

(2011) 02 GUJ CK 0029

In the Gujarat High Court

Case No : Special Civil Application No. 1716 of 2011

Kumarpal Mankelal Shah

APPELLANT

Vs

Kheemraj Ganeshmal Balar and Others

RESPONDENT

Date of Decision : 10-02-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 18 Rule 4(2)

Citation : (2011) 2 GLR 1479

Hon'ble Judges : R.R. Tripathi, J

Bench : Single Bench

Advocate : Jal Soli Unwala, for the Appellant;

Final Decision : Dismissed

Judgement

Ravi R. Tripathi, J.—The Petitioner, who has mentioned his age to be "68 years" in the cause-title of the petition, is before this Court praying that:

7(a) To quash and set aside the orders dated 30-12-2011 and 6-1-2011 passed below Exhs. 102 and 118, which are at Annexure "G" and "I" respectively to the extent to which they are against the present Petitioner and to the extent to which the order below Exh. 102 seeks to impose condition on the Petitioner and be further pleased to allow the application Exhs. 102 and 118 as prayed for before the learned Charity Commissioner.

2. The case of the Petitioner is that the Petitioner is not keeping good health, and therefore, he is not able to remain present in the Court for being cross-examined.

2.1. The factual background of the case is that earlier, the Petitioner had filed an application seeking his cross-examination to be held by a Court Commissioner. That application was not served to the other side and an order was obtained from the learned Charity Commissioner, who granted that application. This order of the learned Charity Commissioner was the subject-matter of a petition before this Court being Special Civil Application No. 15169 of 2010, which came to be heard and decided by order dated 14th December, 2010 (Coram: Hon'ble Mr.

Justice Akil Kureshi). Para 3 of the said order is relevant for the purpose. The same reads as under:

3. Admittedly, said order was passed without hearing the Petitioner who is Respondent No. 1 in the said proceedings. He had no opportunity to raise his objection since application was filed on the same date without copy to Respondent No. 1 and order was passed by the Charity Commissioner without notice to Respondent No. 1. Under the circumstances, only for this short ground of no opportunity to the Petitioner, impugned order dated 19-10-2009 is set aside. Application Exh. 102 stands revived, shall be decided by the Charity Commissioner after hearing the Petitioner and Respondents who shall appear before the Charity Commissioner without any notice on 20-12-2010. It is clarified that if the said date is not convenient to the Charity Commissioner, he may fix Anr. date shortly, thereafter. I have expressed no opinion on the merits of the request made in application.

(Emphasis supplied)

2.2. Thereafter, the Petitioner filed application Exh. 113. Along with that application, he produced a Medical Certificate. This application is decided by order dated 30th December, 2010, which is under challenge in this petition. What is important is that the learned Charity Commissioner has recorded that, "earlier, along with application, no Certificate of any Doctor was produced, whereas, Certificate dated 20th December, 2010 of one Dr. Pinakin P. Soni is produced before the learned Charity Commissioner for consideration along with the application.

2.3. What is important is that the present Respondents, on getting an opportunity, presented their case before the learned Charity Commissioner, which is recorded in Para 3 of the order impugned. It is specifically mentioned in that Paragraph that "the affidavit of one Shri Khimrajji Ganeshmalji is filed, wherein, it is stated that the present Petitioner has made his candidature in the election of the "Sangh". The Petitioner had remained present before the High Court; he frequently visits "Popatben Pathshala"; he climbs stairs; he works of his own; he attends office; he had volunteered himself as a witness in a complaint filed by one of the members; from time to time he is seen around "Derasar"; the Certificate does not show that he is "bedridden"; besides, the affidavits of one Shri Ashish Shantilal Shah, Kirtibhai Babulal Shah and Prakashbhai Vadilal Vasa are produced. In all these affidavits, it is mentioned that the Petitioner moves during the day at any time; he goes to "Popatben Pathshala" at 10-00 a.m.; during "Chaturmas" he was seen going to first floor of "Popatben Pathshala" and at the time of "Upadhan Tap Mala Ropan" on 3rd December, 2010 the Petitioner was present in the ground of Ahmedabad Education with one Prakashbhai".

2.4. The learned Charity Commissioner, after taking into consideration the rival submissions, by order dated 30th December, 2010, directed the Petitioner to file affidavit of the Doctor, who issued Certificate dated 20th December, 2010.

Besides that, learned Charity Commissioner directed the Petitioner to produce the Certificate of a Civil Surgeon of the Civil Hospital.

2.5. The Petitioner then filed an application Exh. 118 and stated that the Doctor, who has issued the Medical Certificate dated 20th December, 2010 i.e. Dr. Pinakin P. Soni, has refused to file any affidavit but has shown willingness that if the Court issues summons to him, he will come and file an affidavit. The Petitioner has produced a Certificate from U.N. Mehta Institute of Cardiology and Research Centre dated 5th January, 2011. The Certificate makes an interesting reading that: "Patient is a case of Post CABG status & DM II & Osteoarthritis knee, P/w Dyspnoea - NYHA III - HTN. He need regular follow-up, medicine and regular ECG, 2D Echo, TMT, PFT after Blood Pressure...". This Certificate, no way, mentions that the health status of the Petitioner is such that he cannot come to the Court for being cross-examined.

2.6. The question is not, as to whether the provisions of Sub-rule (2) of Rule 4 of Order 18 should be resorted to or not. The question is, as to whether a person, who is otherwise moving around and is able to discharge his daily routine, can be allowed to have "luxury" of cross-examination by a Court Commissioner. The Court is conscious of the word "luxury". The provisions are meant for the convenience of the members of the public, at the same time, no member of the public can be allowed to take recourse to any provision, so as to claim a privilege, like in the present case the Petitioner wants him to be cross-examined by the Court Commissioner.

2.7. It is settled position of law that normally, the depositions are to be recorded in presence of the Presiding Officer, so as to enable the Presiding Officer to notice the "demeanour" of the witness. If the Petitioner is allowed to be cross-examined by the Court Commissioner, the Presiding Officer will be deprived of an opportunity of noticing demeanour.

2.8. The learned Charity Commissioner, by order dated 6th January, 2011 has rightly observed that, "as the order dated 30th December, 2010 is not complied with, the matter is kept for recording evidence, the applicant was required to remain present for recording of his evidence, and if he is not able to attend, then keeping his cross-examination pending, other applicant's evidence be recorded.

3. For the aforesaid reasons, the orders passed by the learned Charity Commissioner below Exhs. 102 and 118 are found to be in accordance with law. No interference is called for in those orders. In the result, this petition fails. The petition deserves to be dismissed with cost, however, the Court restrains itself from imposing any cost on the Petitioner.