

(2017) 05 BOM CK 0076
In the Bombay High Court
Case No : 752 of 2016

Shri Robert D'Sa e Peixote, Expired through his legal heir
Shri Godrey Devidinho D'Sa e Peixote, & Anr. APPELLANT

Vs

Shri Antonio D'Souza, Son of late Mariano D'Souza RESPONDENT

Date of Decision : 04-05-2017

Acts Referred:

Citation : (2017) 05 BOM CK 0076

Hon'ble Judges : M. S. Sonak

Bench : SINGLE BENCH

Advocate : J. Ramaiya, I. Santimano, J. Godinho

Judgement

1. Heard Mr. J. Ramaiya, learned Counsel for the petitioners and Mr. J. Godinho, learned Counsel for the respondent.
2. The challenge in this petition is to the order dated 22.4.2016 and 29.1.2016 made by the learned Civil Judge, Junior Division, at Panaji.
3. By order dated 29.1.2016, plaintiff was barred from cross examining DW1 because despite opportunities, neither the plaintiff nor his Advocate remained present when the matter was posted for cross examination of DW1. Therefore, the petitioners took out an application at Exh.102 seeking recall of the order dated 29.1.2016 and leave to cross examine DW1. By order dated 22.4.2016, the learned Civil Judge, Junior Division, Panaji has rejected the application at Exh. 102.
4. Mr. Ramaiya, learned Counsel for the petitioners submits that during the months of December, 2015 and January, 2016, there was some unrest in the legal fraternity. The petitioners' advocate appearing before the learned Trial Judge did not know whether to attend the Court proceedings during the said period. On account of such dilemma, some dates were missed. Mr. Ramaiya submits that yet another opportunity ought to have been afforded to the petitioners to continue the cross examination of DW1. Mr. Ramaiya submits for

recall of the order dated 29.1.2016, application may not have been happily worded. Mr. Ramaiya submits that this was real reason why the petitioners Advocate could not remain present in the court or keep a track of the matter.

5. Mr. Godinho, the learned Counsel for the respondent submits that this is a case where several opportunities have been granted to the petitioners in the past. Even on one earlier occasion evidence had been closed and reopened subject to the payment of costs. The petitioners defaulted even in the payment of such costs. For these reasons Mr. Godinho, submits that no further indulgence may be extended to the petitioners.

6. On consideration of the rival submissions and on perusal of the record, though it is the true that the petitioners and their Advocate were not as diligent as they are required to be, the impugned orders declining the petitioner opportunity to cross examination are rather harsh in the facts and circumstance of the case. For the reason stated in the application for recall, this is probable one. For lack of diligence on the part of the petitioners, the petitioners can always be put to terms. However, yet an additional opportunity is due and therefore, same can be granted.

7. The impugned orders dated 22.4.2016 and 29.1.2016 are accordingly set aside. The petitioner's application at Exh.102 is allowed. This shall however subject to the petitioners paying costs of ₹5,000/- to the respondents within a period of 6 weeks from today. In case costs are not paid within a period of six weeks from today, this petition shall be deemed to have been dismissed without further reference to this Court.

8. If the amount of costs are paid, the petitioners shall proceed with the cross examination of DW1 on the date fixed by the learned Trial Judge without seeking any unnecessary adjournments or without giving excuses. The petitioners shall also pursue the matter with necessary diligence in future.

9. Rule is made absolute in the aforesaid terms.

10. All concerned to act on the basis of duly authenticated copy of this order.