

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

934 WRIT PETITION NO. 13474 OF 2017

CHANGDEO DHANAJI JADHAV AND ANOTHER
VERSUS
BIJALABAI KASHINATH THUBE AND OTHERS

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Advocate for Petitioners : Shri. N. D. Sonavane
Advocate for Respondents : Shri. S. A. Gaikwad h/f
Shri. M. R. Jadhav

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CORAM : RAVINDRA V. GHUGE, J.

DATED : 24th NOVEMBER, 2018.

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PER COURT :

1. The petitioners, who are the original defendant Nos. 1 and 6 in RCS No. 271 of 2012, are aggrieved by the "No Cross" Order passed against them on 09.12.2016 and the impugned order dated 30.10.2017, by which, their application Exh-60 was rejected.

2. The contention of the petitioners is that they have moved an application under Section 5(2) of the Mamlatdars' Courts Act, 1906 before the concerned authority. While the enquiry and hearing in the said proceedings was in progress, the respondents preferred RCS No.271 of 2012 practically

seeking an injunction against the competent authority, which was proceeding with the case under the Mamlatdars' Courts Act, 1906 and further sought an injunction against the defendants that they should be restrained from using the disputed road in the suit property.

3. The grievance of these petitioners is that after the "no cross" order was passed on 09.12.2016 against these defendants, they moved an application Exh-60 on 30.10.2017 praying for recalling of the "no cross" order and for permitting these petitioners to cross-examine the plaintiff and lead their evidence. The said application has been rejected.

4. Learned counsel for the plaintiffs has strenuously opposed this petition and prays that same may be dismissed with heavy costs. My attention is drawn to the observations of the Trial Court in paragraph Nos. 5, 6 and 7, which would indicate that initially, the adjournment request on 03.09.2016 was rejected by the Court. Further request on 09.12.2016 was also rejected. No cross order was, therefore, passed on 09.12.2016. Opportunities were granted to these petitioners

on five occasions. Adjournment applications Exh-56 dated 24.04.2017, Exh-57 dated 03.07.2017 and Exh-58 dated 27.09.2017 were also rejected. Subsequently, no evidence order was also passed against these petitioners. Finally, they prayed that time may be granted to tender written notes of arguments. In this fact situation, these petitioners have wasted almost one year and have delayed the matter. They have acted carelessly and therefore, no sympathy deserves to be shown.

5. The respondents / plaintiffs relied upon the judgment of the *Karnataka High Court in Rabiya Bi Kassim M. Vs. The Country-Wide Consumer Financial Service Limited, Bangalore, 2004(3) Civil Court Cases 593* and the judgment of the Hon'ble Apex Court in the matter of *Arjun Singh Vs. Mohindra Kumar, AIR 1964 S.C. 993*. Contention, therefore, is that in view of the law laid down in **Arjun Singh** (supra), once the matter is reserved and closed for judgment, no application should be tendered for any reason whatsoever.

6. I find from the record that these petitioners are undoubtedly guilty of having acted negligently.

Notwithstanding the fact that the plaintiffs have bypassed statutory remedy under Section 5 of the Mamlatdars' Courts Act, which is a statutory mechanism created by the legislature, by filing a suit before the Trial Court practically attempting to restrain the statutory authorities from acting in accordance with law, the fact remains that these petitioners should have been diligent and should have acted with promptitude. So also, it cannot be ignored that if these petitioners are not granted the opportunity of cross-examining the plaintiffs and leading their own evidence, their cause would practically be defeated and the plaintiffs would succeed in getting a verdict in the absence of the due participation of these petitioners.

7. The suit is of 2012 and cannot be said to be very old. Costs could be imposed on these petitioners so as to be paid to the plaintiffs to reduce their rigours of litigation.

8. This Court, in *Mukund Iron Staff Association Co-operative Housing Society Limited Vs. Vasant Ramchandra Patil and others*, 2015(4) Mh.L.J.855, has considered the law laid down in *Arjun Singh* (supra) and has observed in

paragraph Nos. 15 and 19, which read as under :

15. The learned Counsel for respondent contended that once arguments are commenced, there could be no reopening of evidence or recalling of any witness. This contention is raised by extending the convention that once arguments are concluded and the case is reserved for judgment, the Court will not entertain any interlocutory application for any kind of relief. The need for the Court to act in a manner to achieve the ends of justice (subject to the need to comply with the law) does not end when arguments are heard and judgment is reserved. If there is abuse of the process of the Court, or if interests of justice require the Court to do something or take note of something the discretion to do those things does not disappear merely because the arguments are heard, either fully or partly. The convention that no application should be entertained once the trial or hearing is concluded and the case is reserved for judgment is a sound rule, but not a strait-jacket formula. There can always be exceptions in exceptional or extraordinary circumstances, to meet the ends of justice and to prevent abuse of process of Court, subject to the limitation recognized with reference to exercise of power under Section 151 of the Code. Be that as it may. In this case, the applications were made before the conclusion of the

arguments.

19. We may add a word of caution. The power under section 151 or Order 18, Rule 17 of the Code is not intended to be used routinely, merely for the asking. If so used, it will defeat the very purpose of various amendments to the Code to expedite trials. But where the application is found to be bona fide and where the additional evidence, oral or documentary, will assist the Court to clarify the evidence on the issues and will assist in rendering justice, and the Court is satisfied that non-production earlier was for valid and sufficient reasons, the Court may exercise its discretion to recall the witnesses or permit the fresh evidence. But if it does so, it should ensure that the process does not become a protracting tactic. The Court should firstly award appropriate costs to the other party to compensate for the delay. Secondly the Court should take up and complete the case within a fixed time schedule so that the delay is avoided. Thirdly if the application is found to be mischievous, or frivolous, or to cover up negligence or lacunae, it should be rejected with heavy costs”.

The Apex Court has therefore held that the need for the Court to act in a manner to achieve the ends of justice (subject to the need to comply with the law) does not end when arguments are heard and judgment is reserved. The Apex Court further

held that if there is abuse of process of the Court, or if interests of justice require the Court do something or take note of something, the discretion to do those things does not disappear merely because the arguments are heard either fully or partly. The Apex Court has crystallized the proposition of law by observing that where the application is found to be bona fide and where the additional evidence, oral or documentary, will assist the Court to clarify the evidence on the issues and will assist in rendering justice, that the application is required to be allowed. The Apex Court therefore held that the Court is not powerless to consider the application for leading the additional evidence filed by the plaintiff but the same is circumscribed by the tests which have been laid down by the Apex Court”.

9. In the instant case, it appears that on the one hand, these petitioners moved an application stating that they would tender written notes of submissions and on the other hand, moved application Exh-60 praying for recalling of the no cross order so as to cross-examine the plaintiffs and lead their evidence. The Trial Court, after considering the conduct of these petitioners, has rejected Exh.60.

10. Issue, therefore, is as to whether, these petitioners could now be deprived of an opportunity of participating in the proceedings before the Trial Court. What would be the effect of depriving these petitioners of cross-examining the plaintiffs and being restrained from leading their own evidence. I find that a dispute as regards to the right of way with reference to an agricultural land is at issue. These petitioners are virtually rendered defenseless by the impugned order. It cannot be the case that these petitioners are deliberately ignoring the litigation since it would cause grave prejudice to these petitioners. In order to meet the ends of justice, a last chance could be granted to these petitioners by imposing costs so that there would be a fair trial in the pending suit.

11. In view of the above, this petition is partly allowed.

12. The impugned order dated 30.10.2017 is quashed and set aside.

13. Application Exh-60 is partly allowed with the following directions :

A) It is informed that the pending suit is posted on 17.12.2018 and therefore, these petitioners would cross-examine the plaintiff on the same date, subject to the availability of the plaintiff and subsequently, cross-examine the witness of the plaintiff without seeking any adjournment.

B) After the cross-examination of the plaintiff and his witness and subject to closing of the evidence by the plaintiffs, these petitioners would lead evidence without seeking adjournments.

C) These two petitioners would also deposit costs of Rs.12,000/- together on or before 15th December, 2018 before the Trial Court and the said amount shall be withdrawn by the respondents / plaintiffs in equal proportions, without conditions.

D) All contentions of the litigating sides are kept open.

(RAVINDRA V. GHUGE, J.)

vsm/-