

(2012) 04 BOM CK 0066
In the Bombay High Court
Case No : Writ Petition No. 302 of 2012

Smt. Rosalina Coutinho e Quadros, (since deceased) APPELLANT
represented by legal representative Domingos Antonio M.
Coutinho e Quadros

Vs

Mr. Remigio Quadros (dead) and his wife, through legal RESPONDENT
heirs:, Mrs. Vincy Quadros, Daughter, married to, Mr. Domnic
Fernandes, Mrs. Swetha Quadros, Daughter, married to, Mr.
Menino D'Souza and Mrs. Antonieta Quadros

Date of Decision : 27-04-2012

Acts Referred:

Constitution of India, 1950 — Article 227

Citation : (2012) 04 BOM CK 0066

Hon'ble Judges : F.M. Reis, J

Bench : Single Bench

Advocate : C.A. Coutinho, for the Appellant;

Judgement

F.M. Reis, J.—Heard Shri C.A. Coutinho, the learned Counsel appearing for the petitioner. None for the respondents though served. Rule. Heard forthwith. The parties were put to notice that the above petition may be disposed of finally at the stage of admission. The respondents though served failed to remain present.

2. The above petition challenges the order dated 2/04/2012 passed by the learned Civil Judge Junior Division, Quepem, whereby an application filed by the petitioner to recall an order closing cross-examination of the petitioner came to be dismissed.

3. Shri C.A. Coutinho, the learned Counsel appearing for the petitioner has assailed the impugned order on the ground that though the suit was filed in the year 1996, nevertheless, the evidence of the petitioner began on 12/12/2007 and proceeded by examining at least five witnesses and was concluded on 6/02/2012. The learned Counsel further pointed out that after evidence of the petitioner was closed the matter was referred to the Lok Adalat for conciliation

on 10/02/2012 and a noting was made that the matter could not be settled on 25/02/2012. The learned Counsel further pointed out that the matter was thereafter fixed on 7/03/2012 when both the parties filed a joint application that the parties would file consent terms and the case was posted for consent terms and/or affidavit on 14/03/2012. On the said date the affidavit of the respondents was filed and the matter was fixed for cross-examination on 21/03/2012 at 11.30 a.m. The learned Counsel further points out that on account of other engagements of the advocate appearing for the petitioner, he reached the Court at about 12.50 p.m. and requested the learned Judge to take up the matter. But however, it transpired that the matter was called out at about 12.45 p.m. and the impugned order closing the evidence of the petitioner came to be passed. The learned Counsel further points out that there was no deliberate default on the part of the petitioner not to proceed with the evidence on the said date as it was on account of the default if any, on the part of the advocate as he could not reach in time before the learned Judge. The learned Counsel further points out that these facts have been placed before the learned Judge in the affidavit. The learned Counsel has taken me through the roznama and the records and pointed out that the learned Judge has erroneously refused to recall the order closing the evidence and, as such, committed jurisdictional error which calls for interference by this Court under Article 227 of the Constitution of India. The learned Counsel, as such, submits that the impugned order be quashed and set aside.

4. This Court at the time of issuing notice to the respondents had ordered the petitioner to deposit a sum of Rs. 7,000/- towards costs which the petitioner has already deposited in this Court. The respondents though served failed to remain the present.

5. I have carefully considered the submissions of the learned Counsel as well as perused the relevant records as pointed out by the learned Counsel. On perusal of the records, I find that though the suit was filed in the year 1996, the evidence of the petitioner was concluded on 6/02/2012. Thereafter, the matter was further delayed on account of the fact that the matter was referred to the Lok Adalat and ultimately both the parties filed an application on 7/03/2012 to the effect that they wanted to file consent terms, but however as the case had not been settled the affidavit of the respondents came to be filed on 12/03/2012 and part of examination in chief was recorded on 14.3.2012 and thereafter the matter was adjourned for want of time for cross-examination of the petitioner to 21/03/2012. The records further reveal that though the matter was stated to be posted at 11.30 a.m., the advocate appearing for the petitioner reached the Court at about 12.50 p.m. No doubt there was some negligence on the part of the advocate appearing for the petitioner to remain present in Court when the matter was called out but however, such negligence could be a justification to recall the order passed closing the cross-examination of the petitioner in the facts of the present case. It is well settled that though prior conduct of the parties would not be relevant to consider whether any discretion is to be exercised or not to grant an adjournment on the relevant date, in case there was

justification. Considering that the advocate arrived late to conduct the cross-examination there was some justification to show some indulgence to the petitioner by recalling the order closing the cross-examination of the petitioner as the learned Advocate reached before the rising of the Court. In case the impugned order is not recalled the petitioner would suffer irreparable damage to his case. In such circumstances, considering that there was some default on the part of the petitioner in failing to remain present such inconvenience can always be compensated. In the present case, this Court at the time of issuing notice to the respondents had ordered the petitioner to deposit a sum of Rs. 7,000/- as costs in this Court. Hence, the costs payable to the respondents are as such quantified at Rs. 7,000/-. The learned Judge was not justified to refuse to recall the order closing the cross-examination of the petitioner as well as passing the impugned order dated 2/04/2012. Considering that the matter was fixed for the first time for the cross-examination of the petitioner some latitude could have been given to permit the advocate for the petitioner to conduct such cross-examination. As such, I find that the learned Judge has exercised the discretion with material irregularity whilst passing the impugned order which calls for interference of this Court in exercise of its jurisdiction under Article 227 of the Constitution of India. In view of the above, I pass the following order:

ORDER

- (i) The impugned order dated 2/04/2012 is quashed and set aside.
- (ii) The petitioner is permitted to proceed with the cross-examination of PW1 subject to payment of costs of Rs. 7,000/- to the respondents deposited in this Court.
- (iii) The respondents are permitted to withdraw the said sum of Rs. 7,000/- deposited by the petitioner towards costs referred to herein above.
- (iv) Rule is made absolute in the above terms.
- (v) The petition stands disposed of accordingly with no order as to costs.