

DATE: 27th March, 2018

ORAL JUDGMENT:-

1) Heard.

2) Rule. With the consent of the parties, petition is taken up for final disposal at the admission stage.

3) The petitioner is objecting to the order passed by the 3rd Joint Civil Judge, Junior Division, Kopargaon on 16.7.2014 below Exh.125 in Regular Civil Suit No.179 of 2006. The original tenant/respondent No.4 moved an application seeking permission to depose before the Court.

4) The respondent Nos.4, 5 and 6 presented a joint affidavit in the form of examination-in-chief during the proceedings of the Suit. The respondent No.5 stepped into witness box and examined himself. The respondent No.5 was cross-examined by the petitioner.

5) During the continuance of the proceedings, respondent No.4 presented an application contending therein that he does not agree with the facts deposed by respondent No.5 and as such desirous of stepping into the witness box and examine himself. The application has been allowed by the Trial Court and the said order is impugned in this petition.

6) The learned counsel appearing for the petitioner/original plaintiff contends that since the respondent Nos.4, 5 and 6 presented a common affidavit in the form of examination-in-chief before the Trial Court and that respondent No.5 stepped into witness box and on behalf of all the three respondents/defendants examined himself before the Court, it was not permissible to respondent No.4 to claim to examine himself. The learned counsel has invited my attention to order XVIII of the Code of Civil Procedure relating to 'Hearing of the Suit and Examination of the

Witnesses'. Rule 4 of Order XVIII relates to recording of evidence, which reads thus:-

"4. Recording of evidence -

(1) In every case, the examination-in-chief of a witness shall be on affidavit and copies thereof shall be supplied to the opposite party by the party who calls him for evidence.

Provided that where documents are filed and the parties rely upon the documents, the proof and admissibility of such documents which are filed alongwith affidavit shall be subject to the orders of the Court.

(2) The evidence (cross-examination and re-examination) of the witness in attendance, whose evidence (examination-in-chief) by affidavit has been furnished to the court shall be taken either by the Court or by the Commissioner appointed by it.

Provided that the Court may, while appointing a commission under this sub rule, consider taking into account such relevant factors as it thinks fit.

(3) The Court or the Commissioner, as the

case may be, shall record evidence either in writing or mechanically in the presence of the Judge or of the Commissioner, as the case may be, and where such evidence is recorded by the Commissioner, he shall return such evidence together with his report in writing signed by him to the Court appointing him and the evidence taken under it shall form part of the record of the suit.

(4) The Commissioner may record such remarks as it thinks material respecting the demeanour of any witness while under examination:

Provided that any objection raised during the recording of evidence before the Commissioner shall be recorded by him and decided by the Court at the stage of arguments.

(5) The report of the Commissioner shall be submitted to the Court appointing the commission within sixty days from the date of issue of the commission unless the Court for reasons to be recorded in writing extends the time.

(6) The High Court or the District Judge as the case may be shall prepare a panel of Commissioners to record the evidence under this rule.

(7) The Court may by general or special order fix the amount to be paid as remuneration for the services of the Commissioner.

(8) The provisions of rules 16, 16-A, 17 and 18 of Order XXVI, in so far as they are applicable shall apply to the issue, execution and return of such commission under this rule."

7) Sub-Rule 2 of Rule 4 prescribes that the evidence (cross-examination and re-examination) of the witness in attendance, whose evidence (examination-in-chief) by affidavit has been furnished to the Court shall be taken either by the Court or by the Commissioner appointed by the Court.

8) It is pointed out that there is no separate evidence of respondent No.4 recorded and as such he cannot be permitted to step into witness box for the purpose of examining himself and for the purpose of cross-examination.

9) There does not appear to be any prohibition for furnishing an additional affidavit in the form of examination-in-chief. There also does not appear to be any specific bar for the respondents to depose before the Court individually for themselves or on behalf of other respondents. Thus, there can be no prohibition for the respondent No.4 to examine himself, however, if the respondent No.4 wants or desirous of stating certain facts, which are different than already presented in the Court in the form of affidavit or examination-in-chief, he may have to explain the contentions and state such facts in the form of an affidavit and upon presenting such affidavit, contentions raised by him can be tested by

conducting his cross-examination.

10) In the instant matter, it does not appear that respondent No.4 has presented the facts in the form of affidavit or examination-in-chief separately. The respondent No.5 has already deposed in respect of the facts stated in the affidavit in the form of examination-in-chief already presented and he has been cross-examined.

11) There is no specific bar under the Code of Civil Procedure for the other respondent to present his contentions on oath in the form of an additional affidavit. His contentions raised in the affidavit can be tested by cross-examining him. The Trial Judge has not gone wrong in permitting respondent No.4 to examine himself. However, it shall be ensured that the procedure prescribed under Rule 4 of Order XVIII is observed before respondent No.4 steps into witness box for the purpose of cross-examination. The order

passed by the Trial Court stands modified accordingly.

12) The Trial Court shall ensure recording of evidence of respondent No.4 in observance of Rule 4 of Order XVIII of the Code of Civil Procedure.

13) Rule is accordingly made absolute partly to the extent as prescribed above.

14) There shall be no order as to costs.

(R . M . BORDE)
JUDGE