

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO.12097 OF 2018

GORAKSHANATH DADA UNDARE
VERSUS
THE STATE OF MAHARASHTRA AND OTHERS

...

Advocate for the Petitioner : Shri Pathan Zafar M.

AGP for Respondents 1 to 4 : Shri S.R.Yadav.

...

CORAM: RAVINDRA V. GHUGE, J.

DATE :- 04th February, 2019

Per Court:

1 Despite service of court notice on Respondent Nos.5 to 8, no appearance has been entered.

2 On 23.01.2019, the following order was passed :-

"1. Pursuant to the order of this Court dated 10.12.2018, the Petitioner issued the notice to Respondent Nos.5 to 8. The service affidavit is placed on record. The said Respondents have been served as per the tracking report obtained from the official website of the Department of Posts, Ministry of Communications, Government of India. However, no appearance has been entered on their behalf.

2 As a last chance, stand over to 04.02.2019. On the next date, if none causes an appearance for the individual respondent Nos.5 to 8, this petition would be considered in their absence.

3 The ad-interim relief granted earlier to continue."

3 I have heard the learned Advocate for the Petitioner/ original

Plaintiff and the learned AGP appearing on behalf of Respondent Nos.1 to 4.

4 The Petitioner is aggrieved by the order dated 10.07.2018 passed by the Trial Court by which, his application Exhibit 41 filed in RCS No.546/2016 has been rejected.

5 It is submitted that as the Petitioner is now more than 84 years old and since he is suffering from 49% hearing impairment, he would not be able to appear for the cross examination and his son could, therefore, be permitted to face the cross examination in his place. The Trial Court has rejected Exhibit 41 for the reason that the law does not permit such substitution.

6 I find that there is no provision under the Indian Evidence Act or the Code of Civil Procedure that an affiant could enter the affidavit in lieu of examination in chief before the Trial Court and on the ground of any disablement, his son could be substituted in his place to step into the witness box for the purpose of facing the cross examination. This being not permissible in law, the request of such nature cannot be entertained. The Trial Court has, therefore, rightly rejected Exhibit 41.

7 The learned Advocate for the Petitioner/ Plaintiff now submits, on instructions, that the affidavit entered by the Plaintiff can be discarded and ignored as he would not be stepping into the witness box to face the cross examination. Instead, the Plaintiff would proceed to

examine his witnesses on his behalf and his son would be his first witness.

8 In view of the above, this Writ Petition is disposed of. If the Petitioner produces his son as his first witness and in the event, there is no other legal impediment, he would be at liberty to lead evidence on behalf of the Plaintiff as is permissible in law.

kps

(RAVINDRA V. GHUGE, J.)