

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 611 OF 2022

Elegant Marbles and Granite
Industries Ltd .. Petitioner
Versus
Satish Dhirajlal Vithalani & ors .. Respondents

WITH
WRIT PETITION ST NO. 24321 OF 2022

Leonard Holdings & Trading Pvt.Ltd .. Petitioner
Versus
Satish Dhirajlal Vithalani & ors .. Respondents

...

Mrs.Ranjana Parikh for the original plaintiff.
Mr.Anjal Amin i/b B. Amin & Co. for the petitioner
Mr. Sharan Jagtiani, Sr. Advocate i/b S.S. Shah for the respondent.

CORAM: RAVINDRA V. GHUGE, J.
DATED : 20th JANUARY, 2022

P.C:-

1 Before commencing the hearing of this Court, Shri Amin, the learned Advocate mentioned that Writ Petition St No.24321/2021 is filed by defendant no.142 for the same cause of action i.e. the forfeiture of the right to cross-examination as like the adverse order having been suffered by the present petitioner who is defendant no.40 in TE & R Suit 5/6/2008.

2 The learned Advocate Mrs.Parikh representing the original plaintiff, who is appearing on behalf of the plaintiff in this Court, consents for calling for the papers in Writ Petition St No. 24321/2021. The case papers in WP St. No. 24321/2021 are called for and both these matters are heard together.

3 I have considered the strenuous submissions of Shri Jagtiani, learned Senior Advocate with Shri Shah on behalf of both the petitioners. I have considered the vehement submissions of Mrs.Parikh on behalf of the original plaintiff.

4 The issue involved in this case is as regards the 'No Cross' order passed by the learned trial Court on 11/10/2021, as against these two petitioners, who are defendant 40 and defendant 142, respectively. It is undisputed that the trial Court has also passed the order of forfeiture of the right to cross-examine as against defendant nos.39, 54, 55, 59, 60, 62, 100, 102 to 106, 108, 110, 113, 119 and 124 by order dated 20/9/2021. A similar order has been passed on 8/10/2021, forfeiting the right (to cross-examine) of defendant nos. 15, 37, 38, 43, 61 and 126. All these defendants, including the present two petitioners were to cross-examine PW No.1.

5 The learned Advocate for the plaintiff informs on instructions, and also since she appears on behalf of the plaintiff

in the original proceedings before the trial Court that an Application has been filed by the plaintiff for re-examining PW No.1 and the said Application (Exhibit-1319) is pending hearing. Nevertheless, she submits that, if at all, this Court comes to a conclusion that defendant nos.40 and 142 be permitted to cross-examine PW 1, PW 1 would remain present in the Court at 2.15 p.m tomorrow i.e. 21/1/2022 before the trial Court.

6 Writ Petition No.4594 of 2014 was before this Court on 20/11/2019. An order dated 20/11/2019 was passed by this Court which reads as under :-

“Coram : A.S. Gadkari, J
Dated : 20/11/2021.

1. In pursuance of Order dated 24th September 2019, the learned Judge, Small Causes Court, Mumbai has forwarded a report dated 16th October 2019. It is stated that, there are in all 158 defendants in the said suit and they are being represented by different Advocates. Many of the defendants are filing interim applications in the matter and therefore, it is very difficult to conclude the hearing of the said suit.
2. It is to be noted here that, the Hon'ble Supreme Court in Special Leave to Appeal No. 33118 of 2018 has categorically directed that the Trial Court to strictly observe the time which has been granted by the High Court in concluding the hearing of the said suit.
3. It appears from the record that, the defendants herein are intending to frustrate the Order passed by this Court and also the directions issued by the Hon'ble Supreme Court.

4. Mr. Bijliwala, learned counsel appearing for the respondent Nos. 42, 43, 50, 55, 73, 96 and 105 submitted that, in view of the large number of defendants, it is not possible to conclude the hearing of the said suit within the time frame as described by this Court and affirmed by the Hon'ble Supreme Court. He further submitted that, the parties herein are entitled to file applications under the law and therefore the hearing of the said suit can not be concluded within time frame. The said submissions are recorded only for its rejection, as the Supreme Court has categorically directed the Trial Court to comply with the directions issued by this Court. The said directions issued are to be adhered to and followed in its true sense without giving any excuses by the learned Advocates for the respondents.

5. Be that as it may, by consent of parties, the period to conclude the hearing of the said T.E. & R. Suit No.5/6 of 2008 is hereby extended by one year from today.

6. The Trial Court is directed to hear the said suit on day to day basis irrespective of personal difficulties of the parties and/or their Advocates. No adjournment should be granted to any party on the ground of non availability of their counsel. The Trial Court is directed to frame issues within a period of one month from today.

7. All the parties herein are directed to complete pre-trial formalities including their respective pleadings and filing of affidavit of evidence within a period of two months from today.

8. All the parties herein are directed to co-operate with the Trial Court in expediting the hearing of the said suit without adopting any dilatory practices to the hearing of the said suit. It is expected from all the concerned Advocates appearing in the said suit, to adhere to the

directions issued by the Hon'ble Supreme Court dated 04th January 2019 in Special Leave to Appeal (c) No. 33118 of 2018.

9. In view of the above, the period to conclude the hearing of the said suit No. T.E. & R. Suit No.5/6 of 2008 is hereby extended by one year from today”.

7 It is thus obvious that the Hon'ble Apex Court has passed an order on 4/1/2019 in Special Leave to Appeal No.3311A of 2018 to adhere to it's directions and conclude the Suit No.5/6 of 2008. By the order of this Court reproduced above, the period was extended by one year from 20/11/2019.

8 Mrs.Parikh informs that there has been a further order passed by this Court on 3/12/2021, vide which, the time has been extended by two years with effect from 3/12/2021, which order reads as under :-

“CORAM : A.S. GADKARI, J
Dated : 3/12/2021.

1. Registry has received a communication dated 11th November 2020 from the learned Judge, (C.R.No.19), Court of Small Causes, Mumbai seeking further extension of one year for deciding the T.E.&R. Suit No.5/6 of 2008.

2. Apart from the reasons mentioned in the said communication, it is a fact on record that, there are 158 Defendants in the said Suit. Some of the Defendants have preferred Writ Petitions/Revisions before this Court against interim/interlocutory Orders and the same are pending for final adjudication. Taking into consideration

the number of Defendants and the pleadings on record, it will be appropriate to grant two years of extension to the learned Judge of the Trial Court to dispose off the said suit. Accordingly extension for two years is granted from today.

3. It is needless to mention that, the earlier directions issued by this Court in Order dated 20 th November 2019 are not varied or modified.

4. Registry to communicate to the concerned”.

9 Having considered the strenuous submissions of the learned Advocates for the respective sides, it reveals from the record that the “No cross” order was passed on 11/10/2021 as against defendant 40 and defendant 142. It requires no debate that a “No cross” order can be passed only when a particular witness is offered for cross-examination to a particular litigant and the said litigant either declines to cross-examine or seeks an adjournment. If the circumstances are such, as like in the present case, wherein the Hon’ble Apex Court and this Court have passed orders expediting the Suit, the trial Court is empowered to either refuse an adjournment or impose heavy costs on a party while considering grant of a short adjournment. Ultimately, the Court ought to be interested in having a complete trial and for which purpose, effective orders can be passed so as to balance the equities.

10 I have perused the roznama dated 11/10/2021 placed before the Court, wherein it has been observed as under :-

“Business :Exh. 1225/D:- Pursis by Adv Nariman for defendants regarding withdrawal of appearance against defendant No.40, 41, 75 and 142 filed within. PW No.1 and Adv Suraj Shah for plaintiffs are present. All defendants are absent. Adv. Mohanty, Adv. Nariman, Adv Maravoor, Adv Bhatt, Adv Debashish Nath, Adv Dinesh Jain are present. Today defendants No.40, 41, 75 and 142 are absent. Hence, right of defendants No.40, 41, 75 and 142 to cross of PW No.1. Satish is forfeited. Cross of PW No.1 by Adv Nariman for defendants partly. Adj for (i) Further cross of PW No.1 by Adv. Nariman for defendants (ii) Reply by plaintiff in Exh.1198 to 1202 (iii) Reply by remaining defendants in Exh.949 at 3.30 p.m.

Next

Purpose Part heard HCTB, ACTB, Expedited Sr. Citizens Matters at 2.45 p.m.

Next

Hearing
date

12.10.2021

11 It is thus obvious from the above reproduced roznama that the cross-examination of PW 1 by Advocate Nariman for other defendants, was in progress and the matter was adjourned on 11/10/2021 for continuing the said cross-examination on 10/12/2021. As such, it was not a stage in the matter wherein PW 1 was offered for cross-examination to defendant no.40 and that

the said defendant refused to cross-examine PW 1. The roznama does not reveal that PW 1 was offered to defendant no.40 for cross-examination. In these circumstances, without PW 1 having been offered to defendant 40 or defendant 142 for cross-examination, the trial Court could have waited for their turn to arrive to commence the cross-examination.

12 The learned Advocate for the plaintiff has relied upon a pursis dated 9/10/2021 filed by Advocate Nariman, informing the trial Court that PW 1 would be cross-examined by defendant 40 and defendant 142 through Advocate M/s.B. Amin and Co. However, it does not appear from the roznama that defendant 39 had completed the cross-examination of PW 1 on 11/10/2021 and that the turn of defendant 40 to commence the cross-examination, had arrived. When PW 1 was under cross-examination by another defendant, on 11/10/2021, and the matter was adjourned to 12/10/2021, with PW 1 under part cross-examination, the occasion to pass an order of “No cross” against defendant 40 and defendant 142, had not arisen.

13 Both these petitioners had preferred applications Exhibit 1252 and 1253 on 27/10/2021, praying for recalling of the “No cross” order dated 11/10/2021. By the impugned orders dated 21/11/2021, the trial Court recorded in paragraph nos.13, 14 and 15 as under :-

13 It is true that, on the very next day of "No Cross Order" this defendant has filed their Vakalatnama. However, the present application was filed on 27.10.2021, after passing of sixteen days of passing of "No Cross Order" again on the lame excuse of not receiving the case papers from the previous Advocate. It is not out of place to mention here that, in the present case the Hon'ble High Court on Dtd. 20.11.2019 directed this Court, hear the said suit on day to day basis irrespective of personal difficulties of the parties and/or their Advocates. Hon'ble High Court further directed not to grant any adjournments to any party on the ground of non availability of their counsel. Hon'ble High Court has passed the said order after taking into the consideration of the conduct of the defendants frustrating the order passed by them and also directions of the Hon'ble Supreme Court.

14 This defendant is aware of this order. In spite of it, this defendant and their Advocate remained absent during 07.10.2021 to 11.10.2021. No appropriate steps and alternative arrangement, which could be done, was made in time so that no cross order could have been avoided and trial would have proceeded further. But, this defendant failed to act in the letter and spirit of above mentioned order of the Hon'ble High Court.

15. Considering all, I am not inclined to use discretionary power in favour of this defendant in setting aside the no cross order passed against them. I do not find any merit in the application. The judgments relied upon by this defendant are not helpful to them. Application deserves to be rejected. Hence, point No.1 is answered in the negative. In answer point No.2 following order is passed.

ORDER

- a) Application is rejected.
- b) No order as to cost."

14 Even in the impugned order, the trial Court has not observed that PW 1 was offered for cross-examination to

defendant 40 and that, the learned Advocate who replaced the earlier Advocate, had filed his vakilpatra and yet, did not cross-examine PW 1. It is a matter of record that the new Advocate filed vakilpatra on behalf of defendant 40 and defendant 142 on 12/10/2021, though the said defendants had purportedly obtained the No Objection of the earlier Advocate on 7/10/2021.

15 In view of the above, I find that these are two fit cases to be considered favourably. By way of an alternative submission on behalf of the plaintiff, it is informed that PW 1 would be available before the trial Court on 21/1/2022 at 2.15 p.m.

16 In view of the above, both these Petitions are allowed.

The impugned order 24/11/2021 below exhibit 1252 and 1253 are quashed and set aside and the petitioners are directed as under :-

- (a) Since PW 1 is stated to be available at 2.15 pm on 21/1/2022, before any decision on the pending application filed by the plaintiff to re-examine PW 1, defendant 40 would commence the cross-examination of PW 1 Satish.
- (b) Since it is informed that the Court timings are upto 4.00 p.m, defendant 40 would endeavour to complete the cross-examination of PW 1 on the same day.
- (c) Defendant 142 would commence the cross examination of PW 1 on such date and such time, as would be decided

by the trial Court and even if the matter is posted on 24/1/2022 (since 22/1/2022 is a non-working 4th Saturday and 23/1/2022 is a Sunday), defendant 142 would commence and conclude the cross-examination of PW 1 on the said date.

17 Since these petitioners had preferred Application Exhibit 1252 and 1253 with promptitude and for the reasons assigned herein above, costs are not being imposed on these two defendants. It is made clear that if facts and circumstances of the case would have indicated laches on the part of these defendants, this Court would not have hesitated in imposing heavy costs on the defendants.

18 It is left to the discretion of the learned trial Court to adopt physical or virtual mode for cross-examination of PW 1 by defendant 40 and defendant 142 and, therefore, personal hardships of these two defendants would not be a consideration for seeking adjournment.

RAVINDRA V. GHUGE, J