

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 12281 OF 2015

Mr. Amarjeet T. Kadam

.. Petitioner

vs.

Sau. Savita A. Kadam

.. Respondent

Mr. Milind Deshmukh for the Petitioner.

CORAM : M. S. SONAK, J.

DATE : 15 JANUARY 2016.

P.C. :-

1] Mr. Deshmukh, learned counsel for the Petitioner, states that service of notice, in terms of the order dated 8 December 2015 has been effected upon the Respondent and necessary affidavit of service is also filed. Mr. Deshmukh further states that costs of Rs.5000/- have been deposited before the Trial Court in terms of the order dated 8 December 2015. The said order dated 8 December 2015, reads thus:

1. *Mentioned. Not on board. Taken on board.*
2. *Challenge in this petition is to the orders dated 29th June, 2015 and 3rd July, 2015, in terms of which the petitioner has been denied opportunity of examining his witness Dr.Borte.*
3. *The record indicates that the Advocate was not present on 29th June, 2015 and therefore, the witness could not be examined. Record also indicates that on the said date Advocate for respondent was also not present and the respondent had also applied for time. Application for recall was dismissed on the ground that application is neither signed by the party nor signed by an Advocate.*

4. *At least prima facie subject to payment of costs of Rs.5000/-, the petitioner can be granted another opportunity to examine his witness.*

5. *The petitioner is therefore directed to deposit before the Trial Court a sum of Rs.5000/- towards security of costs on or before 22nd December, 2015. The petitioner is directed to serve a copy of this order upon the respondent once the cost of Rs.5,000/- are deposited by him before the Trial Court. In case respondent is satisfied with the costs amount, respondent need not attend this Court at Mumbai on the next date.*

6. *Subject to payment of such costs, this Court will consider granting the petitioner yet another opportunity to examine his witness. In case the respondent desires to contest the petition, respondent Advocate can appear on the returnable date which shall be 8th January, 2015.*

7. *Place the matter on 8th January, 2015 in supplementary board. All concerned to act on the authenticated copy of this matter.*

2] The challenge in this petition is to the orders dated 29 June 2015 and 3 July 2015, both of which, disabled the Petitioner from examining the witness in support of his case. On 29 June 2015, the Petitioner was present in the Trial Court, but applied for time on the ground that his advocate was busy in some other Court. The request was denied. By order dated 3 July 2015, the Trial Court declined to recall its earlier order dated 29 June 2015, on the ground that the application made by the Petitioner was not signed by the Petitioner or accompanied by the affidavit from the Petitioner.

3] Although, the Trial Court cannot be said to be unjustified in making the impugned orders, the effect of the impugned orders does operate rather harshly upon the Petitioner. No doubt, if the orders are set aside, some prejudice is bound to occasion the Respondent. However, such prejudice can always be compensated in terms of costs.

4] Therefore, the impugned orders are set aside. The costs of Rs.5000/- already deposited by the Petitioner before the Trial Court are directed to be paid to the Respondent. The Respondent shall therefore, be entitled to withdraw the said costs from the Trial Court.

5] The Trial Court shall grant the Petitioner one additional opportunity for examining his witness. The Petitioner to examine his witness on the date fixed by the Trial Court without seeking any adjournment. In case, any further adjournment is applied for by the Petitioner to examine his witness, the Petitioner shall forfeit the relief granted by this order.

6] The learned counsel for the Petitioner states that the next date fixed before the Trial Court is 30 January 2016. The Petitioner to make available his witness on 30 January 2016. Further, the Petitioner to furnish an authenticated copy of this order to the Respondent as well as produce the same before the Trial Court, latest by 20 January 2016.

7] The writ petition is allowed in the aforesaid terms.

8] All concerned to act on the basis of authenticated copy of this order.

(M. S. SONAK, J.)

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