

Sequeira

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

WRIT PETITION NO. 6520 OF 2016

Valecha Engineering Limited.

.. Petitioner

Vs

Mr.Naozar Feroz Irani (deceased)

Mrs.Khorshed Naozar Irani.

.. Respondent

Mr.P.J.Thorat, for the Petitioner.

Mr.Jaydeep Deo, for the Respondent.

***CORAM : N.M.Jamdar, J.
Tuesday, 22 November 2016.***

Oral Order :

Heard learned counsel for the parties. Taken up for final disposal forthwith by consent. The learned counsel for the Petitioner states that for adjudication of the present petition, presence of Respondent Nos.2 to 31 is not necessary and states that he is not pressing the Petition against them. In view of this statement, leave is granted to the Petitioner to delete Respondent Nos.2 to 31.

2. The Petitioner has challenged the order passed by the appellate bench of Small Causes Court, at Mumbai dated 29 January 2016 and the orders passed by the Small Causes Court dated 17 October 2015 and 29 March 2016. As a consequence of the impugned order, the evidence of the Petitioner viz. Defendant No.2 in the suit R.A.E No.902 of 1837 of 1996 filed by Respondent No.2,

stands closed.

3. The suit is filed by the Respondent No.1 seeking eviction of the Petitioner and other Defendants from the suit premises. The suit is instituted in the year 1996 and application was made below Exhibit 240 by the Petitioner to permit the Petitioner to cross-examine the Respondent No.1-Plaintiff. It was the case of the Petitioner that its Advocate who was attending the matter did not inform the progress and even though other Defendants cross-examined, the advocate Plaintiff did not cross-examine the Plaintiff and application was therefore, moved with a prayer to permit the Petitioner to cross-examine the Plaintiff. This application was opposed by Respondent – Plaintiff submitting that the Petitioner was negligent and there was no reason not to cross-examine the Respondent No.1-Plaintiff when other Defendants had carried out the cross-examination. The learned Small Causes Court by order dated 17 October 2015 rejected the Application on the ground that no cause was made out and also observed in the body of the order that the evidence of the Petitioner stands closed.

4. A revision application was thereafter moved by the Petitioner to the appellate bench of the Small Causes Court. The appellate bench by order dated 29 January 2016 rejected the revision. Another application below Exhibit 285 was moved by the Petitioner contending that while rejecting the application to cross-examine the

Plaintiff, the evidence of the Petitioner also stands closed and which was not the purpose of the earlier proceedings. This application was rejected by the learned Small Causes Court, Judge by order dated 29 March 2016 holding that the earlier order closing the evidence of the Petitioner still holds field. It is against these orders that present Petition has been filed.

5. I have heard learned counsel for the parties. As far as the conduct of the Petitioner is concerned, learned counsel for the Respondent is justified in making a grievance. The Petitioner has not acted diligently in respect of cross-examination of the Plaintiff. The other Defendants cross-examined the Plaintiff. While rejecting the application the learned Small Causes Court Judge has recorded that the Petitioner did not participate in the proceedings for a substantial period of time. There is no reason therefore to interfere with the order that rejects the permission to the Petitioner to cross-examine the Plaintiff. The learned counsel for the Petitioner has submitted to show bonafides of the Petitioner, the Petitioner is not insisting to recall the Plaintiff. The learned counsel however submitted that an order closing the evidence of Petitioner ought to be set aside as there was never any application of the Respondent-Plaintiff.

6. When a suit is instituted and relief is sought against a defendant, not permitting the defendant to lead evidence, is a drastic order. Even though there may be delay on the part of the Defendant

to lead evidence, in the present case the Plaintiff has not moved any application to foreclose the right of the Petitioner on that ground. In an application moved by the Petitioner to cross-examine the Plaintiff, while dismissing such application an observation seems to have been made which has closed the evidence of the Petitioner. These observations have been considered as a binding order by the subsequent orders have been passed by the appellate bench and the Small Causes Court. Therefore neither there is any application by the Respondent-Plaintiff nor there is specific adjudication foreclosing the right of the Petitioner to lead evidence.

7. The learned counsel for the Petitioner submitted that Petitioner will lead evidence of only one witness i.e. Rajendrakumar Singh. The affidavit is already filed. The learned counsel for the Petitioner also submits that a stringent time schedule may be provided, but an opportunity be given to the Petitioner to lead evidence. Considering the facts and circumstances, that there was no specific application by the Respondent-Plaintiff to close the evidence of the Petitioner and that the Petitioner is not pressing the relief of cross-examination of the Plaintiff and that the Petitioner will restrict to examination of one witness, permission needs to be granted to the Petitioner to adduce evidence. At the same time, the grievance of the learned counsel for the Respondent No.1-Plaintiff that there is a delay on the part of the Petitioner in the suit cannot be lost sight of. Therefore, to balance the equities a suitable costs need to be

imposed. Accordingly, the Writ Petition is disposed of as under -

- a) The impugned orders passed by the appellate bench of Small Causes Court, at Mumbai dated 29 January 2016 and the orders passed by the Small Causes Court dated 17 October 2015 and 29 March 2016, are quashed and set aside.
- b) The Petitioner, will not cross-examine the Respondent No.1-Plaintiff.
- c) The Petitioner is permitted to lead evidence of witness Rajendrakumar Singh.
- d) The parties will appear before the learned Small Causes Court Judge on 30 November 2016 wherein the learned Small Causes Court Judge, Mumbai will fix further schedule in respect of the examination of the Petitioner.
- e) The Petitioner will pay cost of ₹ 25,000 within one week from today to the Respondent No.1.

8. The Registry shall return the Record and Proceedings to the Small Causes Court, Mumbai forthwith through a special messenger so that it reaches before 30 November 2016. Writ Petition is disposed of in the above terms.

(N.M.Jamdar, J.)