

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

WRIT PETITION NO.11335 OF 2015

1. Vasiyoddin s/o Riyazoddin Mujawar,
Age 43 years, Occu. Business
R/o Peer Nagar, Nanded
2. Sadashiv s/o Madhavrao Deshmukh,
Age 49 years, Occu. Business,
R/o Fule Nagar, Nanded
3. Pravin s/o Omprakash Pokarna,
Age 35 years, Occu. Business,
R/o Maganpura, Nanded ..Petitioners

Versus

1. Maroti s/o Baburao Nalge,
Age 60 years, Occu. Business,
R/o Shyam Nagar, Nanded
2. Smt. Bela w/o Kishorkumar Varma,
Age 54 years, Occu. Business,
R/o Somesh Colony, Nanded
3. Kishorkumar s/o Sumeshchandra Varma,
Age 58 years, Occu. Business,
R/o Somesh Colony, Nanded
4. Smt. Pashmina w/o Rajendra Kshetriya,
Age 60 years, Occu. Business,
R/o Ahmedabad (Gujarat State)
(died, through L.Rs.)
- 4-A Rajendra s/o Vithaldas Kshetriya
Age 64 years, Occu. Business
- 4-B Pulin s/o Rajendra Kshetriya,
Age 40 years, Occu. Business
- 4-C Parag s/o Rajendra Kshetriya,
Age 39 years, Occu. Business,

All 4-A to 4-C R/o 7, Awanti
Apartment, Bhagwan Nagora Tetra
Paldi, Ahmedabad 380007
5. Rajesh s/o Rameshchandra Varma,
Age 55 years, Occu. Business
R/o Mumbai

6. Smt. Sonal Naresh Gujrathi,
Age 60 years, Occu. Business,
R/o Ahmedabad (Gujarat State)

7. Smt. Heena w/o Ashutosh
Kshetriya, Age 43 years,
Occu. Houshold R/o America

Respondent Nos.4 to 7 through
their Power of Attorney -
Kishorkumar s/o Someshchandra
Varma, Age 58 years, Occu.
Business, R/o Somesh Colony,
Nanded

8. Madhavrao s/o Abajirao Patil,
Age 63 years, Occu. Agri.,
R/o Wajegaon, Taluka and
District Nanded

..Respondents

Mr G.R. Syed, Advocate for petitioners
Mr Amit Mukhedkar, Advocate for respondents

CORAM : N.W. SAMBRE, J.

DATE : 4th December 2015

PER COURT

Heard.

2. Special Civil Suit No.196 of 2010, for specific performance was filed by the plaintiffs which has reached at the stage of recording of evidence. The defendant No.2 submitted his examination-in-chief and was subjected to cross-examination by the plaintiffs. During his cross-examination, the learned Counsel for the defendant No.7 sought to cross-examine defendant No.2. The plaintiffs objected to same which was sustained, as is apparent from the observations made by 3rd Joint Civil Judge, Senior Division, Nanded in the order 6th October 2015, passed below Exhibit 146. As a consequence, defendant No.7 was not permitted to cross-examine defendant No.2. Thereafter, defendant

No.7 moved another application Exh.149 with similar prayer seeking permission to cross-examine defendant No.2.

3. The said application Exh.149 came to be granted on 17th October 2015 by the 3rd Joint Civil Judge, Senior Division, Nanded, as such present petition.

4. Learned Counsel for the plaintiffs, while questioning the legality of the order impugned dated 17th October 2015, permitting defendant No.7 to cross-examine defendant No.2, would urge that this order is contrary to the earlier order on the same issue, passed by the same Court on 6th October 2015. According to him, the principle of *res judicata* operates even during pendency of the suit and as such, the order is contrary to the earlier order dated 6th October 2015, refusing permission to defendant No.7 to cross-examine defendant No.2.

5. He would then add that the defendant No.7, for no good reasons is trying to spoil the case of the plaintiffs. As the defendant No.2 and 7 are contrary and as such, the defendant No.7 should not be permitted to cross-examine defendant No.2.

6. While resisting the above submissions, learned Counsel for respondent No.7 by relying upon the provisions of Section 136 and 137 of the Evidence Act would urge that the observations refusing the permission, upon a objection by the petitioner on 6th October 2015 cannot be given colour of the order. According to him, the same was

observed by the learned trial Court while recording the evidence. He would then urge that it is after the cross-examination of defendant No.2 conducted by the plaintiffs, material was noticed against defendant No.7, as was deposed by defendant No.2. Same prompted him to move another application i.e. Exh.149 seeking permission to cross-examine defendant No.2. According to him, the principle of *res judicata* will not operate in the light of above background. He would then add that the material that was brought on record in cross-examination of defendant No.2 by the plaintiffs in relation to the conduct of defendant No.7 will be taken into account against him while deciding the suit on merit and as such, submits that the learned trial Court was right in granting application Exh.149 permitting cross-examination of defendant No.2 by defendant No.7 and prayed for rejection of the petition. So as to substantiate his case, he placed reliance upon the judgment of this Court in the matter of **Vinod Khimji Lodaya Vs. Muljibhai Maujibhai Patel & Ors.**, reported in **2013 (4) Bom. C.R. 487.**

7. Having considered the rival contentions of the parties, it is required to be noted that while recording the evidence by the trial Court if the objection is raised by either of the parties, it is expected of trial Court to deal with the said objection then and there only and while doing so, in the present case it appears that the learned trial Court has rejected the claim of defendant No.7 seeking permission to cross-examine defendant No.2. The said observations are right in its entirety, particularly as reflected in para 14 of evidence of defendant

No.2 from which it could be gathered that the submissions made by rival parties are taken into account and based on the same, learned trial Court has opined that defendant No.7 cannot be permitted to cross-examine defendant No.2 i.e. witness on behalf of other defendants.

8. In view thereof, the requirement of considering the observations as a colour of order or not are already noticed to be satisfied, as the rival submissions are dealt with by making observations by the learned trial Court.

9. It is not in dispute that those observations refusing permission to cross-examine defendant No.2 by defendant No.7 made on 6th October 2015 were not observed by defendant No.7.

10. Defendant No.7 then filed application Exh.149 seeking permission from the same Court for cross-examination of witness defendant No.2 on the ground that he has deposed to the detriment of defendant No.7. Said application is granted by the Court by order impugned which prayer was, in fact, earlier rejected as observed herein above.

11. In my opinion, just because defendant No.2 has deposed to the detriment of defendant No.7 that will not give him liver to move before the Court having suffered order of rejection of such prayer for cross-examination of witness on 6th October 2015. Said observations

definitely operate as *res judicata* as against defendant No.7.

12. Though Mr Mukhedkhar was right in pointing out that the deposition of witness of defendant No.2 during cross-examination by the plaintiffs is subsequent to the said order of rejection of permission for cross-examination, passed on 6th October 2015, however, such change in time will be of hardly any assistance so as to overcome the applicability of principle of *res judicata*.

13. In view thereof, in my opinion, the order impugned passed by trial Court below Exh.149 on 17th October 2015 goes contrary to its own order passed on 6th October 2015 and as such, required to be hit by principle of *res judicata*.

14. As such, the order dated 17th October 2015 passed by learned Civil Judge, Senior Division, Nanded on application below Exh.149 in Special Civil Suit No.196 of 2010 is hereby set aside.

15. However, the above referred illegality on the part of Court below, this Court cannot leave the defendant No.7 remediless. In my opinion, it will be open for defendant No.7 to question the observations made by same Court on 6th October 2015 pursuant to objection raised by the petitioner to the prayer made by defendant No.7 seeking cross-examination of defendant No.2.

16. With these observations, writ petition stands allowed.

17. In view of request of parties and in the interest of justice, the learned trial Court is directed to keep away the hands from the proceedings in question for a period of four weeks from today.

(N.W. SAMBRE, J.)

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