
(2002) 07 BOM CK 0137

In the Bombay High Court

Case No : Civil Revision Application No. 1163 of 2002

Ramdas Dhondibhu Pokharkar

APPELLANT

Vs

State Bank of India and Another

RESPONDENT

Date of Decision : 10-07-2002

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 16 Rule 1(3), Order 16 Rule 15, Order 16 Rule 16, Order 16 Rule 21

Citation : (2003) 1 ALLMR 76

Hon'ble Judges : R.M.S. Khandeparkar, J

Bench : Single Bench

Advocate : R.S. Apte and Mandar Limaye, for the Appellant; A.G. Damle, for the Respondent

Judgement

R.M.S. Khandeparkar, J.—On oral motion by the learned Advocate for the applicant, the respondent No. 2 is allowed to be detailed.

2. Heard Advocates for the parties.

3. Rule. By consent, rule is made returnable forthwith and taken up for hearing.

4. The applicant challenges the order dated 22.1.2002, passed by the Trial Court rejecting the application filed by the applicant for issuance of summons to the Branch Manager of the respondent/plaintiff-Bank by name Laxman.

5. It is the contention of the applicant that a letter under the signature of Laxman, issued by the respondent-Bank, forms a very relevant documents for defence of the applicant in the suit filed by the Bank. When the witness on behalf of the respondent-Bank was corss-examined, he expressed his inability to identify the signature of Laxman on the said letter and, therefore, in the course of recording of the evidence on behalf of the applicant/defendant, the Trial Court was requested for issuance of summons to the said Laxman in order to prove the said letter. The same has been rejected on the ground that it would amount to summoning the plaintiff or his witnesses and the applicant being the defendant is

not entitled for the same, Reliance is placed by the Court below in Para 229(ii) of the Civil Manual as well as in the decision of this Court in the matter of Pirgonda Hongonda Vs. Vishwanath Ganesh and Others, . Para 229(ii) of the Civil Manual provides that the practice of calling the opponent in the case as one's own witness has been condemned by the Privy Council. The decision of this Court in Pirgonda 's case (supra) is to the effect that order issuing summons to the defendant to appear as witness was inconsistent with the practice generally prevailing in the Court.

6. Undoubtedly, in terms of Order XVI, Rule 1 of the Code of Civil Procedure, 1908(for short, "C.P.C."), the parties to a suit are required to file list of witnesses within fifteen days of the settlement of issues. However, the Court is also empowered to permit a party to call any witness irrespective of the fact that the name of such person did not figure in the list filed by such party, provided that the party is able to disclose sufficient cause for such omission in the list and the Court records reasons for grant of such permission. The provisions of law in that regard are clear in Order XVI, Rule 1 (3) of the C.P.C. The amendment to Order XVI in the year 1976 further authorised the parties to examine such person as witness by securing his/her attendance in the Court without applying for summons under Rule 1 but subject to the provisions of Sub-rule (3) of Rule 1 of Order XVI of the C.P.C.

7. Under Order XVI, Rule 15 of the C.P.C., it is the duty of the persons summoned to give evidence or produce document. It provides that whoever is summoned to appear and give evidence in a suit shall attend at the time and place named in the summons for that purpose, and whoever is summoned to produce a document shall either attend to produce it, or cause it to be produced, at such time and place. According to Rule 16 thereof, a person so summoned and attending shall, unless the Court otherwise directs, attend at each hearing until the suit has been disposed of. Further, Rule 20 provides that where any party to a suit present in Court refuses, without lawful excuse, when required by the Court, to give evidence or to produce any document then and there in his possession or power, the Court may pronounce judgment against him or make such order in relation to the suit as it thinks fit.

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 party 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.

10. Bare perusal of the records discloses that the applicant had not sought for the issuance of the summons either to the plaintiff or his witness but merely to a personnel who was at one time an employee of the plaintiff-Bank and that too, to identify the letter which is stated to have been signed by the said person. Certainly, the examination of such a person cannot amount to examination of the plaintiff-Bank itself or even its witness. It is also a matter of record that when the plaintiff's witness was examined, the said letter was produced before him by the applicant. However, the said witness expressed his inability to identify the signature on the said letter. It is also not in dispute that it is the case of the applicant that the letter in question forms part of the material documents in support of the defence of the applicant in the said suit and refusal to summon the person who has signed the said letter, would virtually amount to deny the opportunity to the applicant to prove his case. Viewed from this angle, the issuance of summons to the employee of the plaintiff-Bank would not amount to issuing of summons to the opposite party itself nor it will be in any manner inconsistent with the practice prevailing in the Courts in India. On the contrary, it would be in consonance with the provisions of law relating to examination of the witnesses discussed above. In *Pirgonda's* case, which was a suit for damages, the plaintiff had applied for summons to the defendant as his witness and the Trial Court had allowed the same. Setting aside the same, it was ruled that "Normally a party to the suit is expected to step into the witness box in support of his own case and if a party does not appear in the witness box it would be open to the Trial Court to draw an inference against him. If a party fails to appear in the witness box, it should normally not be open to his opponent to compel his presence by the issue of a witness summons." Apparently, the

decision was totally in different set of facts. It is needless to say that the ratio of a decision is to be understood in the facts of the case and the points which arise for determination in those facts. Therefore, neither the decision of this Court in Pirgonda 's case nor Para 229(ii) of the Civil Manual can be of any assistance to the case in hand.

11. In the facts and circumstances of the case, therefore, the impugned order cannot be sustained and is liable to be set aside and the Trial Court to be directed to issue summons to the said witness Laxman for his appearance before the Court to depose in the matter.

12. In the result, the impugned order is set aside. The Trial Court is directed to issue summons to Laxman for his appearance before the Court to depose in the matter. Rule is made absolute in above terms with no order as to costs.

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