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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.11185 OF 2022

Dinesh Singh Bhim Singh ....Petitioner
V/S
Vinod Shobhraj Gajaria & Anr. ....Respondents
…

Mr. C.K. Tripathi for the Petitioner.
Ms. Neeta P. Karnik for Respondents.
…

CORAM: SANDEEP V. MARNE, J.
DATE : 25 JANUARY 2023.

ORAL JUDGMENT:

1 Rule. Rule made returnable forthwith. By consent of parties, Petition is heard finally.

2 The Petitioner/Defendant assails order dated 26 August 2022 passed by the Civil Judge Senior Division, Vasai, on Application below Exhibit 52 allowing the prayer of Plaintiffs/Respondents to issue witness summons.

3 The objection of the Petitioner/Defendant to the order dated 26 August 2022 is that the Respondents/Plaintiffs in the first instance had failed to file list of witnesses as mandated under Order XVI Rule 1 of Code of Civil Procedure (hereinafter referred to as 'CPC'). Having failed to file list of witnesses under that provision, it was incumbent on the Respondents/ Plaintiffs to show sufficient cause for seeking issuance of witnesses summons to additional witnesses under the provisions of Sub-rule 3 of Rule

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1 of Order XVI of CPC. It is contended that since no sufficient cause was pleaded nor shown, the trial court has erred in allowing the Application and issued summons to witnesses whose names were not included in the list of witnesses to be filed under the provisions of sub-rule 1 of Rule 1 of Order XVI of CPC

4. The learned Counsel for the Petitioner/Defendant in support of his contention submits that showing of sufficient cause is a mandatory requirement under the provision of sub-rule 3 of Rule 1 of Order XVI of CPC and in absence of any sufficient cause being pleaded in the Application, the Court does not enjoy a discretion to allow the Application by issuing summons to the additional witnesses. He would submit that the trial Court noticed the hurdle but has attempted to surmount the same by erroneously holding that the rules of procedures are handmaid of justice and not mistress of justice. He would submit that since the provision is mandatory, the same cannot be given a go by invoking such a general principle. In support of his contention, he would rely upon judgment of this Court, Bench at Nagpur in ***Anil Ramesh Bhusari Vs. Bhaskar Ramesh Bhusari, 2015 (5) Bom.C.R. 52*** *(Writ Petition No.4928 of 2013* decided on 16 June 2014).

5. Per contra, Ms. Karnik, the learned Counsel, appearing for the Respondents/Plaintiffs would oppose the Petition and support the order passed by the trial Court. She would submit that examination of the two

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witnesses is necessary for the purpose of proving the proposed document that was expected to be executed between the parties. She would submit that while Respondents/Plaintiffs have sued Petitioner/Defendants for return of consideration paid towards purchase of flat, the Petitioner/Defendants have raised the defence that there was no such transaction for purchase of flat and the transaction was that of a loan. Ms. Karnik would submit that the 'No Objection Certificate' (NOC) issued by the Developer (which was mandatory in absence of the Co-operative Housing Society being formed) would prove the nature of transaction being that of purchase of flat. She would submit that two witnesses sought to be examined by the Respondents/Plaintiffs have issued such NOC. She would also place interpretation regarding provisions of sub-rule 1 and sub-rule 2 of Rule 1 of Order XVI of CPC to mean that under sub-rule 2 additional witnesses (whose names are not stated in the list of witnesses) can also be summoned by the Court and there is no requirement of showing sufficient cause. Alternatively she would submit that use of the words "show sufficient cause for the omission" is procedural in nature and once Respondents/Plaintiffs satisfied the Court that examination of a particular witness is necessary for the purpose of determining the real question of controversy between the parties, the provision is required to be held to be directory and not mandatory. In support of her contention, she would rely

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upon the judgment of the Apex Court in ***Kailash vs. Nanhku & Ors., (2005) 4 SCC 480***.

6. The rival contentions of the parties now fall for my consideration.

7 Respondents/Plaintiffs have filed suit bearing Special Civil Suit No.72 of 2014 for recovery of an amount of Rs. 21,55,575/- alongwith interest. The claim is premised on the alleged transaction of sale of flat owned by Petitioner/Defendant to Respondents/Plaintiffs. It is the case of Respondents/Plaintiffs that an Agreement to Sale dated 25 July 2013 was executed between the parties and it was agreed to sell the flat at a consideration of Rs.29,00,000/- and accordingly Respondents/Plaintiffs purchased stamp duty of Rs.1,26,000/- for such a transaction. However, when the final document was about to be executed, Respondents/Plaintiffs noticed that the consideration amount was erroneously stated therein by Petitioner/Defendant as Rs.21,00,000/-. It is further contended that the Agreement to Sale dated 25 July 2013 came to be terminated and the Petitioner/Defendant agreed to refund the amounts paid by the Respondents/Plaintiffs. On these pleadings, the prayer for recovery of an amount of Rs. 21,55,575/- has been premised.

8 Petitioner/Defendant has filed Written Statement disputing transaction of sale and has raised a defence that the transaction in question is that of

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loan. True it is that Respondents/Plaintiffs failed to file a list of witnesses as required under the provisions of Order XVI, Rule 2(1) of the CPC. It appears that Respondent/Plaintiff examined himself and during the course of his examination-in-chief, the document concerned could not be proved (possibly because it did not bear his signature). In their quest to prove that the transaction in question is as that of a sale, Respondents/Plaintiffs desires to prove NOC issued by the developers, who constructed the building which was obtained as a Co-operative Housing Society of flat purchasers was yet to be formed. It is also the case of the Respondents/Plaintiffs that the document in question bears the signatures of the developers as confirming parties. It is on the basis of their signatures that the Respondents/Plaintiffs desire to prove the unexecuted document in question. The Respondents/Plaintiffs therefore filed an application dated 26 August 2022 to summon Shri Chandresh Mehta and Shri Santosh Ludhani as witnesses. The Application was resisted by Petitioner/Defendant essentially on the plea that Respondents/Plaintiffs had failed to file a list of witnesses.

9 True it is that the Application filed by the Respondents/Plaintiffs on 26 August 2022 does not disclose any cause as to why the names of the said two witnesses were not included in the list of witnesses which was supposed to be filed under the provisions of Order XVI, Rule 2(1) of the

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CPC. The only issue is therefore whether the trial Court could have rejected that application for the reason of failure on the part of Respondents/Plaintiffs to show any cause as mandated under the provisions of sub-rule 3 of Rule 1 of Order XVI of the CPC. The trial Court has proceeded to allow the Application holding that the rules or procedures are handmaid of justice and not mistress of justice. It is further held that no man should suffer a wrong by technical procedure of irregularities. On this ground, omission on the part of Respondents/Plaintiffs to file list of witnesses or to show sufficient cause is sought to be pardoned by the trial Court.

10. The issue had arisen before me is whether the trial Court has committed an error in allowing Respondents/Plaintiffs' Application filed under the provision of Order XVI, Rule 1(3) of the CPC in absence of a sufficient cause being shown. I have already dealt with a circumstances under which Respondents/Plaintiffs desire to examine the two witnesses. Respondents/Plaintiffs want to prove that the transaction in question is that of sale. It is the case of the Respondents/Plaintiffs that the developers of the building (two additional witnesses sought to be examined) are confirming parties to the Agreement that was supposed to be executed. They also want to prove that NOC was given by the developers for completion of transaction sale. In my view, therefore, examination of these

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two witnesses is vital for the purpose of proving the case of Respondents/Plaintiffs.

11 In these circumstances, whether an omission on the part of Respondents/Plaintiffs to plead sufficient cause in the Application dated 26 August 2022 would disentitle them from examining the said two witnesses is the issue which needs to be decided. In short, whether Respondents/Plaintiffs can be denied an opportunity to examine additional witnesses on account of a technical failure to plead sufficient cause as required under Order XVI, Rule 1(3) of the CPC. Reliance of Ms. Karnik in this regard on judgment of the Apex Court in ***Kailash*** (supra) is apposite. The Apex Court has held as under:

> "28 **All the rules of procedure are the handmaid of justice. The language employed by the draftsman of processual law may be liberal or stringent, but the fact remains that the object of prescribing procedure is to advance the cause of justice. In an adversarial system, no party should ordinarily be denied the opportunity of participating in the process of justice dispensation. Unless compelled by express and specific language of the statute, the provisions of the CPC or any other procedural enactment ought not to be construed in a manner which would leave the court helpless to meet extraordinary situations in the ends of justice.** The observations made by Krishna Iyer, J. in Sushil Kumar Sen vs. State of Bihar (1975) 1 SCC 774 are pertinent: (SCC p. 777, paras 5-6)
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> > "The mortality of justice at the hands of law troubles a Judge's conscience and points an angry interrogation at the law reformer.
> >
> > The processual law so dominates in certain systems as to overpower substantive rights and substantial justice. The

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> humanist rule that procedure should be the handmaid, not the mistress, of legal justice compels consideration of vesting a residuary power in judges to act *ex debito justitiae* where the tragic sequel otherwise would be wholly inequitable. … Justice is the goal of jurisprudence - processual, as much as substantive."

30 It is also to be noted that though the power of the Court under the proviso appended to Rule 1 of Order 8 is circumscribed by the words "shall not be later than ninety days" but the consequences flowing from non-extension of time are not specifically provided for though they may be read by necessary implication. Merely, because a provision of law is couched in a negative language implying mandatory character, the same is not without exceptions. The courts, when called upon to interpret the nature of the provision, may, keeping in view the entire context in which the provision came to be enacted, hold the same to be directory though worded in the negative form.

31 In *Sangram Singh vs. Election Tribunal, Kotah,* (1955) 2 SCR 1 : AIR 1955 SC 425 this Court highlighted three principles while interpreting any portion of the CPC. They are:

> (i) A code of procedure must be regarded as such. It is “procedure”, something designed to facilitate justice and further its ends: not a penal enactment for punishment and penalties; not a thing designed to trip people up. Too technical a construction of sections that leaves no room for reasonable elasticity of interpretation should therefore be guarded against (provided always that justice is done to 'both' sides) lest the very means designed for the furtherance of justice be used to frustrate it. (SCR pp. 8-9)
>
> (ii) There must be ever present to the mind the fact that our laws of procedure are grounded on a principle of natural justice which requires that men should not be condemned unheard, that decisions should not be reached behind their backs, that proceedings that affect their lives and property should not continue in their absence and that they should not be precluded from participating in them. Of course, there must be exceptions and where they are clearly defined they must be given effect to. (SCR p.9)

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(iii) No forms or procedure should ever be permitted to exclude the presentation of the litigant's defence unless there be an express provision to the contrary. (SCR p.9)"

(emphasis supplied)

12. If the Respondents/Plaintiffs in present case is denied an opportunity of examining the two additional witnesses for technical lapse of non inclusion of their names in the list of witnesses or for non-showing of sufficient cause in the application, the same would result in miscarriage of justice. In the event of Respondents/Plaintiffs being successful in proving that the transaction in question is that of a sale by examining the said two additional witnesses, the same would have a material bearing on the result of litigation. In such circumstances, Court would not deny them the opportunity by showing technical rules of procedure, drafted for advancing the cause of justice. Following the principles enunciated by the Apex Court in ***Kailash*** (supra), I am of the view that even if Respondents/Plaintiffs have failed to show/plead any cause for omission of the names of said two witnesses in the list of witnesses which ought to have been filed under the provisions of sub-rule 1 of Rule 1 of Order XVI of the CPC, that alone cannot be a reason for rejecting Respondents/Plaintiffs request for examination of said two witnesses. This is particularly true when this Court has already arrived at a finding that the examination of the said two

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witnesses appears to be necessary for the purpose of determining the real question of controversy between the parties.

13. The judgment in ***Anil Ramesh Bhusari*** (supra) relied upon by the learned Counsel for the Petitioner/Defendant is distinguishable as Plaintiffs therein have been accused of unnecessarily protracting the proceedings pending since the year 1984. This is not a case here.

14 In my view, therefore, the trial Court has not committed any error in passing the impugned order. The Writ Petition is devoid of merits. It is dismissed without any order as to costs. Rule discharged accordingly.

(SANDEEP V. MARNE, J.)