

Vivek Vijay Gupta and another Vs.	...	Petitioners
M/s. Soham Metal Pvt. Ltd.	...	Respondents

CORAM : R. G. KETKAR, J.
DATE : JANUARY 19, 2016

P.C. :

Heard Ms Kranti S. S. Anand, learned Counsel for petitioners and Mr. Sandeep Ghogare, learned Counsel for respondents at length. Rule. Mr. Ghogare waives service for respondents. At the request and by consent of the parties, Rule is made returnable forthwith and the Petition is taken up for final hearing.

2. By this Petition under Article 227 of the Constitution of India, petitioners have challenged the judgment and order dated 21.10.2015 passed by the learned Judge, City Civil Court, Greater Mumbai, below exhibit-80 in Suit No.979 of 2011. By that order, the learned trial Judge rejected the application made by the petitioners, hereinafter referred to as defendants, for setting aside no-cross order passed on 22.09.2015 and for recalling P.W.1 for cross-examination. It is not necessary to go into details. Suffice it to say that earlier, application at exhibit-60 was filed by the defendants for recalling P.W.1. By order dated 12.06.2015, the learned trial Judge rejected the application. Aggrieved by that decision, defendants instituted Writ Petition No.7855 of 2015 in this Court. The Petition was disposed of on 07.09.2015 and the operative part of the order reads thus,

“I) The Plaintiff would keep the witness present for cross-examination on the date fixed by the Trial Court. Since the parties are to appear before the Trial tomorrow i.e. on 08.09.2015, the Trial Court to fix the date for cross-examination either this week or within ten days from date.

II) The cross-examination of the witness PW-1 once commenced would be continuous till it is completed and would be conducted on day to day basis.

III) In the facts and circumstances of the case, the Petitioner to pay costs of Rs.10,000/- to the Plaintiff. The Petitioner to deposit a further amount of Rs.5000/- in this Court within one week and produce evidence before the Trial Court of the deposit of the said costs. The said amount of Rs.5000/- would be in addition to the amount of Rs.5000/- which according to the Learned Counsel for the Petitioners is already deposited in this Court. Thereafter the Respondent No.1 / Plaintiff would be entitled to withdraw the total amount of Rs.10,000/- which would be lying in deposit in this Court. With the aforesaid directions, the Writ Petition is disposed of.”

2. This Court directed that the cross-examination of P.W.1 once commenced would be continued, till it is completed, on day to day basis. The matter was fixed on 11.09.2015. Perusal of Rojnama dated 11.09.2015 shows that further examination-in-chief of P.W.1 Surinder Gupta was concluded by Advocate for respondents / plaintiffs and cross-examination was partly concluded by Ms Kranti Anand due to lunch break. After lunch recess, matter was called out. Matter was kept back at 4.00 p.m. for further cross-examination. At 4.00 p.m., matter was kept back at 4.10 p.m. Advocate for plaintiffs and P.W.1 were present and Advocate for defendants was absent. The matter was adjourned to 14.09.2015 for further cross-examination of P.W.1 at 12.30 p.m.

3. On 14.09.2015, P.W.1 and his Advocate were present. On behalf of defendants, Purshis exhibit-77 was filed for keeping the matter back. Accordingly, the matter was kept back. At 1.25 p.m., the matter was called out when Advocate for plaintiffs was present and P.W.1 was also

present. Advocate for defendants was present. The cross-examination of P.W.1 was partly recorded and matter was deferred till lunch break. The matter was called out after lunch break. It was kept back and later on called out at 3.05 p.m. P.W.1 was present. Advocate for plaintiffs was present. Defendants and his Advocate were absent. The matter was kept back and later on, was called out at 3.50 p.m. Further cross-examination of P.W.1 was partly recorded and it was deferred till next date i.e. 15.09.2015 at 1.00 p.m.

4. On 15.09.2015, at 1.10 p.m., matter was called out when P.W.1 was present. Advocate for plaintiffs was present. Defendants and Advocate were absent. Matter was kept back and later on it was called out at 1.35 p.m. P.W.1 was present. Advocate for plaintiffs was present. Advocate for defendants was present. Further cross-examination of P.W.1 was partly conducted and it was deferred due to lunch break. Again after lunch break, matter was called out at 2.45 p.m. and it was kept back. Later on, at 4.25 p.m., further cross-examination of P.W.1 was partly conducted by Advocate for defendants and was deferred as the Court time was over. It was adjourned to 16.09.2015 for further cross-examination of P.W.1 at 1.10 p.m.

5. On 16.09.2015, at 1.15 p.m., P.W.1 was present. Advocate for plaintiff was present and Advocate Mr. Waghmode holding for Ms Kranti Anand for defendants was present. At his request, matter was kept back. Again it was called out at 1.30 p.m. Advocate Waghmode holding for Ms Kranti Anand was present and Advocate for plaintiffs was present. Rojnama records that Advocate for defendants failed to appear for cross-examination. Matter was kept back for 10 minutes. Later on, at 1.42 p.m., further cross-examination of P.W.1 was partly recorded. Matter was kept back for lunch break. Later on, at 4.45 p.m.,

by consent, the matter was adjourned to 22.09.2015 for further cross-examination of P.W.1 at 12.30 p.m.

6. On 22.09.2015, at 12.35 p.m., matter was called out. Advocate for the plaintiffs was absent. Advocate Waghmode h/f. Ms Kranti Anand for defendants was present and requested to keep back the matter for some time as Ms Kranti Anand was busy in Court Room No.13. P.W.1 was absent. Matter was kept back. Later on, at 12.50 p.m., matter was called out when P.W.1 was present. Advocate for plaintiffs was present. Advocate Waghmode holding for Ms Kranti Anand was present and requested to keep the matter back for some time as Ms Kranti Anand was busy in Court Room No.13. Matter was accordingly kept back. Later on, at 1.35 p.m., again the request was made by Mr. Waghmode for keeping back the matter. Matter was kept back after recess. Later on at 3.00 p.m., P.W.1 was present. Advocate for plaintiffs was present and Advocate Mr. Waghmode holding for Ms Kranti Anand for defendants who was present, requested to keep back the matter for some time as Ms Kranti Anand was busy in another Court. Matter was accordingly kept back. Later on at 3.20 p.m., the matter was called out. Again, Advocate Waghmode requested to keep back the matter for some time. The Court recorded that P.W.1 was present and Advocate for defendants failed to appear. As Advocate for defendants failed to appear and cross-examine the witness, who was sitting before the Court since 12:40 p.m., this shows that the Advocate for defendants is not interested to cross-examine the witness despite the directions given by the Hon'ble High Court for completing the cross-examination on day to day basis. The learned trial Judge, therefore, ordered matter to proceed without further cross-examination on behalf of the defendant and adjourned to 03.10.2015 for evidence of the defendants. At 4.35 p.m., Advocate for defendants filed application exhibit-79 for preponing the date from

03.10.2015 to 23.09.2015, which was taken on record and the trial Court passed order “Other side to say”.

7. On 03.10.2015, application exhibit-80 is filed for setting aside no cross-examination order and for recalling P.W.1. In the application, it is set out that on 22.09.2015, Advocate conducting cross was held up in another matter. It was a professional and genuine difficulty of the Advocate. Request was, therefore, made to set aside the order of 'no cross' and recall P.W.1. This was resisted by the plaintiffs by filing a detailed reply dated 08.10.2015. In paragraphs 13 to 15, the events that took place between 11.09.2015 and 22.09.2015 are narrated. It was contended that the Suit is filed in the year 2011. P.W.1 is regularly attending the Court from 11.00 a.m. to 5.00 p.m. Defendants never remained present and completed cross-examination of P.W.1 though the Suit is expedited. It causes harassment to the P.W.1. After hearing both sides, by the impugned order, the learned trial Judge rejected the application. It is against this order, defendants have instituted the present Petition.

8. Ms Kranti Anand reiterated the submissions that were advanced before the trial Court. She submitted that defendants have not deliberately delayed the cross-examination of P.W.1. As Advocate for defendants was held up in another Court and on account of professional and genuine difficulty, cross-examination could not be completed. She assures that if no-cross order is set aside, on behalf of the defendants, cross-examination of P.W.1 will be conducted on day to day basis either by her or her Junior Advocate Mr. Waghmode or any other Junior Advocate and no request for keeping back the matter or adjourning the matter will be made. If request is made for keeping back the matter or for adjourning the matter, she submitted that in that event, the impugned

order will stand revived. She further states that within 2 weeks from today, defendants will pay cost of Rs.50,000/- to the plaintiffs.

9. Mr. Ghogare strenuously opposed the submissions on the ground that perusal of record, and in particular, Rojnama from 11.09.2015 onwards clearly shows that Court was made to wait for arrival of the defendants Advocate for cross-examination of P.W.1. P.W.1 is a businessman and is attending the Court from 11.00 a.m. to 5.00 p.m. for facing the cross-examination. Despite Suit being expedited by the trial Court and direction of this Court to conduct cross-examination on day to day basis, defendants are prolonging the cross-examination. He, therefore, submitted that no case is made out for invocation of powers under Article 227 of the Constitution of India.

10. I have considered the rival submissions advanced by the learned Counsel appearing for the parties. I have also perused the material on record. Perusal of the record, and in particular Rojnama from 11.09.2015 onwards till 22.09.2015, unmistakably shows that defendants are not completing the cross-examination and are not complying the order passed by this Court on 07.09.2015 in Writ Petition No.7855 of 2015. Perusal of the Rojnama further shows that as per the convenience of the defendants Advocate, the matter was fixed after 12.30 p.m. Perusal of the Rojnama from 11.09.2015 further depicts that the defendants are conducting cross-examination as per their convenience and not as per the schedule fixed by the trial Court. No attempt was made to complete the cross-examination. Rather, requests were repeatedly made for keeping matter back on the ground that the Advocate for defendants is engaged in some other Court. Once the Advocate accepts commitment and is aware that the cross-examination is to be completed on day to day basis, it is unfair to the Court and the

witness to seek indulgence of keeping matter back or adjournment. Be that as it may, the fact remains that the cross-examination was conducted not as per the schedule fixed by the trial Court but as per the convenience of the defendants' Advocate, which is totally not acceptable. However, in order to ensure that adequate opportunity is given to the defendants, in my opinion, one more opportunity deserves to be granted to the defendants subject to imposing cost. Hence, the following order:

- a. The impugned order is set aside and the application at exhibit-80 is allowed;
- b. No-cross order dated 22.09.2015 is set aside and P.W.1 is recalled for further cross-examination subject to payment of cost of Rs.50,000/- to the plaintiffs to be paid within 2 weeks from today. If cost is not paid within two weeks from today, the impugned order shall stand revived without further reference to the Court;
- c. The parties shall appear before the trial Court on 04.02.2016. The trial Judge shall fix the date for cross-examination of P.W.1. The cross-examination of P.W.1 shall be conducted on day to day basis till it is completed;
- d. The learned trial Judge is requested to fix cross-examination of P.W.1 at 12.30 p.m. No request shall be made by the defendants either for keeping the matter back or for adjourning the matter. If for any reason, Advocate Ms Kranti Anand is unable to cross-examine P.W.1, cross-examination shall be conducted on her behalf by her junior Advocate. If for any reason application for keeping back the matter or adjournment is made, the impugned order shall stand revived without further reference to the Court.

e. Rule is made absolute in the aforesaid terms. Order accordingly.

(R. G. KETKAR, J.)

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