

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**  
**NAGPUR BENCH : NAGPUR.**

**Writ Petition No.4825 of 2016**

**(M/s Shrushti Developers, Nagpur and others .vs. Ramesh Rambhau Bidkar  
and ors. )**

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Office Notes, Office Memoranda of Coram,  
appearances, Court's orders or directions  
and Registrar's orders

Court's or Judge's orders.

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Mr. V.A. Dhabe, Advocate for Petitioners.

Mr. P.S. Sadavarte, Advocate for Respondent Nos. 1 to 3.

**CORAM : Manish Pitale, J.**

**DATED : April 23, 2019.**

The original defendants have challenged two orders passed by the Court of Joint Civil Judge, Senior Division, Nagpur (trial Court) in the present writ petition, whereby order passed against the petitioners directing “no cross” has been confirmed. As a result, if the order of “no cross” continues to operate, the evidence of the respondents (original plaintiffs) shall remain unchallenged before the trial Court. By the impugned order, the trial Court has refused to recall its order of “no cross”, commenting upon the conduct of the petitioners during the proceedings before the trial Court.

2. The respondents herein filed suit for recovery of specific amount with 18% interest against the petitioners in the year 1999. The petitioners filed their written statement and opposed the contentions raised on behalf of the respondents. Evidence of witness of respondents was recorded and thereafter the matter

was kept for cross-examination of the witness by the petitioners. It appears that the petitioners failed to cross-examine the witness of the respondents leading to an order dated 06.11.2015 passed by the trial Court, forfeiting the right of the petitioners to cross-examine the said witness. The petitioners filed an application for setting aside of the said order of “no cross”. By order dated 15.12.2015, the trial Court allowed the application filed by the petitioners subject to payment of costs of Rs.1,000/- to the respondents before the next date of listing. It was further made clear by the trial Court that no further adjournment would be granted and that the petitioners were required to conduct the matter on each and every date without fail as this was last chance being granted to them.

3. It appears that the petitioners failed to cross-examine the witness of the respondents, despite the aforesaid order, as a consequence of which on 28.12.2015, again an order of “no cross” was passed by the trial Court against the petitioners. On 07.01.2016, the petitioners moved an application for recalling/setting aside of the aforesaid order dated 28.12.2015, stating that the counsel appearing for the petitioners was caught up in some other work and he could not reach the trial Court in time for conducting the cross-examination. By order dated 18.01.2016, the trial Court rejected the said application recording the previous conduct of the petitioners, coming to a conclusion that the petitioners did not deserve any indulgence. As a consequence, the order of “no cross”

dated 28.12.2015 continued to operate.

4. Thereafter, the petitioners moved another application dated 10.02.2016 seeking recall of the aforesaid order dated 18.01.2016, explaining the reasons why the said order was required to be recalled in the interest of justice. By the impugned order dated 06.06.2016, the trial Court rejected the said application, recording the fact that the petitioners did not deserve exercise of extra ordinary jurisdiction by the Court under Section 151 of the Code of Civil Procedure, 1908. The earlier orders of “no cross” passed against the petitioners were taken into account by the trial Court while passing the said order. It is against the aforesaid orders dated 18.01.2016 and 06.06.2016 that the petitioners have filed the present writ petition.

5. On 23.08.2016, this Court while issuing notice directed that the petitioners shall cross-examine the witness of the respondents on 29.08.2016, which was the next date of hearing before the trial Court. It was recorded that if the petitioners failed to cross-examine the witness of the respondents despite the said witness remaining present in Court, the right of cross-examination of the petitioners would stand forfeited. It has been brought to the notice of this Court by the learned counsel for the petitioners that on 29.08.2016, although the petitioners and their counsel were present before the trial Court from morning to 5.15 p.m., the respondent (plaintiff) failed to remain present in the Court despite repeated calls and his counsel also

remained absent. It is the contention of the petitioners that the aforesaid order dated 23.08.2016 passed by this Court in the present writ petition was brought to the notice of the respondent and despite that he chose to remain absent before the trial Court. The attention of this Court is also invited to subsequent orders passed by the trial Court on 15.07.2017 and 26.07.2017, wherein it is recorded by the trial Court that the respondent (plaintiff) has chosen to remain absent despite the fact that the petitioners and their counsel remained present in Court to conduct cross-examination. The trial Court in the said orders also directed the respondents to produce further witnesses but a statement was made on behalf of the respondents that they had already closed their evidence and they did not wish to lead further evidence in the matter. It is at this stage that the proceedings are pending before the trial Court.

6. On behalf of the petitioners, it has been contended that the trial Court ought not to have rejected the application for recall of order of “no cross” because it would be in the interest of justice that the petitioners are granted at least one chance to cross-examine the witness of the respondents because in the absence of such an opportunity, the case of the respondents (plaintiffs) would remain unchallenged before the trial Court, which would cause great prejudice to the petitioners. It is contended that after the aforesaid order dated 23.08.2016 was passed by this Court, the petitioners and their counsel had remained present before the trial Court to conduct cross-

examination of the witness of the respondents, but the respondents and their counsel deliberately remained absent before the trial Court and that in these circumstances, it would be in the interest of justice that the impugned orders are set aside and the petitioners are granted opportunity to cross-examine the witness of the respondents.

7. On the other hand, it is strenuously contended on behalf of the respondents that the petitioners do not deserve any sympathy and that they have taken the trial Court for a ride repeatedly. It is pointed out that the order dated 28.12.2015, forfeiting the right of the respondents to cross-examine the witness of the respondents, was not the first order of this kind and that the earlier order dated 06.11.2015 passed against the petitioners had been recalled only on the condition that the petitioners would conduct the case before the trial Court by remaining present on each date of listing and that despite such direction, the petitioners had chosen to delay the proceedings before the trial Court. Reliance was placed on judgment of the Hon'ble Supreme Court in the case of **Shiv Cotex .vs. Tirgun Auto Plast Pvt. Ltd.** reported in **2012(2) Mh.L.J. 439**, to contend that the order of "no cross" passed by the trial Court in the present case was justified and that no interference was expected from this Court exercising writ jurisdiction. On the question of the manner in which the writ jurisdiction could be exercised, reliance was placed on the judgment of the Hon'ble Supreme Court in the case of **Shalini Shyam Shetty**

**.vs. Rajendra Shankar Patil** reported in **2010 (6) Mh.L.J. 661.**

8. A perusal of the material on record in the present case shows that there were two orders of “no cross” passed against the petitioners, firstly on 06.11.2015 and thereafter on 28.12.2015. It appears that the petitioners failed to cross-examine the witness of the respondents despite the specific conditional order dated 15.12.2015 passed by the trial Court requiring the petitioners to remain present before the trial Court on each date so that the proceedings would be expedited. It has also come on record that the petitioners repeatedly filed applications for setting aside/recalling of orders of “no cross” mainly on the ground that their counsel was caught up in work in some other Court, due to which cross-examination of the witness of the respondents could not take place. These facts do show that the petitioners have been responsible for inviting the orders of “no cross” passed by the trial Court against them. This has certainly caused inconvenience to the respondents as suit for recovery of money filed by them in 1999 is still pending at the stage of evidence before the trial Court.

9. In these circumstances, much emphasis is placed on the above mentioned judgments of the Hon'ble Supreme Court on behalf of the respondents, to contend that the writ petition ought to be dismissed so that the order of “no cross” passed against the petitioners stands confirmed. A perusal of the judgment

of the Hon'ble Supreme Court in **Shiv Cotex .vs. Tirgun Auto Plast** (supra) relied upon by the learned counsel for the respondents shows that in the said case the High Court while exercising second appellate jurisdiction under Section 100 of the CPC, had set aside two concurrent judgments and orders and remanded the matter back to the trial Court, despite the fact that it had come on record that the defendants therein had not conducted the case properly before the trial Court and that they were to be held responsible for the concurrent decrees passed against them. In those circumstances, the Hon'ble Supreme Court found that the High Court had committed a grave error in exercising its power while considering a second appeal under Section 100 of the CPC.

10. In the present case, the facts are different because the suit is still pending before the trial Court and the question, is as to whether the circumstances are such that unchallenged testimony of witness of the respondents can be permitted to lead to a final disposal of the suit, in the face of "no cross" order passed by the trial Court against the petitioners. There can be no doubt about the fact that if the order of "no cross" passed by the trial court is confirmed, the petitioners would be left without much defence and that the situation would certainly lead to a walk over granted to the respondents. At the same time, the material on record does show that the petitioners are responsible for the situation they find themselves in and for the inconvenience that has been caused to the respondents.

11. But, when this Court passed order dated 23.08.2016 to test the bonafide of the petitioners and directed that the petitioners shall cross-examine the respondent (plaintiff) on the next date of hearing i.e. 29.08.2016, the respondent (plaintiff) chose to remain absent before the trial Court. The order dated 29.08.2016 passed by the trial Court, brought to the notice of this Court, shows that the petitioners and their counsel remained present from morning till 5.15 p.m. for cross-examining the witness of the respondent, who chose to remain absent despite repeated calls. Not only this, subsequent orders dated 15.07.2017 and 26.07.2017 passed by the trial Court show that the respondent (plaintiff) chose to remain absent repeatedly on further dates of listing before the trial Court, despite the fact that the petitioners and their counsel were present for cross-examining him. In fact, order dated 26.07.2017 passed by the trial Court records that the respondents submitted that they did not wish to lead any evidence as they had already closed their evidence. These events clearly show that now the respondents appeared to be taking advantage of the situation and they were seeking to ensure that their witness is not cross-examined so that the evidence led on their behalf remains unchallenged and the petitioners are faced with the situation where there would be lack of proper evidence in terms of cross-examination of the plaintiff to put forth their case.

12. In these peculiar facts and circumstances, this

Court is of the opinion that the petitioners should be granted one opportunity to cross-examine the respondent (plaintiff) and that a specific direction can be given for disposal of the suit before the trial Court in a time bound manner. The inconvenience caused to the respondents cannot be ignored and, therefore, appropriate direction regarding costs needs to be passed in the present matter.

13. The reliance placed on behalf of the respondents on the judgment of the Hon'ble Supreme Court in the case of **Shalini Shyam Shetty .vs. Rajendra Shankar Patil** (supra) can be of no avail to them because this Court is passing appropriate orders under writ jurisdiction to ensure that neither party takes the benefit of its own conduct and actions before the trial Court.

14. In view of the above, the present writ petition is disposed of in following terms:-

- (a) The impugned orders dated 18.01.2016 and 06.06.2016 passed by the trial Court are set aside.
- (b) Consequently, the order of "no cross" dated 28.12.2015 passed by the trial Court is recalled/set aside.
- (c) The petitioners are directed to cross-examine the respondent (plaintiff)/his witness on the next date of listing before the trial Court i.e. 29.04.2019. The said respondent/witness is directed to remain present before the trial Court on the said date for cross-examination.
- (d) The aforesaid permission to cross-examine is

granted to the petitioners subject to their paying costs of Rs.25,000/- (Rs. Twenty Five Thousand) to the respondents on or before 29.04.2019. If the respondents refuse to accept the said amount towards costs, the petitioners will be at liberty to deposit the same before the trial Court on or before 29.04.2019.

15. It is made clear that if the petitioners fail to comply with the aforesaid condition or they fail to cross-examine the respondent /plaintiff /witness on 29.04.2019 despite presence of the said respondent /plaintiff /witness, no further opportunity will be granted to the petitioners to conduct cross-examination.

16. Considering the fact that the suit filed by the respondents is of the year 1999, the trial Court is directed to dispose of the suit expeditiously and in any case within a period of six months from today.

**JUDGE**

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