

(2002) 07 BOM CK 0145

In the Bombay High Court

Case No : Civil Revision Application 320 of 2002

Dilawarkhan Ahmedkhan

APPELLANT

Vs

Manbee Ahemad Khan, Faiyaz Khan Ahemad Khan, Mehmood
Khan Ahemad Khan and Mehtab Bee Lal Khan

RESPONDENT

Date of Decision : 17-07-2002

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 16 Rule 10, Order 16 Rule 11, Order 16 Rule 12

Citation : (2003) 1 ALLMR 647 : (2003) 1 BOMLR 688 : (2003) 2 CivCC 449 : (2003) 1 MhLj 533

Hon'ble Judges : N.V. Dabholkar, J

Bench : Single Bench

Advocate : R.D. Deshpande and S.R. Deshpande, for the Appellant; M.R. Challani, for the Respondent

Final Decision : Allowed

Judgement

N.V. Dabholkar, J.—Heard learned counsel for the respective parties.

2. Rule. By mutual consent, Rule is made returnable forthwith.

3. It appears that Regular Civil Suit No.1159 of 1995 is filed by petitioner against respondents for partition and separate possession. In the suit on 4.4.2002, plaintiff prayed for witness summons. It is an admitted position that defendants were asked to enter the witness box first. Defendants have completed their evidence and subsequently evidence of plaintiff was in progress. On 8.4.2002, Court ordered issuance of summons to witnesses as prayed by plaintiff and on the same day, plaintiff has paid the process.

On 12.4.2002, plaintiff filed another application requesting for issuance of summonses to the same witnesses, because they were not present on that day. From the say filed by respondents and order of the Court dated 12.4.2002 on that application, it appears that the witnesses were served but they were absent.

The learned Judge, therefore, observed that there is no reason to re issue the witness summonses and he rejected the application. It is this order, being impugned in the present revision.

4. Shri Challani, Advocate for respondents has taken me through Order XVI Rules 10 to 12 of Civil Procedure Code. According to him, when admittedly, the witnesses were served and absent, plaintiff could have at the most applied for coercive process by the Court for enforcing the presence of the witnesses and therefore, the trial Court, in rejecting the application to repeat the summons to the witnesses, has committed no illegality or material irregularity and the order does not call for any interference.

5. Shri Deshpande, Advocate for the petitioner has pointed that the roznama of the case shows that the Court has not only rejected the application for fresh summonses, but practically shut the evidence of plaintiff by not taking any coercive method. He has placed reliance upon the observations of the Himachal Pradesh High Court in the matter of Sohan Singh and Co. Vs. Mohammad Aishak Tyagi, . In this matter, the witnesses summoned by defendant No.3 were necessary witnesses for production of documents. Defendant had taken all necessary steps for summoning two witnesses and they were also duly served. The learned Civil Judge, instead of adjourning the case and assisting defendant in procuring the attendance of witnesses, passed an order signifying that the witnesses were not present, defendant was also absent and it appeared that defendant was not interested in producing the evidence. It was held that, when the summonses were duly issued by the Court and properly served upon the witnesses, the Court itself could initiate attendance of witnesses under Order 16, when obviously the defendant could not proceed with his own statement unless the necessary documents were available in the Court. Thus the Himachal Pradesh High Court was of the view that the Court should suo motu proceed for procuring the attendance of witnesses by coercive methods.

Even the Punjab and Haryana High Court in the matter of National Rice and Dal Mills Vs. The Food Corporation of India, New Delhi, , has taken identical view that it is the duty of the Court to enforce attendance of the witnesses summoned by the parties, if necessary, by coercive process and in the interest of justice it can do so by adjourning the case from time to time. It was further observed;

" It would not be justifiable for the court to refuse to issue summons on the ground that the summons were not returned or on the ground that some of the witnesses could not be served because the diet money was not paid to them, or that some witnesses though served did not appear before the Court."

Of course the issue in this matter was propriety of coercive process issued by the Court.

6. The issue before this Court is not whether the Court has/has not powers to use coercive methods for procuring the presence of witnesses. The question that is before this Court is whether the trial Court ought to have issued summonses

second time for procuring the presence of witnesses, when they were absent inspite of service. According to Shri Challani, since the witnesses were once served with summons, plaintiff ought to have applied for appropriate process under Order XVI Rule 10(2) or (3) CPC and not for repeated summonses. In the absence of any such application, according to Shri Challani; the trial Court was justified in rejecting the application to repeat summonses and closing the evidence of plaintiff.

In the light of judicial pronouncements in the cases of M/s National Rice and Dal Mills and M/s Sohan Singh (supra), the aforesaid proposition of Shri Challani is unsustainable. If plaintiff did not apply for coercive method, the Court could not have taken liberty to close the evidence of plaintiff, without taking appropriate steps for securing presence of the witnesses as prayed by plaintiff. This is because, by issuing the summons to the witnesses on earlier occasion, the Court has accepted the contention of plaintiff that evidence of those witnesses was necessary.

Naturally, the only question that is required to be considered is whether the Court is prohibited from issuing summonses on second occasion to the same witnesses, who are served and absent, and is the Court obliged to proceed with coercive method, since witnesses are absent on single service.

7. On reference to sub-rules (2) and (3) of Rule 10 of Order XVI of CPC relied upon by Shri Challani, Advocate, it appears that the Court is required to satisfy itself about certain things before proceeding with coercive methods. Sub rule (2) reads as follows :

" Where the Court sees reason to believe that such evidence or production is material, and that such person has, without lawful excuse, failed to attend or to produce the document in compliance with such summons or has intentionally avoided service, it may issue a proclamation requiring him to attend to give evidence or to produce the document at a time and place to be named therein;"

Opening portion of sub-rule (3) reads as follows :

" In lieu of or at the time of issuing such proclamation, or at any time afterwards, the Court may, in its discretion, issue a warrant, either with or without bail....."

From the opening part of sub-rule (3) it can be seen that bailable or non-bailable warrant can be issued, simultaneously with the proclamation as contemplated in sub-rule (2) or as a substitute to the said proclamation. Consequently, it will have to be presumed that such bailable or non bailable warrant can be issued only when the Court is satisfied with the conditions prescribed for issuance of a proclamation. Sub-section (2) requires that before issuing a proclamation against a person whose presence is necessary for evidence or production of documents, the Court has to be satisfied that such a person has without lawful excuse failed to attend or to produce the document in compliance with such summons.

(Emphasis supplied).

Moreover, the words " it may issue a proclamation " under sub-rule (2) as also words "the Court may, in its discretion, issue a warrant" as appearing in sub-rule (3), signify the issuance of coercive process to be the discretion of the Court and not an obligation upon the Court.

8. It must be taken into account that the processes empowered by Rule 10, to some extent, are coercive processes and of penal consequences. Naturally, the Court is expected to be slow. The Court could have gone ahead with the coercive process only after satisfying itself that the witnesses have remained absent without lawful excuses.

9. Taking into consideration Rule 10 in its totality, it is not possible to arrive at a conclusion that the Court is prevented from issuing the summons to the witnesses on second occasion, although he has been served and remained absent. To take a pragmatic view, it must be said that the single absence in spite of service, need not necessarily lead to an inference that the witness has failed to attend without lawful excuse.

Contention of Shri Challani, Advocate to the effect that because the witnesses were served, there was no option but to proceed with the coercive method and therefore, the trial Court committed no error in rejecting the application for repeat summonses, therefore need not be sustained.

10. In the light of interpretation of Order XVI Rule 10 as above, the revision petition is allowed. The order dated 12.4.2002, refusing to repeat summonses to couple of witnesses of plaintiff, is quashed and set aside. The trial Court is directed to make one more attempt for securing presence of the witnesses by fresh summonses and thereafter, it may consider further process for securing their presence in case, the circumstances so demand.

11. Rule is made absolute accordingly. No order as to costs.