

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

1030 WRIT PETITION NO. 12082 OF 2015
WITH CIVIL APPLICATION NO. 570 OF 2018
MAROTI BABURAO NALGE

VERSUS

VASIYODDIN RIYAZODDIN MUJAAR AND OTHERS

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Advocate for Petitioner : Mr. Mukhedkar Amit A. and Mr. A.A. Kokad

Advocate for Respondent No.3 : Mr. G.R. Syed

Advocate for Respondent No.6 : Mr. D.R. Bhadekar

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CORAM : V. K. JADHAV, J.

DATED : 27th APRIL, 2018

PER COURT:-

1. By consent of the parties, heard finally at admission stage.
2. The petitioner-original defendant No.7 has strongly resisted the suit instituted by the respondents-plaintiffs for decree of specific performance of contract and injunction. The respondents-plaintiffs sought relief of specific performance of contract precisely against original defendant Nos. 1 to 6 and petitioner-defendant No.7, who is purchaser, in terms of the compromise decree between the defendant Nos. 1 to 6 and 7. After commencement of trial of the suit, the respondents-plaintiffs have examined the witnesses and those witnesses were subjected to cross examination separately by defendant Nos. 1 to 6 as well as the petitioner-original defendant No.7. However, when defendant No.6 has examined his witness,

the trial court refused to grant permission to the petitioner-defendant No.7 to cross examine the witness of defendant No.6 on the ground that the pleading and defence of defendant Nos. 1 to 6 and 7 are not contrary. The trial court has observed that defendant No.7 has no contrary interest against defendant Nos. 1 to 6. Thereafter, the plaintiffs have completed the cross examination of the said witness. The petitioner-original defendant No.7 has thus preferred this writ petition.

3. Learned counsel for the petitioner-original defendant No.7 submits that in terms of para 23 of the written statement filed by defendant Nos. 1 to 6, the interest of defendant Nos. 1 to 6 and defendant No. 7 are conflicting. Furthermore, the defendant No. 6 in para 8 of his examination in chief at Exh.146 made certain allegations against petitioner-original defendant No.7. In view of the same, the petitioner-original defendant No.7 is entitled to cross examine the co-defendant, however, the trial court has refused the said permission to the petitioner-original defendant No.7 to cross examine the witness of the co-defendants.

4. Learned counsel for the petitioner in order to substantiate his contentions placed reliance on the judgment of this court in the case of ***Vinod Khimji Lodaya vs. Muljibhai Maujibhai Patel and others***,

reported in **2013 (4) Bom.C.R. 487.**

5. Learned counsel for the respondents-original plaintiff submits that in terms of provisions of Section 137 and 138 of the Indian Evidence Act, only the adverse party has right to cross examine the witnesses, therefore, the petitioner-defendant No.7 cannot have right to cross examine the witness of defendant Nos. 1 to 6. Learned counsel submits that after the trial court refused the permission to the petitioner-original defendant No.7 to cross examine the witnesses of co-defendant Nos. 1 to 6, the plaintiffs have completed their cross examination and in case if the petitioner is permitted to cross examine the witness of the co-defendant that would cause serious prejudice to the interest of the plaintiffs.

6. Learned counsel for the respondent-original defendant No.6 submits that the interest of defendant No.6 and the present petitioners are not conflicting and the trial court has rightly refused the permission. No interference is required.

7. On perusal of the pleadings, it appears that the original defendant Nos. 1 to 6 have filed joint written statement and particularly in para 23 of the written statement, has made the following averments:-

“23. The suit is barred by non-joinder of parties, so also it seems the plaintiff and the defendant No.7 trying to grab the remaining part of land survey No. 52/A which is situated towards the eastern side and for that purpose on the basis of unreliable record the plaintiff at the instigation of defendant No.5 hang the litigation against the answering defendant so also the father of plaintiff No.3 is sitting MLA and therefore they jointly adopted the practice to pressurize these answering defendant either by filing such type of false cases or through police in collusion with defendant No.7. He has also having a political background. The suit is malafidely filed, hence liable to be dismissed. So also plaintiff have no cause of action to file the present suit.”

8. In view of the above specific pleadings, it appears that their interests are conflicting. It has been specifically pleaded by defendant Nos. 1 to 6 that the plaintiff and defendant No.6 are trying to grab the remaining part of the land and further they are playing pressure tactics in collusion with each other. Further, the original defendant No. 6 in para 8 of his examination in chief has specifically stated that in changed circumstances, the petitioner-defendant No.7 would withdraw his false claim in respect of the land and also to settle the dispute with answering defendant Nos. 6.

9. In the case of ***Vinod Khimji Lodaya vs. Muljibhai Maujibhai Patel and others (supra)*** relied upon by learned counsel for the

petitioner in para 14 of the judgment, this Court has made the following observations:-

14. Upon careful perusal of the impugned order, it appears that the Tribunal has not noticed the Judgments of various High Courts except the Judgment of the Punjab and Haryana High Court and rejected the prayer of the applicant i.e. original defendant No. 2, for cross examination of defendant No. 1. The Karnataka High Court in case of Sri Mohamed Ziaulla [supra] while interpreting the provisions of Section 137 and 138 of the Indian Evidence Act, in para Nos. 7 to 9 held thus, :

"Section 137 specifically explains that the examination of a witness by the adverse party is cross examination. Section 138 of the Evidence Act refers to cross examination if the adverse party so desires after the witness is first examined in chief. These two sections of the Evidence Act make it abundantly clear that a party has a right of cross examining his adversary or his witness.

Section 137 and 138 of the Evidence Act do not specifically refer to cross examination of co-defendant's witnesses. But, the courts have to adopt a golden rule that no evidence shall be received against any co-defendant or co-accused who had no opportunity of testing it by cross examination; as it would be unjust and unsafe not to allow a co-accused or co-defendant to cross examine witness called by one whose case was adverse to his, or who has given evidence against him. If there is no dash of interest or if nothing has been said against the other party, there can not be any right of cross examination. A short but, interesting discussion is found in Sarkar's Evidence at Page 1342 13th Edition. Similar opinion is found in Principles and Digest of the Law of Evidence by M.Monir, Third Edition Page 1114.

This very question was debated in the English Courts as far back as in 1920 vide a decision in (LORD V. COLVIN) 6 1855, 24 LJ Ch 517, 3

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222. The learned Judge in the said case after consulting all the equity judges held that before an examiner in Chancery, one defendant might cross examine another defendant's witness. The same right exists between respondent and co-respondent in divorce cases provided either is hostile to the other, for if friendly, e.g. where both deny the adultery, each can only be examined as the other's witness and not cross-examined. A defendant may cross-examine his co-defendant who gives evidence or any of his co-defendant's witnesses if his co-defendant's interest is hostile to his own. Therefore, the procedure that has been followed by the Courts in England and in India has not left this question in doubt. Where it is shown that the interest between the defendants' inter-se conflict each other, the other defendant has necessarily to be treated as an adversary and he is certainly entitled to cross examine the other defendant or his witnesses ".

10. In the instant case, it appears that the interest are conflicting between the co-defendants and in view of the same, the cross examination of the petitioner to the witnesses of original defendant No.6 is permissible in view of the aforesaid ratio and also in view of the judgment of the various High Courts.

11. Learned counsel appearing for the original plaintiffs submits that since cross examination of the plaintiffs to the witness of defendant No.6 is already over, if the writ petition is allowed, in that event, cross examination on behalf of the petitioner to the said witness would cause prejudice to his case. I do not find any

substance in this submission. After the cross examination by the petitioner to the witnesses of defendant No.6, the respondents-original plaintiffs with the permission of the trial court can very well cross examine the witness to the extent as permitted by the trial court. In view of above, I proceed to pass the following order:-

O R D E R

- I. Writ petition is hereby allowed. No costs.
- II. The impugned order/observations made in the order passed below Exh.146 thereby refusing permission to the petitioner original defendant No.7 to cross examine the witness of defendant No.6, is hereby quashed and set aside.
- III. The petitioner-original defendant No.7 is hereby permitted to cross examine the witness of co-defendant No.6 and after that examination is over, the respondents-plaintiffs are hereby permitted to cross examine the witness of defendant No.6 again, if so desire.
- IV. Writ petition is accordingly disposed of.
- V. All pending civil applications are disposed of.

(V. K. JADHAV, J.)