

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

31 WRIT PETITION NO. 3784 OF 2018

RAJESH RAMESHWAR SOMANI

VERSUS

NAVEENCHANDRA MURARJI ASHER

...

Advocate for Petitioner : Mr. Girish Rane,
h/f Mr. Swapnil S. Rathi.

Advocate for Respondent: Mr. J. N. Singh.

...

CORAM : **V. L. ACHLIYA, J.**

DATE : 16th April, 2018.

...

ORDER:

. By this petition filed under Articles 226 and 227 of the Constitution of India, the Petitioner/Defendant has challenged the order dated 3rd March, 2018 passed in Special Civil Suit No.6 of 2010. By the impugned order, the trial Court has allowed the application (Exhibit 84) moved by the Respondent/Plaintiff to recall Plaintiff and lead further examination-in-chief.

2. Heard the learned counsels for the Petitioner and the Respondent. Perused the impugned order.

3. Mr. Rane, learned counsel for the Petitioner assailed the impugned order with contention that the trial Court has grossly erred in entertaining and allowing the application filed by respondent to recall plaintiff and lead further Examination-in-chief while the plaintiff undergoing cross examination. He submits that there is no provision under law to recall the witness to lead further examination-in-chief before the conclusion of cross examination of witnesses.

4. On the other hand, the learned counsel for the Respondent supported the order passed by the trial Court. It is contended that the affidavit by way examination-in-chief was filed in the year 2011. It was necessary for trial Court to have considered the documents produced by the Plaintiff in the light of examination-in-chief of Plaintiff and then to pass the order as to the admissibility of the documents produced along with the affidavit by way of examination-in-chief. Since the recording of oral evidence was proceeded after 6 to 7 years after filing affidavit by way of examination-in-chief and the Court proceeded without passing the order as contemplated under Order 18 Rule 4 of the Code of Civil Procedure in respect of documents referred and relied in affidavit by way of examination-in-chief, it was necessary for plaintiff to seek recall of witness to record his further examination-

in-chief. It is contended that the cross-examination of the Plaintiff is incomplete. No serious prejudice would cause to Defendant if further examination-in-chief of Plaintiff is recorded. The suit filed by plaintiff is for recovery of money. The documents to be proved through the examination-in-chief of the Plaintiff are not much in dispute. The report of handwriting expert is also not disputed by Defendant. In the light of the overall facts of the case, the learned counsel for the Respondent submits that the order passed by the trial Court calls for no interference in exercise of writ jurisdiction.

5. On due consideration of submissions advanced in the light of the copy of deposition placed on record along with the copy of petition, I am of the view that the order passed by trial Court to entertain the application seeking recall of the witness at the stage of cross-examination of witness, is not sustainable in law. It appears from the record that the affidavit in the form of examination-in-chief was tendered on 25th July, 2011. The cross-examination appears to be started on 27th November, 2017. Perusal of the copy of affidavit in the form of examination-in-chief and cross-examination partly recorded, *prima-facie* reveals that after filing the affidavit in the form of examination-in-chief, the procedure as required to be followed under

Rule 5 of Order 18, was not followed. Rule 5 of Order 18 of the Code of Civil Procedure provides as under:

“5. How evidence shall be taken in appealable cases.— In cases in which an appeal is allowed, the evidence of each witness shall be,—

(a) taken down in the language of the Court,—

(i) in writing by, or in the presence and under the personal direction and superintendence of, the Judge, or

(ii) from the dictation of the Judge directly on a typewriter; or

(b) if the Judge, for reasons to be recorded, so directs, recorded mechanically in the language of the Court in the presence of the Judge.”

6. The fact is not in dispute that the judgment and decree to be passed in the matter is appealable and the evidence in the case required to be recorded in a manner provided under Rule 5 of Order 18 of the Code of Civil Procedure. Therefore, though under Rule 4 of Order 18 of the Code of Civil Procedure, the examination-in-chief of witness can be submitted in the form of affidavit but in appealable cases such affidavit cannot become part of evidence unless deponent thereof enters into witness box and affirms that the contents of the

affidavit are as per his say and the affidavit is under his signature. In this context it is useful to refer the decision of this Court in the case of **Anantrao s/o Krishnaji Kulkarni Vs. Vaishali w/o Renukadas Vaidya**, reported in, **2012 (2) Mh. L.J. 61**.

7. In the present case, though there is a note recorded by Court before commencement of cross-examination of witness that the deponent admitted the contents of the affidavit of examination-in-chief to be true and correct and after hearing the rival sides, the documents are marked as Articles 'A' and 'B', but it is not clear as to whether such noting was made after the witness stepped into witness box and affirm the contents of his affidavit. So also no reason has been recorded as to why the documents have been marked as Articles 'A' and 'B'. On due consideration of submissions advanced in the manner in which the evidence has been recorded, the procedural irregularity in conduct of proceeding may be ocured to reason that the affidavit by way of examination-in-chief was filed in the year 2011 and the Court proceeded to record the cross-examination of the witness after more than six years can not be ruled out.

8. It appears that due to procedural irregularity, the

Respondent – Plaintiff was required to file application to recall the witness for recording further examination-in-chief. Although under the facts and circumstances of the case, the Court may be justified in allowing the application, but the order is not legally sustainable as the application to recall the witness for further examination-in-chief could not have been entertained by trial Court before conclusion of cross-examination of witness. On satisfaction that the recall of witness is necessary for proper adjudication of case as well as to overcome the procedural lapse occurred during the conduct of proceedings, such request could have been entertained after conclusion of cross-examination of witness. In this view, the order is liable to be set aside.

9. In this context, it is useful to refer the provisions contained in Chapter X of Indian Evidence Act, 1872. Section 137 of said Act provides the meaning of (I) Examination-in-Chief (ii) Cross examination and (iii) Re-examination. Section 138 provides for order of examination of witness. Section 138 of Evidence Act reads as under.

*“ 138. **Order of examinations** - Witnesses shall be first examined-in chief then (if the adverse party so desires) cross examined, **then (if the party calling him so desires) re-examined.***

The examination and cross-examination must relate to relevant facts but the cross examination need not be confined to the facts to which the witness testified on his examination-in-chief.

Direction of re-examination – The re-examination shall be directed to the explanation of matters referred to in cross-examination; and if new matter is, by permission of the Court, introduced in re-examination, the adverse party may further cross examine upon that matter. ”

Thus, the order of examinations of witnesses u/s 138 of Evidence Act clearly lay down the rule of examination of witness. As soon as examination is over, the witness is subjected to cross examination. In conclusion of cross examination, the party calling such witnesses may recall such witness for further examination with the leave of Court. In case such request for recall of witness is granted and evidence is recorded, such witness has to undergo further cross examination. In that view, the trial Court has erred in entertaining application before conclusion of cross examination of witness.

10. Although the order passed by trial Court is not sustainable

in law and liable to be set aside, still the request for respondent – plaintiff deserves consideration in view of procedural lapse committed during the conduct of proceeding and evidence in the case recorded being six years after filing of affidavit in the form of Examination-in-chief . It is well within the scope of exercise of powers by trial Court to entertain the application to recall witness on conclusion of cross examination of witnesses. It is quite settled that code of Civil Procedure is a procedural law and same is designed to facilitate justice and further its ends and not a penal enactment for punishment and penalties. In this context, it is useful to refer the decision of Full Bench of this Court in the case of ***Hemendra Rasiklal Ghai Vs. Subodh Mody reported in 2008 (6) Mh.L.J. 886*** wherein the Court has observed in paragraph Nos. 52 and 53 as under :

“ 52. The Code of Civil Procedure is a procedural law. It is “procedure”, something designed to facilitate justice and further its ends : not a penal enactment for punishment and penalties; not a thing designed to trip people up too technical a construction of section that leaves no room for reasonable elasticity of interpretation should there be guarded against (provided always that justice is to “both” sides) lest the very means designed for

the furtherance of justice be used to frustrate it.

53. All the rules of procedure are the handmaid of justice. The language employed by the draftsman of processual law may be liberal or stringent, but the fact remains that the object of prescribing procedure is to advance the cause of justice. In an adversarial system, no party should ordinarily be denied the opportunity of participating in the process of justice dispensation. Unless compelled by express and specific language of the Statute, the provisions of the Civil Procedure Code or any other procedural enactment ought not to be construed in manner which would leave the Court helpless to meet extraordinary situations in the ends of justice. ”

11. Thus, considering the overall facts of the case, it is desirable to extend opportunity to Plaintiff to cure the procedural irregularities caused in conduct of proceeding which probably may caused due to confusion exist as to manner of recording evidence of witness wherein examination-in-chief of witness filed in the form of affidavit, as the cross-examination was recorded after the period of more than 6 years of filing of affidavit. I am therefore, inclined to allow the petition and set aside the impugned order and remand the matter

to trial Court to consider and decide the application Exhibit 84 afresh after conclusion of cross-examination of witness. While dealing with the application, the trial Court is directed to consider the procedural irregularity committed during the conduct of proceedings and the fact that cross-examination of witness proceeded after the period of more than six years of filing of affidavit by way of examination-in-chief.

12. In the result, the writ petition is disposed of in above terms.

[V. L. ACHLIYA, J.]

ndm