

Vaibhav

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.18810 OF 2024

Noshir Kaikhushru Engineer And Anr. ...Petitioners

Versus

Kumar Subramaniyan And Ors. ...Respondents

Mr. Karl Tamboly a/w Mr. Shrey Fatterpekar, Ms. Anuja Jhunjhunwala and Mr. Harsh Thadani i/b M Mulla Associates, Advocates for the Petitioners.

Ms. Sneha Phene a/w Mr. Ramachandran Narayanan i/b Narayanan & Narayanan, for the Respondent No.1.

Mr. Rishit Vimadalal a/w (Through V.C.) Ms. Heena Thalesar i/b Vimadalal & Co. for the Respondent No.3.

CORAM: MADHAV J. JAMDAR, J.
DATED: 21 JANUARY 2025

P.C.:

1. Heard Mr. Karl Tamboly, learned Counsel appearing for the Petitioners, Ms. Sneha Phene, learned Counsel appearing for the Respondent No.1 and Mr. Rishit Vimadalal, learned Counsel appearing for the Respondent No.3.

2. By the present Writ Petition filed under Article 227 of the Constitution of India, the Petitioner is challenging the legality and validity of the Order dated 6th September 2024 passed by the learned Judge, Small Causes Court, Mumbai, below Exhibit-51 in R.A.E. Suit No.1115 of 2018.

3. By the said Application bearing Exhibit-51 the Plaintiff has sought appointment of Court Commissioner for recording cross-examination of PW1 i.e. Plaintiff No.1 and the same has been rejected.

4. It is the submission of learned Counsel appearing for the Petitioner that PW1 is 94 years old and therefore, cross-examination is required to be conducted by the Court Commissioner. Learned Counsel appearing for the Petitioner submitted that one of the reason given by the learned Trial Court while rejecting the Application is that the Plaintiff PW1 has not denied the contention of the Defendant with regard to fact of casting of vote by Plaintiff on 20th May 2024 i.e. in the Loksabha Election. He submitted that the same can not be a ground to deny the appointment of the Court Commissioner to record evidence of the witness who is 94 years old.

5. Learned Counsel appearing for the Respondents submitted that although the PW1 is 94 years old, every day he takes regular morning walk and therefore his health is in good condition and he can attend the Court.

6. Learned Counsel appearing for the Petitioner relies on Medical Certificate dated 11th April 2024 which states that the Petitioner No.1 is suffering from Vertigo with deafness and Prostate Cancer and due to the said problems he is unsteady on his feet and confined to his house.

7. Learned Counsel appearing for the Respondents relies on Section

119 of the Indian Evidence Act, 1872, which reads as under:-

"119. A witnesses who is unable to speak may give his evidence in any other manner in which he can make it intelligible, as by writing or by signs; but such writing must be written and the signs made in open Court. Evidence so given shall be deemed to be oral evidence. Provided that if the witness is unable to communicate verbally, the Court shall take the assistance of an interpreter or a special educator in recording the statement, and such statement shall be video graphed."

8. It is required to be noted that the PW1-Plaintiff No.1 is 94 years old and he is also suffering from certain health issues. However it has not come on record that the witness is unable to speak. Therefore Section 119 will have no application.

9. In the facts and circumstances of this case it is necessary to appoint the Commissioner to record cross-examination of the PW1. The Commissioner to adopt the mode as more particularly set out in Section 119 of the Indian Evidence Act, 1872, only if the witness is unable to speak / unable to communicate verbally.

10. The impugned Order dated 6th September 2024 passed below Exhibit-51 in R.A.E. Suit No.1115 of 2018 passed by the learned Judge, Small Causes Court, Mumbai is quashed and set aside and said Exhibit-51 Application is allowed in above terms.

11. Accordingly, with the consent of parties Mr. Devashish Godbole, learned Counsel of this Court is appointed as Court Commissioner.

12. The Writ Petition is disposed of in above terms with no order as to costs.

[MADHAV J. JAMDAR, J.]