

drp

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.5112 OF 2015

Major Gangadhar Keshavrao Ghuge
Age - 70 years, Occ - Agriculture
R/o Mahesh Nagar,
Maharashtra Public School,
Aurangabad

PETITIONER

VERSUS

- | | |
|---|-------------|
| 1. Narayan Pandurang Jagdale
Age - 40 years, Occ - Agriculture
R/o Sawangi, Taluka and District-Aurangabad | RESPONDENTS |
| 2. Dnyandeo @ Dnyaneshwar Pandurang Jagdale
Age - 40 years, Occ - Agriculture
R/o Sawangi, Taluka and District-Aurangabad | |
| 3. Sukhdeo Mansaram Jagdale,
Age - 55 years, Occ - Agriculture
R/o Sawangi, Taluka and District-Aurangabad | |

.....

Mr. S. V. Adwant, Advocate for the petitioner

Mr. P. F. Patni, Advocate for respondents No.1 to 3

.....

[CORAM : SUNIL P. DESHMUKH, J.]

DATE : 16th JUNE, 2016

ORAL JUDGMENT :

1. Rule. Rule made returnable forthwith and heard finally with consent of learned advocates for the parties.
2. The petitioner – defendant aggrieved by “no cross” order dated 18th January, 2014 on Exhibit-65 and refusal of his request

to set aside the same under orders dated 19th March, 2014 Exhibit-67 and 19th January, 2015 on Exhibit-69, is before this court.

3. Learned advocate Mr. Adwant for the petitioner refers to that while order had been passed on Exhibit-67, an elaborate application had been made referring to the difficulties, which were genuine and further to that the advocate had been indisposed and was required to see a physician. Learned advocate further submits that the order on Exhibit-67 rejecting the request to recall no cross order dated 18th January, 2014 as such, is deficient of consideration of the other reason and the court appears to be in oblivion of the same. Under the circumstances, the petitioner was required to move application Exhibit-69, to recall orders passed on 18th January, 2014 and the one on Exhibit-67 dated 19th January, 2014. However, the impugned orders have been refused to be set aside. Learned advocate submits that the impugned orders appear to have been overwhelmed by the events which had lost significance. What ought to have been considered is that on 18th January, 2014, there had been genuine difficulty. He submits that reasons which have went into making impugned orders on Exhibits-67 and 69 are not germane for consideration of the applications. Even for

earlier events the petitioner would not be liable to bear the entire blame.

4. Learned advocate for the petitioner submits that there were various intervening circumstances and difficulties, which had been posed and on account of which cross of plaintiffs' witnesses could not be taken. He under the circumstances, requests the court that in order to let the defendant an opportunity to cross-examine plaintiffs' witnesses to take a lenient view in the matter.

5. Mr. Patni, learned advocate for the respondents - plaintiffs however, vehemently submits that the request on behalf of the petitioner does not deserve any consideration, having regard to the antecedents, since this is third order of "no cross" and earlier on two occasions, orders have been set aside and costs were awarded, that too had not been deposited by the petitioner. The matter has been prolonged at the instance of the defendant-petitioner unreasonably. He submits that the approach of the defendant is casual, negligent and without deference to court and the proceedings. Mr. Patni further submits that the very reason given for setting aside the "no cross" order is not a reason which has been taken in contemplation under the

procedural requirements. He, therefore, submits that no indulgence at all be given to the petitioner.

6. The record, to some extent may reflect that the petitioner – defendant has been listlessly prosecuting proceedings and earlier on, no cross orders had been passed.

7. It may have to be taken into account that the no cross orders had been set aside and the suit was being proceeded with accordingly. On 18th January, 2014, when the matter was posted, an application for adjournment had been moved, which came to be rejected and no cross order was passed. Thereafter, application Exhibit-67 had been moved for recalling order dated 18th January, 2014 giving quite in some detail the circumstances under which the adjournment had been sought on 18th January, 2014 including that the advocate of the defendant had to see a physician on account of his health being unwell. While rejecting application Exhibit-67, it appears, the court had considered that earlier on no cross orders were passed and the petitioner was allowed to cross examine. It surfaces that while passing the orders, the court appears to be in oblivion of that the advocate appearing for the petitioner had not been keeping well and had to see physician. Said reason does not appear to have caught

attention and the court got swayed by the intervening dates.

8. Perusal of the impugned orders indicates that those are overwhelmed by antecedent circumstances which were considered while setting aside earlier order of "no cross" presumably giving the circumstances their due. The circumstances narrated in the applications Exhibits-67 and 69 do not appear to have received due attention which had got diffused since being swayed by the past, and not by objective appreciation of the circumstances in the applications, especially the one that the advocate had been indisposed and had to see a physician leaving not only the matter concerned but also quite a few other professional commitments. As such, it appears to be a case where an opportunity to defendant-petitioner may salvage the situation.

9. In the circumstances, it would be expedient that the application to set aside "no cross" order as and by way of last chance, be given consideration and indulgence in order to have completion of evidence, so that it may avoid further procrastination of the litigation at some later stage and also by giving direction to dispose of the suit at an early date putting conditions to the petitioner which may be beneficial at the end to

the plaintiffs themselves.

10. The inconvenience caused in the process, would be made good by imposing costs and further that the petitioner-defendant would be put to certain conditions by giving direction for further expeditious conduct of the suit. As such, petitioner – defendant to pay costs of Rs.25,000/-. Petitioner - defendant shall complete cross examination of witnesses of plaintiffs examined hitherto as expeditiously as possible, preferably within a period of two weeks from the date of receipt of writ of this order and plaintiffs' other witnesses, if any, be cross examined promptly. In case of failure to comply with above, the trial court would pass appropriate orders. The costs be deposited within a period of four weeks from today. The suit be proceeded accordingly and disposed of preferably within a period of six months from the date of receipt of writ of this order.

11. Having observed aforesaid, the writ petition stands allowed in terms of prayer clause "B", subject to payment of costs of Rs.25,000/-. Rule is made absolute in aforesaid terms.

12. At this stage, Mr. Patni, learned advocate for the respondents - plaintiffs states that the costs be enhanced to Rs.50,000/- While urging this, learned advocate requests to take

into account some judgments viz., in the case of “*Noor Mohammed Vs. Jethanand and Another*” reported in *AIR 2013 SC 1217*, which is in respect of adjournments stating that it should not be allowed to paralyze virtues of adjudication. He refers to the rationale as appearing in paragraph No.11 of the judgment. Mr. Patni also refers to paragraph No.12 of the judgment in the case of “*M/s Bagai Construction Vs. M/s Gupta Building Material Store*” reported in *AIR 2013 SC 1849*. He further refers to a judgment in the case of “*Dhanraj Lilaram Motwani and Another Vs. Rajendra Kumar Dayachand Jain and Others*” reported in *1995 (4) Bom. C. R. 659*.

13. Although learned advocate for the respondents purports to rely on aforesaid judgments, to change the order for costs being less than expected, it would not be appropriate, that the order should be altered. Also considering, as has been observed herein above, that at the end of the litigation, in order to prevent further procrastination on this ground of evidence being not complete in the suits in order to avoid that possibility. It is already referred to that the defendant is being put to some costs and also there are directions for further expeditious prosecution of the suit. The approach on either side is not commendable.

15. Learned advocate for the respondents - plaintiffs has shown his reluctance to accept amount of costs as have been

awarded. In the circumstances, the petitioner defendant to deposit the costs of Rs.25,000/- with the High Court Legal Service Sub Committee, Aurangabad within a period of four weeks from today.

[SUNIL P. DESHMUKH, J.]

drp/wp5112-15