

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.9269 OF 2015**

Afred Sebastian D'Aguiar, since deceased, through L.Rs: 1(a) Mrs Blanche Alfred D'Aguiar and Ors. Petitioners

Vs

1.Shri Mohammed Hussain, since deceased) (exempted from bringing heirs on record) 2.Shri Mohammed Umar. .. Respondents

Mr. S.A. Jabbar i/b Mr. Tanvir Abdul Shaikh, Advocate for Petitioners.

Mr.Kunal Mehta i/b Ganesh & Co., Advocate for Respondent no.2.

CORAM : R.G.KETKAR,J.
DATE : 15/02/2016

PC:

1. Heard Mr. S.A.Jabbar, learned counsel for the petitioners and Mr. Kunal Mehta, learned counsel for respondent no.2 at length.

2. By this Petition under Article 227 of the Constitution of India, the petitioners, hereinafter referred to as plaintiffs no.1(a) to 1(f) have challenged orders dated 17.8.2015 and 19.8.2015 passed by the learned Judge, presiding over Court Room No.14 of Bombay City Civil Court at Bombay, in S.U. No.2429 of 1995. Roznama dated 17.8 2015 shows that the learned trial Judge recorded that "after going through the record it seems that defendant no.2 has filed affidavit of evidence at Exh.20 and Exh.21 (Exh.21 is compilation of documents). There is no cross

examination on behalf of the plaintiffs. It seems that the defendants have not closed the evidence. So, Advocate for the plaintiff is called upon to state whether he wants to cross examine defendant no.2.” Subsequently, on the same day the learned trial Judge passed impugned order which reads thus ;

“Order

Adv. for Plff is called upon to state whether he wants to cross examine Deft no.2. If the Plff fails to state anything about the same, it will be presumed that the Plff does not want to cross-examine the Deft no.2. Deft no.2 to remain present in the Court on the next date till then the matter is adjourned.

Matter is adjourned to 19.8.2015 for cross-examination of DW-2 at 2.45 pm.”

3. On 19.8.2015, the learned trial Judge passed the following order:

“As per order dated 17.8.2015 the plaintiff was called upon to state whether he wants to cross examine DW-2 as it was noticed that the evidence of defendant is incomplete. The learned Advocate for the plaintiff had advanced arguments without original suit papers to the notice of the court. The suit is pretty old. The suit cannot be adjourned merely on the ground stated in the application. As such the application is in fact liable to be rejected. However, in the interest of justice final opportunity is given to the plaintiff for compliance of the order dated 17.8.2015 till next date. It is made clear that on the next date no adjournment on any ground whatsoever will be granted.”

4. Perusal of the impugned orders shows that the learned trial Judge repeatedly called upon the plaintiffs to state whether he wants to cross examine DW No.2 as it was noticed that evidence of defendants is incomplete. The learned trial Judge noted that the suit is of the year 1995 and is pretty old. Suit cannot be

adjourned merely on the grounds stated in the application. Accordingly, he rejected the application dated 19.8.2015 for adjournment and in the ends of justice gave final opportunity to the plaintiffs for compliance of the order dated 17.8.2015 till next date. It was made clear that on the next date no adjournment on any ground whatsoever will be granted.

5. After arguing the petition for quite some time, Mr. Jabbar states that the plaintiffs will cross examine defendant no.2 on the affidavit of evidence at Exh.20. The Plaintiffs took out Notice of Motion No.1568 of 2013 for striking out issue no.2 at Exh.5. That motion was allowed on 22.7.2013. Plaintiff no.1 (b) took out Notice of Motion No.4404 of 2014 for striking out issue no.3 pertaining to jurisdiction. By order dated 17.6.2015, Motion was made absolute. Mr. Jabbar submitted that issues no.2 and 3 are thus struck out and the said orders are not challenged by the defendants and have attained finality. He, therefore, submitted that liberty may be reserved to the plaintiffs for taking out appropriate proceedings for striking out portion of evidence in Exh.20 which is dealing with issues no.2 and 3. In view thereof petition is disposed of as under:

- (1) Statement made by Mr. Jabbar that the plaintiffs will cross examine defendants on affidavit of evidence Exh.20 is recorded.
- (2) Liberty is reserved to the plaintiffs to take out appropriate proceedings for striking out portion of the affidavit of Exhibit-20

which is based on issues no.2 and 3. All contentions of the parties are expressly kept open. In view thereof no further orders are necessary. Petition is disposed off. Order accordingly.

(R.G.KETKAR, J.)