

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.5885 OF 2022

Bhausahab S/o Bapu Janjire and others Petitioners

Versus

Dattatraya S/o Kerba Lonkar and another Respondents

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Mr. Rahul R. Karpe, Advocate for the Petitioners

Mr. S.R. Sapkal, Advocate for Respondent Nos. 1 and 2

.....

[CORAM : NITIN B. SURYAWANSHI, J.]

DATE : 13th September, 2023

ORDER :

1. Petitioners/plaintiffs filed suit for cancellation of sale deed, declaration and permanent injunction in respect of suit properties. Defendants appeared and opposed the suit by filing written statement. Temporary injunction is granted by the Trial Court in favour of the petitioners/plaintiffs.

2. In the suit, plaintiff No.1 filed evidence affidavit and the matter was posted for his cross-examination, and his cross-examination is going on. Plaintiff No.1 failed to make himself available for cross-examination. He, therefore, filed application Exhibit-85 stating that, on the previous date he was not keeping well, and therefore, his cross-examination

could not be completed. Even on 28/04/2022, he is unable to remain present due to some unavoidable circumstances. However, since the High Court has directed to expedite the hearing of the suit, the Court may accept the evidence of plaintiff No.2 by keeping his cross-examination pending. Hence, permission may be granted. On the said application, the Trial Court has passed the following order:

"ORDER

- 1. Application Exh. 85 is hereby rejected.*
- 2. The plaintiff No.1 is directed to make himself available for cross examination on next date; falling which the evidence of plaintiff No.1 will be closed and the value of his affidavit of evidence and part cross examination taken by defendant Nos.1 and 2 would be considered at the final hearing of the suit.*
- 3. The affidavit in lieu of examination-in-chief furnished by plaintiff No.2 will be considered after completion of cross examination of plaintiff No.1 by defendants or after closing of the evidence of plaintiff No.1 as stated above.*
(Dictated and pronounced in open Court.)"

3. Thereafter, plaintiff No.1 filed application Exhibit-88 stating that his cross-examination is incomplete and on previous date, he could not remain present due to unavoidable circumstances. Even on 06/05/2022, since his old aged father is seriously ill, plaintiffs are not in a position to remain present

in the Court. Hence, adjournment may be granted. This application is rejected by the Trial Court. The Petitioners/plaintiffs aggrieved by the order passed below Exhibits 85 and 88.

4. Heard the learned advocate for the petitioners and the learned advocate for respondent Nos.1 and 2. Perused the writ petition memo, annexures thereto, and the impugned orders.

5. It is clear from the record that plaintiff No.1 has persistently committed default in attending the matter and making himself available for cross-examination, therefore, no fault can be found with the orders passed by the Trial Court. However, considering the fact that valuable rights of the petitioners/plaintiffs are involved in the matter, and in the interest of justice and with a view to give fair opportunity to the petitioners/plaintiffs to lead evidence and contest the matter on merits, this Court is inclined to allow the petitioner. Hence, the following order:

ORDER

(I) The writ petition is allowed.

- (II) The impugned orders passed by learned Civil Judge, Senior Division, Shrigonda, below Exhibits-85 and 88 are quashed and set aside.
- (III) Plaintiff No.1 shall remain present before the Trial Court on 25/09/2023, and shall make himself available for further cross-examination.
- (IV) In case of failure on the part of plaintiff No.1 to remain present before the Trial Court on 25/09/2023, this order shall stand recalled, and the orders passed by the Trial Court below Exhibits 85 and 88 shall stand revived.
- (V) Plaintiff shall pay costs of Rs.25,000/- to the defendants in the Trial Court.
- (VI) Clause No.(3) of order dated 28/04/2022 passed by the Trial Court is maintained.

[NITIN B. SURYAWANSHI]
JUDGE