amendment does not take away the Court's inherent power to call for any witness at any stage either *suo motu* or on the prayer of a party invoking the inherent powers of the Court.”
(emphasis supplied)

12. The position in law which thus emerges is that despite the deletion of Rule 17-A of Order XVIII of the Code, the Civil Court is not denuded of the power to permit a party to produce documents or lead additional evidence. The true test that is required to be applied is, whether the application is *bona fide* and the additional evidence oral or documentary is of such nature that it would assist the Court to arrive at a just decision of the case. Undoubtedly, the aspect of delay and reasonableness of explanation for not adducing such evidence at an earlier point of time bear upon the exercise of discretion.

13. Reverting to the facts of the case, first and foremost, it is necessary to note that there is no dispute, as such, about the execution, existence and the contents of the Will and Codicil. In paragraphs 7 to 9 of the written statement filed on behalf of the defendants, the defendants have exclusively referred to the registered Will and Codicil left behind by late Shankar and the authority given to Ashok Mainkar to manage the suit property and enter into transaction to develop the same. What is conspicuous by its absence is the challenge to either the

execution of the Will or the testamentary or disposing capacity of late Shankar. In paragraph 9, it is contended that though the Will and Codicil have been registered yet Probate has not been obtained from the competent court. Secondly, in the MoU there is a specific reference to the said registered Will and Codicil and the authority conferred upon Ashok Mainkar under the said testamentary instruments.

14. If the stand of the defendants, manifested in the written statement is considered, an inference becomes justifiable that the execution, existence and contents of the Will were not put in contest. The real question that arises for adjudication in the suit is, whether Ashok Mainkar had the authority to execute the MoU on behalf of the other legal heirs of late Shankar and, more importantly, bind them. For the determination of the said controversy, the Will and Codicil, which find specific reference in the MoU, appear to be necessary. From this stand point, in my view, the crucial test of necessity of the said evidence for a just decision of the case can be said to have been satisfied.

15. This propels me to the aspect of the delay in seeking the production of the said evidence. Incontrovertibly the application was moved when the suit was posted for argument. However, the sequence of the proceedings before the trial court cannot be

lost sight of. On 12th March, 2024, the plaintiff closed his evidence. The defendants did not lead evidence on 6th April, 2024 and 26th June, 2024 and, thereupon, the evidence of the defendant was closed and the matter was posted for arguments.

16. The submission on behalf of the plaintiff that the plaintiff was under an impression that the defendants would produce the said documents in their evidence may not constitute a complete justification for such belated application. Yet the fact that both the parties proceeded with the trial fully cognizant of the existence of the Will and Codicil nay did not dispute the existence and contents thereof, and the plaintiff had placed a copy of the Will on the record of the Court, indicates that there was no lack of *bona fide* on the part of the plaintiff. As the core controversy essentially turns upon the authority of Ashok Mainkar to execute the MoU on the strength of the power purportedly conferred under the Will and Codicil of late Shankar, in my considered view, the fact that there was inadvertence or delay on the part of the plaintiff in adducing the said evidence does not preclude the plaintiff from seeking the production of those documents and, in the alternative, prove those documents in evidence.

17. It is also imperative to note that even the custody of the said document was not put in contest by the defendants. If the documents are in the possession or power of the defendants and the custody of those documents with the defendants appears to be natural, a direction for production of those documents would advance the cause of justice. If the defendants produce those documents and, as is evident from the written statement of the defendants, do not object to the admission of those documents in evidence, no further evidence would be warranted. On the contrary, if the defendants do not produce the documents, the plaintiff deserves an opportunity to lead secondary evidence in respect of the said Will and Codicil.

18. For the forgoing reasons, I am impelled to allow the petition. Hence the following order:

: O R D E R :

A. The petition stands allowed.

B. The order dated 1st August, 2024 passed on application (Exhibit-67) in Special Civil Suit No.142 of 2012 stands quashed and set aside.

C. The application Exhibit-67 stands allowed in the following terms:

- (i) The defendants are directed to produce the original Will dated 24th December, 1996 and the codicil dated 23rd September, 2002 of Shankar Dhondu Mainkar before the trial court, within a period of three weeks from the date of uploading of this order.
- (ii) If the defendants do not produce the original Will and codicil before the trial court, within the said period, the petitioner – plaintiff shall be at liberty to adduce secondary evidence of the said will and codicil.
- (iii) The parties are at liberty to adduce evidence with regard to the said Will and codicil.

Rule made absolute in the aforesaid terms.

No costs.

[N. J. JAMADAR, J.]