

(2011) 10 BOM CK 0152
In the Bombay High Court
Case No : Writ Petition No. 652 of 2011

M/s. Ravalnath Builders

APPELLANT

Vs

Mrs. Sebastiano Escolastica Beatriz Nunes Mendonsa @
Beatriz Mendonca, represented by her constituted Attorney
Mr. Savio Nunes

RESPONDENT

Date of Decision : 19-10-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 16 Rule 1(3), Order 16 Rule 20, Order 16 Rule 21, Order 18 Rule 17, Order 18 Rule 17A

Citation : (2012) 2 BomCR 403 : (2012) 2 MhLj 292

Hon'ble Judges : F.M. Reis, J

Bench : Single Bench

Advocate : S.D. Padiyar, for the Appellant; M.B.D. Costa with Mr. John A. Lobo, for the Respondent

Judgement

F.M. Reis, J.—Heard Shri S. D. Padiyar, Learned Counsel appearing for the Petitioner and Shri M. B. D"Costa, learned Senior Counsel, appearing for the Respondent.

2. Rule. Heard forthwith with the consent of the Learned Counsel.

3. Learned Counsel appearing for the Respondent waives service.

4. The above Petition challenges the Order dated 15.02.2011 passed by learned Civil Judge, Senior Division at Panaji, whereby an application filed by the Petitioner to examine the opposite party/Respondent as a witness in the suit came to be rejected.

5. Shri Padiyar, Learned Counsel appearing for the Petitioner has pointed out that the learned Judge has relied upon the Judgments reported in Pirgonda Hongonda Vs. Vishwanath Ganesh and Others, , whilst refusing the application filed by the Petitioner. The Learned Counsel further points out that the learned Single Judges of this Court after the amendment of the C.P.C. in 1996, has held that there is no

bar in law to call the adversary/opposite party as a witness in the suit. He has relied upon the Judgment of this Court reported in 2009 (2) Bom. C. R. 915 in the case of Chandrabhan R. Singh vs. Prabhakar R. Desai. The Learned Counsel as such submitted that the impugned Order deserves to be quashed and set aside. Shri Padiyar further submitted that the Respondent is his last witness and he has no other witness to be examined in the suit.

6. On the other hand, Shri M. B. D' Costa, the learned Senior Counsel appearing for the Respondent, has supported the impugned Order. The learned Senior Counsel has pointed out that the Respondent who is sought to be examined is of old age and the Petitioner has deliberately delayed examining the said witness with the sole intention to delay the disposal of the suit. Learned Senior Counsel further pointed out that the Petitioner is only filing the application to ensure further delay of the disposal of the suit. Learned Senior Counsel further pointed out that the Respondent may not be in a position to even depose considering her health state and, as such, the learned Judge was justified to dismiss the application filed by the Petitioner.

7. Having heard the Learned Counsel and on perusal of the record, I find that the learned Judge whilst passing the impugned Order has not considered properly the submissions put forward by the Learned Counsel appearing for the Respondent. The Application has been rejected on the sole ground that the practice of calling the opponent as his own witness is to be condemned.

8. The said aspect has been considered by this Court in the Judgment reported in Ramdas Dhondibhu Pokharkar Vs. State Bank of India and Another, , in the case of Ramdas Dhondibhu Pokharkar State Bank of India and anr., has held at Paras 8 and 9 thus :

8. The most important provision of law for the decision in the matter is Rule 21 of Order XVI of the C.P.C. which provides that, "Where any party to a suit is required to give evidence or to produce a document, the provisions as to witnesses shall apply to him so far as they are applicable."" In other words, the said rule clearly indicates that a party to a suit can seek assistance of the Court to examine the opposite party in the same suit as his witness and require such opposite party to produce a document or documents. Apparently, the said rule wipes out the difference between a party and witness in the matter of giving evidence in a suit. For the purpose of giving evidence, the parties to the suit as well as the witnesses in the suit stand on the same footings. Accordingly, the parties to the suit are exposed to all the consequences and penalties those may be faced by or imposed upon the witnesses consequent to issuance of order to give evidence or to produce document and for disobeying the same, apart from additional risk of judgment being passed against them in exercise of powers under Rule 20 of Order XVI of the C.P.C.

9. The law therefore does not prohibit examination of the opposite party as a witness in the suit. Of course, to enable to secure the presence of the opposite

parly as the witness in the suit, the party will have to take recourse to the provisions of law contained in Order XVI, Rule 1(3) r/w Rule 21 and the Court will have also to consider the provisions of Order XVIII, Rules 17 and 17A of the C.P.C. The said Rule 17 speaks of powers of the Court to recall and examine any witness who had been earlier examined and the Rule 17A provides that where a party satisfies the Court that after the exercise of due diligence, any evidence was not within his knowledge or could not be produced by him at the time when that party was leading his evidence, the Court may permit that party to produce that evidence at a later stage on such terms as may appear to it to be just. Apparently, Rule 17A permits production of additional evidence which was not within the knowledge of the party or which could not be produced while leading the evidence. Obviously, such production of additional evidence can be allowed at a later stage.

9. The said Judgment of this Court has been considered subsequently by another learned Single Judge of this Court in the case of Chandrabhan R. Singh vs. Prabhakar R. Desai (supra) and has held at Para 3 and 4 thus :

3. The judgment as cited by the Learned Counsel for the respondent in Pirgonda Hongonda Vs. Vishwanath Ganesh and Others, , is not applicable in view of above facts. The plaintiff/parties cannot be deprived of their right to substantiate their case by leading proper evidence including by calling the defendants as witnesses, specially when the defendants are not actively participating the proceedings.

4. The Learned Counsel for the petitioner has relied on Ramdas Dhondibhu Pokharkar Vs. State Bank of India and Another, , whereby this Court has considered Order 16, Rule 1(3) read with Rule 21 clearly expressed that the examination of opposite party is not prohibited by law. this Court has also distinguished the judgement cited by the Learned Counsel for the petitioner in Pirgonda Hongonda (supra).

10. Considering the said Judgments of this Court, I find that there is no bar for a party to call his opponent as a witness in the suit. As such, the learned Judge was not justified to refuse the application filed by the Petitioner on the sole ground that such practice is to be condemned. As such the learned Judge fell in error in rejecting the application of the petitioner.

11. Considering the contention of the learned Senior Counsel for the Respondent, I find that as the fact that the Respondent is of old age and has a fragile health is not disputed, a Commissioner is to be appointed to record the evidence of the said witness. Accordingly, both the Learned Counsel have agreed to appoint Shri R. G. Ramani, as a Commissioner to record the evidence of the Respondent as a witness of the Petitioner. The fees of the said Commissioner shall be borne by the Petitioner. The Commissioner shall accordingly proceed to record the evidence of the Respondent, in accordance with law.

12. In view of the above, I pass the following :

ORDER

- (i) The impugned Order dated 15.02.2011 is quashed and set aside.
- (ii) The application filed by the Petitioner to examine the Respondent as his witness is allowed.
- (iii) Shri R. G. Ramani, Advocate, is appointed as a Commissioner to record the evidence of the Respondent as a witness of the Petitioner, in accordance with law.
- (iv) The learned Judge after the said evidence is recorded, shall proceed to hear the final arguments and to dispose of the suit as expeditiously as possible preferably on or before 30.04.2012.
- (v) Rule made absolute in above terms.
- (vi) The above Petition is disposed of accordingly with no orders as to costs.