

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.9830 OF 2012

Smt. Padmavati Nirmalnath Vankudre	]	
(Since Deceased) by legal heirs.	]	
1. Umesh Nirmalnath Vankudre and Ors.	]	... Petitioners

Versus

Chandrakant Shripal Vankudre	]	
(Since Deceased), by legal heirs.	]	
1-A) Shrimati Alka Anil Rasne and Ors.	]	... Respondents

Mr. Sandeep S. Koregave for Petitioners.

Mr. Rajdeep S. Khadapkar for Respondent Nos.2, 3 and 9 to 14.

CORAM :- M. S. SONAK, J.

DATE :- AUGUST 12, 2015

P. C. :-

1. This petition challenges order dated 14/09/2012, by which the Original Petitioner (since deceased, during the pendency of this petition) was not permitted to cross-examine the Defendant Nos.2 and 3, on the ground that such right was waived by him.

2. The suit is for partition. Therefore, it is trite that all the parties thereto, act in the capacity of Plaintiffs, notwithstanding the manner in which they may have been described in the plaint. Upon conclusion of examination-in-chief of Defendant Nos.2 and 3,

Defendant Nos.4 to 6, who in their Written Statement have supported the case of the Plaintiff, have cross-examined the Defendant Nos.2 and 3. Before the Plaintiff could cross-examine the Defendant Nos.2 and 3, the said Defendants took out an application at Exh.308 objecting to cross-examination by the Plaintiff on the ground that the Plaintiff had waived his right to do so by permitting the Defendant Nos.4 to 6 to cross-examine first. Besides, it was urged that since the Defendant Nos.4 to 6, who support the Plaintiff, have already cross-examined the Defendant Nos.2 and 3, no prejudice will occasion to Plaintiff, if permission is denied to cross-examine the Defendant Nos.2 and 3. It is this application at Exh.308 which was allowed by the impugned order. Hence this petition.

3. After this petition was instituted, the Petitioner-original Plaintiff expired on 26/12/2012. The Defendant Nos.4 to 6, who are the legal representatives of the deceased Petitioner-Original Plaintiff, are then brought on record not only in the present petition, but also in the suit. Mr. Rajesh S. Khadapkar, learned Counsel for Respondent Nos.2, 3 and 9 to 14, submits that this is a development which ought to enure to the sustaining of the impugned order, since now the Defendant Nos.4 to 6 have themselves become the Plaintiffs in the suit. Since the Defendant Nos.4 to 6 have already cross-examined the Defendant Nos.2 and 3, there is no question of their insistence upon cross-examination once again.

4. Although there is substance in the contention of Mr.Khadapkar, in view of the peculiar facts and circumstances, no serious prejudice will occasion to Defendant Nos.2 and 3 if, the Defendant Nos.4 to 6, who have now been arrayed as Plaintiffs on account of being legal representatives of the deceased Original Plaintiff, are granted one more opportunity to cross-examine the Defendant Nos.2 and 3. Such opportunity is necessary because it is possible that the earlier cross-examination was only in the context of safeguarding their rights and interests in the suit. It is possible that further cross-examination is necessary in the context of the altered position consequent upon the demise of the Original Plaintiff. No doubt, it will mean that the Defendant Nos.2 and 3 will have to present themselves for cross-examination once again. This prejudice, can be compensated by award of costs. Therefore, appropriate order, in the circumstances, would be to set aside the impugned order dated 14/09/2012 and permit the Defendant Nos.4 to 6, now in their capacity as legal representatives of the deceased Original Plaintiff, to once again cross-examine the Defendant Nos.2 and 3. This shall be subject to the Defendant Nos.4 to 6, who are now pursuing the present petition, paying costs of Rs.10,000/- in favour of the Defendant Nos.2 and 3. Such costs to be deposited before the Trial Court within a period of two weeks from today. Once deposited, the Defendant Nos.2 and 3 shall be at liberty to withdraw the same. Once the costs are deposited, the Trial Court to fix appropriate date for cross-examination of Defendant Nos.2 and 3.

5. Accordingly, the impugned order dated 14/09/2012 is set aside. The Defendant Nos.4 to 6, in their capacity of legal representatives of the deceased Original Plaintiff, are granted an additional opportunity to cross-examine the Defendant Nos.2 and 3, subject to deposit of costs of Rs.10,000/- (Rupees Ten Thousand Only) within a period of within a period of two weeks from today. In case the costs are not deposited, this petition shall be deemed to have been dismissed. Rule is made absolute to the aforesaid extent. There shall be no separate order as to costs other than the one already made.

6. The parties to appear before the Trial Court on 14/09/2015 at 11.00 a.m.

7. All concerned to act on basis of authenticated copy of this order.

(M. S. SONAK, J.)