

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 277 OF 2014

Geeta R. Hatkar .. Petitioner
vs.
Nalinibai K. Dhonde & ors. .. Respondents

Mr. Mayur Khandeparkar a/w. Ms Ambrin Khan for the Petitioner.
Mr. Clive D'zouza for Respondent No.4.
Mr. Omar K. Shaikh for Respondent Nos. 5 & 6.
Ms Manasi Joshi i/b Ms Sharmila V. Deshmukh for Respondent No.7(MHADA)

CORAM : M. S. SONAK, J.
DATE : 7 May, 2015.

P.C. :-

1] The learned counsel for the petitioner states that service has been completed and that necessary affidavit of service will be filed during the course of day.

2] By an order dated 17 April 2015, the parties were put to notice that this petition will be disposed of finally, at the stage of admission. Therefore, Rule.

3] This petition is directed against the order dated 28 October 2013, by which the petitioner has been disallowed to cross-examine defendant No.1 on the ground that the petitioner, who is the original defendant No.3 in the suit has filed a common written statement alongwith defendant Nos.2 and 4 and the advocates for defendant Nos.2 and 4 have already cross-examined defendant No.1.

4] Mr. Khandeparkar, learned counsel for the petitioner, made the following submission in support of the petition:

(a) That the impugned order, incorrectly records that defendant No.1 has already been cross-examined on behalf of defendant Nos.2 to 4, when in fact, the records are clear that the cross-examination of defendant No.1 on the previous date, was only on behalf of defendant Nos.2 and 4;

(b) That in any case, the records would bear out that the petitioner-defendant No.3 has been prosecuting the matter independent of the advocate's appearing for defendant Nos.2 and 4. In fact, the records bear out that the petitioner-defendant No.3 has independently cross-examined the plaintiff in the suit, without any objection or demur from any of the parties. Accordingly, there was absolutely no justification to disable the petitioner from cross-examining defendant No.1.

5] Mr. Clive D'souza, learned counsel for defendant No.1 (respondent No.4 in the present petition) submitted that once a common written statement is filed by and on behalf of the defendant Nos.2 to 4, there was no question of each of the defendants insisting upon cross-examining defendant No.1 independently. Relying upon the decision of this Court in case of *Venkatrao A. Pail and Sons Ltd. Vs. Narayanlal Bansilal & ors. - AIR 1961 Bombay 94*, learned counsel submitted that such a course would be contrary to the well settled tradition at the bar. Learned counsel also relied upon the decision in case of *Sameermal Runwal vs. Prakashchandra Kothari & ors. - AIR 2010 M.P. 178*, in support of his contention that the impugned order be not interfered with.

6] Having heard the learned counsel for the parties and perused the record, in my judgment, the impugned order is required to be set aside.

7] The records would indicate that the petitioner -defendant No.3, though has filed a written statement in common with defendant Nos.2 and 4, has been appearing in person, in the proceedings. There is a separate advocate appearing for defendant Nos.2 and 4. In so far as cross-examination of the plaintiff is concerned, the petitioner-defendant No.3 herself cross-examined the plaintiff, notwithstanding separate cross-examination of the plaintiff by and on behalf of defendant Nos.2 and 4. On 22 August 2013, the Roznama records that advocate for defendant Nos.2 and 5 concluded the cross-examination for and on behalf of defendant Nos.2 and 4 and the matter was adjourned to 28 October 2013 for cross-examination by defendant No.3. There is no record in the Roznama dated 22 August 2013, of any objection being raised by and on behalf of defendant No.1 to the adoption of such a course. On 28 October 2013, however, objection came to be raised on behalf of defendant No.1 to the effect that since defendant No.1 has already been cross-examined on the basis of written statement on basis of defendant Nos.2 to 4, the petitioner-defendant No.3 cannot be permitted to cross examine defendant No.1. This objection came to be upheld by the impugned order dated 28 October 2013, without reference to the previous records, which establishes that the petitioner-defendant No.3, notwithstanding the common written statement, has been appearing and acting personally in the matter.

8] The decision in the case of *Sameermal (supra)* , is not at all relevant to the issue involved in the present case. In the said case, one of the defendants had applied for withdrawal of the written statement, alleging that fraud was played upon him while obtaining his signature on the common written statement. Similarly, in case of *Venkatrao A. Pai and Sons Ltd. (supra)*, the real issue involved was when more persons than one are join as co-plaintiffs in any one action, whether, they should be permitted to be jointly represented by one or more counsel. In the context of decision on this issue, no doubt, certain observations were made to the effect that where defendants have filed a common written statement, the Court, has the power to direct any one of the advocates to be incharge of the case for all the defendants. However, such issue, does not really arise in the present case.

9] In the present petition, as noted earlier, the petitioner, has been permitted to appear in person and the defendant Nos.2 and 4 are being represented by an advocate. This is notwithstanding the circumstance that defendant Nos.2 to 4 have filed a common written statement. Besides, the record indicates without any ambiguity that the petitioner has been appearing in person and has also conducted the cross-examination of the plaintiff by herself. In such circumstances, based upon certain observations, in the decision of *Venkatrao A. Pai (supra)*, which are purported to be drawn out of context, it cannot be said that permitting the petitioner to cross-examine the defendant No.1, would run counter to any tradition at the bar or for that matter fall foul of any legal provisions.

10] In the aforesaid circumstances, the impugned order dated 28 October 2013 is set aside and the Rule is made absolute in terms of prayer clause (b). All concerned to act upon an authenticated copy of this order.

11] At this stage, learned counsel for defendant No.1 (respondent No.4 in the present petition) seeks stay on the implementation of the present order for a period of eight weeks from today, as defendant No.1 seeks to take recourse against this order before the Hon'ble Apex Court. Although, such motion is opposed by the learned counsel for the petitioner, in my judgment, no substantial prejudice will occasion the parties, if the implementation of this order is stayed for a period of eight weeks from today. Accordingly, there shall be stay for a period of eight weeks from today, on the implementation of the present order. It is, however, clarified that for a period of eight weeks from today, there shall be a stay on further proceedings in the suit.

(M. S. SONAK, J.)

dinesh