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

WRIT PETITION NO. 2286 OF 2016

M/s Shilpoo Co-op.HSG.Soc.Ltd. ...Petitioner
vs
Suryakant Shardaprasad Sharma & Ors. ...Respondents

.....
Mr Jagdish N. Jayale for the Petitioner
Mr Vishal Kanade a/w Mr Ashraf Chaurasia i/b Ashoka Law Firm for
Respondent No.4.
Mr Vinod Mhadik for Respondent No.5.
.....

**CORAM : N. M. JAMDAR, J.
17 OCTOBER, 2016**

P.C. :

By this Petition the Petitioner has challenged the order passed by the learned City Civil Court Judge dated 1 July 2014 dismissing the Notice of Motion taken out by the Petitioner for setting aside “no cross-examination” order and to permit Defendant No.4 to cross-examine Plaintiff’s witness.

2 Generally the Court would take a lenient view considering the consequences that may ensue to the parties. However the facts of this present case will show a complete and utter negligence on the part of the Petitioner, as well as clear attempt to delay the proceedings. Learned City Civil Court Judge dismissed the Notice of

Motion taking into account that Defendant No.4 did not remain present for 36 dates between 11 April 2008 to 26 February 2014, while other Defendants participated in the suit and cross-examined the Plaintiff.

3 The suit is filed by the Respondent/ Plaintiff on 9 April 2008 bearing L.C. Suit No.658 of 2008 wherein the Respondent / Plaintiff sought an order of permanent injunction against the Defendants that is the developer, the Petitioner Co-operative Society and the Municipal Corporation, to restrain them from carrying out construction on the suit plot. An order of injunction was also sought to restrain Defendant Nos.1 to 4 from creating any third party rights or assigning in any manner leasehold rights. Further relief was sought to cancel and terminate the sanction given to the plan put up by the Petitioner and the Respondent Developer. The suit is pending since the year 2008. The application for temporary injunction was taken up, and appeal from order was also filed. In the meanwhile, the construction has come up on the suit plot and the members of the Petitioner society are now occupying the suit flat. Therefore, on today the relief that survives is a challenge to the plans sanctioned in favour of the Petitioner and the Respondent Developer by the Municipal Corporation.

4 Learned counsel for the Petitioner submitted that suit was initially assigned to one Court, thereafter it was transferred and the Petitioner lost track of the proceedings and if the Petitioner is not

allowed to cross-examine or lead evidence, the great prejudice would be caused to the members of the Petitioner Society. Learned counsel submitted that the advocate was otherwise diligent in attending the other matters, however, because there was lack of communication between members of the society, the suit could not be attended. He submitted that suitable costs be imposed. It was also urged that the Respondent Plaintiff has alleged that the plan have been obtained by manipulation, which will require rebuttal. Learned counsel for the Respondent/ Plaintiff opposes the Petition submitting that the Petitioner was fully aware and the only attempt is to somehow delay the proceedings. Even when the application for setting aside “no cross order” was made, no prayer was made to permit to lead evidence.

5 The Petitioner has invoked the supervisory power of this Court. It is not for every error that the power is to be exercised. It is the legislative policy that the trials must proceed expeditiously, Courts should not permit deliberate attempts to delay the proceedings. Repeated adjournments and attempts to delay the proceedings have reached chronic proportions. Present case is one of the classic example of such abuse. The suit has appeared on board for thirty six dates. The Advocates for the other Defendant appeared on those dates and also cross-examined the Plaintiff. It is unbelievable that there will be no communication between co-defendants between 2008 to 2014 or at least between the advocates. The affidavit which is filed by the Secretary of Defendant No.4, in which he has not stated as to why the matter could not be followed up with the advocate. In fact the blame

is sought to be put on the Plaintiff that the Plaintiff has made an attempt to obtain the decree by fraud. He has stated that he and his advocate were not aware about transfer of the proceedings, which is impossible to believe given the time span. Remaining absent on thirty six dates simply cannot be tolerated. At some stage the Court must take strict stand otherwise a wrong message will be sent to the litigants and the learned City Civil Court rightly took a strict view. It may be that in a given cases there could be a genuine reason, but that just lost track of the matter, cannot be a justifiable ground. As far as prejudice to the Petitioner is concerned, due to passage of time, it is in fact the Plaintiff who stands prejudiced. The Petitioner and the Developer have gone ahead and constructed the building and the members of the Petitioner society are occupying the flats. The only question, therefore, is challenge to the plans sanctioned by the Municipal Corporation. The Petitioner in March 2010 filed a detailed additional Written Statement sworn by one K.A.Wagh, the Secretary. The affidavit in support of the Notice of Motion was filed by one Om Prakash, the Secretary and when he state that he has no knowledge about the suit, there is no reference to the affidavit sworn by K.A.Wagh, Secretary of Defendant No.4 in March 2010.

6 As on today, therefore, the members of the Petitioner are residing in the construction, which plans have been sanctioned by the Municipal Corporation. Therefore, burden on the Respondent Plaintiff to demonstrate that the plans which have been sanctioned by the Municipal Corporation, should be declared as null and void. As a

society, the Petitioner can only rely on the fact that the plans have been duly sanctioned by the planning authority. As far as the allegations of manipulation by the Respondent / Plaintiff are concerned, it is for the Respondent/ Plaintiff to demonstrate how sanctioning of the plans have been manipulated. The question would be primarily of legality of the sanctioned plan which would be a legal argument to be made, and the burden on the Respondent/ Plaintiff.

7 While passing an order under the equitable jurisdiction of this Court, the legislative policy and the need to curb the abuse of adjournments need to be kept in mind. Nothing is shown as to how the Respondent Plaintiff is responsible for the Petitioner not attending the Court diligently. Therefore, once main relief of injunction has been frustrated due to delay in disposal of the suit and at this stage again the proceedings are further delayed to permit the Petitioner to file an additional evidence and to cross-examine, the Petitioner will continue to enjoy the occupation in the building. This cannot be the balancing of the equities.

8 In the circumstances, I am of the opinion that no case is made out for interference in the writ jurisdiction of this Court. The Writ Petition is, accordingly, rejected. It will be open to the Petitioner to advance all such argument as are available in law in respect of legality of the sanctioned plan on the basis of the Written Statement which is already filed. All contentions of parties, on merits, are kept open.

9 Since, the Petitioner wants to take the challenge to the impugned order further, the next date in the suit will be 7 December, 2016.

(*N.M.JAMDAR J.*)