



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR

WRIT PETITION NO.5124 OF 2017

- 1] Sanj Dainik Lokopchar
An evening daily through its
owner Kishor Babubhai Ruparel.
- 2] Kishor Babubhai Ruparel
Aged about 67 years,
Occupation: Journalism & Social
Service.
- 3] Chanakya Offset Printers
through its owner
Kishor Babubhai Ruparel

No.1 to 3 C/o Sunny Tower,
Main Road Khamgaon,
Tq. Khamgaon, Dist. Buldana.

..... **PETITIONERS**

...V E R S U S...

Gokulchand Govindlal Sananda,
Aged about 78 years,
Occupation: Money Lending & Agriculture
R/o Balaji Plots, Khamgaon,
Tq. Khamgaon, Dist. Buldana.

..... **RESPONDENT**

Shri Amit Bhate, Advocate for Petitioner.
Shri Ashwin Deshpande, Advocate for Respondent.

CORAM: ROHIT B. DEO, J.
DATE: 11th OCTOBER, 2018.

ORAL JUDGMENT

1] Heard Shri Amit Bhate, the learned Counsel for the petitioners and Shri Ashwin Deshpande, the learned Counsel for respondent.

2] **Rule.** Rule made returnable forthwith by consent of the learned Counsels for the parties.

3] The petitioners are the defendants in Special Civil Suit 17/2013 instituted by respondent – plaintiff seeking decree of damages for defamation.

4] The respondent – plaintiff moved an application Exh. 97 seeking permission to examine his power of attorney before he steps into the witness box. The application is presumably moved under Order XVIII, Rule 3-A of the Code of Civil Procedure (Code).

5] The application is predicated on the assertion that the power of attorney holder – who is the son of the plaintiff is

personally acquainted with the facts. The averment in the application is that the plaintiff is aged 80 years and is suffering from various ailments. The only other relevant averment is in paragraph 3 of the application which is that no prejudice would be caused to the defendants if the son of the plaintiff is examined before the plaintiff.

6] The defendants opposed the application Exh.97 *inter alia* denying that the plaintiff is suffering from various ailments. The defendants pointed out that most of the documents placed on record by the plaintiff to substantiate the contention that he was not keeping well are more than a decade old. The defendants further pointed out that adjournment was sought by the plaintiff on 20.12.2016 on the ground that he is busy in attending a family wedding function. In paragraph 6 of the reply to Exh.97 the defendants pointed out that the plaintiff inaugurated and attended the District Level Wrestling Selection Competition on 08.01.2017. In support of the said assertion the defendants placed on record the newspaper reports.

7] By the order impugned 20.02.2017 the Trial Court allowed the application on the ground that the plaintiff is aged person and is suffering from various ailments and that *prima facie* it is established that the plaintiff is unable to appear and step into the witness box as the first witness. This order is impugned herein.

8] The legislative mandate is that ordinarily where a litigant himself wishes to appear as a witness, he shall so appear before any other witness on his behalf has been examined.

9] The provision confers a discretion to the Court to permit, for reasons to be recorded, the plaintiff to appear as his own witness at a later stage. Implicit in the statutory scheme is the rider that the normal rule may be deviated from only in exceptional circumstances and for reasons recorded which must sustain judicial review.

10] Rule 3-A has been inserted by the Code of Civil Procedure (Amendment) Act, 1976. The Law Commission noted with concern the unhealthy practice which has developed which

enabled the party to step into the witness box last to fill in the lacuna, or loopholes which remained in the deposition. Addressing the said issue, the Law Commission in 14th Report observed thus:

In dealing with the question of oral evidence we wish to refer to an undesirable practice which seems to prevail in certain courts. The plaintiff or the defendant upon whom lies the burden of proving certain issues and who has to give evidence in support of his case is not called as witness before the evidence of the other witnesses is recorded. He is called after all his witnesses have been examined. The underlying purpose of this practice appears to be that the plaintiff or the defendant giving evidence at the end may be able to fill in gaps in the evidence given by his witnesses. We strongly deprecate this practice and recommend that it should be stopped.

The parties to a proceeding should be in a position at the commencement of the proceedings to make up their minds whether they wish to give evidence. If they do wish they should be required to enter the witness box before any of their witnesses are examined. We recommend that Rule 2 or Rule 3 of Order XVIII of the Code of Civil Procedure be suitably amended so as to embody such a provision.

11] The 27th Report of the Law Commission notes thus:

The Fourteenth Report has recommended that, ordinarily, a party who wishes to be examined as a witness should offer himself first, before the other witnesses are examined. It is however,

considered unnecessary to make any such statutory provision. This should be the ordinary rule; but a rigid provision on the subject does not seem to be desirable.

12] Finally, the 54th Report of the Law Commission recommended thus:

We think that the amendment recommended in the 14th Report should be carried out. Since the proposed rule will be confined to ordinary cases, the hardships arising from special features of the case, should not present a problem. Having regard to the persistent and notorious malpractice indulged in by litigants in this respect-malpractice which borders on dishonesty – we think that the time has come to insert a statutory provision.

13] The legislative object of bringing on statute Rule 3-A is to ensure that a litigant should not be permitted to bide his time and to fill in the lacuna or cover the loopholes after the other witnesses are examined.

14] The order impugned is unsustainable in law for reasons more than one.

15] Firstly, it is difficult to believe that the plaintiff is suffering from various ailments to such an extent that he is not in a position to step into the witness box as the first witness. The material on record, particularly the material placed on record by the defendants, would suggest to the contrary. Moreover, if the plaintiff is not in a position to attend the Court, the appropriate course would have been to move an application seeking examination on commission. It is difficult to appreciate as to how, if the plaintiff is suffering from ailments and is therefore, not in a position to depose as the first witness, would the plaintiff be in a position to do so after his son is examined as the first witness. Be it noted, that the suit is expedited by the Hon'ble Apex Court and the direction is to decide the suit within a year. It would follow, that the plaintiff would have to step into witness box in close proximity of time after his son is examined as the first witness, assuming that the order impugned is upheld. It is not conceivable that the plaintiff, who contends that he is not in a position to attend the Court, would be hale and hearty and in a position to attend the Court within a few days after the examination of his son as the first witness.

16] Secondly, the discretion under Order XVII, Rule 3-A of the Code ought not to be exercised in favour of a litigant who opts to mark time to assess how the power of attorney – son fares in the evidence and then depending on the evidence of the power of attorney – son takes a call on stepping into the witness box, which clearly appears to be the case here.

17] I am satisfied that the order impugned militates against the object and intendment of Order XVIII, Rule 3-A of the Code.

18] The order impugned is quashed and set aside.

19] The Trial Court shall decide the suit with utmost priority in view of the directions issued by the Hon'ble Apex Court. The trial shall be conducted on a day-to-day basis and adjournment shall not be granted for any reason whatsoever, unless extremely exceptional and compelling case is made out. The parties shall bring this order to the notice of the Trial Court.

20] Rule is made absolute in the afore-stated terms.

JUDGE

NSN