

IN THE HIGH COURT OF JUDICATURE AT BOMBAY***CIVIL APPELLATE JURISDICTION*****WRIT PETITION (ST) NO. 26972 OF 2018****Pandurang Narayan Patil,****Since deceased,****through his legal heirs and legal representative****Smt.Laxmi Pandurang Patil & Ors.****..... Petitioners****VERSUS****Ankush Narayan Patil & Ors.****..... Respondents**

Mr.S.S.Patwardhan, i/b. Mr.Chetan G.Patil for the Petitioners.

Mr.Manoj A. Patil for the Respondent no.1.

CORAM : R.D. DHANUKA, J.**DATE : 25th OCTOBER, 2018****P.C.**

By this petition filed under Article 227 of the Constitution of India, the petitioners have impugned the order dated 2nd August,2018 passed by the learned trial judge below Ex.115 in Regular Civil Suit No.673 of 2011 *inter alia* praying for setting aside the order of 'no cross' passed by the learned trial judge.

2. The petitioners are the legal heirs of the original defendant no.1 who expired on 26th September,2014. On 16th July, 2013, there was an order of 'no cross' passed by the learned trial judge insofar as the original defendant no.1 is concerned. The original defendant no.1 had thereafter filed three applications before the learned trial judge *inter alia* praying for setting aside the said order of 'no cross' which came to be rejected by the learned trial judge. The original defendant no.1

thereafter expired on 26th September, 2014.

3. The original plaintiff thereafter applied for setting aside the order of abatement if any and to bring the legal heirs of the original defendant no.1 on record. Pursuant to the said application made by the original plaintiff on 19th October,2016, the petitioners were brought on record as the legal heirs of the original defendant no.1 in place of the original defendant no.1. The petitioners filed a pursis before the trial court adopting the statement filed by the original defendant no.1. On 17th July, 2018, the petitioners filed an application for setting aside the order of 'no cross'. The said application came to be rejected by the learned trial judge by the impugned order.

4. Mr.Patwardhan, learned counsel for the petitioners has placed reliance on the annexures to the writ petition and would submit that the trial court passed an order of 'no cross' on 16th July, 2013. Though the original defendant no.1 had filed applications before the learned trial judge after giving sufficient reasons, the learned trial judge did not set aside the said order of 'no cross'. The petitioners were brought on record only on 19th October,2016 in view of the demise of the original defendant no.1.

5. Learned counsel invited my attention to the application dated 17th July, 2018 made by his client for setting aside the order of 'no cross' which was passed during the lifetime of the defendant no.1. He submits that the learned trial judge ought to have taken liberal approach in the said application filed by the legal heirs of the original

defendant no.1 and could have imposed the conditions upon them for setting aside the said order of 'no cross'.

6. Mr.Patil, learned counsel for the original plaintiff submits that the original defendant no.1 had not disclosed in the second and third application for setting aside the order of 'no cross' that the earlier application filed by him was rejected by the learned trial judge. He submits that the in application dated 17th July, 2018, the petitioners had not rendered any reasons as to why the order of 'no cross' passed as far back as on 16th July, 2013 shall be quashed and set aside. He submits that in view of such conduct on the part of the petitioners, this court shall not interfere with the impugned order passed by the learned trial judge on 2nd August,2018.

7. It is not in dispute that though the original defendant no.1 had filed the written statement, his advocate could not remain present when the order of 'no cross' was passed by the learned trial judge on 16th July, 2013. Though the original defendants had recorded various reasons as to why his advocate was absent when the order dated 16th July, 2013 came to be passed by the learned trial judge, he rejected all the applications filed by the original defendant.

8. Insofar as the petitioners are concerned, in view of the demise of the original defendant no.1, they were brought on record in place of the original defendant no.1 only on 19th October,2016. The petitioners have adopted the written statement filed by their predecessor by filing pursis before the learned trial judge.

9. The application came to be filed by the petitioners only on 17th July, 2018 for setting aside the order of 'no cross' which came to be rejected.

10. In my view, in these circumstances, the learned trial judge ought to have given an opportunity to the petitioners who are the legal heirs of the original defendant no.1 and who have adopted the written statement filed by the defendant no.1 to cross examine the plaintiff's witnesses.

11. I am not inclined to accept the submission of the learned counsel for the original plaintiff that no case was made out by the petitioners for setting aside the order of 'no cross'. It is not in dispute that the learned trial judge has not closed the matter for pronouncement of the judgment and the said suit is still pending. In the interest of justice, an opportunity has to be given to the petitioners to for cross examine the witnesses of the original plaintiffs.

12. I, therefore, pass the following order :-

(a) Impugned order dated 2nd August,2018 passed by the learned trial judge rejecting the application (Ex.115) filed by the petitioners is quashed and set aside.

(b) The said application (Ex.115) filed by the petitioners is allowed.

(c) The petitioners are permitted to cross examine the witnesses of the plaintiffs without seeking any further adjournment in the matter.

(d) The learned trial judge shall not grant adjournment to the petitioners in any circumstances.

13. Writ petition is allowed in the aforesaid terms. There shall be no order as to costs.

14. The parties as well as the learned trial judge to act on the authenticated copy of this order.

[R.D. DHANUKA, J.]