

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

WRIT PETITION NO.7126 OF 2017

1. Mrs. Radhaben Wd/o Jethalalbhai Chawda
Aged about 80 years, Occ: Housewife,
2. Prafful Jethalalbhai Chawda
Aged about 59 years Occ: Business
3. Zaverbhai Jethalalbhai Chawda
Aged about 55 years, Occ: Business
4. Ashwin Jethalalbhai Chawda
Aged about 51 years, Occ: Business
5. Rajesh Jethalalbhai Chawda
Aged about 47 years, Occ: Business
6. Deepak Jethalalbhai Chawda
Aged about 55 years, Occ: Business
7. Mrs. Neetaben Prafful Chawda
Aged about 54 years, Occ: Business,
All residents of Rail Toli, Gondia {All
original defendants 2 to 8}

...PETITIONERS

---VERSUS---

Shaileshkumar Jethalalbhai Chawda
Aged about 52 years, Occ: Business,
Resident of Sardar Patel Colony, Rail Toli,
Gondia {Original Plaintiff}

...RESPONDENT

Shri I.S. Charlewar, Advocate for the petitioners.
Shri R.K. Thakkar, Advocate for respondent.

CORAM : AMIT B. BORKAR, J.
DATED : 30th JUNE, 2022.

ORAL JUDGMENT :

1. **Rule.** Rule is made returnable forthwith. Heard finally by consent of the parties.

2. Challenge in this petition is to the orders dated 06.10.2017 passed below Exhs.133 and 134 and also to orders dated 24.10.2017 passed below Exhs.1 and 137 in Special Civil Suit No.20 of 2012.

3. The respondent had filed Special Civil Suit No.20 of 2012 for declaration, partition and possession of his right in the suit property. Since the petitioners intended to examine DW3, who is according to the petitioners, attesting witness to the Will executed by Late Jethalalbhai Chawda, his examination-in-chief was submitted before the trial Court (Exh.133). On 28.09.2017, the Presiding Officer was on leave therefore the next date was fixed on 06.10.2017. On 06.10.2017, the petitioners filed an application seeking adjournment on the ground that close relative of the DW3 expired on 03.10.2017. The learned trial Court on 06.10.2017 rejected the application below Exh.134 for grant of adjournment and discarded the evidence by passing order below Exh.133.

4. On the next date, i.e. on 24.10.2017, the witness DW3 was present. On the said date petitioners filed an application below Exh.137 for recalling of order dated 06.10.2017 passed below Exh.133. The learned trial court by order dated 24.10.2017 rejected the application below Exh.137. Therefore petitioners have challenged the order of discarding the evidence and also rejecting application for recalling of the said order.

5. The Advocate for the petitioners submitted that on 06.10.2017 the close relative of the petitioners had expired. The said fact is supported by document in the form of death certificate of the said relative which shows that on 03.10.2017 his nephew had expired.

6. If that be so, the witness sought to be examined by the petitioner being attesting witness, was material witness for the adjudication of dispute between the parties. In my opinion therefore the learned trial Court has erred in discarding the evidence of DW3 merely on the ground that on solitary date i.e. 06.10.2017 the witness failed to remain present. The cause shown by the DW3 for not remaining present, in my opinion, is sufficient cause. Therefore, the petitioners need to be given opportunity to lead evidence of DW3 as attesting witness. I, therefore, pass the

following orders.

7. Impugned orders dated 06.10.2017 passed below Exhs.131 and 134 and orders dated 24.10.2017 passed below Exhs.1 and 137 are quashed and set aside.

8. Petitioners are permitted to lead oral evidence of DW3. The respondent will be at liberty to cross-examine the said witness.

9. Considering the fact that there was ad-interim relief during pendency of the present petition, the learned trial Court shall decide the suit within three months from the receipt of this order.

10. Rule is made absolute in above terms. No costs. Pending civil application (s), if any, stand disposed of.

JUDGE

Wagh