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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.2554 OF 2019

Jagannath Bhau Bhavake

..Petitioner.

V/s.

Ayub Lal Mutalwali & Ors.

..Respondents.

Mr.Kalpesh U. Patil for the Petitioner.

Mr.Vaibhav R.Gaikwad for the respondents.

CORAM: M.S.SONAK, J.

DATE : MARCH 12, 2019

ORAL JUDGMENT

Heard Mr.Kalpesh Patil, learned counsel for the petitioner and Mr.Vaibhav Gaikwad, learned counsel for the respondents.

2. Rule. Rule, made returnable forthwith. By consent of the parties, the matter is heard finally and disposed of.

3. Challenge in this petition is to the order dated January 10, 2019 made by the learned trial Judge closing the petitioner's

(original defendant) evidence on account of his failure to remain present and offer himself for cross-examination.

4. If the record is perused, then, it is clear that the petitioner has not at all been diligent in pursuing the matter. The affidavit in lieu of examination-in-chief was filed in the year 2013 and on an earlier occasion also, similar order was made on the assurance of the petitioner that the petitioner would present himself for cross-examination and the said order was recalled. Despite the assurances, the petitioner failed to remain present. Accordingly, there is no error as such in the impugned order.

5. However, Mr. Patil, learned counsel for the petitioner has pointed out that the petitioner is 74 years old. He submits that if one additional chance is granted, the petitioner will ensure that he shall present himself for cross-examination. He submits that this Court may fix a date and or on such further date as the learned trial Judge would appoint, the petitioner will positively remain present and offer himself for cross-examination.

6. Learned counsel for the respondents strongly opposed the grant of relief in this petition. He points out that the petitioner has actually delayed the suit by about five years on account of his

attitude of not remaining present and offering himself for the cross-examination.

7. Although, as noted above, there is no error in the impugned order, still the requirement of substantial justice prompts me to grant yet another chance to the petitioner. However, this shall be subject to payment of costs by the petitioner. In granting such a chance, due regard is had to the assurance given on behalf of the petitioner that the petitioner shall under no circumstances avoid remaining present and offering himself for cross-examination. Regard is also had to the position that the petitioner is 74 years.

8. The petition is, therefore, disposed of with the following order :-

- a) The impugned order dated January 10, 2019 passed below Exhibit 56 In Regular Civil Suit No.51/2010 is quashed and set aside and application Exhibit 56 is allowed;
- b) The petitioner to appear before the learned trial Judge on April 1, 2019 at 11.00 a.m. and offer himself for cross-examination;
- c) If that date is not convenient to the learned trial Judge, the

trial Judge may fix some other short date and the petitioner to positively remain present on that date and offer himself for cross-examination;

- d) The petitioner to pay costs of Rs.10,000/- on or before April 1, 2019;
- e) In case there is difficulty in payment of such cost to the respondents, the petitioner to deposit the cost in the trial Court positively on April 1, 2019;
- f) If no costs is paid or deposited on or before April 1, 2019, this petition shall be deemed to have been dismissed with costs of Rs.10,000/-;
- g) Trial Court then shall ensure that the costs of Rs.10,000/- are also recovered from the petitioner;
- h) Rule is made absolute in the aforesaid terms.

All concerned to act on the basis of an authenticated copy of this order.

(M.S.SONAK, J.)