

**Kamleshsingh Harnamsingh Chowhan v/s Smt. Jayalaxmi Kantilal**

**WRIT PETITION NO.2844 OF 2008**

*decided on*

**29-09-2008**

*at*

**High Court of Judicature at Bombay**

*by*

**THE HONOURABLE MR. JUSTICE A.A. SAYED**

*advocates*

**Mr.Vivek Kantawala i/b M/s Vivek Kantawala and Co. for the petitioner. Mr. Karl F. Tamboly with Mr. Rajiv A. Jadhav i/b Dhiren H. Shah for the respondent.**

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Judgment P.C.

This petition has been filed impugning the order dated 7th March,2008, passed by the Small Causes Court, Mumbai, whereby the Application filed by the respondent under Order 11 Rule 14 of the Code of Civil Procedure to direct the petitioner to produce all the documents mentioned in the notice dated 12th February, 2008, came to be allowed.

2.It is the case of the petitioner that he is the landlord and co-owner of the suit building. The respondent is the mother of the deceased monthly tenant. The suit being RAE suit No.316/498/2007 is filed by the petitioner against the respondent inter alia on the ground of non-user. The issues in the suit were framed by the Trial Court and directions were issued to the parties to complete the inspection of the documents on or before 9th January, 2008. The respondent has disputed the title of the petitioner and one of the issues framed in the suit is whether the petitioner is the landlord of the suit building. The affidavit of examination-in-chief was filed by the petitioner and the documents produced by him were marked as exhibits. Now the petitioner's cross-examination is in progress. The petitioner alleges that during the cross-examination irrelevant questions were being asked and the respondent is unnecessarily calling upon

the petitioner to produce the documents which are not relied upon by him and not relevant for the purpose of deciding the issues.

3.The petitioner's case is that though the matter was part heard, the respondent's Advocate had addressed a notice dated 12th February, 2008 under order 11 Rule 16 of C.P.C. calling upon the petitioner to produce the following documents:-

(1) All accounts maintained by the petitioner in respect of the suit building and property and particularly in respect of all outgoing, receipts etc.

(2) Ledger Accounts in respect of the suit building and property as maintained by the petitioner on Computer.

(3) Papers and Proceedings in respect of the suits, decrees in respect whereof have been submitted in Court.

(4) Rent Books, Counter foils of rent books in respect of all the premises in the suit building.

(5) List of tenants paying rent to the petitioner alongwith the details of the premises in the suit building.

(6) List of premises in possession of the petitioner in the suit building.

4.By letter dated 16th February, 2008 the petitioner declined to comply with the notice of the respondent's Advocate on the ground that the said documents are not referred nor relied upon by the petitioner in the pleading/affidavit.

5.The respondent then, by his Application dated 7th March, 2008 under Order 11 Rule 14 of CPC sought an order from the Court to direct the petitioner to produce all the documents as mentioned in the notice dated 12th February, 2008. The petitioner opposed the Application by filing his reply. After hearing the parties, the learned Trial Judge by the impugned order dated 7th March, 2008 allowed the Application of the respondent and directed the petitioner to produce all the documents except the document at serial No.3 as mentioned in the notice dated 12th March, 2008. Aggrieved by this order the petitioner has filed this petition.

6.The learned Counsel for the petitioner submitted that the oral application by the respondent for production of documents was already refused by the Court by its order dated 13th February, 2008 and the written application having same genesis ought not to have been allowed. The learned Counsel further submitted that the provisions of Order 11 Rule 14 cannot be pressed into service after invocation of the Order 11 Rule 16. He contended that the issues in the suit have already been framed on 15th December, 2007 and therefore, Order 11 Rule 14 or 16 could not have been invoked and the petitioner cannot be called upon to produce the documents in cross-examination which are not referred or relied upon by him in his pleadings. The learned Counsel submitted that the Trial Court ought not to have passed the impugned order and there was an error on the face of the record which has resulted in grave injustice and the impugned order is required to be set aside. In support of his contention the learned Counsel for the petitioner relied upon the following cases viz.- (1) Municipal Commissioner for Greater Bombay Vs. M/s Sangam Cinema, reported in 1992 (3) Bom. C.R. 482 (2) Indian Overseas Bank V. Shreekrishna Woollen Mills Pvt. Ltd, reported in AIR 1988 Bombay 343 (3) Union Bank of India V. Hemantlal Ranchhodbhai Vegad, reported in AIR 1991 Gujarat 113, (4) Vinod Kumar V. Shanti Devi and others, reported in AIR 1986 Madhya Pradesh 19.

7.Per contra, the learned Counsel for the respondent submitted that the petitioner is not the owner and landlord respect of the suit building and that he has admitted in the evidence that he is in possession of the counter-foils of the rent receipts issued to various tenants, receipts for payment of statutory taxes, income and expenditure account, etc. On discovering that the petitioner is in possession of the documents, the respondent's Advocate addressed a notice dated 12th February, 2008 to the petitioner under Order 11 Rule 16 of CPC, calling upon him to produce the documents enumerated therein.

8.The learned Counsel submitted that under Order 11 Rule 14 C.P.C. it is lawful for the Court at any time during the pendency of the suit to order production of the documents in possession of the party relating in the matter in respect of the suit. Accordingly, the respondent has issued notice to the petitioner to produce the documents. However, the petitioner has refused to produce the documents which necessitated the filing of the Application by the respondent. He further submitted one of the issues in the suit relates to the title of the petitioner to the suit building and the impugned order has been rightly passed. He further urged that this Court in exercise of the supervisory jurisdiction ought not to convert itself into a Court of Appeal and ought not to interfere with the impugned order.

9.In support of his contentions, the learned Counsel for the respondent relied upon the following cases viz.- (1) Maharaja Srish Chandra Nandi V. Kala Chand Roy, reported in AIR (29) 1942 Calcutta 445 (2) Surya Devi Rai Vs. Ram Chander Rai, reported in 2003 SCC 675 (3) Chandrasekhar Singh and others Vs. Siya Ram Singh and others, reported in 1979 (3) SCC 118.

10.I have heard the learned Counsel for the parties and perused the material on record including the impugned order.

11.The point which arises for consideration is whether the Trial Court was right in directing the petitioner to produce the documents as mentioned in the notice, dated 12th February, 2008. To examine this issue it would be necessary at the outset to refer to the provisions of Section 30 and Order 11 Rule 14, 15 and 16 of the CPC, which are reproduced hereinbelow :-

"S. 30 : Power to order discovery and the like.- Subject to such conditions and limitations as may be prescribed, the Court may, at any time, either of its own motion or on the application of any party,-

(a) make such order as may be necessary or reasonable in all matters relating to the delivery and answering of interrogatories, the admission of documents and facts, and the discovery, inspection, production, impounding and return of

documents or other material objects producible as evidence;

(b) issue summonses to persons whose attendance is required either to give evidence or to produce documents or such other objects as aforesaid;

(c) order any fact to be proved by affidavit."

"O.11 R.14: Production of documents.- It shall be lawful for the Court, at any time during the pendency of any suit, to order the production by any party thereto, upon oath of such of the documents in his possession or power, relating to any matter in question in such suit, as the Court shall think right; and the Court may deal with such documents, when produced, in such manner as shall appear just."

"O.11 R.15: Inspection of documents referred to in pleadings or affidavits.- Every party to a suit shall be entitled on or before the settlement of issues to give notice to any other party, in whose pleadings or affidavits reference is made to any document, or who has entered any document in any list annexed to his pleadings to produce such document for the inspection of the party giving such notice, or of his pleader, and to permit him or them to take copies thereof; and any party not complying with such notice shall not afterwards be at liberty to put any such document in evidence on his behalf in such suit unless he shall satisfy the Court that such document relates only to his own title, he being a defendant to the suit, or that he had some other cause or excuse which the Court shall deem sufficient for not complying with such notice, in which case the Court may allow the same to be put in evidence on such terms as to costs and otherwise as the Court shall think fit."

"O.11 R.16 : Notice to produce.- Notice to any party to produce any documents referred to in his pleadings or affidavits shall be in Form No.7 Appendix C, with such variations as circumstances may require."

12.It cannot be disputed that the notice dated 12th February, 2008 was issued

for production of documents under Order 11 Rule 16 inasmuch as the notice specifically states as follows :-

"In pursuance of the provisions of Order 11 Rule 16 I have to call upon your client through you to produce the following documents with regard to the averments made in the the plaint....."

13.Thus, a bare reading of the notice dated 12th February, 2008 and Rule 16 of Order 11 of the CPC reveals that the documents which are sought to be produced for inspection are those documents which are referred to in the pleadings. The said notice specifically mentions the words "with reference to the averments made in the plaint". However, pertinently, the documents enumerated in the notice do not form part of the pleadings.

14.It is further to be noted that inspection of documents under Rule 15 of Order 11 CPC may be ordered of documents which are referred to in the pleadings or affidavits, including those or particulars as disclosed in the Affidavit of documents of other party, and under Rule 18(2) inspection of 'other documents' in possession or power of other party.

15.The respondent having failed in his endeavour to have the documents produced by the petitioner by giving notice under O.11 R.16 of the CPC, thereafter made the Application in question with a prayer which reads thus :-

"(a) That this Honourable Court be pleased to direct the Plaintiff under the provisions of Order 11 Rule 14 of the CPC to produce all the documents mentioned in the notice dated 12th February, 2008 issued by the defendants to the plaintiff (Exh.A14) before this Honourable Court."

16.Though under order 11 Rule 14 of CPC it is the discretion of the Court to order production of documents from any party, unfortunately in the present case, this discretion has not been exercised in a judicious manner by the Trial Court. The Trial Court ought to have appreciated that the notice was issued

under Order 11 Rule 16 of the CPC which relates to production of documents relied upon by the petitioner and the respondent having failed in their attempts to have the documents produced, has simplicitor made this Application by adding the following words in the prayer clause "to direct the plaintiff under Order 11 Rule 14 to produce all the documents....". The Trial Court, as it appears, has not applied its mind and allowed the Application of the respondent by stating in the impugned order as follows:-

".... If the plaintiff produces those documents, it will help to decide the issue of ownership"

17.It is not understood as to how the accounts, rent books, counter foils, list of tenants, list of premises (as mentioned in the notice) would be of any relevance in deciding the ownership of the suit property, as is observed in the impugned order. In fact on going through the cross-examination of the respondent, the respondent has specifically stated therein as follows :-

"It is true that apart from Exhibit 21 letters of administration, I have no document to show that I am the co-owner and landlord of the suit property."

18.I am informed that the suit building is about 100 years old. In my view, no useful purpose would be served in directing the petitioner to produce "all" the counterfoils of the rent receipts of the tenants, rent books, ledger accounts, list of tenants, list of premises etc. This fishing inquiry is uncalled for and would only lengthen the litigation and it would invite unnecessary and irrelevant cross-examination. In this regard reference may be made to the decision in the case of BASANAGOUDA VS. DR. S.B.AMARKHED AND ORS. reported in 1992 (2) SCC 612, wherein the Honourable Supreme Court, while dealing with Order 11 Rule 14, has observed as follows :-

"Therefore the power to order production of documents is coupled with discretion to examine the expediency justness and relevancy of the documents to the matter in question. These are relevant consideration which the court shall have to advert to and weigh before deciding to summoning the documents in possession of the party to the election petition....."

19.It was therefore incumbent upon the Trial Court in the present case to have examined the expediency, justness and relevancy of the documents before giving such directions for production of the documents, more particularly, when the said documents are not even relied upon by the petitioner.

20.It may be useful at this juncture to further examine Order 11 of CPC and Rules thereunder. Order 11 deals with discovery and inspection. Rules 1 to 11 deal with discovery of facts, whereas Rules 12 to 20 deal with discovery, production and inspection of documents - in other words, discovery of documents. Rule 21 lays down the consequences of non-compliance with the order of discovery. Rule 22 allows answers in interrogatories to be used in evidence by parties. Rule 23 deals with application of this Order to minor plaintiffs and the defendants and persons under disability. Thus, what is required to be noted is that the discovery of facts and discovery of documents narrow down the controversy, avoid unnecessary expenses and shorten litigation. In the instant case, there is no explanation by the respondent as to why the exercise of delivery of interrogatories in writing was not carried out by him before the issues were framed and in any event before the suit became part heard. There is no explanation as to why inspection of the documents was not sought for by the respondent under Order 11 Rule 18(2) of CPC. The documents, the production of which are sought during the midst of cross-examination of the petitioner, are ordinarily available with all landlords and it cannot be said that it was only during the course of cross-examination, that it was discovered that the documents were in the possession of the petitioners.

21.It is no doubt true that normally the power of cross-examination is unfettered, and the Court has ample power to order production of any document relating to the matter in question by any party at any stage and it is for the learned Judge to ultimately decide as to the relevancy and admissibility of the documents as provided under Section 136 of the Indian Evidence Act. However the discretion conferred upon the learned Judge for production of documents which are not relied upon by the parties, is to be exercised judiciously and with caution and keeping in view the provisions of Order 11 Rule 14 of the CPC and after having satisfied itself about the expediency, relevancy and justness of production of the documents sought for. The ultimate test for the Court to consider is whether the production of the documents would be necessary for fairly disposing of the suit. In the instant case it can hardly be said that the documents, in question are necessary for fairly disposing of the suit.

22.It may further be useful to note the provisions of Section 114 of the Indian Evidence Act, which reads thus :-

"Court may presume existence of certain facts.- The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business,in their relation to the facts of the particular case".

Illustration (g) under Section 114 of the Evidence Act provides that the Court may presume that the evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it. In the instant case, looking to the facts and circumstances of the present case, at the highest the Trial Court could have drawn an adverse inference in the matter, if the Court comes to the conclusion that vital documents were being withheld.

23.Coming to the decisions cited on behalf of the Petitioner, it is to be noted that in the case of INDIAN OVERSEAS BANK VS. SHREEKRISHNA WOOLEN MILLS PVT.LTD (Supra) it was held by a Single Judge of this Court that Under O.11 R.14 the Court has the discretion to order production of documents at any stage directing the documents relating to any matter in question in such suit to be produced and it is not mandatory for the Court to direct production of documents whenever asked for. In paragraph 15 of this decision, it is observed that ".. Under O.11 R.14 production can be granted of documents only if they relate to any matter in question in such suit". Thus, in the present case, merely because an Application is made would not mean that the Court was obliged to grant the prayer for production of documents without considering the relevancy of the documents.

24.The cases of UNION BANK OF INDIA VS. HEMANTLAL RANCHHODBHAI VEGAD (Supra) and VINOD KUMAR VS. SHANTI DEVI AND ORS. (Supra) are however of no assistance to the petitioner in the instant case inasmuch as in those cases the Court was dealing with the provisions under Order 11 Rule 12 of the CPC and not Order 11 Rule 14 or 16. The case of the Municipal Corporation oration for Gr.Bombay vs. M/s. Sangam

Cinema (Supra) would also not be applicable in the facts of the present case. In that case the Division Bench of this Court was dealing with a matter where the witness was being examined in cross and was asked to produce documents in the cross-examination without giving any notice in that regard. The Division bench observed that the practice of calling upon witness while under cross-examination to produce this or that document is at variance with the procedure laid down in law as the steps provided under the provisions of CPC of giving notice and making an application were not followed. In the present case, however, this procedure has been followed, though belatedly.

25. In so far as the decision cited on behalf of the Respondent is concerned, it is required to be noted that in case of MAHARAJA SRISH CHANDRA NANDI VS. KALA CHAND ROY (Supra) the Single Judge of Calcutta High Court was dealing with general proposition of law in relation to Section 13 of the Indian Evidence Act which speaks about facts relevant when right or custom is in question. The Court in that case was not at all dealing with the specific issue of production of documents under O.11 R. 14 or 16 of C.P.C. with which we are concerned in the case in hand. This decision therefore is of no help to the respondent.

26. The decisions in case of SURYA DEVI RAI VS. RAM CHANDER RAI (Supra) and CHANDRASHEKHAR SINGH VS. SIYA RAM SINGH (Supra) cited by the learned Counsel for the respondent are with regard to the scope of interference and the power of superintendence by the High Court, conferred by Article 227 of the constitution. In the above cases it was held that this power under Article 227 is to be exercised sparingly and only in appropriate cases, in order to keep the subordinate courts within the bounds of their authority and not for correcting mere errors and that the power cannot be invoked to correct an error of fact which only a superior court can do in exercise of its statutory power as the court of appeal. The High Court cannot, in exercise of its jurisdiction under Article 227, convert itself into a court of Appeal. There can be no dispute to this law laid down by the Honourable Apex Court which follows from a catena of judgments over the years. However, in the present case, impugned order of the Trial Court is in my view not in accordance with the provisions of law and is passed without proper application of mind and its conclusions are perverse and unless extraordinary jurisdiction under Article 227 is exercised, it would result in failure of justice and may burden the court with immaterial and irrelevant voluminous documents which would unnecessarily result in prolonging the life of the litigation.

27. In the case in hand, it is pertinent to note that suit is already part heard and substantial cross-examination is already over. In my opinion for the reasons stated above, the Trial Court has gravely erred in directing the petitioner to produce the documents sought for by the respondent. The impugned order, therefore, warrants interference under the supervisory jurisdiction of this Court under Article 227 of the Constitution.

28. In the result the petition is allowed and the impugned order is set aside and rule is made absolute with no order as to costs.

29. It is clarified that by passing of this order the Trial Court would not be precluded from calling for production of any document hereafter in the trial under Order 11 Rule 14; however, it would do so only in accordance with law and after satisfying itself to the expediency, relevancy and justness of the production of the document and also satisfying itself that the document is necessary for the just and fair disposal of the suit.