

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

WRIT PETITION NO. 4339 OF 2017

Prakash Premnath Gaikwad,	]	
Adult, Age 47 years,	]	
Occupation : Agriculture & Business,	]	
Residing at : Room No.2, Nair Chawl,	]	
Damu Nagar, Opposite Last Bust Stop,	]	
Akurli Road, Kandivali (East),	]	
Mumbai - 400 101.	]	... Petitioner

Versus

1)	Rolf D'Souza,	]	
	Adult, Age not known,	]	
	Occupation Service,	]	
	Residing at : 8/1, Dave Dall,	]	
	C.N.S. 158, D'monte Lane,	]	
	Orlem, Malad (West),	]	
	Mumbai - 400 064	]	
2)	Austin Luis Demello,	]	
	Adult, Age not known	]	
	Occupation : Business,	]	
	Residing at : Amar Niwas,	]	
	Block No.2, Somwari Bazar,	]	
	Malad (West), Mumbai - 400 064	]	... Respondents

- Mr.Amit Atul Tungare a/w. Ms.Gauravi Adhikari for Petitioner.
- Mr.Antohny T. Marques for Respondent No.1.

CORAM : DR.SHALINI PHANSALKAR-JOSHI, J.

DATE : 19th MARCH, 2018.

ORAL JUDGMENT :

1] Rule. Rule is made returnable forthwith. Heard finally, at the stage of admission itself, by consent of Mr.Tungare, learned counsel for the Petitioner, and Mr.Marques, learned counsel for Respondent No.1.

2] By this Writ Petition, filed under Article 227 of the Constitution of India, the Petitioner is challenging the order dated 4th January 2017 passed by the Civil Judge Junior Division, Wada, below the Application at Exhibit-56 in Regular Civil Suit No.13 of 2012.

3] The Application at Exhibit-56 was moved by the present Petitioner, who is Defendant No.2 before the trial Court, with a request to set-aside 'evidence closed order' passed by the Court against him on 6th August 2016 at Exhibit-1.

4] The grievance of the Petitioner is that, as he was suffering from jaundice, he could not attend the Court and as a result thereof, this order dated 6th August 2016 came to be passed by the trial Court of closing his evidence. It is urged that in the said suit, he has also filed his counter claim and therefore, if the opportunity of leading evidence is not given to him, he will suffer irreparable loss and hardship and hence, the trial Court should have set-aside the order of evidence

closed and given him an opportunity to lead his evidence. It is further submitted that, this Court may give such opportunity and the Petitioner undertakes to complete his evidence and proceed with the final argument, within the time as may be stipulated by this Court, and it can be also made subject to the costs.

5] Per contra, learned counsel for Respondent No.1/Original Plaintiff has strongly supported the order passed by the trial Court and resisted the request made by learned counsel for the Petitioner for setting aside the impugned order and giving an opportunity to the Petitioner to lead his evidence. It is submitted by learned counsel for Respondent No.1 that the trial Court has passed a reasoned order giving the valid and satisfactory reasons as to how the Petitioner is trying to prolong and protract the hearing of the suit and despite ample opportunities, has failed to lead the evidence. According to learned counsel for Respondent No.1, even if, now, the Court makes the hearing of the suit time bound, there is no guarantee of the Petitioner proceeding with the suit diligently. Respondent No.1 is not interested in getting the costs but in having the matter decided. According to him, no supporting document is produced on record, like the Medical Certificate to show that the Petitioner was suffering from jaundice, and very conveniently he is blaming his own Advocate for

not communicating date to him. According to learned counsel for Respondent No.1, therefore, no reason is made out to set-aside the order of evidence closed, passed against the Petitioner.

6] I have given my thoughtful consideration to the submissions advanced at bar and also perused the impugned order passed by the trial Court.

7] As observed by the trial Court, Respondent No.1, the original Plaintiff had closed his evidence by filing pursis at Exhibit-52 on 28th December 2015. Thereafter, the suit was adjourned from time to time till 15th June 2016. On that day, the present Petitioner had moved an application at Exhibit-53 for seeking adjournment. The said application came to be allowed, as a “very very last chance” and the matter was adjourned on 22nd July 2016. Again on that day, the Petitioner had moved another application below Exhibit-54 seeking adjournment. That application also came to be allowed as a “very very last chance” and the matter was adjourned to 6th August 2016. On that day also, the Petitioner moved third application at Exhibit-55. The said application was naturally rejected by the trial Court and the order of 'evidence closed' was passed against him.

8] It is a matter of record that thereafter also, the suit came

to be adjourned for final argument on 20th August 2016, 7th September 2016 and 19th September 2016. However, on two earlier dates, the Petitioner did not remained present. He appeared only on 19th September 2016 and filed this application.

9] In this situation, in my considered opinion, the trial Court was fully justified in rejecting such application for setting aside the order of 'evidence closed' in the light of the callous and careless attitude of the Petitioner throughout the proceeding. If the matter remained adjourned from 28th December 2015 till 6th August 2016 i.e. for a period of about more than seven months and that too, when it has already become part-heard and despite the repeated adjournments, then the trial Court was justified in passing the order of 'evidence closed'. Thereafter also, for two dates, if the Petitioner did not remain present to set-aside the said order, then no fault can be found in the impugned order passed by the trial Court, if the trial Court has refused to set-aside the said order. As rightly observed by the trial Court, the Petitioner had availed sufficient opportunities including the last two opportunities for leading his evidence, but failed to adduce such evidence.

10] Even as regards the reason given by the Petitioner that he was suffering from jaundice, he has not given the details as to when he

fell sick; the treatment of which Doctor he was taking and when he became fine. The Medical Certificate is also not produced on record. It becomes too difficult to accept that during all this period of 6 to 8 months, the Petitioner could not contact his Advocate or remain present to adduce his evidence.

11] The trial Court has in this respect rightly considered the dictum laid down by the Hon'ble Apex Court in the case of *Shiv Cotex V/s. Tirgun Auto Plasto P. Limited, 2011(4) RCR (Civil) 807*, wherein the Hon'ble Apex Court has laid down the guidelines as to how to exercise the discretionary jurisdiction in the matter of giving adjournments.

12] In the words of the Hon'ble Apex Court :

“No litigant has a right to abuse the procedure provided in the CPC. Adjournments have grown like cancer corroding the entire body of justice delivery system. It is true that cap on adjournments to a party during the hearing of the suit provided in proviso to Order XVII Rule 1 CPC is not mandatory and in a suitable case, on justifiable cause, the Court may grant more than three adjournments to a party for its evidence but ordinarily the cap provided in the proviso to Order XVII Rule 1 CPC should be maintained. When we say 'justifiable cause' what we

mean to say is, a cause which is not only 'sufficient cause' as contemplated in sub-rule (1) of Order XVII CPC but a cause which makes the request for adjournment by a party during the hearing of the suit beyond three adjournments unavoidable and sort of a compelling necessity like sudden illness of the litigant or the witness or the lawyer; death in the family of any one of them; natural calamity like floods, earthquake, etc. in the area where any of these person reside; as accident involving the litigant or the witness or the lawyer on way to the court and such like cause. The list is only illustrative and not exhaustive. However, the absence of the lawyer or his non-availability because of professional work in other Court or elsewhere or on the ground of strike call or the change of a lawyer or the continuous illness of the lawyer (the party whom he represents must then make alternative arrangement well in advance) or similar grounds will not justify more than three adjournments to a party during the hearing of the suit. The past conduct of a party in the conduct of the proceedings is an important circumstance which the Courts must keep in view whenever a request for adjournment is made. A party to the suit is not at liberty to proceed with the trial at its leisure and pleasure and has no right to determine when the evidence would be let in by it or the matter should be heard. The parties to a suit-whether plaintiff or defendant-must cooperate with the Court in ensuring

the effective work on the date of hearing for which the matter has been fixed. If they don't, they do so at their own peril. Insofar as present case is concerned, if the stakes were high, the plaintiff ought to have been more serious and vigilant in prosecuting the suit and producing its evidence. If despite three opportunities, no evidence was let in by the plaintiff, in our view, it deserved no sympathy in second appeal in exercise of power under Section 100 CPC. We find no justification at all for the High Court in upsetting the concurrent judgment of the Courts below. The High Court was clearly in error in giving the plaintiff an opportunity to produce evidence when no justification for that course existed."

13] Therefore, the Court can grant such opportunity provided there is a justifiable cause. Here in the case, no justifiable cause is shown. It become difficult to accept that for a period of more than 8 months, the Petitioner could not contact his Advocate and that too, on the ground that, he was suffering from jaundice, and when has not given any supporting document to that effect. The trial Court has granted several wholesome opportunities to the Petitioner to adduce the evidence but he has failed to do so.

14] In the case of *Salem Advocate Bar Association, Namil Nadu V/s. Union of India*, AIR 2005 SC 3353, the Hon'ble Apex Court has,

while examining the scope and validity of several sweeping amendments brought by the 1999 Amendment to the Code of Civil Procedure, 1908 effective from 1st July 2002 and while dealing with amended order 17 and especially Rule-2 C.P.C., has observed as follows:

“We may, however, add that grant of any adjournment let alone first, second or third adjournment is not a right of a party. The grant of adjournment by a Court has to be on a party showing special and extra-ordinary circumstances. It cannot be in routine. While considering prayer for grant of adjournment, it is necessary to keep in mind the legislative intent to restrict grant of adjournments.”

15] Therefore, if one considers the very object of making Amendment in the Code of Civil Procedure as regards the adjournments, if one also considers the dictum laid down by the Hon'ble Apex Court in the above said decisions, then it follows that, no indulgence can be shown to the Petitioner, whose conduct all along has remained callous and negligent. Allowing further indulgence to the Petitioner will be as good as frustrating the very object of the Amendment made in the C.P.C.. The generosity of the Court cannot be misused for unjustifiable adjournments. The Court cannot be taken for granted or taken for ride on the spacious plea that the litigant was

suffering from some illness and without even bothering to support or justify such plea.

16] Therefore, if the impugned order, which is passed by the trial Court, after considering all the aspects of the case, if set-aside in the writ jurisdiction, it will be an injustice to the other side, namely, the Respondent No.1/Plaintiff of the suit, who expects the Court to decide his suit as expeditiously as possible and at-least not want the matter to be taken back to the same position, though he has remained throughout the diligent in prosecuting the said suit.

17] The impugned order, therefore passed by the trial Court, by exercising its discretion cannot be disturbed. The Writ Petition being devoid of merits, stands dismissed.

18] Rule discharged.

[DR.SHALINI PHANSALKAR-JOSHI, J.]