

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION St.NO.4376 OF 2015
WITH
WRIT PETITION ST. NO.21734 OF 2014**

**1 Dhondi Ganu Kirulkar)
Age Adult Occ Agriculturist)**

**2 Rajaram Dhondiba Kirulkar)
Age Adult Occ Agriculturist)**

**3 Dilip Dhondiba Kirulkar)
Age Adult Occ Agriculturist)**

**4 Sou Droupadi Dhondi Kirulkar)
Age Adult Occ Agriculturist /Household)
All-R/0 Kelosi Budruk Tal Radhanagari)
Kolhapur)**

..Petitioners

Versus

**1 Shripati Subhana Phadke)
Age Adult Occ Agriculturist)**

**2 Abaji Bapu Phadke)
Age Adult Occ Agriculturist)**

**3 Mahadev Babu Phadke)
Age Adult Occ Agriculturist)**

**4 Tukaram Babu Phadke)
Age Adult Occ Agriculturist)**

**5 Vishnu Banu Phadke)
Age Adult Occ Agriculturist)
All residing at kelosi Budruk,)
Tal Radhanagari, Dist Kolhapur)**

..Respondents

**Mr. Manoj Gonda Patil for the Petitioners
Mr. Sagar Mane for the Respondents**

CORAM : R. M. SAVANT, J.
DATE : 10th MARCH, 2015

ORAL JUDGMENT

1 Rule. With the consent of the Learned Counsel for the parties made returnable forthwith and heard.

2 The above Writ Petitions lay a challenge to identical orders and since they involve the same parties are heard together.

In so far as the Writ Petition St. No.4376 of 2015 is concerned, by the said Writ Petition, the Petitioners challenge the order dated 7-7-2014 passed by the Learned Civil Judge Junior Division, Radhanagari, by which order, the application Exhibit 105 filed by the Petitioners for setting aside the evidence close order passed against them on 12-2-2014, came to be rejected.

In so far as the Writ Petition St. No.21734 of 2014 is concerned, the same takes exception to the orders both dated 7-7-2014 by which orders the applications Exhibit 72 and 73 filed by the Petitioners came to be rejected.

3 The Petitioners are the original Defendants in the Suit in question which has been filed by the Respondents in both the Petitions for seeking declaration and injunction in respect of two properties. As indicated above the parties to the Suit are common. It seems that the said Suits were placed before

the Trial Court on 12-2-2014 when the Defendants were required to cross-examine the witness of the Plaintiffs. However, the Defendants did not so cross-examine the Plaintiffs' witness as a result of which no cross order came to be passed against the Defendants in Regular Civil Suit No.49 of 2008 and therefore evidence closed order came to be passed against the Defendants in both the Suits i.e. Regular Civil Suit No.68 of 2009 and Regular Civil Suit No.49 of 2008.

4 In so far as the Regular Civil Suit No.49 of 2008 is concerned, the Defendants i.e. the Petitioners herein filed an application Exhibit 69 for setting aside the said no cross order passed on 12-2-2014. The reasons why they could not cross-examine the Plaintiff's witness were mentioned in the said application Exhibit 69. The Defendants thereafter filed an application Exhibit 72 for review of the said order dated 10-3-2014. The said application for review also came to be rejected by the Trial Court by order dated 7-7-2014. The Defendants thereafter filed application Exhibit 73 for setting aside the evidence close order passed against the Defendants. The said application also came to be rejected by an order passed on the same day i.e. 7-7-2014.

5 In so far as the Regular Civil Suit No.68 of 2009 is concerned, the Defendants filed an application Exhibit 105 for setting aside the evidence close

order passed against them, on the grounds mentioned in the said application Exhibit 105. The Trial Court has by the impugned order rejected the said application as according to the Trial Court inspite of adequate opportunities, the Defendants have not led evidence. Hence the challenge in the above Petition revolves around the orders passed by the Trial Court rejecting the applications filed by the Defendants for setting aside the no cross order and evidence close order, passed against the Defendants in the two Suits i.e. Regular Civil Suit No.68 of 2009 and Regular Civil Suit No.49 of 2008.

6 The Learned Counsel for the Petitioners would contend that the Defendants should be given an opportunity to lead evidence and a final indulgence be shown to the Defendants for the said purpose. The Learned Counsel would contend that if the Defendants are not allowed to cross-examine the Plaintiff's witness or lead evidence, grave prejudice would be caused to the Defendants.

7 Per contra, the Learned Counsel appearing for the Respondents/Plaintiffs would contend that the conduct of the Defendants is such that indulgence cannot be shown to them. The Learned Counsel would contend that though in Regular Civil Suit No.49 of 2008, the Defendants had filed two applications Exhibit 52 and Exhibit 54 for the same purpose, the said fact does not find a mention in the application filed thereafter. The Learned

Counsel would contend that the Defendants have also not paid the meager costs of Rs.500/- which was granted to the Plaintiffs while allowing the applications Exhibit 52 and Exhibit 54. The Learned Counsel therefore contend that in the facts of the present case, no indulgence can be shown to the Defendants.

8 Having heard the Learned Counsel for the parties, in my view, the Defendants deserve a final indulgence to be shown to them for cross-examining the Plaintiffs' witness and for leading evidence. It is required to be noted that the Defendants seem to be agriculturists and therefore not aware of the niceties of law. It is probably in the said circumstance that steps could not be taken by them to cross-examine the Plaintiffs' witness and lead their own evidence. It is well settled that a party should be given an opportunity to prosecute the proceedings on merits rather than being non suited on technicalities and for the inconvenience that is caused to the Plaintiffs, the same can be compensated by way of costs. However, if the opportunity is not granted to the Defendants then grave prejudice is likely to be caused to the Defendants. Hence the impugned orders passed on Exhibits 69, 72 and 73 in Regular Civil Suit No.49 of 2008 and on Exhibit 105 in Regular Civil Suit No.68 of 2009, dated 12-2-2014 and 7-7-2014 are required to be quashed and set aside and are accordingly quashed and set aside. The applications Exhibit 69, 72, 73 and 105 would accordingly stand allowed. The Defendants would

be entitled to cross-examine the Plaintiffs' witness and to lead their own evidence. The Learned Counsel for the parties i.e. Mr. Patil for the Petitioners and Mr. Mane for the Respondents to inform the Trial Court about the development in the above Petitions and accordingly get the schedule fixed for cross-examination of the Plaintiffs' witness. The same to be done expeditiously. The Defendants would also lead their own evidence and complete the same expeditiously by keeping their witness present in Court, as would be directed by the Trial Court. In the facts and circumstances of the case, the entire process to be completed by 15-5-2015. The Trial Court to see to it that no unnecessary adjournments are granted.

9 In the facts and circumstances of the case, the Defendants to pay costs of Rs.5000/- in total, for both the Petitions to be paid over to the Plaintiffs within two weeks from date. The payment of the said costs is a condition precedent, if the costs are not paid by the Defendants as directed by the instant order, the benefit of this order would not enure to the Defendants and resultantly the Petitions would be deemed to have been dismissed. If the costs are paid, then the course of action as directed by the instant order would be required to be followed. The Petitions are allowed to the aforesaid extent. Rule in both the Petitions made absolute in the aforesaid terms with parties to bear their respective costs of the Petitions.

[R.M.SAVANT, J]