



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO. 14131 OF 2023

SHAIKH ABDUL MOBIN SHAIKH RAHIM
VERSUS
RADHAKISAN NAMDEO YEOLE AND OTHERS

...
Advocate for Petitioner : Mr. Rahul P. Dhase
Advocate for Respondents : Mr. Omkar M. Joshi h/f.
Mr. Sharad V. Natu
...

CORAM : MANJUSHA DESHPANDE, J.

DATE : 25-04-2025

PER COURT:-

1. Heard learned Advocates for the parties.
2. Petitioner is original defendant No.2 in Regular Civil Suit No.332 of 2010 filed by the original plaintiff/present respondent No.1 in this writ petition.
3. The petitioner has challenged the order dated 02.01.2023 wherein application at Exhibit-100 filed by the General Power of Attorney on behalf of defendants No.1 to 3 to set aside "no cross-order" passed below Exhibit-64, has been rejected.
4. It is contention of the petitioner that the suit has been filed in the Court of Civil Judge Junior Division, Georai, District Beed for declaration of ownership and perpetual injunction in respect of the

suit property land Block No.71 admeasuring 9H 19R, situated at village Takarwal, Taluka Gevrai, District Beed. Defendants No.1 to 3 filed their written statement on 22.11.2010. On 19.08.2014, the plaintiff has filed his affidavit of examination-in-chief. Since the defendants failed to cross-examine the plaintiff/witness, order of “no-cross” was passed by the trial Court on 08.11.2016.

5. It is further observed in the order that though respondents' Advocate was called upon for cross-examination of the plaintiff, nobody caused appearance. Therefore, “no-cross” order was passed by the learned Civil Judge Junior Division, Georai, on 08.11.2016.

6. It is further contention of the petitioner that due to illness of defendant No.1, defendants have executed power of attorney. The Power of attorney holder was looking after proceedings in the suit on behalf of the defendants. On 08.11.2016, “No cross” order was passed by the Court. The defendant filed application to set aside no cross order, which was allowed on 16.06.2016 on the condition of depositing cost of Rs.400/- and, therefore, the plaintiff was to be cross-examined subject to deposit the said amount.

7. Being aggrieved by the order which was passed on 08.11.2016, an application was moved by power of attorney of defendants No.1 to 3 on 13.11.2021. In the application, it is stated by the General Power of Attorney (for short, “G.P.A.”) on behalf of

defendants No.1 to 3, that though the order was passed by the Court setting aside “no-cross order” subject to depositing the cost of Rs.400/-, he could not deposit the cost of Rs.400/- in the Court as directed below Exhibit-64. It is further stated that since defendant No.1 is an aged person, he could not cause appearance before the Court. Defendants were aged persons, they had visibility and hearing issues. Defendant No.1 suffers from hypertension, therefore, defendant No.1 to 3 have executed general power of attorney on 10.01.2017 in favour of one Nazib Munir Ahmed. After executing of G.P.A. defendant No.1 expired. It is further stated that the G.P.A. failed to remain present before the Court, and even the Advocate for the defendants suffered an accident, eventually both of them did not remain present before the Court due to Pandemic lock-down. As a result, he could not file the application for setting aside the order at Exhibit-62.

8. It is contended by the petitioner that the substantial rights of the petitioner are at stake, the order Exhibit-62 needs to be quashed and set aside by granting opportunity to cross-examine the witness. The delay caused in filing application has not been intentional. Upon filing application at Exhibit-100/B, order was passed by the learned Civil Judge Junior Division on 02.01.2023. In the impugned order, it is observed that though the order of “no cross” was set aside on 08.16.2016 at Exhibit-62, the defendants had not deposited the cost, which was directed to be deposited.

On 10.01.2017, copy of G.P.A. in favour of Nazib Munir Ahmed by the defendants has been placed on record. Death certificate at Exhibit-103 is also placed on record, which shows that she has died on 05.07.2021. Therefore, the G.P.A. executed in favour of Shri. Nazib Munpir Ahmed does not remain valid in respect of defendant No.3. It is further observed that the order below Exhibit-69 has not been challenged by any defendant till date. Though sufficient opportunity was granted to the defendants to cross-examine the plaintiff, they failed to deposit the amount of cost. Hence, similar application for setting aside the order is not tenable.

9. Learned Advocate appearing for the petitioner submits that the suit is filed for declaration of ownership by the plaintiff, which has been opposed by the defendants, substantial rights of the defendants are at stake. The subject matter of suit is a property, hence, the valuable rights of the defendants will be deprived if the order is not set aside.

10. Admittedly, defendants No.1 and 3 have expired during pendency of the proceedings. Though the GPA was not valid against defendants No.1 and 3, it is very much valid to the extent of defendant No.2/petitioner. Hence, considering the substantial and valuable rights of the parties which are at stake, the “no-cross order” dated 08.11.2016 as well as order dated 02.01.2023

deserve to be quashed and set aside.

11. The learned Advocate appearing for respondents/defendants opposed the prayer made in the petition. It is submitted that though an opportunity was granted to the defendants to cross-examine the plaintiff by depositing the cost of Rs.400/-, yet they failed to deposit said cost and cross-examine the plaintiff. He further submits that from the application filed by the G.P.A. dated 13.11.2021 itself, it is apparent that an application is not valid application since defendants No.1 and 3 had already expired when the application was filed by the G.P.A. on 13.11.2021. Therefore, the application itself was not maintainable as it was not valid.

12. I have heard the learned Advocates for the respective parties and gone through the relevant documents placed on record.

13. While issuing notice this Court has observed in paragraph No.2 of the order dated 07.11.2023, as under;

“The petitioner is challenging the order dated 02.01.2023 passed below Exhibit 100 in R.C.S. No. 332 of 2010 by the learned Joint Civil Judge Junior Division, Georai. The learned counsel for the petitioner submits that due to unavoidable circumstances, the earlier order of setting aside no cross could not be complied with. In the interest of justice, it is desirable to extend an opportunity to the petitioner.”

14. While issuing the notice, this Court expressed that due to unavoidable circumstances, the earlier order of setting aside “no-cross order” has not been complied with. In the interest of justice, to extend an opportunity to the petitioner, it is further directed that the petitioner should deposit an amount of Rs.10,000/- (Rs. Ten Thousand Only) in the trial Court before the returnable date.

15. Upon going through the documents and the order passed by this Court while issuing notice, has observed that there shall be *ad-interim* stay in terms of prayer clause “C”. Upon perusal of the application Exhibit-100/D, it can be gathered that averment is made that owing to the physical constraints faced by the defendants, they had appointed G.P.A. to look after the matter. Though the order was passed setting aside “No cross” order subject to deposit of cost of Rs.400/-, but due to difficulties stated in the application, the G.P.A. had not deposited the cost.

16. Admittedly, defendants No.1 and 3 are no more and after their death, application was filed by G.P.A. on 13.11.2021 on their behalf to set aside the order of no-cross passed below Exhibit-64. However, the fact remains that the G.P.A. which executed by original defendant No.2 who is petitioner is still alive, his G.P.A. is valid and his substantial rights, needs to be taken care of. Considering the unavoidable circumstances as stated in the application by the G.P.A., I am satisfied that due to circumstantial

constraints he could not comply earlier order dated 08.11.2016. Hence, in my opinion, it would be appropriate if the plaintiff is appropriately compensated by granting the cost for inconvenience caused to him by granting opportunity to the petitioner to cross-examine the plaintiff.

17. As a result, the writ petition is allowed by quashing and setting aside the order below Exhibit-100 passed by the Joint Civil Judge Junior Division, Georai, in R.C.S.No.332 of 2010, dated 02.01.2023.

18. Though, initially this Court had directed the petitioner to deposit the cost of Rs.10,000/-, however, considering that the order was passed on 08.11.2016 directing the defendants to deposit cost of Rs.400/- to set aside "No cross" order, and thereafter, the suit remained pending till date due to which inconvenience is caused to the plaintiff to a considerable extent due to the pendency of proceedings, it would be appropriate to grant cost of Rs.15,000/- [i.e. Rs.5,000/- in addition to the costs already deposited in the trial Court.].

19. The Writ Petition is allowed in above terms.

[MANJUSHA DESHPANDE]
JUDGE

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