

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 1691 OF 2020

Shailaja Purushottam Hegde & Anr.Petitioners.

Vs.

Sushila Raghu Shetty & Ors.Respondents.

Mr. Rakesh Kumar a/w Ms. Kajal Thallapalli i/by M/s. Legal Vision for the Petitioners.

Mr. N.P. Waghle for the Respondent No.1.

Mr. M.P. Pawar for the Respondent No.2.

CORAM : A. S. GADKARI, J.

DATE : 21st FEBRUARY, 2020.

P.C.:-

By the present Petition under Article 227 of the Constitution of India, the Petitioners-Plaintiffs have impugned Orders dated 6th February, 2020 passed on Exhibit 120-D and 24th January, 2020 passed in R.A.D. Suit No. 161 of 2009.

2 By an Order dated 24th January, 2020, the Trial Court directed that, the trial be proceeded without cross-examination of D.W. No. 1 by the Petitioners and by an Order dated 6th February, 2020, the Application preferred by the Petitioners below Exhibit 120-D for recalling of the said Order dated 24th January, 2020 has been rejected with costs.

3 Heard Mr. Rakesh Kumar, learned counsel for the Petitioners, Mr. Waghle, learned counsel for the Respondent No.1 and Mr. Pawar, learned counsel for the Respondent No.2. Perused the record.

4 The Petitioners have filed R.A.D. Suit No. 161 of 2009 for declaration that, they are monthly contracted tenants in the suit premises of the Respondent No.3 and for other consequential reliefs. The record indicates that, D.W. No.1 was under cross-examination by the Petitioners herein. That, D.W. No.1 was cross-examined by the Petitioners on 15th November, 2019 and the matter was adjourned for further cross-examination on 9th December, 2019. That, on 9th December, 2019, the concerned Court was busy in other matters and therefore, the present case was adjourned for further cross-examination of D.W No.1 to 7th January, 2020. On 7th January, 2020, at the request of the learned Advocate for the Petitioners, the matter was adjourned on 24th January, 2020, for further cross-examination of D.W. No.1. It appears from record that, on 24th January, 2020, neither the Plaintiffs nor their Advocate were remained present in time before the concerned Court and therefore, the Trial Court passed following Order at 12.30 p.m., which reads as under:-

“The Plff. and advocate are absent when repeatedly called out. No steps are taken. Witness and advocate are present. Hence, proceed without cross of the witness.”

5 The record further indicates that, subsequently on 24th January, 2020 itself, an Advocate holding for the Advocate on record appeared before the Court and made an oral request to recall the above Order. By that time, the said case was already adjourned to 6th February, 2020. The Trial Court in its later part of Roznama dated 24th January, 2020 has

observed as under:-

“Later on plttf Holding adv present.

*Case Adjourn for : Part Heard HCTB, Expedited, Sr. Citizens
Matters At 11 AM”.*

The record further indicates that, on 6th February, 2020, the Advocate for the Petitioners/Plaintiffs filed an Application below Exhibit 120D for recalling of Order dated 24th January, 2020. The Respondent/Defendant No.1 filed say to the said Application and objected for setting aside the said Order dated 24th January, 2020. The Trial Court by its Order dated 6th February, 2020 passed blow Exhibit 120-D has rejected the said Application on the ground that, the reason assigned in the said Application is not justified. That, the Plaintiff was not ready to cross-examine D.W. No.1 on that date also and therefore, the Petitioners/Plaintiffs did not show bonafide. The Application therefore, came to be rejected by the Trial Court.

6 The aforestated chronology of events is emerging from the Roznama and the record produced before me by the Petitioners. The learned counsel for the Respondents has no dispute about the genuineness of the record produced by the Petitioners and the chronology of the events narrated hereinabove.

7 A minute perusal of record would indicate that, after passing of the Order dated 24th January, 2020 at 12.30 p.m. on the said day itself an

Advocate holding for Advocate on record for the Plaintiffs appeared in the matter and orally requested to recall the Order of, no cross of the said witness. However, by that time the case was adjourned to 6th February, 2020.

It is to be noted here that, by non cross-examination of the D.W. No.1, the Petitioners are not gaining anything and they will be in fact ultimate losers in the Suit, instituted by themselves.

It is further to be noted that, on 24th January, 2020, the Petitioners so also the Advocate for the Petitioners were not deliberately absent, which fact can be clearly discerned from the record that, though belatedly, Advocate holding for Advocate on record appeared in the matter as per Roznama of that day.

8 In view thereof, and to meet the ends of justice, I am inclined to set aside both the Orders dated 6th February, 2020 passed below Exhibit 120-D and 24th January, 2020 passed in R.A.D. Suit No. 161 of 2009, subject to condition that, the Petitioners shall pay a costs of Rs.5,000/- to the High Court Legal Services Committee, Mumbai, having its account in the name of "*High Court Legal Aid Fund*" within a period of two weeks from today.

It is made clear that, payment of costs within the stipulated period shall be a condition precedent for setting aside the Orders dated 24th January, 2020 and 6th February, 2020.

9 In view thereof and for the reasons stated herein above, the Petition is allowed in terms of prayer clauses (b) and (c).

10 The Petitioners/Plaintiffs are directed to co-operate with the learned Judge of the Court of Small Causes at Mumbai in expeditious hearing of the R.A.D. Suit No. 161 of 2009 instituted by them in the year 2009.

(A.S. GADKARI, J.)

Sanjiv S.
Mashalkar

Digitally signed
by Sanjiv S.
Mashalkar
Date: 2020.02.29
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