

IN THE HIGH COURT OF JUDICATURE AT BOMBAY**CIVIL APPELLATE JURISDICTION****WRIT PETITION NO. 884 OF 2023**

Madhukar Atmaram Bhoir and Ors.

.. Petitioners

Versus

Baddrudin Abbas Patel

.. Respondent

.....

- Mr. Kishor Patil a/w. Mr. Amol Mhatre and Mr. Sameer Mhatre for Petitioners
- Mr. Mohit Goyal i/by Wadia Ghandy & Co. for Respondent

.....

CORAM : MILIND N. JADHAV, J.**DATE : JANUARY 20, 2023.****P.C.:**

1. Heard Mr. Patil, learned Advocate for Petitioners and Mr. Goyal, learned Advocate for Respondent.

2. Perused the impugned order dated 07.11.2022 passed below Exhibit-1 in R.C.S. No. 479 of 2013 by which the learned Trial Court has vacated its order dated 01.11.2022 passed below Exhibit-147.

3. Record indicates that by order dated 01.11.2022 passed below Exhibit-147 the learned Trial Court had put the Plaintiff substantial Conditions which are enumerated in the said order (Page 128 of the Writ Petition).

4. Accordingly, the date of cross-examination of the Plaintiff was fixed on 07.11.2022. On reading the impugned order it is clear that on that date the Plaintiff was present in the morning session. The

order also states that PW-1 Madhukar Atmaram Bhoir alongwith his Counsel was present at the time of passing of order passed below Exhibit-147. It appears that the cross examination of the Plaintiff and PW-1 was fixed at 3:30 p.m. and it transpires that at 3:30 p.m. when the matter was called out before the learned Trial Court the Plaintiff's witness PW-1 as also his Counsel, both were absent. The learned Trial Court hence revisited the order dated 01.11.2022 passed below Exhibit-147 and in view of breach of the one of the condition mentioned therein vacated the stay and closed the evidence of the Plaintiff. The learned Trial Court thereafter fixed the matter for evidence of the Defendants.

5. Mr. Patil would submit that admittedly the Plaintiff's witness could not remain present at 3:30 p.m. on that date due to health reasons which are enumerated in the Petition.

6. Mr. Goyal would contend that in the event if Plaintiff's witness is willing to resurrect his mistake and present himself for cross examination, he would certainly not oppose the Petition and in that view of the matter he would have no grievance. This submission of Mr. Goyal is appreciated by the Court. However, he would contend that in a companion Writ Petition filed by the Plaintiff, the Plaintiff has also approached this Court and got the trial stayed in view of the application made by the Plaintiff.

7. Be that as it may, the scope of the present Writ Petition

involves the order dated 01.11.2022 passed below Exhibit-147, the breach of which has led to the passing of the impugned order dated 07.11.2022. It is seen that the order dated 01.11.2022 has been passed in order to enure to the benefit of the Plaintiff and despite that the Plaintiff has breached that order and the impugned order came to be passed. However, considering the *lis* between the parties, parties cannot be non-suited and not allowed to lead evidence. It is also equally true that the errant parties / litigants should also be put to terms, stringent terms.

8. The learned Trial Court by order dated 01.11.2022 had put reasonable terms to the Plaintiff. The conduct of the Plaintiff shows that he has taken the terms lightly and that cannot be allowed. In view of the same, exemplary costs are required to be imposed upon the Plaintiff if he seeks to set aside the order dated 07.11.2022 and seeks cross examination of his witness.

9. Mr. Patil on instructions submitted that the Plaintiff's witness PW-1 Mr. Madhukar Atmaram Bhoir shall remain present before the learned Trial Court on 30.01.2023 at 12:00 noon on which date the learned Trial Court is requested by this Court to fix up a schedule and direct the said witness to remain present thereafter for cross examination.

10. It is directed that the witness PW-1 Madhukar Atmaram Bhoir on behalf of Plaintiff shall adhere to the directions given to the

learned Trial Court and remain present on all such dates as fixed by the learned Trial Court for his cross examination.

11. However this order is passed subject to payment of costs of Rs.25,000/- by the Petitioner to be paid to Kirtikar Law Library, High Court, Mumbai. Payment of costs shall be condition precedent for the learned Trial Court to take into cognizance this order and allow the cross examination of the Plaintiff and determine the schedule on 30.01.2023.

12. Writ Petition disposed.

[MILIND N. JADHAV, J.]

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SATISH
KILAJE

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by SONALI
SATISH KILAJE
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