

(2021) 10 BOM CK 0021
In the Bombay High Court
Case No : Writ Petition No. 8350 Of 2018

Mangalabai And Others

APPELLANT

Vs

Dattatraya S/O Manikrao Jadhav And Others

RESPONDENT

Date of Decision : 04-10-2021

Acts Referred:

Code Of Civil Procedure, 1908 — Order 26 Rule 1, Order 26 Rule 21

Citation : (2021) 10 BOM CK 0021

Hon'ble Judges : Mangesh S. Patil, J

Bench : Single Bench

Advocate : Kasliwal Anil H, J.R. Pati

Final Decision : Dismissed

Judgement

Mangesh S. Patil, J

1. Heard. Rule. The Rule is made returnable forthwith. At the request of the both the sides the matter is heard finally at the stage of admission.

2. The petitioners are the original plaintiffs who have instituted a suit for partition, possession and perpetual injunction. As can be gathered, petitioners are the heirs of one Digambar. Dattatraya was the defendant No. 1 but since has died, his legal representatives have come on record. Respondent No. 2 Laxmibai (since deceased) and 3 Chabubai, who are the original defendants No. 2 and 3 are his widows and the respondent No. 4 Indumati (since deceased) and respondent No. 5 Sunita are Dattatraya's married daughters. By filing application (Exh. 126) purportedly under Order XVI Rule 1 read with Rule 21 of the Code of Civil Procedure, the petitioners sought a witness summons to be issued to the respondents Indumati and Sunita. By the impugned order the application has been rejected. Hence this petition.

3. At the outset it is necessary to note that, admittedly, the respondent No. 4 Indumati is no more and consequently the request to call her as a witness has become infructuous.

4. The learned advocate for the petitioners relying upon the decisions of this Court in the case of Ramdas Dhondibhu Pokharkar Vs. State Bank of India and Anr.; 2003(1) ALL M.R. 76 and M/s. Ravalnath Builders Vs. Mrs. Sebastiano Escolastica Beatriz Nunes Mondonsa @ Beartiz Mendonca; 2012(7) ALL M.R. 162 submits that there is no provision in the Code of Civil Procedure prohibiting a party from calling the adversary as its own witness. He would submit that during pendency of this suit respondent No. 5 Sunita could get one of the house properties mutated in her name in the Municipal record by furnishing incorrect information and it is at the instance of the petitioners that such mutation was subsequently cancelled. She had furnished incorrect information regarding her service and residential proof and in order to establish these facts it was imperative to call her as a witness.

5. Per contra, learned advocate for the respondents Mr. Patil submits that the practice of calling the adversary as ones own witness has been deprecated by the Privy Council and a reference can also be found in Paragraph No. 229 of the Civil Manual published by Bombay High Court.

He would point out that in Pirgonda Hongonda Vs. Vishwanath Ganesh; A.I.R. 1956 Bombay 251 also such practice of calling the adversary as ownwitness has been deprecated. He would further submit that the decision in the case of Pirgonda Hongonda (supra) was distinguished on facts in the case of Ramdas Dhondibhu Pokharkar (supra) whereas, it has not even been so distinguished in the case of M/s. Ravalnath Builders (supra) which merely seeks to place reliance on the decision in the case of Ramdas Dhondibhu Pokharkar (supra).

6. The learned advocate would then submit that there was a common appearance of the respondents who are the original defendant Nos. 1 to 3 and 5 (respondent No.5 Sunita being defendant No. 5), when defendant No. 1 has already stepped into the witness box and has testified, the petitioners cannot be allowed to call her as their own witness. In the case of Ramdas Dhondibhu Pokharkar (supra), the witness sought to be called though was an employee of Bank which was the plaintiff, he was being called to confront him with a document purportedly bearing his signature and he was not representing the bank. The matter in hand is altogether different. The petitioners now want to establish the fact that the respondent No. 5 Sunita having got mutated her name in the Municipal record to one of the suit properties by misrepresenting her identity and residential proof. Therefore, the petitioners are not entitled to place reliance in the decisions cited on their behalf.

7. The learned advocate would, lastly, submit that this Court in the case of Suresah Sahebrao Tawale Vs. Uttam Shankar Ghadge; 2012(5) ALL M.R. 880 relying upon the decision in the case of Pirgonda Hongonda (supra) as also the earlier decisions of the Privy Council in the case of Mahunt Shatrugan Das Vs. Bawa Sham Das and others; A.I.R. 1938 Privy Council 59; and decisions of few other High Courts has distinguished the decision in the case of Ramdas Dhondibhu Pokharkar (supra) and in similar set of facts has quashed and set

aside the order of the Trial Court conceding to the request of the plaintiff to call the defendant as his witness.

8. I have carefully considered the rival submissions and perused the decisions cited at the Bar.

9. As is mentioned herein above, it is a suit for partition and separate possession of the suit properties stated to be the joint family properties. The respondents who are the defendants No. 1 to 3 and 5 have put common appearance and have filed joint written statement (Exh. 37). Admittedly, the defendant No. 1 has also stepped into the witness box on their behalf and it is at that stage, after the defendants closed their evidence that the present application was filed. Before advertng to the legal aspects, it is apparent that the petitioners want respondent No. 5 Sunita to be examined as their witness to prove the facts that she had got her name mutated to one of the suit properties by misleading the Municipal Authorities as regards her identity and the place of residence. There is every room to doubt as to if the facts that are sought to be established by calling her as a witness would be relevant for the just decision of the suit which is a suit for general partition and separate possession.

10. Besides, unlike in the case of Ramdas Dhondibhu Pokharkar (supra), respondent No. 5 Sunita is not being sought to be called to prove some document independent of her capacity as a co-defendant who had put in appearance along with the other respondents-defendants and has filed a joint written statement disputing the petitioners' claim.

11. Coming to the legal aspects, as has been referred to by the learned Single Judge in the case of Suresh Sahebrao Tawale (supra) since long the Privy Council as well as several High Courts have depreciated the practice of calling the adversary as its own witness. In the case of Ramdas Dhondibhu Pokharkar (supra) the Bank had filed the suit and the defendant had sought a witness summons to one of its employees to identify a signature on the document. The witness himself was not a party to the suit nor was he having any authority to represent the bank. By referring to such peculiar state of affairs, in the case of Ramdas Dhondibhu Pokharkar (supra) the decision in the case of Pirgonda Hongonda (supra) was distinguished. In the case of M/s. Ravalnath Builders (supra) though the decision in the case of Pirgonda Hongonda (supra) was cited, it has not been distinguished and the decision was rendered merely relying upon the decision in the case of Ramdas Dhondibhu Pokharkar (supra) which itself is distinguishable on facts.

12. Considering all the aforementioned set of facts and law, one cannot but follow the decision in the case of Pirgonda Hongonda (supra) which concludes that a party is not entitled to call its adversary as its own witness. If that be so, I do not find any error in the impugned order rejecting the petitioners' application by taking such a view.

13. The Writ Petition is dismissed. The Rule is discharged.

14. Pending Civil Application is disposed of.