

IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.11319 OF 2022

- 1 Kalpesh Manubahi Shah  
of Mumbai Residing at Mahalaxmi,  
4<sup>th</sup> Floor, No.--/6, JVPD Scheme Road No.12,  
Vile Parle West, Mumbai – 400 056.
- 2 Nitin Kantilal Shah  
of Mumbai, Indian inhabitant,  
residing at 601, Dhanlaxmi Bldg.  
6<sup>th</sup> Floor, 90 feet Road,  
Ghatkopar East, Mumbai – 400 077.
- 3 Harshad Kanitlal Shah  
of Mumbai, Indian inhabitant  
residing at 203, Bhagnari Co-operative  
Housing Society, Near Chunabhatti  
Railway Station, Chunabhatti Sion,  
Mumbai – 400 022.
- 4 Rahul Kantilal Shah  
of Mumbai, Indian inhabitant,  
residing at 168/A, Hanuman Prasad,  
1<sup>st</sup> Floor, Block No.8,  
Behind Dena Bank, Kings Circle,  
Matunga (CR), Mumbai – 400 019.
- 5 Mayur Kantilal Shah  
of Mumbai, Indian inhabitant,  
residing at 7, Nath Krupa  
2<sup>nd</sup> Floor, Opp. A.T.I., P.N. Purav Marg  
Chunabhatti, Sion, Mumbai – 400 022.
- 6 Suketu Bhogilal Shah  
of Mumbai, Indian inhabitant,  
residing at 601, Manju Castle,  
51/A, St. Xaviers Road,  
Vile Parle West, Mumbai – 400 056.

....Petitioners

V/S

- 1 Mervyn Joseph Cardoz
- 2 Percy Auguste Cardoz  
Both of Bombay, Indian inhabitants,  
Residing at Angela Villa Maryland,  
Mount Poinsur, Borivali West,  
Mumbai – 400 103.
- 3 Smt. Pedrina D’Costa
- 4 Salvino D’Costa  
Both of Bombay, Indian inhabitant  
Residing at Plot No.17, Holy Cross Colony,  
Borivali West, Mumbai – 400 103.
- 5(a) Luciano Marcuso Fernandes
- (b) Mira Isabella Lobo
- (c) John Rency Fernandes  
of Bombay, Indian inhabitants,  
All adults, residing at Plot No.20,  
Holy Cross Colony, Borivali West,  
Mumbai – 400 103.
- 6 The Municipal Corporation of Greater Mumbai  
A Corporation sole having its office at  
Mahapalika Marg, Fort, Mumbai – 400 001.
- 7 Hariram Padam Patil
- 8 Dwarkanath Padam Patil
- 9 Kamlakar Jeevan Patil
- 10 ~~Yeshwant Jeevan Patil~~  
Nos.2 to 5 Hindu, Indian inhabitants,  
of Bombay, all residing at Patil House

Eksar Village, Borivali West,  
Mumbai – 400 092.

(a) Ravindra Y Patil.

(b) Bhalchandra Y Patil

Both adults, residing at Eksar,  
Borivali, Mumbai – 400 092.

(c) Jayanti K Bhagat  
Adult, residing at Dahisar Gaothan,  
Dahisar West, Mumbai-400 068.

(d) Smt. Durgabai Vasudeo  
Adult, residing at Village Rai,  
Bhayander West, Thane.

(e) Savitri N Patil  
Adult, residing at Village Tivari,  
Naigaon East, Thane.

(f) Kalpana V Bhoir  
Adult, residing at Village Juchandra,  
Naigaon East, Thane.

(g) Malti B Patil  
Adult, residing at Village Sasunavghar,  
Thane.

11. Hareshwar M Patil

12. Narayan M Patil

13. Manohar M Patil

14. Sakharam M Patil

(a) Meena S Patil  
being of unsound mind  
Through her son Jayesh Sakharam Patil

Being her guardian as appointed by this  
Hon'ble Court by order dated 17.09.2004

(b) Jayesh S Patil

(c) Nilesh S Patil

(d) Reshma S Patil  
being minor below the age  
of 18 years, through her brother  
Jayesh Sakaharam Patil being her  
guardian as appointed by this  
Hon'ble Court by order  
dated 16.09.2004

15. Ramdas M Patil

16. Govind M Patil

17. Namdev M Patil

18. Yadav M Patil

19. Chandrakant R Patil

20. Prabhakar R Patil

21. Dinkar T Patil

22. Vaman T Patil  
Residing at Eksar Matherphakadi,  
Dattapada Eksar Road, Borivali West,  
Mumbai-400 092.

23. Shri Sadashiv M Thombre

24. Smt Hemlata S Thombre

Carrying on partnership business from  
Sai Kutir, Dharamdas Marg, Borivali West,  
Mumbai-400 092.

....Respondents

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WITH  
INTERIM APPLICATION NO.18415 OF 2022  
IN  
WRIT PETITION NO.11319 OF 2022

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of Mumbai Residing at Mahalaxmi,  
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....Applicants

**IN THE MATTER BETWEEN:**

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of Mumbai Residing at Mahalaxmi,  
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Carrying on partnership business from  
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Mumbai-400 092.

....Respondents

...

**Mr. Aman Kacheria** a/w Mr. Neel R. Kothari and Ms. Krushika Udeshi for the Petitioners/Applicants.

**Ms. Poonam Madhwani** a/w Ms. Anjali Devkar for Respondent Nos.4 and 5(a) to 5(c).

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**CORAM: SANDEEP V. MARNE, J.**

**DATE : JULY 28, 2023.**

**JUDGMENT:**

1     **Rule.** Rule made returnable forthwith. Petition is taken up for final hearing with the consent of the learned Counsel appearing for Petitioners and the learned Counsel appearing for Respondent Nos.4 and 5(a) to 5(c).

2     By this Petition, Petitioners challenge order dated 10 August 2022 passed by the City Civil Court at Bombay thereby rejecting Notices of Motion Nos. 2316 of 2022 and 2317 of 2022.

3     Petitioners are original Defendant Nos.20 to 25 in S.C. Suit No.4835 of 1982. They filed Notice of Motion No.2316 of 2022 for recall of order dated 13 April 2022 by which the Court passed "No Cross" order and thereby prevented Petitioners from cross-examining PW1 (Plaintiff No.6). Petitioners also filed Notice of Motion No.2317 of 2022 seeking recall of order dated 6 May 2022, by which the Court directed that the Suit shall proceed without evidence *inter alia* of Defendant Nos.20 to 25.

4 Briefly stated, relevant facts of the case are that:

Plaintiffs have filed Suit No. 4835 of 1982 seeking *inter alia* declaratory reliefs with respect to land bearing plot No.s 12, 16 and 23 bearing City Survey Nos. 992, 96 and 999 respectively at Village Eksar, Taluka Borivali, Mumbai Suburban District. Respondent Nos. 1 to 5 herein are the original plaintiffs in the Suit. Petitioners herein purchased suit property from Defendant Nos. 2 to 5 in the year 2010. Consequently, Petitioners came arraigned as Defendants to the Suit on 18 January 2011. By that time, recording of evidence of PW-1 (Plaintiff No.6) was already complete. Petitioners filed their written statement on 30 March 2011. An Affidavit of Additional Evidence in lieu of Examination-in-Chief was filed by PW-1 (Plaintiff No.6) on 22 February 2019 and further cross-examination of PW-1 (Plaintiff No.6) was conducted on behalf of Defendant Nos. 2, 3(a) to 3(e) and 5(b) on 16 March 2020 and 19 March 2021. On 20 September 2021, an order was passed directing closure of cross-examination of PW1 (Plaintiff No.6). Defendant Nos.2, 3(a) to 3(e) and 5(b) moved application on 7 October 2021 to set aside order directing closure of cross-examination of PW1 (Plaintiff No.6). Plaintiffs did not object to further conduct of cross-examination of PW1 subject to payment of costs. Accordingly, further cross-examination of PW1 at the behest of Defendant Nos.2, 3(a) to 3(e) and 5(b) was conducted on 8 November 2021. Later, Plaintiffs were required to file Chamber Summons for impleadment of a Society to the suit as Defendant No. 26, who had apparently acquired rights in the suit property. The Chamber Summons was rejected in March 2022. On 13 April 2022, Defendant Nos.2, 3(a) to

3(e) and 5(b) completed the cross-examination. Since there was no appearance on behalf of Petitioners (Defendant Nos.20 to 25), the Court passed order of “No Cross” against them 13 April 2022. It appears that thereafter Plaintiff No.6 sought time to file further evidence on 25 April 2022 and 30 April 2022. However, on 6 May 2022 Plaintiffs as well as Defendant Nos.2, 3(a) to 3(e) and 5(b) filed pursis of closure of the evidence. Court accordingly passed order of “No evidence” against all Defendants including Defendant Nos.20 to 25 (Petitioners herein).

5. Aggrieved by Order dated 13 April 2022 denying them cross examination and Order dated 6 May 2022 closing evidence by all parties, Petitioners filed Notice of Motion Nos. 2316 and 2317 of 2022 for recall of Orders dated 13 April 2022 and 6 May 2022 respectively. By common Order dated 10 August 2022, the City Civil Court was pleased to reject both the Motions. Aggrieved thereby, Petitioners have filed the present Petition.

6. Mr. Kacheria the learned counsel appearing for Petitioners would contend that though Petitioners had engaged an Advocate to defend the Suit, he had not appeared in the suit throughout. That Petitioners changed their Advocate in July 2022 who noticed passing of “No cross” and “No evidence” order against Petitioners and filed Notices of Motion Nos.2316 of 2022 and 2317 of 2022 for recall of the orders passed on 13 April 2022 and 6 May 2022. He would submit that the chronology of

events narrated above would indicate that though Petitioners are guilty of non-appearance before the Court for conducting cross-examination of PW-1 (Plaintiff No.6), the Plaintiffs themselves have delayed the proceedings on one count or the other. He would submit that even after “No Cross” order was 13 April 2022, PW1 (Plaintiff No.6) sought time to lead further evidence. He would submit that though the Suit is of the year 1982 and requires early disposal, Petitioners came to be impleaded to the suit only in the year 2011. That the evidence was filed by PW1 (Plaintiff No.6) only in the year 2019. He would further submit that Plaintiffs desired impleadment of Defendant No.26 and were prosecuting proceedings in respect thereof till 12 January 2023. That after their Application for impleadment of Defendant No.26 was rejected by the City Civil Court, they filed Writ Petition No.8695 of 2022 before this Court and withdrew the same only on 12 January 2023. That under these circumstances Petitioners cannot be accused of causing any delay in decision of the suit.

7 *Per contra*, Ms. Madhwani, the learned Counsel appearing for Respondent Nos.4, 5(a) to 5(c) would strenuously oppose the Petition. She would take me through the Affidavits filed in support of Notices of Motion and would contend that the only reason sought for recall of the order is alleged mistake on the part of the Advocate of the Petitioners. She would submit that it is the duty of the Petitioners to make enquiries about progress of the suit and condonation of inordinate delay cannot be sought only by blaming an Advocate. In support of her contentions, she

would place reliance on judgments of the Apex Court in ***Salil Dutta vs. T.M. And M.C. Private Limited***, 1993 DGLS (SC) 114 and decision of this Court in ***Vasant Vithal Gawand vs. Shantaram Tukaram Gawand***. 2016 (4) Bom. C.R. 658.

8 Ms. Madhwani would further submit that application filed by Plaintiffs for impleadment of proposed Defendant No.26 cannot be cited as a reason by Petitioners for accusing Plaintiffs of causing delay in decision of the suit. She would further submit that the Original Defendants have been creating third party rights in respect of the suit property in favour of various individuals/entities who are required to be impleaded in the suit by Plaintiffs. The proposed Defendant No.26 was one such entity in whose favour rights have been created by some of the Defendants and merely because Plaintiffs are required to implead such third parties to the suit, the same would not *ipso facto* mean that any delay is caused by the Plaintiffs in prosecuting the suit. She would further submit that some of the Plaintiffs have died and the remaining are at advanced stage. She would submit that PW1 (Plaintiff No.6) is also at an advanced age and cannot be put to inconvenience at the cost of the Petitioners who have been extremely negligent in defending the suit. She would pray for dismissal of the Petition.

9 I have considered the submissions canvassed by the learned counsels appearing for the parties. True it is that the Petitioners have been negligent in defending the suit. It is the contention of the

Petitioners in their Motions that though they had engaged an Advocate to defend the Suit, their earlier Advocate did not give them any information about progress of the suit. This justification is unacceptable and the City Civil Court cannot be blamed in turning down the request for recall of orders.

10. There are however few mitigating factors, which can be considered to examine whether Petitioners can be granted an opportunity to cross examine PW 1. Petitioners, upon engaging a new Advocate in July 2022, took immediate steps for filing Notices of Motion for recall of orders dated 13 April 2022 and 6 May 2022. It is also required to be borne in my mind that though the City Civil Court passed “No Cross” order against Petitioners on 13 April 2022 and thereafter closed the evidence on 6 May 2022, the arguments in the suit are not concluded till date. This Court has passed interim order in the present Petition on 29 September 2022 and 23 November 2022 requesting the City Civil Court to defer arguments in the suit. It also appears that the Plaintiffs in the meantime were prosecuting proceedings for impleadment of proposed Defendant No.26 and Writ Petition No.8695 of 2022 filed by them for such impleadment came to be withdrawn on 12 January 2023. Considering these aspects, it cannot be stated that the hearing and disposal of the suit is delayed only on account of Petitioners.

11 Considering the overall conspectus of the matter, though Petitioners are guilty of negligence, in my opinion, one opportunity can be granted to them to cross-examine the witness (PW1) (Plaintiff No.6)

purely by way of indulgence and by imposing exemplary costs. The concerns expressed by Ms. Madhwani about advanced age and inconvenience likely to be caused to PW1 (Plaintiff No.6) can be taken care of by appointment of Court Commissioner for conducting his cross-examination.

12. Accordingly, Writ Petition partly succeeds and I proceed to pass the following order:

**ORDER**

- i) The impugned order dated 10 August 2022 passed in Notices of Motion Nos.2316 of 2022 and 2317 of 2022 is set aside.
- ii) Petitioners are permitted to cross-examine PW-1 (Plaintiff No.6).
- iii) The City Civil Court shall appoint appropriate Court Commissioner for conduct of cross-examination of PW-1 (Plaintiff No.6) on the next date of hearing. The cross-examination shall be conducted at the place of residence or such other place as is convenient to PW-1 (Plaintiff No.6).
- iv) Petitioners shall not seek unnecessary adjournments while conducting cross-examination by the Court Commissioner. The cross-examination shall be completed and report of cross-examination shall be filed before the City Civil Court by the Court Commissioner on or before 31 August 2023.

v) Petitioners shall bear the entire costs of the Court Commissioner. Additionally, Petitioners shall pay costs of Rs.1,00,000/- to Plaintiffs, by way of demand draft drawn in the name of Plaintiff No. 6 by handing over the same to the learned Advocate appearing for Plaintiffs within a period of two weeks from today. Failure to pay the costs within time stipulated shall result in automatic withdrawal of the order passed herein.

vi) After closure of cross examination of PW 1 (Plaintiff no. 6), Petitioners shall be at liberty to apply to the Court for leading their own evidence, if they so desire and complete the same in an expeditious manner, without seeking any unnecessary adjournments.

13 With the above directions, the Writ Petition and Interim Application No.18415 of 2022 are disposed of, with costs as directed above. Rule is partly made absolute.

SUDARSHAN  
RAJALINGAM  
KATKAM

Digitally signed by  
SUDARSHAN  
RAJALINGAM KATKAM  
Date: 2023.07.31  
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**(SANDEEP V. MARNE, J.)**