

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR.**

WRIT PETITION NO. 3737 OF 2021

- 1) Smt. Gumphabai wd/o Gyaneshwar
Waghmare, Aged about 69 years,
Occupation – Household Work,
- 2) Sugat s/o Gyaneshwar Waghmare,
Aged 60 years, Occupation – Contractor,
- 3) Sau. Priti w/o Premanand Palaspagar,
Aged about 43 years,
Occupation – Household Work,

All R/o Sugat Bhawan, Ranpise Nagar,
Akola, Tq. and District Akola.

.... **PETITIONERS**

VERSUS

- 1) Smt. Rajkanya wd/o Gyaneshwar
Waghmare, Aged about 53 years,
Occupation – Service,
- 2) Suraj s/o Gyaneshwar Waghmare,
Aged about 25 years, Now Major,

Both R/o Suraj Bhawan, Madhav
Nagar, Gorakshan Road, Akola,
Tq. and District Akola.

.... **RESPONDENTS**

Mr. J.B. Gandhi, Counsel for the petitioners,
Mr. A.B. Patil, Counsel for the respondents.

CORAM : ROHIT B. DEO, J.
DATED : 21st FEBRUARY, 2022

ORAL JUDGMENT :

Heard. **Rule.** With consent, the petition is heard finally.

2. The petitioners are the contesting defendants in Special Civil Suit 113/2008 which is pending in the Court of 3rd Joint Civil Judge (Senior Division), Akola and the relief sought by the respondents-plaintiffs is declaration and permanent injunction qua the suit property which comprises eighteen plots.

3. Impugned herein is the rejection by the learned trial Judge of an application preferred by the defendants for permission to cross-examine PW. 1 by recalling the earlier orders.

4. The suit is instituted in the year 2008.

5. The affidavit in lieu of examination-in-chief is filed on 09-10-2015.

6. It appears, that the defendants either deliberately, or otherwise, avoided to cross-examine PW. 1 and vide order dated 03-1-2019 the trial Court proceeded without cross-examination.

7. The defendants preferred application Exhibit 60 for setting aside “no cross order” and for permission to cross-examine the witness of the plaintiffs. This application came to be allowed vide order dated 16-2-2019 the operative part of which reads thus :

- “1. Application Exhibit 60 is allowed with cost of Rs.3,000/-.*
- 2. Out of said amount costs of Rs.2000/- be paid to the plaintiff and Rs.500/- be paid to PW-2 and PW-3 each, on next date positively. If failed face the consequences. Payment of cost is condition precedent.*
- 3. It is directed to the plaintiff to secure her presence as well as presence of witness on next date positively and the defendant shall have to complete the cross-examination, who paid shall have to suffer.*
- 4. Both parties to take note.”*

8. Undeterred, the defendants continued with the strategy of delaying the hearing. The trial Court again proceeded without cross-examination as is discernible from orders dated 22-3-2021.

9. The evidence was fixed on 22-3-2021 and an application was preferred on the ground that the senior counsel is unwell. This application Exhibit 92 is rejected on the ground that time and again the cross-examination is adjourned on similar ground and the defendants are already put on notice that alternate arrangement shall be made.

10. After rejecting the application for adjournment, the learned trial

Judge did call upon the counsel for the contesting respondents Mr. Dwivedi to cross-examine the witness. The counsel refused and the cross-examination was closed.

11. The defendants apparently preferred an application dated 31-3-2021 for setting aside the order dated 22-3-2021 and for grant of permission to cross-examine the plaintiffs.

12. The application dated 31-3-2021 was rejected since none appeared to argue the said application. The order dated 26-8-2021 reads thus :

“None present though called repeatedly. Say not filed. Matter is old one. Yet the cross-examination of plaintiffs is not completed. Hence application is rejected.”

13. On the same day, the defendants preferred another application contending that the counsel did appear at 11-35 a.m. and was told by the Clerk that the application was rejected. The subsequent application came to be rejected by the learned trial Judge observing thus :

“Order was passed after considering the conduct of defendant vide Exhibit 92. Therefore today order is passed at first session. Matter is old one. Hence as already sufficient time was given to them. Application is rejected.”

14. The learned Counsel Mr. J.B. Gandhi would submit that

notwithstanding the conduct of the defendants, a final opportunity be granted to the defendants to establish their defence on merits. Mr. J.B. Gandhi states, on instructions received, that the defendants are ready and willing to pay costs to the plaintiffs and to conduct and conclude the cross-examination of all the witnesses of the plaintiffs within next thirty days and thereafter to conclude their evidence within next thirty days so that the suit itself can be finally disposed within the next ninety days.

15. Mr. Amol Patil would argue that considering the earlier conduct of the defendants, the undertaking does not appear to be *bona fide* and that in any event, there is no case made out for interference in writ jurisdiction.

16. From a strict legalistic perspective I find no fault in the approach of the learned trial Judge. The suit is pending since 2008 and it is more than apparent that the defendants have reduced the proceedings to a mockery by ensuring that though the affidavits are filed in 2015, since last seven years no cross-examination is conducted. I also find substance in the submission of Mr. Amol Patil referred to supra.

17. However, considering that important property rights are involved, and giving the defendants the benefit of the doubt that they are serious

in undertaking given to this Court, as a final opportunity to the defendants to participate in the proceedings, effectively, the following order is passed.

- a) The orders impugned are set aside.
- b) Subject to payment of costs of Rs.20,000/- (Rupees Twenty Thousand) by the defendants to the plaintiffs, the defendants are permitted to cross-examine the witnesses.
- c) The undertaking of the defendants that the cross-examination of all the witnesses of the plaintiffs shall be concluded within thirty days is noted. The defendants are further directed to conclude their evidence within the next thirty days, as has been undertaken. The trial Court shall dispose of the suit within next ninety days.
- d) A praecipe shall be filed by the learned Counsel for the defendants before the trial Court today bringing to the notice of the learned trial Court the substratum of this order and the learned trial Judge is requested to fix an early date for recording of evidence, which shall not be later than seven days from today.

18. The petition is disposed of in the afore-stated terms.

JUDGE

adgokar

Digitally signed by PRAFULLA
MANOHARRAO ADGOKAR
Signing Date: 25.02.2022 18:59