

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.1273 OF 2022

M/s Percept Holdings Pvt. Ltd. & Ors. .. Petitioners

Versus

Satish Dhirajlal Vithalani & Ors. .. Respondents

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Mr.Sharan Jagtiani, Senior Advocate with Mr.Rajesh Maravoor, Ms.Apurva Manwani i/b Maravoor Wamorkar & Co. for the Petitioners.

Ms.Ranjana Parikh i/b Mr.Suraj Shah for the Respondents.

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CORAM: RAVINDRA V. GHUGE, J.
DATED : 10th FEBRUARY, 2022

P.C:-

1. This is yet another petition filed by some of the defendants in T.E.&R.Suit No.5/6 of 2008. Earlier, this Court (Coram : Ravindra V. Ghuge, J.) had passed orders on 20/01/2022 in Writ Petition No.611 of 2022 with Writ Petition (St) No.24321 of 2022 and on 04/02/2022 in Writ Petition No.983 of 2022. While passing these two orders, I have specifically referred to the order passed by the Hon'be Supreme Court in Special Leave to Appeal (C) No.33118 of 2018 dated 04/01/2019 and the order dated 20/11/2021 (Coram : A.S.Gadkari, J.) in Writ Petition No.4594 of 2014 as well as a subsequent order passed by the same Court on 03/12/2021 in Writ Petition No. 4594 OF 2014. Today, I have been shown one more order dtd.24/09/2019 passed by this Court (Coram : D.S.Naidu, J.) in Writ Petition No.4594 of 2014.

2. The net result of the order dated 03/12/2021 is that the above mentioned suit has to be decided on or before 02/12/2023.

3. It would be gainsaid that a complete trial in a suit is always in the interest of justice, albeit, not at the cost of time, if any litigant is found to be delaying the matter on account of self serving purposes or with oblique motives.

4. The issue in this petition is about an Advocate representing all the petitioners before this Court i.e. defendant Nos.39, 54, 55, 59, 60, 62, 100, 102 to 106, 108, 110, 113, 119 and 124, who had remained absent, when in the midst of the cross-examination of PW 1 on 20/9/2021. He had to proceed with the cross-examination keeping in view the directions issued by the Hon'ble Supreme Court and the directions issued by this Court by orders dtd. 20/11/2021 and 3/12/2021. The representative of the defendants is said to have mentioned the matter at 3.45 p.m. before the trial Court praying for a pass-over and thereafter, disappeared. These defendants, represented by M/s. Maravoor Wamoorkar & Co., were not represented before the Court. After waiting for a long time in the day-to-day hearing schedule of the suit, the trial Court passed an order at 4.55 p.m. on the same date, forfeiting the right of these defendants to further cross-examine PW 1.

5. On 21/09/2021, an application (Exh.1203) was filed by these defendants praying for the recalling of the "no cross"

order passed in the evening on the earlier date. The said application was opposed by the plaintiffs and by order dtd.05/10/2021, the application was rejected. This petition has been filed on 29/10/2021 and circulated on 27/01/2022 by the Advocate on record for the petitioners.

6. Shri Jagtiani, the learned Senior Advocate has vehemently put forth his submissions which can be summarized as follows :-

- (a) The Advocate representing these defendants developed viral fever on 20/09/2021 and being apprehensive on account of Covid 19 pandemic, did not appear before the Court
- (b) No medical certificate was tendered
- (c) An application on medical ground seeking adjournment was not filed.
- (d) The very next morning, Exh.1203 was filed praying for recalling of the “no cross” order and had the application been allowed on the same day, by now the entire cross-examination of PW 1 Shri Satish Dhirajlal Vithalani would have been concluded.
- (e) Costs are to be imposed considering the gravity of the conduct of a litigant and not going by the richness of such a litigant.
- (f) The fault committed by the Advocate of not filing an application on 20/09/2021 and filing an application for vacating the “no cross” order dated 21/09/2021, is

measurable.

(g) If laches are attributable to the conduct of a litigant and if it is noticed that the litigant has ulterior or oblique motives, heavy costs can be imposed.

(h) The error committed by the Advocate in not filing an adjournment application on 20/09/2021 and moving an application on 21/09/2021, would not indicate such delay which can be branded as being deliberate or inordinate.

(i) The concerned Advocate has demonstrated his *bona fides* by filing an affidavit-in-rejoinder, personally, on 28/09/2021, since he was medically unfit on the earlier date.

(j) Upon consulting the learned Advocate of these defendants before the trial Court, it is stated that if this Court grants an opportunity to these petitioners to cross examine PW 1, the learned Advocate would conduct a common cross-examination on behalf of all these petitioners.

7. The learned Advocate representing the plaintiffs has vehemently opposed this petition and her submissions can be summarized as under :-

(a) These petitioners/defendants and several other defendants (in all 158) are bent upon delaying the suit.

(b) These petitioners are occupying approximately 76,800 sq.ft. area of commercial premises. They are

earning in crores and, therefore, even if this Court imposes heavy costs on each of the petitioners, they would be remorseless.

(c) These defendants would willingly pay heavy costs, since the adjournments earned by them would enable them to earn in crores and the cost amount would appear to be a trivial issue. By paying costs as directed by this Court, they would earn in multiple times since they would be buying time to operate their business.

(d) Since this Court passed two orders on 20/01/2022 and 04/02/2022, defendants like these petitioners, who were watching the proceedings from a distance, have also approached this Court by filing writ petitions.

(e) This Court may consider the conduct of these defendants while delaying the suit and accordingly, impose heavy costs upon them if they are to be granted an opportunity to cross-examine PW 1.

(f) If an opportunity of cross-examination is granted subject to payment of heavy costs, a time-frame may be ordered so that the suit will not be further delayed.

8. Having considered the fact situation as above, it is apparent that the petitioners/defendants should have been diligent. On 20/09/2021, when a representative of these defendants prayed for a pass-over in the trial Court, it was disrespectful that nobody cared to place an application on record to convey to the trial Court about the medical urgency of the Advocate. Merely seeking a pass-over and then

disappearing from the Court was an inappropriate behaviour on the part of the representative of these defendants.

9. It is apparent that with the passage of 14 years and the various orders passed by this Court as well as the Hon'ble Supreme Court, time has become very precious in these proceedings. All the litigating parties are required to meticulously plan a road-map to conduct the suit proceedings. Seeking adjournments or moving applications for securing adjournments, so as to kill time and delay the proceedings, is inappropriate. Filing various applications on every date on trivial grounds and seeking orders on such applications would result in killing time. A continuous behaviour of this nature may reflect on the conduct of the parties to this suit.

10. As such, the issue is that the petitioners/defendants have committed a serious mistake of not filing a proper application to indicate the illness of their Advocate. Nevertheless, the petitioners have filed an application for recalling the "no cross" order on the very next day. In my view, the trial Court could have imposed heavy costs and fettered these defendants with a time-frame to conduct the cross-examination.

11. In view of the above, the above factors would indicate that the behaviour of these petitioners is not as grave as defendant Nos.66 and 70, which I have taken note of earlier. Nevertheless, reasonable amount of costs will have to be imposed on these defendants for their conduct and for

approaching this Court and keeping the writ petition pending. Though the title of the petition indicates that there are 11 petitioners, there are only 6 establishments who are occupying the suit premises. Some of their representatives have been arrayed as respondents as they are the authorised signatories, to the six establishments before the Court. As such, there are six firms/establishments before this Court.

12. In my order dtd.04/02/2022, I have imposed costs of Rs.2.5 Lakhs on each of the petitioners, considering that their conduct was grave. In the instant case, after the no-cross order was passed on 20/09/2021 at 4.55 p.m., these petitioners have preferred the application (Exh.1203) on the very next day.

13. Today, while considering as to whether the petitioners should be granted an opportunity to cross-examine PW 1, the plaintiffs have issued specific instructions to the learned Advocate to state that the plaintiffs are not seeking the dismissal of the writ petition, but are praying for identical costs as ordered in Writ Petition No.983 of 2020.

14. As noted above, I do not find that the conduct of these defendants is as grave as the conduct of defendant Nos.66 and 70, who are party to the order dtd.04/02/2022. The learned Advocate for the plaintiffs submits, on instructions, that defendant Nos.66 and 70 are cross-examining PW 1 and they have been granted time to complete the cross-examination

today. It would be appropriate to permit these petitioners to cross-examine PW 1 on 16/02/2022.

15. Considering the fact situation as discussed above, this petition is allowed. The impugned order dtd.05/10/2021 is quashed and set aside and application (Exh.1203) is allowed on the following terms :-

(a) Since these 11 defendants are actually the representatives of 6 firms/establishments, I hereby order each of these 6 firms/establishments to pay costs of Rs.1,25,000/- (total Rs.7,50,000/-) by preparing a demand draft drawn in the name of Khimji Bhagwandas Charity Trust, to be delivered to the learned Advocates for the plaintiff Trust before the trial Court , on 16/02/2022.

(b) PW 1 would remain present for cross-examination on 16/02/2022 at 2.30 p.m.

(c) Since the learned Advocate would be cross examining PW 1 on behalf of all these 11 petitioners, the cross-examination would be concluded by the end of court hours on 18/02/2022.

(d) Application for extension of time would neither be entertained by this Court nor the trial Court.

(e) After the cross-examination is concluded, the same would be subject to re-examination, if any.

(RAVINDRA V. GHUGE, J.)