

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH AT NAGPUR

Writ Petition No. 8155 of 2019
Rashmi Gaikwad & Anr. Vs. Ghanshyam Gharpuriya and Ors.

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

Court's or Judge's orders

Mr. S. Raisuddin, Advocate for the petitioners
Mr. S.G. Karmarkar, Advocate for the respondent No.1.

CORAM : MANISH PITALE, J.

DATED : MARCH 05, 2020

By this writ petition, the petitioners (original defendants No.2 and 3) have challenged order dated 26/08/2019, passed by the Court below of 10th Jt. Civil Judge (Senior Division), Nagpur, whereby application at Exh.87 filed by the petitioners to set aside order of no cross-examination, has been rejected.

2. The respondent No.1 (original plaintiff) has filed a suit for recovery of specific amount against the petitioners and respondents No.2 to 4. In the said proceedings, due to failure on the part of the defendants, including the petitioners herein to conduct cross-examination, an order of no cross-examination was passed against the defendants on 10/08/2017. The said order was subsequently set aside on 04/09/2017, as a result of which all the defendants including the petitioners herein had a chance to cross-examine the witness of respondent No.1 (original

plaintiff). The documents on record show that pursuant to the said order dated 04/09/2017, whereby no cross-examination order was set aside, the cross-examination of the witness of respondent No.1 was conducted on behalf of respondent (original defendant No.4) on 08/02/2018 and on behalf of the original defendant No.1 on 15/03/2018. The documents also show that cross-examination on behalf of respondent (defendant No.4) was finally concluded on 12/09/2018. It is an admitted position that the petitioners (original defendants No.2 and 3) failed to cross-examine the witness of the respondent No.1, despite opportunity granted by the Court below. As a consequence, the evidence of respondent No.1 was closed on 12/09/2018. Thereafter, the defendants, including the petitioners herein remain absent and so their evidence was closed on 01/03/2019. Thereafter, the defendants preferred an application at Exh.86, seeking permission to lead their evidence, which was allowed. Despite this, no evidence was led on behalf of the petitioners herein. Instead, they filed an application at Exh.87, purportedly for setting aside order of no cross and recalling the witness of respondent No.1 for cross-examination on behalf of the petitioners. The said application has been dismissed by the Court below by making the following observations.

“3] The suit is for recovery of substantial amount over Rs.24 lakhs. It appears that there is persistent default by defendant in conducting the case. The defendants were earlier permitted to present written statement upon condonation

of delay. As evidence began, there were no cross orders against defendants on 10/08/2017. It was set aside by order dt. 04.09.2017. Since then the defendants failed to conduct cross examination and the evidence proceeded further. Plaintiff closed his evidence on 12.09.2018. The defendants remained absent for evidence and as such their evidence was closed on 01.03.2019. The defendants thereafter preferred application at Exh.86 which is allowed subject to costs and matter was for defence evidence. However, since then defendant no.3 has not appeared for his further evidence. The present application instead is filed.

4] Considering the consistent defaults by defendants, it appears that the defendants merely want to prolong the matter. The present application for setting aside no cross examination order at the stage of defence evidence seem to be filed with similar intent. There is no explanation why application for setting aside no cross examination order was not filed earlier. There is no explanation why cross examination was not conducted earlier when opportunity was provided. The application as preferred is not just and proper. Hence, liable to be rejected. Hence, the following order.”

3. The learned counsel appearing for the petitioners submitted that the application at Exh.87, ought to have been allowed, in the interest of justice. On the other hand, the learned counsel appearing for respondent No.1 submitted that all the defendants have been adopted delaying tactics in the proceedings before the Court below from the beginning. It is submitted that although the earlier order of no cross was set aside on 04/09/2017 and ample opportunity was granted to the petitioners to cross-examine the

witness of defendant No.1, only the original defendants No.1 and 4 availed of the opportunity and conducted cross-examination. The petitioners throughout failed to cross-examine the witness of respondent No.1. On this basis, it was submitted that the writ petition deserves to be dismissed.

4. A perusal of the impugned order, particularly the above quoted observations and documents on record show that the petitioners (original defendants No.2 and 3), who are now claiming that they ought to have been granted opportunity to cross-examine the witness of respondent No.1 in the interest of justice, have been avoiding to take benefit of the opportunity granted by the Court below not just once but on more than one occasion. As is evident from the documents on record, there was order of no cross on 10/08/2017, which stood set aside on 04/09/2017 and yet, the petitioners failed to take benefit of the opportunity granted by the Court below for conducting cross-examination of the witness of respondent No.1. The evidence of respondent No.1 then stood closed on 12/09/2018 and the evidence of the defendants was also declared to be closed on 01/03/2019 and it is thereafter that the application at Exh.86 was moved on behalf of the petitioner.

5. The aforesaid facts clearly demonstrate that

the petitioners have been abusing the process of law and they are falsely trying to create an impression of being deprived of opportunity to cross-examine the witness of respondent No.1. The petitioners are entirely to blame for the situation for which they find themselves. In any case, the original defendants No.1 and 4 did take benefit of the opportunity granted by the Court below and they have already cross-examined the witness of respondent No.1. It appears that the defendants are deliberately delaying the proceedings before the Court below and the petitioners herein deliberately did not take advantage of the opportunity given by the Court below to cross-examine the witness of respondent No.1. In this situation, no error can be attributed to the Court below for having passed the impugned order.

6. For the said reasons, this Court declines to exercise writ jurisdiction in favour of the petitioners.

7. Accordingly, the writ petition is dismissed.

8. Considering the facts of the present case, the Court below is directed to expedite the proceedings and to dispose of the suit within a period of six months from today.

JUDGE