

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.10558 OF 2016

Subhash S/o Bhanudas Wagh & others

Petitioners

Versus

Smt. Drupadabai w/o Devidas Wagh & others

Respondents

Mr.A.D. Kasliwal advocate for the petitioners

Mrs. P.V. Langhe advocate for Respondent No.1

CORAM : **RAVINDRA V. GHUGE, J**

(Date : 27th June, 2017.)

PER COURT :-

1 The petitioners are aggrieved by the order dated 26.7.2016, by which application Exh.98 filed by the defendant No.1 has been rejected.

2 Defendant No.1 i.e. the petitioner herein, had moved Application Exhibit 98 for recalling defendant No.12 for cross-examination, for the reason that, in the cross-examination of defendant No.12 conducted by the plaintiff, she has made certain adverse statements against the interest of defendant No.1. Considering the adverse statements, Exh.98 was filed so that defendant No.1 should get an opportunity to cross-examine defendant No.12 and the same has been rejected.

3 I have considered the strenuous submissions of the learned Advocates for the respective sides.

4 Learned counsel for respondent No.1, original plaintiff has relied upon the Judgments of this Court in the matter of **Mandabai Ramkrishna Tumsare & others versus Ramlal Hiramanji Hiwarkar & others** (1986 BCI 95) and the Judgment of the Honourable Apex Court **Vadiraj Nagappa Vernekar (D) through LRs versus Sharad Chand Prabhakar Gogate** ((2009 (4) SCC 410).

5 There is no dispute that in the matters of civil nature and for that reason in any matter before the Trial Court, proforma defendants who are supporting the cause of the plaintiff or the applicant, are to be permitted to cross-examine the plaintiff to be followed by the cross-examination by those defendants who are contesting the suit. The Honourable Apex Court in case of **Vadiraj Nagappa** has observed in para No.10 that a chance to fill up the lacuna in the evidence and cross-examination conducted by the contesting defendants, should not be made available to the proforma defendants as they are likely to fill up the omissions that have been left or the admissions that have been extracted by the contesting defendants.

6 In **Mandabai** supra, this Court has observed in para No.10 that the logic behind allowing the proforma-defendant to cross-examine the plaintiff first, is to ensure that they do not become alert, after the contesting defendants cross-examine the plaintiff and then take the opportunity of posing leading questions so as to fill up the lacuna and dilute the admissions given by the plaintiff in the cross-examination. It is observed that proforma defendants some times attempt to resort to this strategy and hence, they should not be permitted to cross examine the plaintiff after the contesting defendants have cross examined him.

7 In the instant case, a peculiar situation has arisen. Defendant Nos.8 to 12 who have filed a common Written Statement are the contesting defendants. Learned counsel for the petitioners, who are original defendants, submits that none of them are proforma defendants and all of them are contesting the suit and the claim of the plaintiffs. In this peculiar backdrop, defendant No.12 filed an affidavit in lieu of examination in chief. There is no whisper of anything adverse to defendant No.1. Naturally as a co-defendant, defendant No.1, was not required to cross-examine co-defendant unless anything adverse is brought on record in the evidence of any of the co-defendants. It is settled law that *per se* a co-defendant does not get right to cross-

examine another defendant unless there are adverse statements brought on record.

8 Considering the examination in chief of defendant No.12, defendant No.1 found no reason to cross-examine her. However, after the plaintiff cross-examined defendant no.1, she has uttered some statements which according to defendant no.1 are adverse to his rights.

9 Learned counsel for defendant No.1 petitioner categorically states that as an adverse statement has been made in the cross-examination against defendant no.1, it would carry probative value and would adversely affect the right of defendant No.1 since the said statement would go uncontradicted and would be held in evidence against defendant No.1.

10 In none of the cases cited by the learned counsel for the plaintiff can such peculiar facts be visible.

11 In the light of above, as adverse statements to defendant No.1 from defendant No.12 have been extracted by the plaintiff in the cross-examination, refusing an opportunity to defendant No.1 to cross-examine defendant No.12 only to the extent of the adverse statement would in my view lead to a miscarriage of

justice.

12 Learned counsel for the plaintiff submits that though the suit is of 2012, it is at the final stage and rather than admitting this Writ Petition, in this Court, which may not find its turn for final hearing in another 15-20 years, it would be appropriate to direct a time frame to be followed by defendant No.1 for cross-examining defendant No.12.

13 In the light of above and since these peculiar facts were not properly appreciated by the trial Court, the impugned order dated 26.7.2016 is quashed and set aside. This petition is accordingly allowed.

14 Application Exh.98 is allowed by permitting defendant No.1 to cross-examine defendant No.12 only with relation to the statement made by defendant no.1 in para No.5, in line Nos.7, 8, 9, 10 and 11 below Exh.92 which is the cross-examination of defendant No.12.

15 The Trial Court shall issue summons to defendant No.12 Sulochanabai Kashinath Gadekar forthwith and on the date of her appearance in the Court, defendant No.1 will cross-examine her only with reference to the five lines in paragraph No.5 of her cross-examination. The Trial Court would ensure that the

defendant No.1 will not cross-examine defendant No.12 on any other issue.

16 Learned counsel for the petitioner – defendants and the plaintiff shall intimate the Trial Court tomorrow as the matter is scheduled on the said date and file a purshis that defendant No.12 is to be cross examined.

(RAVINDRA V. GHUGE , J)

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