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

WRIT PETITION NO. 9436 OF 2016

Mr P.J.Joseph & Ors. ...Petitioners
vs
Mr Nandkumar Govind Mhatre & Ors. ...Respondents

.....
Ms Archana Khan i/b Rahul Motkari for the Petitioners
Mr Pankaj Dwivedi for the Respondents
.....

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

P.C. :

Heard learned counsel for parties. Considering the short question involved, the Petition is taken up for final disposal.

2 Limited grievance made by the Petitioners/Defendants is that, learned City Civil Court Judge by an order dated 9 December 2015 below Exh.25 has held that since the witness of the Respondents/ Plaintiffs i.e. P.W.1 is unable to continue cross-examination due to his ill-health the application below Exh.25 and impugned order dated 3 May 2016 below Exh.28 require to be allowed. The application was tendered by the Plaintiffs below Exh.25 that the witness is not able to say anything properly in the witness box, and therefore, Plaintiff No.2 be permitted to withdraw his

affidavit of evidence. This application is allowed by the impugned order. Though the learned City Civil Court Judge has power to pass such orders and generally the learned Judge who is conducting the trial is the best Judge to decide a particular course of action in the trial. In the circumstances that is present one, the witness is stated to be unwell, when a prejudice is likely to be caused to the other side it is expected that that learned Judge would hear both sides and give reasons for agitating the particular course of action. In the present case, the grievance is made by the learned counsel for the Petitioners that handwritten purshis was handed over and when there being an opportunity to file the reply, the application was allowed. It was contended that the stand taken by the Plaintiffs that Plaintiff No.2 is not feeling well and he always feels unwell in the witness box, is only to get over the earlier admissions made. Learned counsel for the Respondents/Plaintiffs contended that the statement in the earlier cross-examination have been kept open to be considered at the time of trial. Without going into the rival contentions, I am of the opinion that before passing order of this nature, the learned City Civil Court Judge ought to have given opportunity to the Petitioners to file reply to this application, called upon the Respondents/ Plaintiffs to produce the medical certificates if so required. Allowing Plaintiff No.2, who is already been cross-examined substantially, to withdraw his affidavit of evidence is certainly cause prejudice to the Petitioners/ Defendants. In the circumstances, since there is no reason given at all before allowing application Exh.25, so also the orders dated 3 May 2016, 20 July 2016 which are sequitur, the impugned orders are required to be

quashed and set aside. Accordingly, the orders dated 9 December 2015 below Exh.25, 3 May 2016 below Exh.28 and 20 July 2016 and 27 June 2016 below Roznama are quashed and set aside. The applications filed by the Respondents/Plaintiffs below Exh.25, and Exh.28 stands restored to file. The Petitioners will file reply to these applications within a period of two weeks from today and the learned City Civil Court Judge shall indicate the reasons briefly for deciding particular course of action. It is made clear that I have not considered the merits of rival contentions and has set aside the impugned order only on the ground of an opportunity to the Petitioners and lack of adequate reasoning in the impugned orders. All contentions of the parties are kept open. Learned City Civil Court Judge will adopt such course of action which the learned City Civil Court Judge thinks appropriate as per law. The Writ Petition is disposed of in the above terms.

(*N.M.JAMDAR J.*)