

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD.**

WRIT PETITION NO. 11490 OF 2021

Malan Dattatraya Shelke & Anr.

...Petitioners

Versus

Shamrao Apasaheb Gade & Ors.

...Respondents

.....

Smt. Anjali Dube (Bajpai), Advocate for the petitioners
Shri. P. G. Borade, AGP for respondent/State
Shri. R. A. Tambe, Advocate for respondent no. 1

.....

CORAM : PRITHVIRAJ K. CHAVAN, J.

DATE : MARCH 16TH, 2022

PER COURT : -

1. Learned AGP waives service on behalf of respondent no. 2 and 3. None present on behalf of respondent nos. 4 and 5, despite due service.

2. With the consent of the learned Counsel for the parties, the petition is taken up for final disposal at the stage of admission.

3. Undisputedly, the plaintiff's evidence has been closed. The affidavit in lieu of examination-in-chief *qua* defendant nos. 3 and 4 has been filed before the trial Court awaiting cross-examination on

behalf of the plaintiff/respondent.

4. The petitioners herein are the original defendants nos. 5 and 6, who have raised a plea of *bona fide* purchasers of the suit property for value without notice of the plaintiff's interest in the properties. An application moved on their behalf to cross-examine the plaintiff and/or his witnesses came to be rejected by the trial Court by passing an impugned order on 24.08.2021, below Exh. 124, by assigning reasons.

5. At the outset, Mrs. Dube, learned Counsel for the petitioners assailed the impugned order by contending that since the petitioners are *bona fide* purchasers of the suit property for value, their rights *qua* immovable property would be prejudiced if they are not given an opportunity to cross-examine the plaintiff. It is contended that due to health issues, the defendants could not appear before the trial Court to cross-examine the plaintiff. I am afraid, the argument is without any substance for the simple reason that it is not the contention of the Counsel that the Counsel representing the petitioners was prevented from cross-examining the plaintiff. The learned trial Court has, therefore, rightly observed in the impugned order, more particularly, in paragraph nos. 7 and 8, as to how the

petitioners herein failed to substantiate their absence before the trial Court without tendering any documentary evidence in respect of the alleged illness of the defendant nos. 5 and 6. It is apparent from the record that no applications for adjournment were filed by the defendants on 01.08.2018, 20.08.2018 and 16.07.2019 nor any attempt was made to cross-examine the plaintiff and his witnesses and, therefore, rightly 'no-cross' examination order was passed.

6. The learned trial Court *inter alia* observed that in view of the Order XVIII Rule 17 of the Code of Civil Procedure, there is a provision to recall the witness for examination, however, those powers can be exercised *suo motu* by the Court or also at the invitation of the either party. However, the powers are discretionary and are to be exercised with greatest care and caution only in view of peculiar circumstances. The learned trial Court has, therefore, rightly exercised it's discretion in rejecting the application.

7. Learned counsel for the contesting respondent no. 1 has supported the impugned order by contending that there is nothing in the order which would require interference of this Court under Article 227 of the Constitution of India. However, it is equally true that if the petitioners are the *bona fide* purchasers of the property

without notice, their valuable right will have to be adjudicated upon in the same suit without there being any further scope of multiplicity of litigation.

8. In that view of the matter, the impugned order will have to be quashed by imposing some costs upon the petitioners, which would compensate the respondent no. 1 and the controversy can be resolved finally without there being any further scope of litigation. Consequently, following order is expedient.

ORDER

- [i] The Petition is allowed.
- [ii] The impugned order passed by the Civil Judge Senior Division, Shrigonda, dated 24.08.2021, below Exh. 124, is set aside subject to costs of Rs. 20,000/- (Rupees Twenty Thousand) to be deposited before the trial Court on or before 25.03.2022.
- [iii] The petitioners shall appear before the Civil Judge Senior Division on 28.03.2022 at 11:00 am. The trial Court shall permit the defendant nos. 5 and 6 i.e. petitioners to cross-examine the plaintiff on the same day without granting any adjournment.
- [iv] Liberty to the petitioners to directly pay/deposit the costs into the bank account of the plaintiff through the RTGS.

The plaintiff may give his bank account details to the petitioners to facilitate the petitioners to directly deposit the amount of cost.

[v] The payment/deposit of amount in the account of the plaintiff shall be a condition precedent for plaintiff's cross-examination before the trial Court on 28.03.2022.

[vi] The trial Court shall, thereafter, proceed further with the matter as expeditiously as possible and shall make an endeavour to dispose off the same by the end of June-2022.

9. The Petition stands disposed off in the aforesaid terms.

[PRITHVIRAJ K. CHAVAN]
JUDGE