

(2009) 04 BOM CK 0109

In the Bombay High Court

Case No : Writ Petition No. 5203 of 2008

Kawadu Latari Ramteke and Another

APPELLANT

Vs

Suresh Latari Ramteke and Others

RESPONDENT

Date of Decision : 21-04-2009

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 18 Rule 4

Citation : (2009) 4 BomCR 253 : (2009) 3 CivCC 496 : (2009) 4 MhLj 446 :
(2010) 8 RCR(Civil) 1977

Hon'ble Judges : Pangarkar C.L., J

Bench : Single Bench

Advocate : M.P. Khajanchi, for the Appellant; Kirti Satpute, for the Respondent

Judgement

Pangarkar C.L., J.—Rule. Rule is made returnable forthwith. Heard finally with consent of the parties.

2. This writ petition has been filed against the order passed by the Civil Judge (Sr.Dn.), Chandrapur on an application (Exh. 100).

3. The facts are as follows:

The respondents/plaintiffs have instituted a suit for declaration, partition and separate possession. The petitioners/ defendants had filed a list of witnesses in the said, proceeding by way of defence. The evidence of the plaintiffs is recorded and they have been cross-examined by the defendants. The defendant's affidavit has been filed on record, but has not as yet been examined.

4. The plaintiffs moved an application (Exh. 100) before the Court praying that it should direct the defendants to file affidavit of all the witnesses on record at a time. This application was opposed by the defendants. In spite of the opposition of the defendants, the learned Judge of the trial Court granted the application and the defendants feel aggrieved by the same.

5. I have heard the learned Counsel for the petitioners and the respondents.

6. Learned Counsel for the petitioners/ defendants submits that there is nothing in the Rule 4 of Order 18 of C.P.C. which permits a Court to direct any party to file the affidavit of all the witnesses at a time. He submits that it is a well-known fact that a party has right to decide at the eleventh hour whether it should or should not examine any particular witness in the Court although the said witness may have been cited as a witness and his name may appear in the list of witnesses. He submits that at the eleventh hour, the defendant may find the evidence of one witness, which he has examined, sufficient to rebut the case of the plaintiff and there is no need to examine any more witnesses. He submits that, therefore, there was no need in fact for the trial Court to have directed the defendants to file the affidavit of all the witnesses. He submits that the defendant has a choice to examine or not to examine any witness although names of such witnesses appear in the list of witnesses. This proposition cannot at all be disputed.

7. Smt. Satpute, learned Counsel for the respondents submits that discretion is with the learned Judge of the trial Court and discretion has been rightly used by him and this Court should not, therefore, interfere with the discretion. She relied upon the decision reported in F.D.C. Limited Vs. Federation of Medical Representatives Association India (FMRAI) and Maharashtra Sales and Medical Representatives Association, , wherein this Court has observed as follows:

18. There is no doubt that the Rule 4 on the face of it nowhere speaks of the time or the State at which the affidavit of examination-in-chief can be filed. Does it mean that such affidavit of a witness can be filed few minutes before the cross-examination of such witness begins? Certainly not, as it can invariably cause great prejudice to the opposite party who has to cross-examine such deponent. In all fairness, therefore, the copies of such affidavits will have to be furnished to the opposite party well in advance. It may not be however, appropriate for this Court to fix a time frame programme in general for furnishing such copies of the affidavits to the opposite party. It will depend on the facts and circumstances of each case and the trial Court in its discretion will have to fix the time for giving such copies in advance. However, under no circumstances, on account of failure to give advance copy of the affidavit, the parties shall be entitled to seek adjournment of the hearing of the suit. In case there is failure to give advance copy of the affidavit in examination-in-chief to the opposite party and grievance is made in that regard by the opposite party, certainly the Court can order examination-in-chief of such witness to be recorded in open Court or before the Commissioner as the case may be, ignoring or discarding the affidavit of such witness. However, it should depend upon judicious exercise of discretion by the Court in that regard and depending upon facts and circumstances in each cases. It is also to be noted that it is not necessary for the party to file affidavit of all the witnesses at one and the same time or day. This again would depend upon the number of witnesses and nature of testimony of each of the witnesses as well as the discretion to be exercised by the Court in that regard. It cannot be disputed that question of filing of affidavit of witnesses by the opposite party

cannot be ordered unless the first party concludes its evidence.

8. With respect, the ratio as laid down by the Court does not help the cause of the respondents but in fact helps the cause of the petitioners. What is observed by the Court is that it is not necessary for the party to file the affidavit of all the witnesses at one and the same time or day, and it should depend upon the number of witnesses and testimony of each of the witnesses as well as the discretion to be exercised by the Court in that regard. In view of this, it is clear that no party can in fact be directed to file affidavit of the witnesses at one and the same time because the party has a choice to decide as to number of witnesses to be examined in the Court. In view of this, there was no need for the learned Judge of the trial Court to have directed the defendants to file the affidavit of all witnesses, which they want to examine. The order as passed by the learned Civil Judge is, therefore, liable to be set aside and quashed. In view of this, the writ petition is allowed. The order passed by the learned Judge of the trial Court is set aside. The defendants are at liberty: to file the affidavit of the witnesses as they may choose to examine at the time of trial. It is, however, clear that it is always desirable that the parties submit the affidavit at least two days in advance before the witness is examined in the Court.

Rule made absolute.