

FARAD CONTINUATION SHEET
IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.2433 OF 2016

Anwar Husain Choudhary .. Petitioner

vs.

Suresh Maganlal Nagrecha .. Respondent

Mr.Devasis Mitra with Mr.Kewal Sanghvi i/b M/s.Legal Assistance for the petitioner

Mr.Sajjad H. Patel for the respondent no.3

CORAM : K. K. TATED, J.
DATE : MAY 4, 2016

P.C.:

1 Heard the learned counsel for the parties.

2 By this petition under Article 227 of the Constitution of India, petitioner defendant no.3 challenges the order dated 27.3.2015 passed by Trial Court below Exhibit-34 in R.A.E.Suit No.1109/1665 of 2009 and the order dated 9.12.2015 passed by Appellate Bench of Small Causes Court in Revision Application No.210 of 2015 directing defendant no.3 to enter into the witness box first with liberty to the plaintiff to lead his evidence, if any, subsequently.

3 In the present proceeding, initially the respondent plaintiff filed R.A.E.Suit No.1109/1665 of 2009 against defendant nos.1 and 2 for

vacant and peaceful possession of the suit premises i.e. shop no.1 ground floor, 'Fern House, 67/89, Shahid Bhagat Road, Colaba, Mumbai 400 039. In that suit, the plaintiff and defendant nos.1 and 2 filed Consent Terms. Court passed consent decree on 8.4.2014. Thereafter the petitioner defendant no.3 filed application for joining him as party in the suit and for setting aside the consent decree. That application was allowed and thereafter petitioner was joined as defendant no.3 in R.A.E.Suit No.1109/1665 of 2009. Thereafter, the petitioner defendant no.3 filed written statement. On the basis of written statement the Trial Court framed following two issues:

1(a) Do Plaintiffs prove that, defendant No.1(a) to 1(d) and 2(a) to 2(b) illegally sublet the suit premises to Defendant No.3?

1(b) Does the Defendant no.3 prove that his father was joint tenant with Defendant Nos.1 and 2. However, for the convenience of parties, rent receipts were issued in the name of original Defendant Nos.1 and 2 only?

4 Thereafter, plaintiff filed application under Order XVIII, Rule 3 of the Code of Civil Procedure, 1908 in the month of January 2015 being Exhibit-34 to reserve right to file evidence after defendant no.3's evidence is over. That application was allowed by the Trial Court as well as confirmed by the appellate bench of Small Causes Court. Hence, the present Writ Petition.

5 The learned counsel for the defendant no.3 submit that the orders passed by the Trial Court as well as appellate court allowing the plaintiff's application under Order XVIII Rule 3 of the Code of Civil Procedure, 1908 Exhibit-34 is against justice, equity and good conscious and same is liable to be set aside. He submits that as per Order XVIII Rule 3 of the Code of Civil Procedure, 1908 defendant on his own can make application for leading evidence in advance. He submits that court cannot direct the defendant to enter into the witness box before the plaintiff completes his evidence. In support of this contention, the learned counsel for the petitioner defendant no.3 relies on the judgment in the matter of *Metafield Coil Pvt.Ltd vs. Nikivik Tube Industries Pvt.Ltd.*, *Mh.L.J. 2012 (1) 289*, *Gopal Changu Patil vs. Hasuram Mahadu Patil*, *Mh.L.J. 2012 (3) 236*, *Bhartiya Adim Jati Sevak Sangh vs. Vallabhdas Magia*, *Laws (Bom) 2007 8 165* and *Gouri Food Products vs. Priya Trading Co.*, *Mh.L.J. 2002 (14) 880*. On the basis of these submissions and the law declared by this court, the learned counsel for the petitioner defendant no.3 submits that impugned orders passed by Trial Court as well as appellate bench of Small Causes Court is required to be set aside.

6 On the other hand, the learned counsel for the respondent plaintiff vehemently opposed the present Writ Petition. He submits that in the present proceeding, initially decree was passed by consent of defendant nos.1 and 2. Thereafter defendant nos.3 filed application for joining him as party and that application was allowed. Thereafter, the Trial Court framed issue. He submits that bare reading of issue no.1(b) shows that the entire burden is on defendant no.3 to prove that his

father was joint tenant with defendant nos.1 and 2. He submits that if defendant no.3 succeeds in proving issue no.1b then only plaintiff had to give evidence if any. Hence, plaintiff made application under Order XVIII Rule 3 of the Code of Civil Procedure, 1908 and that application was allowed by the Trial Court as well as upheld by the appellate court. Therefore, there is no question of entertaining the present Writ Petition at this stage.

7 Heard the learned counsel for the parties. The issue involved in the present proceeding is whether the court can direct defendant under Order XVIII Rule 3 of the Code of Civil Procedure, 1908 to enter into the witness box before plaintiff completes his evidence. In the present proceeding, both the courts held that the entire burden is on defendant no.3. Initially, the suit filed by the Plaintiff against defendant nos.1 and 2 was decreed by consent. Thereafter the defendant no.3 filed application claiming tenancy in respect of suit premises. That application was allowed and petitioner joined defendant no.3 in the suit. Both the courts held that defendant no.3 claimed tenancy in respect of the suit premises on the ground that his father was joint tenant with defendant nos.1 and 2. Both the courts held that if defendant no.3 proves that his father was joint tenant of suit premises with defendant nos.1 and 2 then only plaintiff requires to enter into the witness box.

8 It is to be noted that as per Order XVIII Rule 3 of the Code of Civil Procedure, 1908 defendant on his own can only make application to enter into the witness box before the plaintiff completes his

evidence. Court cannot direct the defendant to enter into the witness box to prove his case before the plaintiff completes his evidence. Same view is taken by our Hon'ble Court in above mentioned matters. In any case in the present proceeding, Trial Court also framed issue no.1(a). To prove issue no.1(a), burden is on plaintiff only. Considering these facts, the provisions of Order XVIII Rule 3 of Code of Civil Procedure, 1908 and the law declared by our Court in the above mentioned authorities, as the issue no.1(a) is required to be proved by the plaintiff, I am of the opinion that both the courts below erred in coming to the conclusion that defendant no.3 have to enter into the witness box first to prove issue no.1(b). Hence, following order is passed:

- a) Writ Petition is allowed.
- b) Order dated 27.3.2015 passed by Trial Court below Exhibit-34 in R.A.E.Suit No.1109/1665 of 2009 and order dated 9.12.2015 passed by appellate bench of Small Causes Court in Revision Application No.210 of 2015 is set aside.
- c) Application filed by plaintiff below Exhibit-34 is dismissed.
- d) Hearing of R.A.E. Suit No.1109/1665 of 2009 is expedited.

JUDGE