

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

932 WRIT PETITION NO.8486 OF 2015

PRAKASH BANSILAL AGRAWAL DIED THROUGH LRS ILA
PRAKASHAGRAWAL AND OTHERS
VERSUS
THE ADMINISTRATOR AND ANOTHER

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Advocate for Petitioners : Mr Laharimanohar D.Vakil
Advocate for Respondent No. 1 : Mr Sachin S. Deshmukh
Advocate for Respondent No. 2 : Mr S.V. Adwant

CORAM : SANDEEP V. MARNE, J.
DATE : 8th DECEMBER, 2022

PER COURT :

1. This petition is unique and a peculiar case which came to be kept pending for the long period. Petitioners challenge order dated 4th July, 2015 passed by 2nd Joint Civil Judge Junior Division, Aurangabad rejecting their application for issuance of witness summons.

2. The suit has been instituted by petitioners' father in the year 1997 for specific performance of agreement. On account of failure of petitioners' father to lead evidence suit was adjourned on seven dates and the same came to be dismissed in default on 25th March, 2011. Petitioners' father applied for restoration of the suit on 25th April, 2011. Unfortunately, he expired on 26th February, 2020. After his death, his wife and sons, (present petitioners) are prosecuting the application for restoration of the suit.

3. Petitioners led evidence in support of application for restoration and evidence of both the parties was closed and the application was fixed for arguments. At that stage, petitioners moved an application dated 15.09.2014 for issuance of witness summons to the Managing Director, Ketu Constructions (I) Ltd. Mr Rajesh Garg and Shri Rajesh Joshi, owner of Hotel Joshi Palace. It is contended by petitioners that their father had travelled to Sangamner in connection with execution of contract with Ketu Constructions (India) Ltd. Petitioners contend that though the agreement executed with Ketu Constructions (India) Ltd. as well as bills of Hotel Joshi Palace are brought on record, in absence of examination of those two witnesses, those documents would not be exhibited and are likely to be ignored by the trial Court while deciding the application for restoration. For this reason, petitioner filed application for issuance of witness summons and the application was kept for arguments on 15.09.2014. The application has been turned down by the trial Court by order dated 4th July, 2015.

4. Mr Vakil, learned counsel for petitioners would submit that since petitioners' father is no more, the direct evidence of his travelling to Sangamner in connection with execution of contract at the time of dismissal of the suit cannot be adduced. He would submit that petitioners can prove travel plan of their father by examining the said two witnesses.

5. Per contra, Mr Adwant, learned counsel for respondent No. 2 would strenuously oppose the petition. He would submit that petitioners' father was extremely casual in prosecuting the suit. He failed to lead

evidence on seven consecutive dates and left no choice for the trial Court to dismiss the suit in default. He would further submit that even if petitioners prove the alleged travel plan of their father to Sangamner on one day, the same would not wipe out his conduct of failure to lead evidence on the previous six occasions.

6. Mr Adwant relies upon the Judgment of the Supreme Court in case of Shiv ***Cotex Vs Tirgun Auto Plast Private Limited and others*** reported in **(2011) 9 SCC 678** in which the Supreme court has held as under :

15. It is sad, but true, that the litigants seek – and the courts grant- adjournments at the drop of the hat. In the cases where the Judges are little proactive and refuse to accede to the requests of unnecessary adjournments, the litigants deploy all sorts of methods in protracting the litigation. It is not surprising that civil disputes drag on and on. The misplaced sympathy and indulgence by the appellate and revisional courts compound the malady further. The case in hand is a case of such misplaced sympathy. It is high time that courts become sensitive to delays in justice delivery system and realise that adjournments do dent the efficacy of the judicial process and if this menace is not controlled adequately, the litigant public may lose faith in the system sooner than later. The courts, particularly trial courts, must ensure that on every date of hearing, effective progress takes place in the suit.

7. Mr Deshmukh, learned counsel appearing for respondent No. 1 would also oppose the petition and support the contentions of Mr Adwant.

8. After hearing learned counsels for the parties, there is no manner of doubt that conduct of both the petitioners as well their father appear to be extremely casual while prosecuting the suit which has been pending since the year 1997. It is the case of petitioners in their

application for restoration that their father had travelled to Sangamner in connection with executing contract on account of which he could not remain present in the Court to prosecute the application for restoration. Once this fact was in the knowledge of petitioners, they ought to have led necessary evidence by seeking issuance of summons to the concerned witnesses. However, it appears that petitioners once again acted in a casual manner and did not submit any application to the Court for summoning to those witnesses at an appropriate stage. After the suit was fixed for arguments, petitioners took a *volte face* and filed application for summoning witnesses. This conduct exhibited by petitioners would actually disentitle them from seeking any equitable relief at the hands of this Court.

9. At the same time, present petition is pending for last 7 long years. Therefore, purely by way of indulgence, one more opportunity can be given to petitioners to lead evidence by summoning two witnesses. However, petitioners are required to be saddled with costs for the manner in which they acted in casual manner while prosecuting the application. Hence, I proceed to pass the following order :-.

ORDER

- (i) The order dated 4th July, 2015 passed by the 2nd Jt. Civil Judge, Junior Division, Aurangabad on application at Exh. 49 is set aside and the application filed by petitioners at Exh. 49 is allowed in terms of prayers made therein.

- (ii) Petitioners to pay costs of Rs.10,000/- each to respondent Nos. 1 and 2 within a period of four weeks from today.
- (iii) Costs to be deposited in the trial Court with liberty to respondent Nos. 1 and 2 to withdraw the same.
- (iv) Needless to state that failure to deposit costs within the stipulated time will result in rejection of the application Exh. 49.
- (v) Petitioners to keep both the witnesses present for the examination on 27th January, 2023 on which date, the trial Court shall proceed to examine both the witnesses.
- (vi) The writ petition is accordingly disposed of.

[SANDEEP V. MARNE, J.]

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