

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.12954 OF 2024**

Shobha Vijay Gavhale	...	Petitioner
versus		
Sushila Madhukar Niravane (deceased)		
through legal heirs		
Shobha Bapu Bhandare and Ors.	...	Respondent

Mr. Abhijit P. Kulkarni, for Petitioner.

CORAM: N.J.JAMADAR, J.

DATE : 6 JANUARY 2025

P.C.

1. Heard the learned Counsel for the Petitioner.
2. The challenge in this Petition is to an order dated 25 January 2024 passed by the learned Joint Civil Judge, Baramati, on an application seeking permission to examine a witness, though a list of witnesses containing the name of the said witness was not filed, whereby the said application was allowed subject to payment of costs of Rs.800/- payable by the Plaintiffs to the Defendant Nos.1 and 2.
3. The suit has been instituted for partition and separate possession of joint family properties and also for a declaration that the sale deed dated 15 May 2016 in respect of portion of the suit property, executed by deceased Altaf Sonawane, predecessor in title of Defendant Nos.1A and 1B, in favour of Defendant No.2, is not binding on the share of the Plaintiffs. After the

evidence of Plaintiff No.1(D1) was recorded, the Plaintiffs filed an affidavit in lieu of examination in chief of Mangaldas Nikalje, alongwith an application for permission to examine the said witness. The Plaintiffs had not filed the list of witnesses.

4. The Petitioner / Defendant No.2 resisted the application.

5. The learned Civil Judge was of the view that if the Plaintiffs are not permitted to examine the said witness, the Plaintiffs would suffer prejudice and, on the contrary, the Defendants would not suffer any prejudice as they would have an opportunity to cross-examine the said witness. Thus the Plaintiffs were permitted to examine the witness, though no list of witnesses was filed.

6. Mr. Kulkarni, learned Counsel for the Petitioner, submitted that the impugned order suffers from grave procedural illegality. The learned Civil Judge did not exercise the discretion in a judicious manner, as no cause, much less justifiable one, was ascribed for not filing list of witnesses and seeking permission to examine the second witness.

7. Attention of the Court was invited to the application preferred by the Plaintiffs. In the said application, the Plaintiffs have made a bald assertion that due to inadvertence, list of witnesses was not filed. Such an assertion does not justify permission to examine the witness sans the list of witnesses, urged Mr. Kulkarni.

8. Reliance was sought to be placed on an order passed by this Court in the case of **Anil Ramesh Bhusari V/s. Bhaskar Ramesh Bhusari and Ors.**¹ wherein it was enunciated that in terms of Order 16 Rule 1 (3) of the Code of Civil Procedure, 1908, the Court may permit the party to call any other witness, provided the party who desires to examine any such witness, whose name is not included in the list of witnesses, shows sufficient cause for the omission to mention the name of such witness in the said list and the Court has to record reasons for permitting the party to examine the witness whose name is not included in the list submitted as per sub rule (1) of Rule 1.

9. I have perused the application preferred by the Plaintiffs seeking permission to examine P.W.2 and the impugned order. The Court has the benefit of affidavit in lieu of examination in chief filed by the P.W.2.

10. Filing of list of witnesses as mandated by sub-rule (1) of Rule 1 of Order 16 is not an empty formality. Yet, under sub-rule (3) of Rule 1 of Order 16, the Court has been empowered to permit a party to examine witness other than those whose names appear in the list referred to in sub-rule (1), if such party shows sufficient cause for the omission to mention the name of such witness in the said list, for reasons to be recorded by the Court.

11. Twin condition needs to be satisfied. One, the sufficiency of cause ascribed by the party. Two, the recording of reasons by the Court.

¹ 2014(5) Mh.L.J.792

12. In the case at hand, the Plaintiffs asserted that inadvertently the list of witnesses was not filed. What is of critical significance is the fact that upon appraisal of the material, the Court has recorded that refusal to grant permission to the Plaintiffs to examine witness would cause serious prejudice to the Plaintiffs, and, conversely, the Defendants would not suffer such prejudice as they would have an opportunity to cross-examine the said witness. Thus, it cannot be said that the learned Judge has not recorded adequate and justifiable reasons.

13. In any event, the affidavit in lieu of examination in chief of P.W.2, runs into two pages. In the context of the question which would warrant adjudication at the trial, the evidence sought to be led by the Plaintiffs by examining P.W.2 does not appear to be of such a nature as would take the Defendants by surprise or otherwise cause an irretrievable prejudice to the Defendants.

14. As the learned Civil Judge has exercised discretion which promotes the determination of the lis on merits, this Court does not find any justifiable reason to interfere with the exercise of such discretion in exercise of extraordinary writ jurisdiction.

15. The Writ Petition, thus, stands dismissed.

(N.J.JAMADAR, J.)