

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

WRIT PETITION NO.12966 OF 2016

Ravasaheb Ganpati Patil

...Petitioner

V/s.

Bandu Ramchandra Patil

....Respondent

Mr. Saurabh Oka for the Petitioner.

Mr. Nagesh Y. Chavan for the Respondent.

CORAM : M.S. SONAK, J.

DATE : 1st MARCH, 2018

P.C.

1. Rule. Rule made returnable forthwith. Heard finally with the consent of the parties.
2. The challenge in this petition is to the order dated 01.08.2016 made by the learned Trial Judge, dismissing the petitioner's application at Exh.43 to set aside the "No cross" order made on 11.07.2016, in so far as cross examination of PW-2 is concerned.
3. Mr. Saurabh Oka, the learned counsel for the petitioner submits that on 07.07.2016 there was a death in the family of the

petitioner. Therefore, the petitioner could not inform his advocate about his inability to either attend the proceedings on 11.07.2016 or to impart instructions in the matter of cross examination of PW-2. Mr. Oka submits that the application for setting aside of “No cross” order dated 11.07.2016 was filed on 15.07.2016 i.e. hardly within 5 days from the date after such order was made. He submits that the learned Trial Judge, in this circumstance, should have granted opportunity to the petitioner to cross examine PW-2. He submits that the highest costs could have been imposed. Mr. Oka on behalf of the petitioner offered costs of Rs.10,000/-, taking into consideration the time lapse as also the expenses which the respondent may have had to incur to defend the present petition.

4. Mr. Nagesh Y. Chavan, the learned counsel for the respondent submits that in so far as cross examination of PW-1 is concerned, again, on account of lack of diligence on the part of the petitioner, a “No cross” order was made in the year 2014. He submits that this order has not been challenged. He submits that at least in the light of 2014 order, greater diligence was expected from the petitioner. He points out that the petitioner is financially well placed and had also taken out proceedings to seek right of pre-emption in respect of

the suit property. After the failure of such proceedings, the petitioner was interfering with the rights of the respondent to the suit property, and therefore, the respondent was constrained to institute the suit seeking for injunction. Mr. Chavan submits that taking into consideration all these facts, this petition may be dismissed.

5. Mr. Chavan also submits that the real reason for seeking adjournment was the pendency of the appeal against order of temporary injunction. He points out that such appeal is still pending and there is no stay on further proceedings in the suit. He submits that this is additional reason why no indulgence will be shown to the petitioner.

6. Upon consideration of rival contentions and perusal of the material on record, the impugned order can be set aside, subject to payment of costs as offered by the petitioner.

7. There is merit in the submissions of Mr. Chavan that the pendency of appeal against the temporary injunction order has nothing to do with the trial in the suit proceedings. Therefore, on the ground of such pendency, no adjournment could have been applied for. However, some consideration would require to be shown

to the submission of Mr. Oka that on 07.07.2016 i.e. hardly 4 days prior to the date on which the matter was posted for cross examination of PW-2, there was a death in the petitioner's family. It is clarified that the petitioner's daughter's mother-in-law had expired on 07.07.2016. The submission of Mr. Oka that for this reason, the petitioner was unable to impart instructions to his advocate in the matter of cross examination of PW-2 is plausible and was required to be considered. Besides, if in this case, application to set aside “No cross” order made was hardly within 5 days of the order which again indicates no lack of diligence. In such a situation, “No cross” order can be set aside, no doubt, subject to payment of costs.

8. In this case, even if the costs were not to have been offered by the petitioner, this Court, would have been inclined to impose perhaps higher costs. This is because without any default on the part of the respondent, they are required to attend the proceedings in this Court and further it is their suit which has been unduly prolonged.

9. On cumulative consideration of the aforesaid facts and circumstances, the impugned order dated 01.08.2016 is set aside. The petitioner's application at Exh.43 is allowed. The “No cross”

order dated 11.07.2016 is set aside and the petitioner is granted liberty to cross examine PW-2 on the date to be appointed by the learned Trial Judge. It is made clear that, on the appointed date, the petitioner or his advocate will proceed with the cross examination without seeking any unnecessary adjournments. The order is set aside subject to the petitioner depositing before the Trial Court a costs of Rs.10,000/- within a period of four weeks from today. Upon depositing, the respondent/plaintiff will be entitled to withdraw the said amount unconditionally. If the amount of costs are not deposited within a period of four weeks from today, this petition shall be deemed to have been dismissed with costs of Rs.10,000/- without further reference to this Court.

10. The Trial Court to ensure that such costs are thereafter paid by the petitioner to the respondent.

11. The rule is made absolute to the aforesaid extent.

12. All the concerned to act on an authenticated copy of this Order.

(M.S. SONAK, J.)