

ORDER BELOW EXH. 422

This is the application filed by plaintiffs for permission to re-open their evidence and to allow plaintiffs to examine witnesses namely editor/owner/representative of Rashtratej and also to examine advocate Shri. Babasaheb Marutrao Kad as witness on the basis of documents produced along with list Exh. No. 325. Plaintiffs have further prayed for directions to editor/owner of Rashtratej to produce its copy of original newspaper dated 17.09.2007 which is maintained and preserved by their office records in usual course of business.

Facts which gave rise to the application are as under:

2) Plaintiffs had filed this suit before CJSD, Pune. Initially it was bearing as Summary Suit No.207/2009. After filling of the suit, summons were served to defendants and defendant no.4 appeared before the Court and filed application for leave to defend. Plaintiffs have also filed their reply to said application. It is plaintiffs case that, defendants never published public notice as per mandatory provision of Section 32 of Indian Partnership Act. Said matter went up to Hon'ble High Court and in Writ Petition No.8166/2011 the Hon'ble High Court has specifically observed that defendants have not published public notice as per mandatory provisions of Indian Partnership Act. Thus, while filling for leave to defend it was never case of defendants no.1 to 4 that they have published the public notice. It is alleged that after observations of Hon'ble High Court defendants no.4 has improved his case and has pleaded in written statement particularly in para 20 (a) that said defendant had issued public notice to that effect. Thus from

said statement in para no. 20 (a) defendant no.4 has come with the case that he has published public notice. However, defendant no.4 has not given any details and particulars of the newspaper, date on which such notice was published and who has paid the charges for the alleged public notice. It is contended that, defendant no.1 filed its affidavit of evidence at Exh.205 and has never contended in said affidavit that defendant no.1 had published public notice, or has paid charges for the same.

3) It is pointed out that, defendant no.4 filed his evidence affidavit on 03.08.2015 at Exh.294. In said affidavit in para no. 1(a), defendant no.4 stated that he had issued public notice whereas in para (h) of the said evidence affidavit. Defendant no.4 has stated that defendant no.1 firm has published public notice in daily Rashtratej. Said statement in affidavit is suspiciously missing from the written statement. Facts on record show that thus when suit was filed by plaintiffs, in fact no such public notice was given by defendant no.1 to 4, but after knowing the observations of Hon'ble High Court in Writ Petition No.8166/2011, defendant no.4 has decided to manipulate public notice, but defendant no.4 was not sure about the name of the newspaper and therefore he conveniently avoided to mention the name of newspaper in the written statement. It is alleged that, when defendant no.4 actually manipulated and fabricated alleged public notice in collusion with concerned owner/editor of newspaper Rashtratej, he improved his story by filling evidence affidavit he mentioned name of newspaper particularly in para 4. Initially defendant no.4 had contended that, he has published public notice but

when he came to know that he may land in trouble in view of fabrication and manipulation of public notice, he conveniently twisted his stand and stated that it is defendant no.1 firm who has published public notice. It is contended that, in fact no such statement was made on behalf of defendant no.1 either in written statement or in the evidence of affidavit.

4) It is contended that, plaintiffs cross examined defendant no.4 on the point with respect to publication of public notice in Rashtratej and relevant newspaper. Said cross examination was recorded in para no. 38 up to para no.41. In said cross examination when plaintiffs had shown certified copy of original newspaper published on 17.09.2007 obtained from the office of Rashtratej, defendant no.4 avoided to give answer to the question put with respect to the public notice. It is contended that defendant no.4 has not produced entire newspaper but produced only cutting of the newspaper.

5) It is contended that, in addition to that plaintiffs have also produced original copy of newspaper dated 17.09.2007 obtained from the custody of advocate Shri. Babasaheb Marutrao Kad who received the copy of said newspaper as he had published his own public notice in said newspaper. It is alleged that, defendant no.4 in collusion with concerned owner/editor of Rashtratej, had in fact fabricated and manipulated said alleged public notice by replacing original public notice issued by advocate Shri. Babasaheb Marutrao Kad on page no.4. It is alleged that original copy of newspaper was shown by plaintiffs to defendant no.4 during cross examination but again defendant no.4

avoided to answer. Defendant no.4 was also cross examined by plaintiffs suggesting that in fact said public notice was never published and defendant no.4 never retired from defendant no.1 partnership in accordance with the provisions of Indian Partnership Act. When defendant no.4 was asked whether he is going to examine the editor or concerned representative of newspaper Rashtratej, defendant no.4 denied said suggestion. During the cross-examination particularly in para no.39 which was recorded by the predecessor of this Court, it is observed that even though original copy of newspaper Rashtratej was given Exh.326, it was responsibility of plaintiffs to prove and establish said original newspaper. Thus, according to plaintiffs defendant no.4 is guilty of fabrication of false evidence and leading false evidence before this Court, for which defendant no.4 is liable for committing an offence of perjury. In order to prove and establish said fact that said public notice produced by defendant no.4 is in fact fabricated and manipulated, according to plaintiffs it is necessary to re-open the evidence and examine the witnesses namely concerned editor/owner of Rashtratej and also it is necessary to examine advocate Shri. Babasaheb Marutrao Kad as witnesses as since beginning it is the case of plaintiffs that no proper procedure was followed by defendant no.4. It is contended that, record shows that defendant no.4 never approached before this Court with clean hands stating since the inception that he had published public notice. The defence of publication of notice was raised subsequently by manipulating the said public notice. Hence, plaintiffs propose to re-open the evidence and examine both above referred witnesses.

6) It is contended that, defendant no.4 had never cross examined plaintiff on the issue of the publication of notice in daily newspaper Rashtratej. As already stated above even the defendant no.4 had not specifically referred the public notice alleged to be published in the newspaper Rashtratej. As such plaintiffs thought it not to lead evidence in anticipation that defendant no.4 will lead fabricated and manipulated before the Court. It is contended that before the evidence of defendant no.4, plaintiff did not produce those original newspapers on record. But subsequently when defendant no.4 lead the manipulated and fabricated evidence before this Court by filling the affidavit of evidence, plaintiff immediately produced all the original newspapers before this Court and even confronted those new papers to defendant no.4. Thus, according to plaintiffs the facts on record establish that it is necessary to clarify said aspect of the matter, by reopening evidence which was closed by plaintiffs earlier. Hence, according to plaintiffs they have sufficient reason and good cause, for seeking the relief of reopening the evidence.

7) It is contended that, issue whether defendant no.4 has retired by following due process of law which includes publication of public notice, is already the matter before the Court. Plaintiffs are not raising any new issue before this Court. Hence, according to plaintiffs this application needs to be allowed and no loss or prejudice will be caused to defendant no.1 to 4 if this application is allowed. As already stated above, defendant no.1 to 3 are not supporting defendant no.4 on the issue of publication of public notice. Hence, no prejudice is likely to be caused to them. With the help of those contentions plaintiffs have

prayed to allow the application.

8) Defendant no.1 to 3 have filed their reply and they have resisted the application contending that, plaintiffs have closed their evidence twice. The plaintiff's application is false and illegal. The contents of application are denied by defendants. This application is not maintainable in law specifically at this stage, because plaintiffs cannot be permitted to reopen their evidence. With the help of those contentions defendant no.1 to 3 have prayed to reject the application.

9) Defendant no.4 has resisted the application by filing his reply at Exh.424 contending that this application is based upon misconception of facts and that of law. It is alleged that contents of the application are totally false. It is pointed out that this application is necessary to be decided in the light of pleadings and evidence and the documents filed by plaintiffs. It is contended that in para no.14 of the plaint, plaintiffs have pleaded that, defendant no.4 though have been retired from said partnership firm, still he is continuously liable to pay dues of defendant no.1 firm. It is contended that, the defendant no.4 has enjoyed the profits and benefits which was earned by defendant no.1 firm and therefore, defendant no.4 cannot run away from all his liability, on the technical ground. Plaintiffs also filed affidavit of evidence and in para no.19 stated that though the defendant no.4 shown to have been retired from the said partnership firm still he is continuously liable to pay the dues of defendant no.1 firm. It is contended that, defendant no.4 had enjoyed the profits and benefits which was earned by the defendant no.1 firm. Therefore, defendant

no.4 cannot run away from all his liabilities.

10) It is contended that, from such averments and depositions of plaintiffs, it is ample clear that, plaintiffs are well aware and it is admitted by plaintiffs that defendant no.4 is duly retired from the firm. It is contended that, on perusal of the Exh.3 the list of documents produced by plaintiffs it is noticed that at Sr. No.1 plaintiff have produced the extract of partnership firm which shows that, initially, defendant no.2 to 4 were partners of defendant no.1 firm and in the year 2007 there was a retirement and re-constitution of defendant no.1 partnership firm, whereby, defendant no.4 retired from the firm and defendant no.3 was substituted in his place. Accordingly, suit is filed by plaintiff and they have specifically pleaded that, though defendant no.4 has been retired from the firm since he has enjoyed the fruits and profits of the firm, he is liable to pay to defendant no.1 firm. In para no.15 of the plaint, plaintiffs have given the cause of action to file the suit, which is on 21.01.2009 and 11.02.2009 when defendant no.1 firm has executed an agreement and admitted to pay the liquidated damages. There is no other cause of action pleaded by plaintiffs in the total suit. Taking into consideration, the pleadings and documents and evidence of plaintiffs it is ample clear that, plaintiffs are well aware that, defendant no.4 has retired from the partnership firm, in the year 2007. According to plaintiffs though he is retired in the year 2007, he is liable to pay the amount, for which cause of action arose in the year 2009. According to defendant no.4, in fact defendant no.4 does not admit all such allegations and averments made by plaintiffs and by filling written statement, defendant no.4 very specifically came with the

averment that, this defendant no.4 has been retired with effect from 12.09.2007 and defendant no.4 has also issued public notice to that effect. Very specifically defendant no.4 has pleaded that, in order to extract the illegal amount from defendant no.4 this suit is filed.

11) It is contended that, plaintiffs have not mentioned that under what provision present application is filed. In fact there is no such provision in CPC to allow plaintiffs to reopen his evidence after, closure of the evidence of the plaintiffs and defendants also. According to defendant no.4, the suit should have posted for final arguments. In fact, while filling the application by defendant no.4 for leave to defend, the application was on the limited points and defendant no.4 was under the impression that, since, it is admitted position that, defendant no.4 has been retired from the firm, no further pleadings are necessary. However, while deciding the application for leave to defend the admitted position was overlooked by the Court and such observations were made. According to defendant no.4, it is settled principal that observations made at interim stage are not to be taken into consideration while deciding the suit. It is denied that, defendant no.4 has improved his story and has pleaded in his written statement that, public notice was issued. In fact the said public notice was given by the defendant no.1 and 2. However at the time of filling written statement, defendant no.4 has pleaded regarding the public notice. It is contended that, plaintiffs are aggrieved for the reason that defendant no.4 has not given any details and particulars of the public notice in that case according to defendants plaintiffs should have replication as per Order VIII Rule 9 or should have asked interrogatories as per Order XI of the

CPC. It is denied that defendant no.1 has given his evidence affidavit. In fact, during the pendency of the suit, defendant no.2 died and defendant no.1 Prashant Dattatray Melinkeri has given evidence affidavit and Prashant Melinkeri is not partner in the defendant no.1 firm. It is admitted that defendant no.4 filed his evidence affidavit on 03.08.2015 at Exh.294. It is denied that, statements in the affidavit in respect of publication of public notice are suspiciously missing from the written statement and facts on record show that, no such public notice was given by defendant no.1 to 4. It is denied that after knowing the observations of the Hon'ble High Court, defendant no.4 has decided to manipulate the public notice. It is denied that, defendant no.4 was not sure about the name of the newspaper and therefore, he conveniently avoided mentioning the name of the newspaper. It is contended that, public notice has to be issued by running firm and accordingly, public notice was issued by defendant no.1 firm. As defendant no.4 retired from the firm, he was only aware that such a public notice was given and he was not knowing the details of the same. It is denied that, defendant no.4 has manipulated and fabricated public notice in collusion with the concerned owner/editor of newspaper Rashtratej and he improved his story by filling affidavit of evidence. It is denied that when defendant no.4 came to know that, he may land in trouble in view of fabrication and manipulation of public notice, he conveniently twisted his stand and stated that, it is the defendant no.1 firm who has published public notice. It is denied that no such statement was made on behalf of the defendant no.1 either in written statement or in evidence affidavit. It is denied that he has avoided to give answers to the questions put with respect to public notice. It is denied that he has

produced entire newspaper but produced only cutting of the public notice. It is contended that defendant has produced the receipt issued by concerned employee of the newspaper. It is denied that advocate Shri. Babasaheb Marutrao Kad who has received the copy of newspaper dated 17.09.2007 has been produced before the Court. It is denied that defendant no.4 has manipulated said public notice, suggestions put by plaintiffs are not admitted by him and it is denied that it was his responsibility to prove the newspaper by examining the editor of the newspaper. It is admitted that the newspaper is produced at Exh.326 and it was referred by plaintiffs to defendant no.4. It is denied that defendant no.4 is guilty of false evidence before the Court and he is liable for committing an offence of perjury. It is denied that it is necessary to allow plaintiffs to reopen the evidence to examine witnesses cited by plaintiffs. It is denied that defendant no.4 has never approached before this Court with clean hands, according to defendant no.4, the proposal of plaintiff to reopen the evidence and examine the both the witnesses are not only un-warranted but also trying to fill up the lacuna and plaintiffs are trying to mislead the Court.

12) It is contended that, question regarding cross examination of plaintiffs on the issue of publication of notice does not arise for the simple reason as it is plaintiffs case that defendant no.4 has been retired from the firm. It is denied that defendant no.4 has not specifically referred the public notice alleged to be published in daily newspaper Rashtratej and subsequently he has manipulated and fabricated evidence before the Court. It is denied that plaintiffs immediately filed original newspaper and confronted those newspaper

to defendant no.4. It is denied that there is an issue before the Court that whether defendant no.4 is retired by following due process of law which includes the publication of public notice. It is denied that defendant no.1 to 3 are not supporting on the point of shows public notice. It is alleged that defendant no.1 to 3 have made illegal collusion and trying to extract amount of this defendant, therefore, prejudice is likely to be caused to defendant no.4. It is further contented that, allegations made in the applications are totally false. It is pointed out that principle of Estoppel will be applicable in present case against plaintiffs however, after recording the evidence by plaintiffs and defendant no.4 matter went up to Hon'ble High Court, on the point that as to whether the dispute between plaintiff and defendant is of sale of flat or whether it is a commercial transaction and Hon'ble High Court came considered to it is a commercial transaction. At that time plaintiffs requested Hon'ble High Court the evidence recorded by the Court should not be set aside be kept as it is and matter be proceeded from the stage which was in the Court for which defendant gave no objection. It is contended that, when evidence of defendant no.4 was completed there was opportunity for the plaintiffs to record fresh evidence, but plaintiffs refused to record new evidence as such principle of estoppel will be applicable against plaintiffs. It is contended that, with the pleadings and the evidence before the Court is required to decide issues and Court can decide those issues on the evidence for before it. Therefore, according to defendant no.4 this application is liable to be rejected.

13) From the contentions raised by the parties, following points arose for my determination, I am recording my findings against those points for the reasons discussed below.

Sr. No.	Points	Findings
1.	Do the plaintiffs prove that it is necessary to reopen plaintiff's evidence after evidence is closed by parties?	In the affirmative.
2.	Whether it is necessary to call the witnesses referred by plaintiffs in this application for just and proper decision of the suit?	In the affirmative.
3.	What order ?	As per final order.

REASONS

AS TO POINT NOS. 1 TO 2 :-

14) I have heard plaintiff's advocate Mr. Bhalerao and advocate Mr. Nanajkar for defendants at length. According to plaintiff's advocate as defendant no.4 has not given details of the public notice published in the newspaper, plaintiffs could not adduce evidence to rebut the contention of defendant no.4 in respect of issuing of public notice. It is pointed out that defendant no.1 has not raised the contentions about issuing such public notice as contended by defendant no.4 and defendant no.1 has not adduced any evidence in respect of publishing such public notice by defendants. According to plaintiff's advocate when defendant no.4 came to know observations about Hon'ble High Court to the effect that defendants had not published a mandatory

public notice as provided by the provision of Indian Partnership Act, defendant no.4 has manipulated disputed public notice and he has filed such a fabricated public notice without filling the entire newspaper before the Court. According to plaintiff's advocate as defendants have not given any details about disputed public notice by defendant no.4, there was no question to adduce evidence by plaintiffs on record in respect of such a public notice. However, after plaintiffs came to know that defendant no.4 has manipulated and filed fabricated public notice before the Court, plaintiffs have filed certified copy of the original newspaper and they had also filed original copy of which was received by Advocate Shri. Babasaheb Kad. Plaintiffs advocate has referred documents on record argued that, it becomes clear that defendant no.4 without pleading the details of alleged public notice in his original pleadings has later on produced the fabricated public notice before the Court. Hence, according to plaintiff's advocate it is necessary to reopen the plaintiffs evidence to bring on record the correct newspaper and to bring on record conduct of defendant no.4. In support of his arguments, he relied on the following case law.

(1) **K.K. Velusamy Vs. N. Palanisamy**, reported in (2011) 11 Supreme Court Cases 275, in which it is observed that,

“Order 18 Rule 17 of the Code enables the court, at any stage of a suit, to recall any witness who has been examined (subject to the law of evidence for the time being in force) and put such questions to him as it thinks fit. The power to recall any witness under Order 18 Rule 17 can be exercised by the court either on its own motion or on an application filed by any of the parties to the suit requesting the court to exercise the said power. The power is discretionary and should be used sparingly in appropriate

cases to enable the court to clarify any doubts it may have in regard to the evidence led by the parties. The said power is not intended to be used to fill up omissions in the evidence of a witness who has already been examined. Order 18 Rule 17 of the Code is not a provision intended to enable the parties to recall any witnesses for their further examination-in- chief or cross-examination or to place additional material or evidence which could not be produced when the evidence was being recorded. Order 18 Rule 17 is primarily a provision enabling the court to clarify any issue or doubt, by recalling any witness either suo moto, or at the request of any party, so that the court itself can put questions and elicit answers. Once a witness is recalled for purposes of such clarification, it may, of course, permit the parties to assist it by putting some questions. There is no specific provision in the Code enabling the parties to re- open the evidence for the purpose of further examination-in-chief or cross- examination. Section 151 of the Code provides that nothing in the Code shall be deemed to limit or otherwise affect the inherent powers of the Code to make such orders as may be necessary for the ends of justice or to prevent the abuse of the process of the court. In the absence of any provision providing for re-opening of evidence or recall of any witness for further examination or cross-examination, for purposes other than securing clarification required by the court, the inherent power under section 151 of the Code, subject to its limitations, can be invoked in appropriate cases to re- open the evidence and/or recall witnesses for further examination. This inherent power of the court is not affected by the express power conferred upon the court under Order 18 Rule 17 of the Code to recall any witness to enable the court to put such question to elicit any clarifications.”

15) In reply defendant's advocate Mr. Nanajkar has strongly argued that, plaintiffs long by have closed their evidence, thereafter evidence was adduced by defendants and now after defendants have closed their evidence, plaintiffs cannot be permitted to reopen plaintiffs

evidence. In support of his arguments, he relied on the following case law.

(1) **Bagai Construction Vs. Gupta Building Material Store**, reported in (LAWS(SC)-2013-2-62), in which it is observed that,

“Some of the principles akin to Order 47 CPC may be applied when a party makes an application under the provisions of Order 18 Rule 17 CPC, but it is ultimately within the court's discretion, if it deems fit, to allow such an application. In the present appeal, no such case has been made out.” If we apply the principles enunciated in the above case and the limitation as explained with regard to the application under Order XVIII Rule 17, the applications filed by the plaintiff have to be rejected. However, learned counsel for the respondent by placing heavy reliance on a subsequent decision, namely, [K.K. Velusamy vs. N. Palanisamy](#), (2011) 11 SCC 275, submitted that with the aid of Section 151 CPC, the plaintiff may be given an opportunity to put additional evidence and to recall PW-1 to prove those documents and if need arises other side may be compensated. According to him, since the High Court has adopted the said course, there is no need to interfere with the same. In *Velusamy (supra)* even after considering the principles laid down in *Vadiraj Naggappa Vernekar (supra)* and taking note of Section 151 CPC, this Court concluded that in the interest of justice and to prevent abuse of the process of the Court, the trial Court is free to consider whether it was necessary to reopen the evidence and if so, in what manner and to what extent. Further, it is observed that the evidence should be permitted in exercise of its power under Section 151 of the Code. The following principles laid down in that case are relevant: We may add a word of caution. The power under Section 151 or Order 18 Rule 17 of the Code is not intended to be used routinely, merely for the asking. If so used, it will defeat the very purpose of various amendments to the Code to expedite trials. But where the application is found to be bona fide and

where the additional evidence, oral or documentary, will assist the court to clarify the evidence on the issues and will assist in rendering justice, and the court is satisfied that non-production earlier was for valid and sufficient reasons, the court may exercise its discretion to recall the witnesses or permit the fresh evidence. But if it does so, it should ensure that the process does not become a protracting tactic. The court should firstly award appropriate costs to the other party to compensate for the delay. Secondly, the court should take up and complete the case within a fixed time schedule so that the delay is avoided. Thirdly, if the application is found to be mischievous, or frivolous, or to cover up negligence or lacunae, it should be rejected with heavy costs.”

“With these principles, let us consider the merits of the case in hand. The perusal of the materials placed by the plaintiff which are intended to be marked as bills have already been mentioned by the plaintiff in its statement of account but the original bills have not been placed on record by the plaintiff till the date of filing of such application. It is further seen that during the entire trial, those documents have remained in exclusive possession of the plaintiff but for the reasons known to it, still the plaintiff has not placed these bills on record. In such circumstance, as rightly observed by the trial Court at this belated stage and that too after the conclusion of the evidence and final arguments and after reserving the matter for pronouncement of judgment, we are of the view that the plaintiff cannot be permitted to file such applications to fill the lacunae in its pleadings and evidence led by him. As rightly observed by the trial Court, there is no acceptable reason or cause which has been shown by the plaintiff as to why these documents were not placed on record by the plaintiff during the entire trial. Unfortunately, the High Court taking note of the words “at any stage” occurring in Order XVIII Rule 17 casually set aside the order of the trial Court, allowed those applications and permitted the plaintiff to place on record certain bills and also granted permission to recall PW-1 to prove those bills. Though power under Section 151 can be exercised if ends of justice so warrant and to prevent abuse of process of the court and Court can exercise

its discretion to permit reopening of evidence or recalling of witness for further examination/cross-examination after evidence led by the parties, in the light of the information as shown in the order of the trial Court, namely, those documents were very well available throughout the trial, we are of the view that even by exercise of Section 151 of CPC, the plaintiff cannot be permitted.”

“After change of various provisions by way of amendment in the CPC, it is desirable that the recording of evidence should be continuous and followed by arguments and decision thereon within a reasonable time. This Court has repeatedly held that courts should constantly endeavour to follow such a time schedule. If the same is not followed, the purpose of amending several provisions in the Code would get defeated. In fact, applications for adjournments, reopening and recalling are interim measures, could be as far as possible avoided and only in compelling and acceptable reasons, those applications are to be considered. We are satisfied that the plaintiff has filed those two applications before the trial Court in order to overcome the lacunae in the plaint, pleadings and evidence. It is not the case of the plaintiff that it was not given adequate opportunity. In fact, the materials placed show that the plaintiff has filed both the applications after more than sufficient opportunity had been granted to it to prove its case. During the entire trial, those documents have remained in exclusive possession of the plaintiff, still plaintiff has not placed those bills on record. It further shows that final arguments were heard on number of times and judgment was reserved and only thereafter, in order to improve its case, the plaintiff came forward with such an application to avoid the final judgment against it. Such course is not permissible even with the aid of Section 151 CPC.”

16) I have given serious consideration to the arguments advanced on behalf of the parties. At this stage I find that, it necessary to refer here written statement filed by defendant no.4 in para no.20(a)

written statement, defendant no.4 has contended that “from the documents produced by plaintiffs themselves this defendant has retired from defendant no.1 firm with effect from 12.09.2007, this defendant has also issued a public notice to that effect. It is specifically submitted that plaintiff is aware of such facts”. Thus from the above pleadings from para no.20 (a) of written statement of defendant no.4, it becomes clear that he has raised defence of public notice was published about retirement from defendant no.1 firm. On careful perusal of said para no. 20(a) of written statement of defendant no.4 is it noticed by the Court that defendant no.4 has not given the date on which such public notice was published by him, thus on perusal of para no. 20(a) it can be said that pleadings about publication of public notice are given by defendant no.4 in para no.20(a) of the plaint. At this stage it is necessary to refer here affidavit examination in chief of defendant no.4 which is at 294. It is noticed that in said affidavit in paragraph no.(h) defendant no.4 has stated that, defendant no.1 through defendant no.2 as authorized partner of defendant no.1 firm made the publication of the said effect in daily Rashtratej and said public notice is published in the newspaper dated 17.09.2007. On perusal of cross-examination of defendant no.4 particularly paragraph no. 37 and 38 of his cross-examination it becomes clear that defendant no.4 had admitted that he has not given any written authority to defendant no.1 for publishing a public notice or he has not given written authority to Rajeev Melinker. It is pertinent to note here that defendant no.4 has produced his affidavit in examination in chief at Exh.294, he has filed application for production of documents at Exh.298 and he has produced documents below list of documents of Exh.299 and there is original newspaper

Rashtratej dated 17.09.2007, in which disputed public notice about the retirement of defendant no.4 from defendant no.1 firm has published. Said newspaper filed below Exh.298 shows that in said newspaper the public notice issued by advocate Babasaheb Kad was also published the affidavit of examination in chief of defendant no.4. Exh.294 is filed before the Court but on 03.07.2015 and on same date list of documents Exh.299 was filed before the Court, in which disputed notice is filed. However, affidavit of examination in chief of defendant no.4 shows that said notice has not got Exhibited by defendant no.4. At the time of examination in chief thus even though copy of daily newspaper Rashtratej dated 17.09.2007 is filed by defendant no.4 on record, he has not got it exhibited. Exh.294 i.e. the affidavit of examination in chief of defendant no.4 shows that cross-examination of defendant no.4 was started by defendant no.1 to 3 on 12.10.2015 and his cross-examination was started by plaintiffs on 19.10.2015, thus on the date cross-examination of defendant no.4 made by plaintiffs copy of daily newspaper Rashtratej in which disputed public notice was published was before the Court and therefore it cannot be said that defendant no.4 has intentionally avoided to produce the entire copy of daily newspaper Rashtratej before the Court. It cannot be said that entire newspaper dated 17.09.2007 was not filed on record. As such it becomes clear that, on perusal of Exh.326 it is filed by plaintiffs show that in Exh.326 disputed public notice published by defendants is not appearing. At this stage I find that, it is necessary to point out here that public notice Exh.326 was referred by plaintiff's advocate to defendant no.4 while cross-examining defendant no.4 and paragraph no.39 of the cross-examination shows that the newspaper filed by plaintiff is

exhibited by my Ld. Predecessor as Exh.326, but my Ld. Predecessor observed that it will be the responsibility of plaintiffs to prove contents of Exh.326. Thus, there are 2 copies of daily Rashtratej dated 17.09.2007 filed by parties on record and one of its copy filed by defendant no.4 below list of documents below Exh.299 and another copy is filed by plaintiffs below Exh.325. I have already pointed out that, defendant no.4 has not got exhibited the copy of daily Rashtratej to show that, public notice was published in said newspaper on 17.09.2007 either by defendant no.4 or by defendant no.1 on the contrary the copy of daily Rashtratej dated 17.09.2007 filed by plaintiff at Exh.326 is exhibited by my Ld. Predecessor with the responsibility upon the plaintiffs to prove the contends of Exh.326. I have already pointed out that in his written statement defendant no.4 has contended that, he has published public notice about his retirement in the newspaper but in his written statement he has not given details about said notice and in his affidavit in examination in chief in para no.1(h) he has contended that, said notice was published by defendant no.1 through defendant no.2 as authorized partner on defendant no.1 on 17.09.2007 in daily newspaper Rashtratej. Thus, evidence adduced by defendant no.4 in respect of publishing disputed public notice by defendant no.1 and 2 is out of his pleadings because he has not given the details in his written statement in respect of said public notice. Further, in cross-examination defendant no.4 has admitted that he has not given written authority to defendant no.1 and 2 to publish such a notice. Thus it becomes clear that defendant no.4 who has not given details about disputed notice has later on stated in his examination in chief that said notice was published by defendant no.1 and 2.

Admittedly defendant no.1 to 3 have not pleaded that they have issued with such public notice and they have not adduced evidence to that effect, thus it is natural that plaintiffs could not get the opportunity to cross-examine the witnesses of defendant no.1 to 3 in respect of said disputed public notice. At this juncture I find that, it necessary to refer here Order 18 Rule 17 of CPC which provides that,

“Order 18, Rule 17 of the Code enables the Court, at any stage of a suit, to recall any witness who has been examined (subject to the law of evidence for the time being in force) and put such questions to him as it thinks fit.”.

17) Defendant no.4 has not given details of disputed public notice in his written statement and as he is not got exhibited the public notice filed below Exh.299, further as my Ld. Predecessor has casted responsibility on the shoulders of plaintiffs to prove contents of Exh.326, I find that plaintiffs have made out the reasonable grounds to allow this application and plaintiffs have filed this application to fulfill their responsibility casted upon by the Court upon them in respect proving contents of Exh.326. Thus, I find that plaintiffs have not filed this application to protect the trial and I find that application is necessary to be allowed reopen plaintiffs evidence and to permit them to call the witnesses referred in the application to prove the contents of Exh.326. As this application is filed after completion of evidence and considering the fact that last witness of defendants was cross-examined by plaintiffs on 08.01.2019 and considering the fact that defendant no.4 has filed evidence closure purshis at Exh.421 as per the rojnama on 02.02.2019 I find that immediately thereafter on 12.02.2019 this

application came to be filed, hence, it cannot be said that plaintiffs have caused delay in filing application Exh.422.

18) However, considering the fact that after closing of evidence of defendants this application is filed by plaintiffs, I find that it is necessary to direct plaintiffs to pay cost of Rs.3000/- to defendant no.4. It is pertinent to note here that the application was filed on 12-09-2019 but this suit came to be transferred to this Court on 14.10.2019. I find that plaintiffs can not be held responsible for delay in decision of this application because of the Covid-19 pandemic all over the Country. For all above reasons I have recorded my findings to point Nos. 1 and 2 in the affirmative and proceed to pass the following order.

ORDER

1. The Application Exh.422 is allowed.
 - a) Plaintiffs are permitted to reopen their evidence and to examine the witnesses namely editor / owner / representative of daily newspaper Rashtratej and advocate Shri. Babasaheb Kad.
 - b) Plaintiffs are directed to pay cost of Rs. 3000/- to defendants as defendants are required to face this application and as defendants will be required to cross-examine plaintiffs witnesses if any called by plaintiffs after this order.

Dt. : 28.03.2022

(K. P. Nandedkar)
District Judge-2
Pune.

CERTIFICATE

“I affirm that the contents of this [P.D.F.](#) file Judgment/order are same word to word as per original Judgment/order”.

Name of Stenographer : Shri. Kiran S. Pawar (Grade- III)

Name of the court : Shri. K. P. Nandedkar
District Judge -2 &
Additional Sessions Judge, Pune

Judgment/order declared on : 28/03/2022

Judgment/order signed

by Presiding officer : 05/04/2022

Judgment/order uploaded on : 05/04/2022