

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

WRIT PETITION NO. 1007 OF 2017

Mrs. Mrudalaben w/o Manoharlal Babaria
& others

.. PETITIONERS

VERSUS

M/s Chhallani Ginning & Pressing Factory
& others

.. RESPONDENTS

Mr. B.R. Waramaa, advocate for petitioners.
Mr. A.P. Basarkar, AGP for the State.
Mr. P.F. Patni, advocate for respondent no. 1.

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**CORAM : S. B. SHUKRE, J.
DATE : 3rd FEBRUARY, 2017.**

PER COURT :

1. Heard learned counsel for petitioners and learned counsel for respondent no. 1.

2. Impugned order dated 13th January, 2017, allows respondent no. 1, original plaintiff, to cross examine original defendant no. 1, who is respondent no. 2 in the present case and, this is after evidence of defendant no. 1 was over after completion of his cross examination taken by original plaintiff as well as petitioners, original defendant nos. 4 to 6.

3. On going through the impugned order as well as relevant portion of the cross examination, as filed on record of this petition by petitioners, I

find that original defendant no. 1 and original defendant nos. 4 to 6 could not be considered as parties who were adverse to each other. Some admissions have appeared in the cross examination of defendant no. 1 taken by original defendants 4 to 6 (petitioners). These admissions appear after cross examination of original plaintiff (respondent no. 1) was over. These admissions go against the interest of original plaintiff and therefore, he would be certainly having a right to cross examine defendant no.1 in order to confront him with the admissions given by him as against original plaintiffs. That apart, original defendant no. 1 does not have any objection to the order passed by learned Civil Judge in allowing his further cross examination by the original plaintiff. If defendant no. 1 does not have any objection to this order, the person who is not adverse party to original defendant no. 1 cannot say that defendant no. 1 should take an objection. Therefore, I see neither any illegality nor perversity in the impugned order.

4. Learned counsel for petitioners has placed reliance upon the case of Balkrishna Shivappa Shetty Vs. Mahesh Nenshi Bhakta and others reported in **2003(3) Mh.L.J. 47** to support his argument that power under Order 18 Rule 17 of the Code of Civil Procedure cannot be exercised by the Court for cross examination of witness by either of the parties though it should be exercised by the Court for cross examination of the witness by the Court itself and, that inherent power of the Court cannot be exercised to enable the party to fill up the lacuna in the evidence. There can be no doubt about the nature of power available under Order 18 Rule 17 of the Code of Civil Procedure and also, there can be no quarrel about the principle that

inherent powers of the court under section 151 of the Code of Civil Procedure cannot be exercised to enable the party to fill up lacuna in the evidence. The impugned order, though passed by invoking powers under Order 18 Rule 17 of the Code of Civil Procedure, however, appears to be passed by resorting to powers of the Court under Order 18 Rule 16 of the Civil Procedure Code r/w section 138 of the Indian Evidence Act, 1872. This is clear from the fact that the evidence adverse to the original plaintiffs appeared for the first time only when original defendant no. 1 was cross examined by original defendant nos. 4 to 6 and till that time, original plaintiff was not aware nor did he anticipate that any such adverse material would appear later on against him during cross examination of defendant no. 1 by original defendant nos. 4 to 6. Therefore, so far as this new material which was adverse to the interest of original defendant was concerned, original plaintiff would have right to cross examine the witness i.e. original defendant no. 1 in terms of section 138 of the Indian Evidence Act and, to enable him to do so, the trial Court invoked its powers not under Rule 17 but under Rule 16 of Order 18 of the Code of Civil Procedure. This is also not a case wherein the original plaintiff has been allowed to fill up the lacuna in the evidence. So, the case of Balkrishna would be of no help to the petitioners.

5. Learned counsel for petitioners has submitted that petitioners conducted cross examination of original defendant no. 1 in terms of their pleadings. I must say, it is nobody's case that petitioners, while cross examining original defendant no. 1, ventured outside or were allowed to go

astray their pleadings in the written statement. But to say that original defendant did not take any objection to such pleadings and, therefore, should not be allowed to take objection by confronting defendant no. 1, it would be going against the well settled principle of the cross examination of the witness. Every party against whom a witness speaks something adverse has a right to confront such a witness with that. If it was not the pleading of original defendant no. 1 that original plaintiff was aware of the subsequent transfers, there was no reason for the original plaintiff to have cross examined the original defendant on these lines.

6. Learned counsel for petitioner has also placed reliance upon the cases of Vinod s/o Khimji Lodaya Vs. Muljibhai s/o Maujibhai Patel and others **2013(5) Mh.L.J. 371** and Bhujang Nathuji Daf and another Vs. Ramkrishna Daulat Daf and others **2009(1) Mh.L.J. 683**. These cases are entirely on different facts and, therefore, have no application to the facts of the instant case. In these cases, it has been held that cross examination of the co-defendant was permissible and that the plaintiff was rightly permitted to cross examine defendant no. 1 and thereafter purchasers were rightly called to cross examine defendant no. 1 and that re-examination is to be particularly allowed where new facts are introduced in cross examination. In the present case, new facts were introduced during cross examination and original plaintiff was not given any opportunity to confront defence with these new facts and, therefore, all these cases would have no application to the facts of the instant case.

7. In this view of the matter, I find neither any illegality nor arbitrariness in the impugned order. Writ petition stands dismissed summarily at admission stage.

(S. B. SHUKRE)
JUDGE

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