

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO.1064 OF 2013

Bharamendraprasad @ Pawan	]	
Jaykumar Bagwade	]	
Age 60 years, Occu-Business	]	
R/o. Hindnagar, Tarabai Park	]	
Kolhapur, District Kolhapur.	]	...Petitioner

V/s.

1) Appasaheb Dattatray Bagwade	]	
Age 76 years, Occu-Nil	]	
R/o. City Survey No.579/KH/3	]	
Shahupuri, Kolhapur, Dist.Kolhapur.	]	
2) Narandra Appasaheb Bagwade	]	
Age 41 years, Occu-Business	]	
R/o. City Survey No.579/KH/3	]	
Shahupuri, Kolhapur, Dist.Kolhapur.	]	
3) Darshan Appasaheb Bagwade	]	
Age 36 years, Occu-Advocate	]	
R/o. City Survey No.579/KH/3	]	
Shahupuri, Kolhapur, Dist.Kolhapur.	]	
4) Meghan Appasaheb Bagwade	]	
Age 36 years, Occu-Business	]	
R/o. 199, Ruikar Colony, Jivala	]	
Kolhapur, District Kolhapur.	]	
5) Jaykumar Dattatraya Bagwade	]	
Age 82 years, Occu-Nil	]	
R/o. 199, Ruikar Colony, Jivala	]	
Kolhapur, District Kolhapur.	]	...Respondents

Mr. Vijay Killedar for the Petitioner.
None for the Respondents.

CORAM : R. M. SAVANT, J.

DATE : 26th FEBRUARY, 2015.

J U D G M E N T

1] Rule, having regard to the challenge raised in the Petition, heard forthwith.

2] Inspite of the notice being issued for final disposal, the Respondent Nos.1 to 4 do not appear in the above Writ Petition. In so far as the Respondent No.5 is concerned, he has expired but the Petitioner is his legal heir, being his son.

3] The above Writ Petition takes exception to the order dated 18th October, 2012 passed by the learned 12th Joint Civil Judge, Junior Division, Kolhapur, by which order the application Exhibit 119 filed by the Defendants i.e. Respondents herein came to be allowed and resultantly, the affidavit of additional examination-in-chief filed by the Plaintiff at Exhibit 118 has been rejected/struck down and the Trial Court has observed that it would not be read in evidence. The further direction issued is that the Defendants would be at liberty to withdraw the cost of Rs.400/-.

4] It is required to be noted that in the Suit in question being Regular Civil Suit No.1202/2003, an additional issue came to be framed

which was numbered as Issue No.9 and which is to the following effect:-

“Whether the Suit in the present form without seeking relief of declaration is maintainable?”

5] In view of the framing of the said additional issue, the Plaintiff filed the application Exhibit 104 for being permitted to lead further evidence in respect of the said issue. The said application came to be allowed by the Trial Court and the Plaintiff was permitted to lead further evidence in respect of the said issue No.9. It appears that thereafter cost of Rs.400/- was imposed on the Plaintiff by virtue of the order dated 14th June, 2012 passed on Exhibit 117. The said cost was to be paid within a particular time frame. The Plaintiff accordingly filed his further affidavit of examination-in-chief, however, had not deposited the costs and, therefore, filed application Exhibit 121 for extension of time which was allowed by the Trial Court and the time was extended by a period of three working days and the Plaintiff was directed to pay the said cost within the next three working days. In view of the fact that out of three working said days, two were the holidays i.e. 25th August, 2012 and 26th August, 2012 and since the concerned clerk was on leave on third day i.e. 27th August, 2012, the Plaintiff filed the application Exhibit 123 seeking further extension of time. The said application was allowed and the Plaintiff was granted further extension

of time on 30th August, 2012 and the extension granted was for one week. The Plaintiff accordingly deposited the said amount of Rs.400/- in the Trial Court. However, it appears that prior to the application Exhibit 123 being allowed, the application Exhibit 119 was already filed by the Defendants on 25th July, 2012. The said application was founded on the fact that the Plaintiff having not complied with the order passed on Exhibit 117, the further affidavit of examination-in-chief could not have been taken on record. The Trial Court has allowed the said application on the ground that the orders passed on Exhibit 121 and 123 might be on account of the mistake committed by it without going through the record. The Trial Court was of the view that the payment of the said costs was a condition precedent and since the said costs were not paid, the Plaintiff was not entitled to file his further affidavit of examination-in-chief. The Trial Court has further observed that the Plaintiff though granted a liberty to file the further affidavit of examination-in-chief only in respect of issue No.9, the said affidavit exceeds the scope of issue No.9 and covers other aspects also. Hence, on the said twin grounds, the Trial Court has passed the impugned order and thereby allowed the application Exhibit 119 filed by the Defendants.

7] Heard the learned counsel for the Petitioners Shri Killedar. In the

instant case, it is required to be noted that the additional issue i.e. Issue No.9 has been framed by the Trial Court and the Plaintiff was permitted to file his further affidavit of examination-in-chief so as to allow the Plaintiff to lead further evidence in the Suit in respect of the said newly framed issue No.9. The Trial Court allowed the application Exhibit 104 as also Exhibit 117 filed by the Plaintiff by imposing costs of Rs.400/- on the Plaintiff. The Trial Court has thereafter even taken the further affidavit of examination-in-chief filed by the Plaintiff on record and as also extended the time to pay cost of Rs.400/-. No doubt, the Plaintiff was required to deposit the said cost as the application Exhibit 104 was allowed on the said basis but the Trial Court having allowed the said applications i.e. the application Exhibit 104, 117, 121 and 123 thereafter could not have struck off the affidavit of further examination-in-chief on the ground that the cost was not paid.

8] In so far as the Plaintiff traversing beyond the issue No.9 is concerned, the Trial Court could have directed the Plaintiff to either withdraw the affidavit of examination-in-chief or amend the affidavit of examination-in-chief by restricting to the newly framed issue No.9, however, could not have rejected or struck down the said further examination-in-chief having allowed the Plaintiffs to file the same. It is well settled that a party should not be non-suited on the ground of

technicalities. The learned counsel appearing on behalf of the Petitioner in the instant Petition, Shri Killedar, fairly states that the said further affidavit of examination-in-chief traverses beyond the issue No.9. He further submits that instead of amending the said affidavit of examination-in-chief, the Plaintiff be permitted to file a fresh further affidavit of examination-in-chief restricted to the newly framed issue No.9. In my view, the request is reasonable considering the fact that the Plaintiff was already granted permission to lead further evidence in the Suit covering the said issue No.9. In that view of the matter, the impugned order dated 18th October, 2012 is required to be quashed and set aside and, is accordingly, quashed and set aside. The Plaintiff would be permitted to withdraw the further affidavit of examination-in-chief at Exhibit 118 and file a fresh affidavit of examination-in-chief restricted to the newly framed issue No.9. It is clarified that the said affidavit would not contain any material which does not concern issue No.9. The Trial Court would accept the said further affidavit of examination-in-chief restricted to the said issue No.9. The Petition is allowed to the aforesaid extent. Rule is accordingly made absolute with parties to bear their respective costs of the Petition.

(R. M. SAVANT, J.)