

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.4528 OF 2016

Ramnath Shanakar Shinde ...Petitioner
vs.
Narayan Pandurang Shinde and Ors. ...Respondents

Mr. M.L. Patil, for the Petitioner
Mr. K.U. Nikam, for the Respondent.

CORAM : M. S. SONAK, J.

DATE : MARCH 27, 2019

JUDGMENT

. Heard Mr. Patil, learned counsel for the Petitioner and Mr. Nikam, learned counsel for Respondent No. 1- contesting Plaintiff.

2. Since Respondent No. 1 is the only contesting Respondent, service on other Respondents was already dispensed with.

3. Accordingly, Rule. Rule made returnable forthwith with consent of and request of the learned counsel for the parties.

4. The challenge in this Petition is to the following orders:

(a) The order dated 23rd February, 2016 by which the learned trial Judge rejected the Petitioner's application seeking leave to

amend the written statement.

(b) Order dated 26th April, 2016 by which the learned trial Judge rejected the Petitioner's adjournment application and made "no cross" order.

5. Mr. Patil, learned counsel for the Petitioner submits that the application for leave to amend the written statement was made only in order to alter the defenses already taken in the written statement. He submits that such amendment particularly when they relate to the written statement, are required to be granted. He submits that prejudice if any to the Plaintiff could not always be compensated by way of costs. He submits that because the Petition was pending in this Court, adjournment was applied for. He submits that there was really no justification as to why the learned Judge has declined the adjournment and thereafter makes "no cross" order dated 26th April, 2016.

6. Mr. Nikam, learned counsel for the Respondent No. 1 submits that application for leave to amend the written statement was taken out after three months of P.W.1 had been examined. He submits that there is no explanation whatsoever regards the

diligence on the part of the Petitioner. He therefore submits that the application seeking leave to amend the written statement was rightly rejected. Mr. Nikam, further submits that merely because the Petition was filed in this Court, the Petitioner was not entitled to seek adjournment before the learned trial Judge. He submits that there is really no case made out to interfere in the order dated 26th April, 2016. However, without prejudice, Mr. Nikam submits that even after the “no cross” order is to be set aside, it will be clarified that such order will not effect the testimony of P.W.1 which is expired on 1st July, 2017. Mr. Nikam submits that this is a fit case where costs are liable to be imposed upon the Petitioner if at this stage, the order dated 26th April, 2016 to be set aside.

7. The rival contentions fall for determination.

8. The Petitioner who is Defendant No. 2 applied for leave to amend much after the progress of the trial in the suit. By the time, the application was taken out, the Plaintiff had already examined 3 witnesses. The proviso to Order VI Rule 17 of Code of Civil Procedure, clearly provide that no application for amendment shall be allowed after the trial has commenced, unless the court comes

to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial.

9. In the present case if the Petitioner's application seeking leave to amend is perused. Then there is not even a wisper on the aspect of due diligence. Besides, from the nature of the amendment which is proposed, it is apparent that the same could have been applied much before the commencement of the trial. For these reason, there is no case made out to interfere with the impugned order dated 23rd February, 2016. In fact the learned trial Judge has appreciated the issue from the correct perspective and there is no jurisdictional error in making the impugned order. Accordingly, the challenge in so far as the order dated 23rd February, 2016 is concerned is rejected.

10. In so far as the order dated 26th April, 2016 is concerned, the same relates to cross examination of P.W.1. As noted earlier P.W. 1 has since expired on 1st July, 2017, at this stage, there is no point in setting aside the order dated 26th April, 2016. Accordingly, the Petition in so far as it relates to the challenge to the order dated 26th April, 2016 is also rejected.

11. Mr. Patil, learned counsel for the Petitioner states that that he is not aware as to whether “no cross” order, if any made, in relation to P.W. 2 and P.W.3. However, Mr. Nikam states that he has instructions that such “no cross” order was indeed made.

12. According to me, though there was no justification on the part of the Petitioner to seek adjournment on the ground of pendency of the present Petition, the order of “no cross” as against P.W. 2 and P.W. 3 appears to be rather harsh. Therefore, in the exercise of supervisory jurisdiction under Article 227 of the Constitution of India, notwithstanding the fact that there is no specific prayer in this Petition, the order of “no cross” as against P.W. 2 and P.W. 3 is set aside subject to Petitioner's paying costs of Rs. 10,000/- to Respondent No. 1 within a period of four weeks from today.

13. The cost may be paid to Respondent No. 1 or deposited before the learned trial Judge and Respondent No. 1 would then be at liberty to withdraw such costs unconditionally.

14. If the costs are indeed paid within four weeks, this order of

“no cross” qua P.W. 2 and P.W. 3 shall stand set aside. However, if the costs are not paid/deposited within four weeks then, even this order will stand confirmed.

15. The Petitioner should not delay the cross examination and be prepared for the cross examination on the date assigned by the learned trial Judge.

16. Rule in this Petition is made partly absolute to the aforesaid extent.

17. Parties to appear before the learned trial Judge on 29th April, 2019 at 11.00 am. and produce the authenticated copy of this order.

18. Since the suit is of the year 2004, the learned trial Judge is directed to dispose of the suit as expeditiously as possible and in any case before 31st December, 2019.

(M. S. SONAK, J.)