

Wakodikar

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION (STAMP) NO. 11100 OF 2019**

Sarju F. Kanu and others. Petitioners.

V/s.

India Finance and Construction Company
Pvt. Ltd. And others. Respondents.

Ms. Prachi Khandge I/b. M. P. Vashi Associates, Advocate for the
Petitioners.

Mr. Amogh Singh, Advocate for Respondent No.1.

Ms. Sheetal Mane, Advocate for Respondent Nos.2 and 3.

CORAM : M. S. SONAK, J.

DATED : 30th APRIL, 2019.

ORAL JUDGMENT :

1. Heard Ms.Prachi Khandge for the petitioners, Mr.Amogh Singh for respondent No.1 and Ms.Sheetal Mane for respondent Nos.2 and 3.

2. Rule. Rule is made returnable forthwith, with the consent of and at the request of Learned Counsel for the parties.

3. Challenge in this petition is the order dated 26/02/2019 and 29/03/2019, by which, the petitioners have been denied opportunity of examining an Architect as their witness.

4. The record indicates the suit in which the impugned order has been made, has been directed by this Court to be disposed of in a time bound manner. On 26/02/2019, on behalf of the petitioners/plaintiffs, the affidavit of an Architect was tendered, but as the Architect was not present, on behalf of the petitioners, a short adjournment was applied for to file affidavit of an Architect and to examine him. However, on this date, Learned Trial Judge, dismissed the application for adjournment and declared that the evidence of the petitioners/plaintiffs stands closed.

5. In the order dated 26/02/2019, however, the Learned Trial Judge made it clear that if on the next date prior to filing of the affidavit of defendant No.1, the plaintiffs to file affidavit of evidence of their Architect, it may be considered and for that purpose, the plaintiffs to take out Notice of Motion to set aside the order of forfeiture of the plaintiffs' evidence.

6. The petitioners/plaintiffs then took out Notice of Motion No.1343 of 2019 seeking recall of order dated 26/02/2019 by which, their right to adduce further evidence was forfeited. Alongwith this Notice of Motion, the petitioners filed affidavit of the Architect and sought for leave to examine such Architect.

7. By order dated 29/03/2019, the Learned Trial Judge has rejected the Notice of Motion No.1343 of 2019. Hence, challenge to the orders dated 26/02/2019 and 29/03/2019 in this petition.

8. If the impugned orders are perused, then, the main reason why the Learned Trial Judge has dismissed the Notice of Motion

No.1343 of 2019 is because, according to the Learned Trial Judge, the petitioners, by examining an Architect, are attempting to filling the lacuna in the evidence of the petitioners and the petitioners witnesses. According to me, this is not at-all correct reason and the Learned Trial Judge, was not justified in pre-judging the matter at this stage. Assuming without admitting that some lacuna had crept into the evidence of the petitioners' or the petitioners' witnesses, nothing prevents the petitioners from examining an Architect – an expert to depose on their behalf and thereafter, to explain the so-called lacuna. This was not at-all relevant consideration on the basis the petitioners' Notice of Motion should have been rejected.

9. Further reason set out in the impugned order is that there were directions from this Court to expeditiously dispose of the suit. No doubt, the petitioners, should have been more diligent and filed the affidavit of an Architect on 26/02/2019 itself. However, the record also appears that the petitioners were seeking a short adjournment because they have to collect certain documents which were necessary for preparing and filing the affidavit of the Architect. In such circumstances, short adjournment, was due and the same was not to have been denied. At the most, some costs to have been imposed upon the petitioners.

10. The Learned Counsel for the respondent No.1 points out that the affidavit of the Architect is completely irrelevant in the facts and circumstances of the present case. He points out that the petitioners are only interested in delaying the proceeding before the Trial Court. He points out that in the original pleadings, there was no reference of the examination of an Architect or no reference to such or any manner

which now the Architect seeks to depose. According to me, it is always open to the respondent No.1 to raise an objection at the appropriate stage on all such matters assuming such issues will need arise in the matter. However, the Learned Trial Judge, is not justified in forfeiting opportunity of the petitioners who lead further evidence of the Architect.

11. Accordingly, the impugned orders are liable to be set aside and are hereby set aside. The setting aside is however, subject to the petitioners paying costs of Rs.25,000/- in favour of TATA Cancer Memorial Institute at Parel. This is because Mr.Singh, the Learned Counsel for respondent No.1 on the basis of instructions from the representative of respondent No.1, has graciously stated that the costs to be paid in favour of the hospital which renders medical services free of charge to poor cancer patients.

12. The costs to be paid within a period of two weeks from today and necessary receipt to be produced before the Trial Court.

13. The affidavit of the Architect which is already accompanied the Notice of Motion now to be taken on record and opportunity will have to be granted to the defendants in the suit to cross-examine the said witness. It is made clear that the Architect/witness should remain present in the court on the appointed date and there will be no adjournment applied for by the petitioners on the ground of non-availability of the said Architect.

14. The rule is made absolute in the aforesaid terms.

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

this order.

16. The learned Counsel for the petitioners undertakes that within three days she will clear the office objections and pay the necessary Court Fees. Her statement is accepted.

(M. S. SONAK, J.)