



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR

WRIT PETITION NO. 355 OF 2025

Kamalkishor Bhikuram Kedia (dead) through L.Rs. ... PETITIONER

Versus

Abdul Salim Sattar Miya & Ors. ... RESPONDENTS

Mr. R. N. Badhe, Advocate for Petitioners.

Mr. A. A. Mankar, Advocate for Respondent No.7.

CORAM : ANIL L. PANSARE, J.

DATE : MARCH 13, 2025.

ORAL ORDER

. Hear Mr. R. N. Badhe, learned Counsel for the Petitioner and Mr. A. A. Mankar, learned Counsel for the Respondent No.7.

2. Notice to the Respondent Nos.1 to 6 has been not issued. The learned Counsel for Petitioners submits that they are not appearing before the trial court, therefore, no relief is claimed against them. He submits that no notice be issued to the Respondent Nos.1 to 6. Accordingly, the Petition proceeds further at the risk of the Petitioners.

3. The challenge is to the order dated 18/10/2024 passed below Exhibit-65 by the 6th Joint Civil Judge Senior Division, Nagpur in MJC No. 258/2020, thereby rejecting the application filed by the Petitioners for setting aside the order dated 3/8/2024 passed below Exhibit-1 and for permission to lead further evidence.

4. On 25/2/2025 following order was passed :

“1] The respondent No.7 who is on caveat has filed additional affidavit stating therein that the petition has not been signed by any petitioner and further the affirmation is signed by one Iftekhar Ahmed s/o Nisar Ahmed, as power of attorney of the petitioner.

2] Learned Counsel for respondent No.7 has invited my attention to the so called power of attorney given by petitioner to Iftekhar Ahmed. It appears that petitioner No.1(b) Mrs. Rashmi w/o Swapnil Lele has only appointed Iftekhar Ahmed as power of attorney and other petitioners have not appointed him as their power of attorney. That apart in the power of attorney executed by petitioner No.1(b) there are no recitals that would permit Iftekhar Ahmed to file petition on her behalf.

3] At this stage, learned counsel for the petitioner seeks time to take instructions.

4] List the matter in the week commencing from 10th March, 2025.”

5. In response to the said order, the Petitioners have placed on record the Power of Attorney dated 23/3/2023 registered on 28/3/2023, by which, Mr. Iftekhar s/o Nisar Ahmed was authorized by the Petitioner No.1(b) to perform all necessary acts including filing proceedings before various courts including this Court. That being so, the objection raised by the Respondent No.7 that Mr. Iftekhar Ahmed does not have powers to file Petition is of no avail. As regards the other Petitioners, since they have signed Vakalatnama, the Petition can be said to have been filed in accordance with the High Court Appellate Side Rules, 1960.

6. On merits, the order dated 21/1/2025 passed by this Court will be helpful to understand the factual aspect. The order reads as under :

“ *Heard for some time.*

Prima facie it appears that the petitioners were not diligent in pursuing the cause. It further appears that Special Civil Suit No. 353/2008 was withdrawn on 29-7-2020. Thereafter application came to be filed for restoration of suit, and to make out a case, evidence was led. The evidence of applicant was closed on 17-2-2023. Thereafter respondent adduced evidence. The applicants, after about 1½ years of closure of evidence, have then moved application, Exhibit 60 for adducing further evidence, which was allowed on 6-7-2024. The applicants, however, failed to adduce evidence on the next date and, therefore, the evidence was again closed on 3-8-2024. Thereafter, after couple of adjournments, yet another application came to be filed on 5-9-2024 for setting aside the order of no evidence. The Court observed that the application is not supported by document nor is affidavit of evidence filed and accordingly held that despite giving sufficient opportunities, the applicants failed to avail the same and rejected the application. In the light of above, the petitioners shall justify inaction during the period from 17-2-2023 till 6-7-2024. The petitioners shall also place on record the order of withdrawal of suit.

The petitioners are praying for interim relief. However, for the reasons noted above, no case for interim relief is made out. The request is rejected.

At the request of learned counsel for the petitioners, stand over to 23-1-2025.”

7. In response to the said order, Petitioners filed the Affidavit dated 22/1/2025, wherein following reasons have been assigned for their inaction for the period from 17/2/2023 till 6/7/2024.

“2. In compliance of the above directions issued by this Honourable Court it is stated that the original applicant Shri Kamalkishor Kedia was not keeping well in the month of February 2023 before he died on 24-02-2023. After the death of the original applicant in the MJC No. 258/2020, the petitioners/legal representatives of the original applicant, being not aware of the legal procedures, informed the fact of the death of Shri Kedia to the earlier advocate Shri Sitani, who used to represent Shri Kedia then, only in the month of April 2023. Thereafter on 04-05-2023 an application was placed on the record of the learned trial court for bringing of the legal representatives of the Original Applicant on record.

3. It is submitted that on 05-09-2023 application for bringing of legal representatives on record came to be allowed by the learned trial court. In all this while the petitioners/legal representatives of the original applicant being lay man were not aware of the legal proceedings and the stage at which the miscellaneous judicial case was before the learned Trial Court. It was never informed by the earlier advocate that the matter was fixed for evidence or the learned trial court had passed any adverse order is pertaining to the leading of evidence of the original applicant. Thereafter in the month of April 2024 the petitioners enquired with their earlier advocate regarding the stage of the proceedings, the earlier advocate, informed that an application would be required to be filed before the learned trial court. The petitioners without knowing the legal/technical aspect of it filed the application on 26-04-2024 (at Exh.60), which came to be allowed on 06-07-2024. Needless to mention here that the widow of the original applicant being a senior citizen was all through out not keeping well due to her ailments such as high blood sugar and so also the other petitioners stay out of Nagpur therefore there was no occasion for the petitioners to personally come down to the trial court and enquired about the stage of the case. Thus the petitioners, all throughout have acted in a bona fide and diligent manner. In compliance of the order dated 21-01-2025, passed by this honourable court the petitioners are

annexing herewith the order dated 29-07-2020 passed in special civil suit number 353/2008, as ANNEXURE No.7.”

8. In view of the aforesaid reasons, on 23/1/2025 another order was passed by this Court, which reads as under :

“ *Heard.*

2. In response to order dated 21.01.2025, the petitioners have filed an affidavit explaining the steps taken during the period from 17.02.2023 till 06.07.2024 and have also placed on record the order of withdrawal of the suit. If what has been stated in the affidavit is correct, the petitioners’ predecessor appears to have been misled by his advocate in withdrawing the suit. This aspect, however, will be considered once the reply is filed by the other side.

3. In the meantime, let the petitioners placed on record the application seeking withdrawal of the suit.

4. Stand over to 29.01.2025.”

As could be seen, the Petitioners have assigned reasons for not taking prompt action from 17/2/2023 till 6/7/2024. Thus, what is now relevant is, to note the conduct of the Petitioners on and after 6/7/2024. The matter was fixed for evidence of Petitioners on 3/8/2024. The Petitioners failed to lead evidence and, therefore, the order of ‘no evidence’ came to be passed on 3/8/2024. Immediately on next date i.e. 5/9/2024, the Petitioners moved application for setting aside the said order. The trial court observed that the application was not supported by the documents, nor was affidavit of evidence in lieu of examination-in-chief filed by the Petitioners, and accordingly, rejected the application vide order dated 18/10/2024. The order further indicate that inspite of sufficient opportunities, the Petitioners failed to tender evidence. However, considering the fact that Petitioners were in some

difficulties during the period from 17/2/2023 till 6/7/2024, they would carry blame of not entering witness-box only on one date i.e. 3/8/2024, and for such lapse, it would be too harsh to not permit them to lead evidence.

9. As such, the trial court was correct in expecting from the Petitioners to file along with the application an affidavit of evidence in lieu of examination-in-chief. However, since the lapse was committed only once, i.e. on 3/8/2024, in my considered view, the trial court ought to have extended some concession in this regard, may be by imposing costs, because to not permit party to lead evidence is something that would amount to denial of justice.

10. At this stage, the learned Counsel for Respondent No.7 has tendered across Bar Vakalatnama filed by the Petitioners before the trial court. It is signed by Mr. Iftexhar Ahmed and none else. Accordingly, it is argued that Vakalatnama before the trial court is only on behalf of the Petitioner No.1(b), and therefore, the other Petitioners are not represented. He further submits that the explanation of absence on 3/8/2024, if any, will be on behalf of the Petitioner No.1(b), and there is no reason why should other Petitioners not entered witness-box on 3/8/2024.

11. I do not find any substance in the said argument. Firstly because, this fact was not brought to the notice of the trial court, and the trial court has not passed impugned order by considering the said fact. It has been brought to the notice of this Court today. The trial court appears to be oblivious to these facts. Nonetheless, the effect of Vakalatnama having been signed by the Petitioner No.1(b) will be that, before the trial court Petitioner No.1(b) only is prosecuting the cause and not the other Petitioners. In the circumstances, the

absence on behalf of the Petitioners on 3/8/2024 to lead evidence can be attributed only to the Petitioner No.1(b). The others appear to have chosen not to be a part of the application filed before the trial court. The consequences of the same may be considered by the trial court. Put altogether, the Petitioner No.1(b) deserves opportunity to lead evidence. Hence, the following order.

ORDER

1. Writ Petition is partly allowed.
2. The order dated 18/10/2024 passed below Exhibit-65 by the 6th Joint Civil Judge Senior Division, Nagpur in MJC No. 258/2020 is hereby quashed and set aside.
3. Application (Exhibit-65) is allowed to the extent of granting permission to lead evidence to the Petitioner No.1(b), subject to costs of Rs.10,000/- to be paid to the Respondent No.7, which shall be paid within two weeks from today by depositing the same before the trial court.
4. The Petitioner No.1(b), on 18/3/2025, which is the scheduled date, shall file affidavit in lieu of examination-in-chief before the trial court and shall make herself available for cross-examination. Needless to mention that Petitioner No.1(b) is represented through the power of attorney holder Mr. Iftekhar s/o Nisar Ahmed.
5. The parties shall co-operate with the trial court for early disposal and no

adjournment will be sought without there being sufficient reason to the satisfaction of the trial court.

6. Writ Petition is disposed of in above terms.

(ANIL L. PANSARE, J.)

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