

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.14239 OF 2017

Sanjay Balaram Kene,	]	
Age : 34 years, Occ. Agriculture,	]	
R/at Bhal, Post – Badarli,	]	 Petitioner /
Tal. Ambernath, Dist. Thane.	]	(Org. Defendant)

Versus

Ananta Chandar Gaikwad,	]	
Age : 40 years, Occ. Agriculture & Business,	]	
R/at Tukaram Darshan Society,	]	
Gavali Nagar, Tisgaon,	]	 Respondent /
Kalyan (East), Dist. Thane.	]	(Org. Plaintiff)

Mr. Girish R. Agrawal for the Petitioner.

Mr. Shashank C. Mangle for the Respondent.

CORAM : DR. SHALINI PHANSALKAR-JOSHI, J.

DATE : 10TH JANUARY 2018.

ORAL JUDGMENT :

1. Rule. Rule is made returnable forthwith. Heard finally, at the stage of admission itself, by consent of Mr. Agrawal, learned counsel for the Petitioner, and Mr. Mangle, learned counsel for the Respondent.

2. By this Petition, filed under Article 227 of the Constitution of India, the Petitioner is challenging the order dated 29th November 2017 passed by the Civil Judge, Junior Division, Deorukh, below “Exhibit-66” in Regular Civil Suit No.47 of 2013.

3. Petitioner is the Original Defendant in the Suit. The application at “Exhibit-66” was filed by the Petitioner for setting aside the “No Cross” order passed by the Trial Court on 23rd February 2017, considering the repeated absence on the part of the Petitioner to remain present and even his Advocate being unable to secure the presence of the Petitioner and filing the pursis of no instructions. Therefore, after having regard to the entire conduct of the Petitioner, which was reflected in the 'Roznama', the Trial Court refused to set aside the order of “No Cross”; especially observing that, the reason given by the Petitioner that his father was suffering from paralysis was not supported with any document.

4. According to learned counsel for the Petitioner, in the said Suit, the Petitioner has also filed counter-claim and as he is residing in Kalyan and the Suit is pending in the Court of Deorukh, there was some difficulty for him to remain present and as a result thereof, earlier the order of “No WS” was filed and after it was set aside, the order of “No Cross” is filed. It is urged that, the interest of justice requires that this order of “No Cross” is set aside, so that the dispute between the parties can be decided finally, effectually and completely on merits.

5. Learned counsel for the Respondent submits that, the conduct of

the Petitioner does not deserve any indulgence. Earlier also, he has remained negligent and as a result thereof, the order of “No WS” was passed. Thereafter, again he remained absent and negligent, but kept the track of the proceedings on the Internet. Only when the things were at the last stage, he has appeared and put up some false excuse for setting aside of order of “No WS”. Therefore, according to learned counsel for the Respondent, the impugned order passed by the Trial Court, does not call for any interference.

6. There is definitely much substance in the submission advanced by learned counsel for the Respondent, as the 'Roznama' and the impugned order passed by the Trial Court clearly reflects that the conduct of the Petitioner throughout has been that of negligent and callous. From time to time, he has remained absent and even his Advocate could not secure his presence and was constrained to file the “No Instructions” pursis.

7. However, everything said and done, the fact remains that the matter pending before the Trial Court should be decided on merits and not on the technical grounds; as then only the controversy between the parties can effectually come to an end; especially when the hearing of the Suit is at the final stage. Hence, in the interest of substantive cause of justice, a last opportunity needs to be given to the Petitioner. The financial loss and the mental harassment suffered by the Respondent as

a result of the absence of the Petitioner can be compensated in terms of money. On this sole ground of advancing substantive cause of justice, the impugned order of “No Cross” passed by the Trial Court is set aside. It is done, of-course, subject to the heavy costs, as the Respondent herein is also the resident of Mumbai and he has to go from time to time on various dates to the Court at Deorukh, where the matter came to be adjourned on account of the repeated absence of the Petitioner.

8. The Writ Petition is, therefore, allowed. The impugned order passed by the Trial Court is set aside. In consequence, the order of “No Cross” is also set aside, subject to the Petitioner paying to the Respondent, or, depositing in the Trial Court, the costs of Rs.30,000/- for being paid to the Respondent, within a period of two weeks from the date of receipt of a copy of this order.

9. Thereafter, the Trial Court to expedite the hearing of the Suit.

10. Rule is made absolute in the above terms.

[DR. SHALINI PHANSALKAR-JOSHI, J.]