

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.4056 OF 2014

1. Banobi Abbaskhan Pathan
Age 47 years, Occu. Household,
2. Sherkhan Abbaskhan Pathan
Age 29 years, Occu. Nil,
3. Salman Abbaskhan Pathan
Age 25 years, Occu. Nil,
4. Hanif Abbaskhan Pathan,
Age 27 years, Occu. Nil,
All R/o. Ward No. 1, Fakirwada,
College Road, Shrirampur,
Taluka Shrirampur,
District Ahmednagar.

.. Petitioners
(Original Defendants)

Versus

Mastankhan Sirajkhan Pathan,
Age 47 years, Occu. Nil,
R/o. Ward No. 1, Fakirwada,
College Road, Shrirampur,
Taluka Shrirampur, District Ahmednagar ..

Respondent
(Original Plaintiff)

...

Mr. Ravindra M. Deshmukh, Advocate for Petitioners
Mr. Pushpak U. Gujrathi, Advocate holding for Mr. V. P. Latange,
Advocate for Respondent

...

CORAM : NITIN B. SURYAWANSHI, J.

DATE : 26-11-2021

JUDGMENT :-

Rule. Rule made returnable forthwith. Heard finally with
consent of both the parties.

2. This petition impugns order dated 20-11-2013 passed by the Civil Judge, Junior Division, Shrirampur, below Exhibit-36 in Regular Civil Suit No. 90 of 2011.

3. The respondent-plaintiff filed R.C.S.No. 90 of 2011 praying for permanent injunction against the petitioners-defendants.

In the said suit, application Exhibit-27 was filed by the plaintiff-respondent seeking time to lead evidence on the ground that important papers were not available. The application was granted subject to payment of costs of Rs.100/- by order dated 02-02-2013. Application Exhibit-28 was filed by the plaintiff seeking adjournment on the ground that he is not keeping well. The said application was allowed on 06-03-2013 subject to payment of costs of Rs.200/-. Thereafter, application Exhibit-29 was filed by the plaintiff seeking adjournment on the ground that his Advocate is not keeping well. The said application came to be allowed subject to costs of Rs.200/- by order dated 16-04-2013. Thereafter, application Exhibit-30 seeking adjournment was filed on 19-06-2013 on the ground that his Advocate is out of station, which was granted on the same day.

4. The defendants-petitioners filed application Exhibit-36, dated 22-08-2013 contending that the plaintiff has failed to deposit the costs as directed by the trial Court, therefore, he be restrained

from participating in the suit and his evidence be struck off.

The said application was resisted by the plaintiff-respondent contending that his financial condition is extremely poor and, therefore, he could not arrange for the said amount. If the plaintiff is not permitted to present his case before the Court, irreparable loss will be caused to him. The plaintiff submitted that he is ready to pay the costs.

The learned trial Court by the impugned order rejected the application. Hence, the present petition.

5. Heard the learned Advocate for the petitioners and learned Advocate for the respondent.

6. The learned Advocate for the petitioners strenuously submitted that since the plaintiff failed to deposit costs as directed by the trial court on 02-02-2013, 06-03-2013 and 16-04-2013, he has lost the right to participate in the suit. In support of his submissions, he relied on the decision of Hon'ble Apex Court, in the case of **Manohar Singh Versus D. S. Sharma and another, 2010(2) Mh.L.J. 515**. He submitted that trial court has failed to consider the decision relied on by the petitioners in proper perspective and has erred in passing the impugned order. He, therefore, submitted that the impugned order deserves to be set aside and writ petition is required to be allowed.

7. Per contra, learned Advocate for the respondent submitted that the due to poor financial condition of the plaintiff, he could not deposit the amount of costs at earlier point of time. However, he has shown his willingness to deposit the costs which is observed by the learned trial Court in the impugned order. According to him, Sections 148 and 151 of the Code of Civil Procedure, 1908 (CPC) empower the Court to extend time to deposit the costs. In this behalf, he relied on the decision of the Hon'ble Apex Court, in the case of ***Nashik Municipal Corporation Versus M/s. R. M. Bhandari, AIR 2016 Supreme Court 1090***. He therefore submitted that no fault can be found with the impugned order and urged that the writ petition, being devoid of any substance, may be dismissed.

8. It is matter of record that total cost of Rs.500/- was imposed on the plaintiff by the trial Court vide orders passed below Applications at Exhibit 27 dated 02-02-2013, Exhibit-28 dated 06-03-2013 and Exhibit-29 dated 16-04-2013. Thereafter, from time to time the plaintiff sought adjournments on various grounds, which were granted by the learned trial Court. By filing application Exhibit-37, the plaintiff applied for permission to deposit the costs in the court. On the same day, application Exhibit-36 was filed by defendants/petitioners with the above

prayer. In the light of this fact that the plaintiff has shown his willingness to deposit the costs on the day of which the application Exhibit-36 came to be filed, the learned trial court has recorded a finding that it is not case that the plaintiff is avoiding or refusing to deposit the costs to prolong the matter. The plaintiff has also filed his affidavit of examination-in-chief and the case is fixed for cross-examination of the plaintiff. The trial Court was of the view that the ratio in **Manohar Singh's** case (*supra*) is rendered in different facts of the case, therefore, trial Court in the facts of the matter rejected the application Exhibit-36.

9. In **Manohar Singh's** case (*supra*), the Hon'ble Apex Court has held that in view of the provision of Section 35-B of the CPC, the suit cannot be dismissed as a consequence of non-payment of costs. However, the plaintiff will have no further right to participate in the suit. In paragraph No.6 of the Judgment, it is observed :-

"6. But, the said provision will not come in the way of the Court, in its discretion extending the time for such payment, in exercise of its general power to extend the time under section 148 of Civil Procedure Code. Having regard to the scheme and object of section 35B, it is needless to say that such extension can be only in exceptional circumstances and by subjecting the defaulting party to further terms. No party can routinely be given extension of time for payment of costs, having regard to the fact that such costs under section 35B were itself levied for causing delay."

In the case in hand, admittedly, the plaintiff has filed Exhibit-37 on record, thereby, showing his willingness to deposit costs of Rs.500/-. The reason assigned by him of his precarious financial condition is also acceptable. In Nashik Municipal Corporation's case (*supra*), the Hon'ble Apex Court has held that, time can be extended for depositing the costs if the explanation offered by the appellant for delay is proper. The ratio in this ruling supports the case of respondents.

10. For the afore-stated reasons, I find no merit in the challenge raised by the petitioners to the impugned order, the learned trial court has assigned proper reasons and no case is made out to interfere with the order impugned in the petition. The writ petition is dismissed with no order as to costs. Rule is discharged.

(NITIN B. SURYAWANSHI)
JUDGE

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