

IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 14440 OF 2022

Arun Jain s/o Pritamchand Jain

...Petitioner

*Versus*

Mr. Gajanan Sahdev Gawde And Anr.

...Respondents

-----  
Mr. Atul Damle, Sr. Advocate a/w Mr. Hitesh P. Vyas for the Petitioner.  
Mr. Pavan Patil a/w Nitin Jagtap for the Respondents.  
-----

CORAM : R.I. CHAGLA J

DATE : 30TH NOVEMBER, 2022

ORDER :

1. Heard Mr. Atul Damle, learned Senior Advocate appearing for the Petitioner and learned Counsel appearing for the Respondents.
2. By this Writ Petition, the Petitioner is seeking quashing and setting aside of the judgments and orders dated 7<sup>th</sup> November 2022 of the Small Causes Court at Mumbai, Bandra Bench rejecting the Revision Application No.93 of 2022 for seeking revision of order dated 8<sup>th</sup> October 2022 and earlier order dated 13<sup>th</sup> December 2021

passed by the Single Judge. Further relief is sought for permitting the Petitioner/Original Defendant to cross-examine the Plaintiff.

3. The Petitioner is aggrieved by the impugned orders on the ground that the Petitioner was not granted a fair opportunity to defend the Suit which according to the Petitioner is in violation of the principles of natural justice. The Petitioner has been denied the right to cross examine the witness of the Plaintiff and also denied the right to lead evidence, thus precluding the Petitioner from defending the Suit in any manner.

4. The Petitioner was carrying out his business from Shop Nos.1 and 2 near Bhavishay Nidhi Bhavan, Khernagar, Bandra (East), Mumbai 400 051. The Respondents are the owners of the rented property and have executed leave and license agreement and Petitioner was put in possession pursuant to the said leave and license agreement. The Respondents filed L.E. & C Suit No.183/199 of 2014 before the Court of Small Causes at Mumbai Bandra Bench, for decree directing the Petitioner to handover the said Shop No.2 and order for mesne profits.

5. The Petitioner upon being served with the summons has appeared before the Court of Small Causes and filed written statement and contested the Suit. Issues have been framed on 20<sup>th</sup> October 2018 and thereafter the Respondent had filed affidavit in lieu of examination in chief.

6. The Suit proceeded for trial and the Respondent / Plaintiff No.2 filed examination in chief on 28<sup>th</sup> January 2015. Thereafter, further affidavit in lieu of examination in chief was filed by the Plaintiff not in 2018. An Application had been made for adducing further evidence which application was ultimately rejected on 10<sup>th</sup> November, 2021 in Revision.

7. In view of default on the part of the Defendant to appear a no cross order was passed by the Judge, Court of Small Causes at Mumbai, Bandra Bench, on 13<sup>th</sup> December 2021.

8. By an order dated 28<sup>th</sup> September 2022 the Defendant's evidence was closed upon considering the adjournment application of the Defendant as well as noting that a prior adjournment application was allowed on 30<sup>th</sup> August 2022 subject to payment of costs. The

Defendant had sought further adjournment on the ground that he had appointed a new Advocate. The Plaintiff's evidence was closed in February 2022 and thereafter the matter was fixed for evidence of the Defendant. The Court had considered that thereafter the matter was adjourned for five dates and last chance had already been granted. However, no steps were taken by the Defendant to adduce evidence. Accordingly, by the impugned order dated 28<sup>th</sup> September 2022 the Judge had rejected the application.

9. The Petitioner has placed reliance upon the application dated 8<sup>th</sup> October 2022 which has been filed for setting aside the no cross order dated 13<sup>th</sup> December 2021 and the order dated 28<sup>th</sup> September 2022 by which the Judge had closed the Defendant's evidence. It is stated in that application that for personal/medical reasons known to Defendants Advocate he had not given proper attention to the matter and was remaining absent and ultimately had asked the Defendant to engage a new advocate and had given his NOC for engaging new Advocate after continuously pursuing him on 23<sup>rd</sup> June, 2022.

10. It is further stated in the said Application that on 5<sup>th</sup> August 2022 and 30<sup>th</sup> August 2022 the Defendant himself has sought adjournment for appointing new Advocate and accordingly Defendant's new Advocate filled the vakalatnama on 28<sup>th</sup> September 2022. However, since the matter was for dealing with Exhibit 10, 57 and filing evidence of Defendant, the Defendant's Advocate had shown his inability to proceed with the matter on account of mistakes in the roznama. Therefore, the Hon'ble Court vide order dated 28<sup>th</sup> September 2021 has closed the Defendants evidence.

11. This application was considered by the Judge of C.R. No. 37 of Small Causes Court on 8<sup>th</sup> October 2022. Reliance has been placed on the decision of this Court in *Prafulla s/o Narhar Wagh and Anr. vs. Govind s/o Narayan Pimpalkar* in Civil Revision Application No.32 of 2017, dated 8<sup>th</sup> June 2017. In that decision, the object behind Order 17 Rule 1 of the Code of Civil Procedure, 1908 has been explained. The Judge had considered that the facts of that case and the present case in hand, were similar. Hence, the Court found no substance and merit in the application.

12. The Petitioner had thereafter filed Revision Application Nos.93 and 94 of 2022 which was considered by the Judge, C.R.No.31 in the impugned orders dated 7<sup>th</sup> November 2022, the Judge considered the aforementioned dates of filing of the evidence of the Plaintiff as well as no cross order and closure of evidence of the Plaintiff as well as the closure of the evidence of the Defendant. It is further noted that evidence of the Defendant was struck off. The Judge also considered the decision of *Prafulla s/o Narhar Wagh* (Supra) and held that the ratio laid down by this Court is squarely applicable to the present case in hand. This Court in that case had held that where once last chance was granted, the Court would be careful enough not to further adjourn the matter as there is no question of giving any more chances after last chance has been granted.

13. This Court in that case further held that the Trial Court instead of following law settled by the Apex Court and following the spirit of its earlier orders, granted further adjournment by the impugned order which is manifestly perverse as well as contrary to the settled principles of law. Such an order must go and the conduct of the Respondent would necessitate passing of further order of dismissal of the suit.

14. Having considered the said decision, the Judge in the recent case has considered that ample and sufficient opportunities had been given to the Defendant to protect his substantive rights. The Defendant was himself at fault. He has not availed the opportunity to protect his substantive right. Therefore, the Judge was of the considered view that the order passed by the Court below Exhibit 64 & 65 were not perverse and illegal. Accordingly, the Review Application was dismissed and the order in Application below Exhibits 64 and 65 was confirmed by the impugned orders, both dated 7<sup>th</sup> November 2022.

15. The Petitioner has accordingly filed the present Writ Petition.

16. Having considered the case of the Petitioner as well as taking note of the impugned orders which have been challenged in this Petition, it is clear that ample opportunity have been granted to the Petitioner/Original Defendant by the Court below in the Suit filed by the Respondent/Original Plaintiff. I find no satisfactory explanation for the delay on the part of the Original Defendant in remaining present before the Court during the trial and this is borne out from the roznama of the Court below which has been annexed to the

Petition. Further, several last chances were given to the Defendant to remain present as well as the Defendant was put to notice that the defence would be struck off. In spite of these opportunities, the only explanation which is on record can be seen from the Application filed by the Defendant on 8<sup>th</sup> October 2022 for the Defendant not remaining present viz. that his Advocate was not giving proper attention to the matter for personal/medical reasons and the Defendant had to take steps to engage new Advocate after pursuing until June 2022. However, there is no mention of any particulars, including as to when the Defendant's Advocate had not given proper attention.

17. The impugned order dated 13<sup>th</sup> December 2021 had been passed only after a last chance notice had been given to the Defendant and despite which, though the Plaintiff's witness and Advocate were present, the Defendant remained absent and thus no cross order was passed against the Defendant. I find no infirmity in the cross order dated 13<sup>th</sup> December 2021 passed by the lower Court.

18. Further, the order dated 8<sup>th</sup> October 2022 had considered the Application filed by the Defendant/Petitioner herein to set aside the

order dated 13<sup>th</sup> December 2021 and subsequent order dated 28<sup>th</sup> September 2022 which had closed the evidence of the Defendant by not granting further opportunity to the Defendant for adjournment. After noting the progress of the matter including that the Suit was filed on 27<sup>th</sup> June 2014 and the Defendant file written statement thereafter, and issues were framed on 20<sup>th</sup> October 2018, the Court below considered that the Defendant had sought repeated adjournments in the matter including by not remaining present and by an order dated 5<sup>th</sup> August 2022 the Court below considered that since the matter was an old one, a last and final chance was granted and no further adjournment will be granted. The Court had accordingly considered Proviso to Rule 1 of Order 17 of C.P.C. 1908 as well as the decision of the *Prafulla s/o Narhar Wagh* (Supra) and held that since the facts in that case were similar, where last chance notice was granted, there is no question of giving any more chances. Accordingly, the Application for setting aside no cross order dated 13<sup>th</sup> December 2021 and order dated 28<sup>th</sup> September 2022 was rejected. I find no infirmity in the said order.

19. Further, I find no infirmity in the impugned orders dated 7<sup>th</sup> November 2021 which was passed in the Revision Application Nos.93

and 94 of 2022 which had been preferred by the Original Defendant/Petitioner herein. The Court below has given sufficient reasons as to why the Revision Application is dismissed and based its findings on not only the facts in the present case as well as several opportunities to be given to the Defendant but also on the law laid down by this Court in *Prafulla s/o Narhar Wagh* (Supra). Thus, the impugned orders of the Court below are in conformity with the settled law. In the decision in *Prafulla s/o Narhar Wagh* (Supra), this Court had considered that it is settled law that sufficient cause is something which is beyond the control of the party seeking adjournment and certainly the Advocate being busy in another Court is not a circumstances which is beyond the control of such party. This has also been held by this Court in *Dhanraj Lilaram Motwani and Anr. vs. Rajendra Kumar Dayachand Jain and Ors.*, 1995 SCC Online Bom 86.

20. The Supreme Court in *M/s. Shiv Cotex v. Tirgun Auto Plast Pvt. Ltd. & Ors.* (2011) 9 SCC 678 had in paragraph 17 held as under:

*“17. However, the absence of the lawyer or his non-availability because of professional work in other court or elsewhere or on the ground of strike call or the change of a*

*lawyer or the continuous illness of the lawyer (the party whom he represents must then make alternative arrangement well in advance) or similar grounds will not justify more than three adjournments to a party during the hearing of the suit. The past conduct of a party in the conduct of the proceedings is an important circumstance which the courts must keep in view whenever a request for adjournment is made. A party to the suit is not at liberty to proceed with the trial at its leisure and pleasure and has no right to determine when the evidence would be let in by it or the matter should be heard. The parties to a suit – whether the plaintiff or the defendant – must cooperate with the court ensuring the effective work on the date of hearing for which the matter has been fixed. If they don't, they do so at their own peril.”*

21. The Supreme Court in said decision considered that the absence of a lawyer or the continuous illness of the lawyer will not justify more than three adjournments to the parties during the hearing of the suit. The past conduct of the party in the conduct of the proceedings is an important circumstance which the Courts must

keep in view whenever a request for adjournment is made. Further, a party is not at liberty to proceed with the trial at its leisure and pleasure and has no right to determine when the evidence would be led by it or the matter should be heard. The parties to a Suit must co-operate with the Court in ensuring the effective work on the date of hearing for which the matter has been fixed. If they do not, they do so only at their own peril.

22. Thus, it is settled law that the repeated adjournments taken by the party to the Suit, which in the present case is the Original Defendant/Petitioner herein cannot be permitted and that the Court below has correctly disentitled the Original Defendant/Petitioner herein from cross examination of the Plaintiff's witness by passing no cross order dated 13<sup>th</sup> December 2021 as well as thereafter closing the evidence of the Defendant on account of non-cooperation by the Defendant to remain present and adduce evidence. Thus, no fault can be found in the impugned orders.

23. Accordingly, Writ Petition is dismissed. There shall be no order as to costs.

24. Considering the view taken by this Court, the application now made by Mr. Damle for directing the Trial Court to defer the proceedings is not granted.

**[R.I. CHAGLA J.]**