



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

914 WRIT PETITION NO. 525 OF 2023

LALITA PAPALAL VANJARI AND OTHERS

VERSUS

PUSHPABAI PRAKASH PATIL THROUGH POWER OF ATTORNEY
HOLDER BHATU GORAKH PATIL

...

Advocate for Petitioners : Mr. Sonawane Maheshkumar S.

Advocate for Respondent : Mr. Salunke Mayur Vasant

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CORAM : SHAILESH P. BRAHME, J.

DATE : 12 APRIL 2024

PER COURT :

Heard both the sides finally.

2. Petitioners have assailed order dated 21.10.2022 passed below exhibit 90 in RCS no. 126 of 2023 by learned Joint Civil Judge Senior Division, Dhule, refusing to set aside no cross order passed on 06.12.2021. Respondent has filed Special Civil Suit No. 126 of 2023 for specific performance and perpetual injunction. Petitioners have filed written statement to contest suit.

3. The respondent filed affidavit of examination-in-chief on 22.10.2021 below exhibit 46. No cross examination was conducted by the petitioners and their advocate. On 06.12.2021,

an order forfeiting right to cross examination was passed. Petitioner submitted application exhibit 90 on 30.08.2022 to set aside order dated 06.12.2021. It was opposed by the respondent. By impugned order application exhibit 90 was rejected.

4. Learned counsel for the petitioner submits that earlier Advocate did not inform the stage and progress of the matter and no effective steps could be taken. Petitioners were required to change lawyer. They learnt about filing of affidavit of examination-in-chief and no cross order after engaging new lawyer. There was outbreak of Covid-19 at the relevant time, due to which petitioners were unable to remain present. Learned counsel submits that one opportunity needs to be granted to the petitioners, in the interest of justice. Substantial rights are at stake and the cross-examination is necessary. He would further submit that impugned order is hyper technical causing prejudice to the petitioner.

5. Per contra, learned counsel Mr. Salunke supports impugned order on the basis of affidavit-in-reply filed in the matter. He would raise preliminary objection for maintainability of the petition because concerned lawyer who has been castigated by the petitioner has not been impleaded as a party in the petition as

well as in the application at exhibit 90. Petition is liable to be dismissed. He would further point out roznama and various dates of the proceedings to indicate conduct of the petitioners. When order of no cross-examination was passed, they were present and were aware of the order. Therefore, they should not have blamed their lawyer. On 22.10.2021, 17.11.2021, 04.01.2022, 24.01.2022 lawyer for the petitioners was present but no endeavor was made to conduct cross-examination.

6. It is further submitted that considering conduct of the petitioners, they are deemed to have waived their right of cross-examination. Application exhibit 90 was filed belatedly and by that time seven witnesses were examined by the respondent without there-being any cross-examination. It is further pointed out that new Advocate appears to have filed Vakalatnama on two occasions. Learned counsel, lastly submits that petitioners are protracting the matter. He seeks reliance on the judgment of the Supreme Court in the matter of *Salil Dutta Versus T.M. and M.C. Private Limited*, 1993 (2) SCC 185.

7. I have considered rival submissions of the parties. I have gone through affidavit-in-reply filed by the respondent and

various dates of proceedings as can be seen from the roznama. Undisputedly, suit is for specific performance of contract and injunction. Substantive rights of the litigating sides are at stake. Suit is at the stage of completion of recording of evidence. It cannot be overlooked that after no cross order, several further witnesses filed affidavits of examination-in-chief but they were not cross-examined.

8. It reveals from record that the petitioners were required to change earlier lawyer and new lawyer was engaged who stepped in on 30.08.2022. Certain allegations are made by the petitioners against earlier lawyer in application exhibit 90 as well as in present Writ Petition for not providing information of the dates, stages of the suit and filing of affidavit of examination-in-chief. There is want of co-ordination between petitioners and their lawyer. I am of the considered view that there are no serious imputations of competency, integrity and the conduct of lawyer. By no stretch of imagination it can be inferred that the lawyer concerned is a necessary party for the application exhibit 90 or for the present writ petition. The submission in this regard cannot be countenanced.

9. It is mentioned by the petitioners in their application, exhibit 90, that for want of knowledge, information and due to pandemic situation for Covid-19 they were unable to take steps or attend proceedings. Regular proceedings of the Courts were hampered due to outbreak of Covid-19. Courts were not regularly functioning at the relevant time. The litigants were in dilemma. This situation was taken care of by Apex Court by passing orders in *Suo Moto Writ Petition No. 03 of 2020*. No submissions have been made in respect of the order of the Apex Court and the protection applicable to petitioners. There is no reason to deny benefit of orders to them.

10. Learned counsel for the respondent has pointed out lapses on the part of petitioners as well as their conduct from *roznama*. They had opportunity to contact their lawyer and to conduct cross-examination. However, in peculiar facts and circumstances it would be too technical to forfeit their right of cross-examination.

11. This Court is of the considered view that though matter has proceeded further and on the verge of completion, one opportunity needs to be extended to the petitioner to conduct

cross-examination of the first witness. It would be in consonance with principles of natural justice. Equities can be balanced by imposing certain conditions on the petitioners.

12. Learned counsel for the respondent seeks reliance upon judgment of *Salil Dutta* (supra) and for that purpose paragraph no. 8 is being pointed out. The judgment of the Apex Court is distinguishable. It may not enure to the benefits of respondent.

13. In view of the reasons stated above, I pass following order :

ORDER

i. Impugned order below exhibit 90 is quashed and set aside. Order dated 06.12.2021 passed below exhibit 46 is also quashed on a condition that the petitioners shall deposit an amount of Rs. 5,000/- in the trial Court within a period of two weeks or directly pay it to the respondent. In case, amount is deposited, respondent shall be at liberty to withdraw the same.

ii. Petitioners shall co-operate for expeditious disposal of the proceedings.

iii. Writ Petition is disposed of in above terms.

[SHAILESH P. BRAHME, J.]