

ORDER BELOW EXH.83

(Passed on 02.05.2024)

1. This is an application filed by the defendants for dismissing this suit in default of the plaintiff as he failed to adduce his evidence in this very old suit.

2. In this application it is contended by the defendant that this is very old suit. Initially this suit was filed in the year 2013 as RCS No.544/2013. In this suit, plaintiff had repeatedly failed to adduce his evidence therefore, this suit was already dismissed in his default. Later on, this suit is restored.

3. The defendants have further contended that, after the restoration of this suit also since August-2023 plaintiff repeatedly failed to adduce his evidence. Since long time plaintiff has been taking adjournments on various grounds. On 20.4.2024, the cross-examination of the plaintiff was going on, at that time, plaintiff informed this court that his blood pressure is increased and sugar is down, therefore, considering his request this court had adjourned the matter but since then he failed to appear before this Court for recording his further evidence. From the conduct of plaintiff it is very much clear that he just wants to prolong this suit and for that purpose giving various reasons for adjournment. In such circumstances, considering the overall conduct of plaintiff this suit be dismissed in his default.

4. The plaintiff has filed his say on the leaf of this application. In his say, he has stated that the plaintiff was ready for recording his evidence, therefore, he has already filed his affidavit of examination of chief on record, but during his cross-examination his

health was down, therefore, he went to doctor and local doctor has referred him to Akola. In such circumstances, this application is not tenable so it be rejected and plaintiff be allowed to adduce his evidence.

5. Heard the Ld. Respective Advocates of both sides. I have also gone through the medical papers produced on record. It appears that the doctor has advised the plaintiff to take rest at his home and he is called after 15 days for his check-up.

6. From the submissions of the Ld. Advocates of both sides it is very much clear that they both are agreed for the further examination of plaintiff as witness. But the health problem of the plaintiff is the difficulty before them. The Ld. Advocate of plaintiff is also submitting that the plaintiff is ready for his further examination but he has to take sufficient rest at his home, therefore, he is unable to attend this court for his further examination.

7. In above circumstances, as both parties are ready to conduct the examination of plaintiff for recording his evidence in this old suit, it would be just and proper to appoint a Court Commissioner vide Order-XXVI, Rule-1 of Code of Civil Procedure for the examination of plaintiff as witness. Further, both Ld. Advocates are agreed for such appointment of commissioner to examine the plaintiff as his witness.

8. At the outset, it is to be noted that a party can not be prevented from adducing the best evidence, if such evidence can be adduced with help of the commissioner. Refusal of request of the Ld. Advocates of both sides to appoint a commissioner in an appropriate case amount to failure of exercise of jurisdiction vested in court.

Perusing the medical papers and considering the condition of plaintiff narrated by his Ld. Advocate at length. It is obvious that the plaintiff is unable to attend the court due to sickness. But considering the very old nature of the suit it is necessary in order to expedite the matter to examine him. It appears that it will take uncertain time for recovery of plaintiff from the sickness. Till then this very old matter can not be kept stand still. Therefore, in my view it is necessary to appoint the commission to examine the witness i.e. plaintiff namely Brajesh Ashokrao Chikte.

9. The plaintiff has to establish his own case by adducing the evidence at his costs. In such circumstances, it is not desirable to over burden the defendants with the expenses of this commission. Therefore, expenses incurred for the commission have to be borne by the plaintiff.

10. In view of above overall discussion this application needs to be rejected and while rejecting this application Court Commissioner needs to be appointed for the further examination of PW No.1. Both parties are agreed for appointing Mr. D.M.Kute, learned advocate from Akot Bar Association as a Court Commissioner for examination of plaintiff as witness. Hence, I proceed to pass the following order

ORDER

1. Mr. D.M.Kute Ld. Advocate is hereby appointed as court commissioner to examine the witness/plaintiff Brajesh Ashokrao Chikte R/o. Malegaon Bazar Tq. Telhara Dist. Akola on 10.5.2024 at his residence. However commissioner is at liberty to pre-pone the date of commission subject to notice to advocates of both the parties.

2. The plaintiff is directed to deposit the amount of Rs.4,000/- provisionally to meet the fees of commissioner. He is further directed to deposit Rs.500/- provisionally towards expenses of the defendant on or before 08.05.2024 and also to pay Rs.500/- as the Bhatta of the clerk of this court.
3. Both the parties are directed to remain present on 10.05.2024 before the commission at the residence of plaintiff.
4. The Court Commissioner is directed to submit evidence taken under it to this court on or before 13.05.2024.
5. The Junior Clerk of this court is directed to assist the commission in recording evidence and he is permitted to carry the record and proceeding of this case under his safe custody to the place of commission.
6. The plaintiff shall deposit the above said charges punctually on or before 08.05.2024, failure to it, necessary order will be passed, so as to dispose of this very old suit.
7. Costs in main cause.
8. Issue commission letter accordingly.

Date : 02-05-2024

(Mahesh S. Kale)
Civil Judge (Sr.Dn.)
Akot.