

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

WRIT PETITION NO.124 OF 2018

D's Design Shop & Anr.

...Petitioners

Vs.

Smt.Krishna w/o.Hansraj Khatau & Ors.

...Respondents

Mr.Sameer Kolge for Petitioners.

Ms.E.A. Gonsalves for Respondents.

Coram : G.S.KULKARNI, J

Date : 1st FEBRUARY 2018

P.C.

Heard learned Counsel for the parties.

2. By this petition, the petitioners, who are original defendant Nos.2 and 3 in R.A.E. Suit No.297/419 of 2016, have challenged the order dated 20th December 2017 passed by the learned Judge, Small Causes Court at Mumbai, whereby the application of the petitioners below Exhibit 76 has been partly allowed to the extent of allowing the petitioners to lead their evidence within one week and rejected the prayer of the petitioners to cross-examine the plaintiffs' witness No.1. Learned trial Judge, in the impugned order, has observed that

on 7th October 2016, cross-examination of plaintiff was completed on behalf of defendant No.1. Defendant Nos.2 and 3 had remained absent and thus, cross-examination to be conducted on behalf of the defendant Nos.2 and 3 stood closed.

3. In the application as moved on behalf of the petitioners below Exhibit 76, the petitioners contended that the Advocate appearing on their behalf at the relevant time had not informed the petitioners about closing of cross-examination of PW-1 on 7th October 2016 and thus, for want of knowledge to that effect, the petitioners could not cross-examine the plaintiffs' witness No.1. It was thus submitted that an opportunity to cross-examine the plaintiffs' witness No.1 be granted. In the impugned order, the learned trial Judge has refused to accept the contention, for the reason that almost for more than one year, the petitioners did not move any application and suddenly when the suit had progressed in December 2017 for final hearing, moved a belated application and thus, held that such a permission cannot be granted.

4. Having heard learned Counsel for the parties and also having perused the application below Exhibit 76 filed on behalf of the petitioners, it is quite clear, that by the impugned order, the application of the petitioners was partly allowed in as much as defendant Nos.2 and 3 were permitted to lead their evidence within

one week. The trial is thus at the stage of evidence. It appears that the petitioners, who are sub-tenants, have now appeared through another Advocate. Further the averment as made by the petitioners in paragraph 3 of the application that the petitioners were never informed that the cross-examination of PW-1 stood closed as against the petitioners, also would be required to have some credence considering the reply which has been filed on behalf of the plaintiffs which clearly says that the defendant Nos.2 and 3 never appeared in the matter and they were bound and liable to keep track of the matter. This shows that it is not the case of the respondents/ plaintiffs that the defendant Nos.2 and 3 had earlier remained present in the matter and/or were aware of the proceedings. If that be the case, then some allowance was required to be made considering the interest of justice. No doubt that learned Counsel for the respondent is correct in his contention that there is a delay on the part of the petitioners in approaching the trial Court however, taking into consideration that by the impugned order, the learned trial Judge has permitted the petitioners to lead their evidence, in my opinion, an opportunity ought to be granted to the petitioners to cross-examine the plaintiffs' witness No.1. It would therefore be necessary and in the interest of justice that the petitioners are permitted to cross-examine the plaintiffs' witness No.1. Petition is, therefore, required to be allowed. As noted above, as there was delay on the part of the petitioners to approach the Court by making

an application in question, some cost would be required to be imposed on the petitioners as the suit had substantially progressed. Hence, the following order:-

ORDER

- i. The impugned order dated 20th December 2017 is set aside;
- ii. The petitioners are permitted to cross-examine the plaintiffs' witness No.1 on any convenient day to the parties which the learned trial Judge may fix within two weeks from today;
- iii. The petitioners undertake that they will restrict the cross-examination to one hour and complete the same. The statement is accepted.
- iv. The above order shall be subject to the condition of the petitioners paying costs of Rs.50,000/- to the respondents/plaintiffs on or before cross-examination of plaintiffs' witness No.1 is undertaken. Cost is condition precedent.
- v. The petition is accordingly allowed in the above terms. No costs.

(G.S.KULKARNI, J)