

IN THE HIGH COURT OF BOMBAY AT GOA**WRIT PETITION NOS. 795 & 796 OF 2018****WRIT PETITION NO. 795 OF 2018**

Surinder Kumar Khosla		Petitioner
Versus		
Shalan Raghuvir Jaca & 6 Others		Respondents

WRIT PETITION NO. 796 OF 2018

Surinder Kumar Khosla		Petitioner
Versus		
Suresh Atmaram Jaca & 7 Others		Respondents

Smt. A. Agni, Senior Advocate with Ms. Jaya Sawaikar,
Advocate for the Petitioner.

Shri Gaurish Agni, Advocate for the Respondent Nos. 1 and 2.

CORAM : C.V. BHADANG, J.

Reserved on : 29th November, 2018

Pronounced on : 20th December, 2018

ORDER:

Both these petitions involve common and connected questions and they are being disposed of by this common order.

2. The question is what should be the sequence of cross examination, in a suit, where there are two sets of defendants, having conflicting interest (one of which is said to be partly favouring the plaintiffs).

3. The petitioner and the respondent no. 8 are the original defendant nos. 6 and 7, who together form one set of the defendants, while the respondent nos. 3 to 7 (defendant nos. 1 to 5), constitute another set, in two suits filed by the respondent nos. 1 and 2 herein. The suits are filed for declaration, recovery of possession, compensation, injunction and damages alongwith mesne profits.

4. Both these suits are resisted by the original defendant nos. 1 to 5. The petitioner and the respondent no. 8 (defendant nos. 6 and 7), apart from resisting the suit, have raised a counterclaim for recovery of Rs.61,500/- to each of these defendants from the plaintiffs.

5. In the said suits, after the evidence of the plaintiffs was concluded, the matter was fixed for evidence of the defendant nos. 1 to 5. At this stage, the respondent nos. 1 and 2/plaintiffs, filed an application, purportedly, under Order XVIII of the Code of Civil Procedure (Code, for short), claiming that the defence of the two sets of the defendants, is not consistent with each other and they have come with defences, which are diametrically opposite and are having conflicting interest. It is contended that the defence of the defendant nos. 1 to 5 is partly

in consonance with the averments in the plaint, while the respondent nos. 6 and 7 have taken a completely adversarial defence to the plaintiffs. It was in these circumstances claimed that “procedural propriety” would require that the defendant nos. 6 and 7 cross examine defendant no. 1 (DW-1), prior to the plaintiff's cross examining him. It is contended that failing which, there is every possibility that in the event, the plaintiffs solicit favourable answers, the defendant nos. 6 and 7 will attempt to either negate the cross examination or fill up the lacunae, in the defence raised by them. It was contended that this would cause prejudice to the plaintiffs.

6. The application was opposed by the petitioner and the respondent no. 8, on the ground that the application is not maintainable under Order XVIII of the Code. It is contended that only in the event, the interest of the plaintiffs or the defendants are common or they are in collusion with each other that it can be claimed that the parties are having a common interest or are in collusion and should cross examine first, before the cross examination of a party having an out and out adversarial interest.

7. The learned Trial Court has passed an order directing the petitioner and the respondent no. 8 to cross

examine DW-1 prior to the cross examination by the respondent nos. 1 and 2 (plaintiffs). Feeling aggrieved, the petitioner is before this Court.

8. I have heard Smt. Agni, the learned Senior Counsel for the petitioner and Shri Agni, the learned Counsel for the contesting respondent nos. 1 and 2. Perused record.

9. On behalf of the petitioner, reliance is placed on the decision of this Court in the case of **Suresh Maruti Korke & Others Vs. Sau. Latabai Sharad Lipane & Others, 2009 (3) AIR Bom R 786**, in order to submit that the petitioner and the respondent no. 8, cannot be directed to cross examine the defendant no. 1, prior to he being cross examined by the respondent nos. 1 and 2 (original plaintiffs). It is submitted that the Trial Court was in error in allowing the application filed by the respondent nos. 1 and 2, on the ground that the two sets of the defendants are “not at loggerheads with each other”.

10. Shri Agni, the learned Counsel for the respondent nos. 1 and 2, on the contrary, has placed reliance on the decision of this Court in the case of **Bhujang Nathuji Daf Vs. Ramkrishna Daulat Daf, 2009 1 MhLJ 683**, in order to submit that when the interest of two sets of the defendants are

adversarial and the defendant nos. 1 to 5 are partly favouring the plaintiffs, it is appropriate that the defendant nos. 6 and 7 cross examine the defendant no. 1, prior to the plaintiffs cross examining the defendant no. 1.

11. On hearing the learned Counsel for the parties, I find that it would be appropriate if, the learned Trial Court reconsiders the application on its own merits and in accordance with law. The decisions on which, now reliance is placed by both the parties, were not brought to the notice of the Trial Court and thus, the Trial Court had no benefit of the said decisions. The learned Trial Court has only gone on the aspect that when the defendants, who are not at loggerheads with each other, must be directed to cross examine before the plaintiffs as there is scope of filling up of lacunae in the cross examination by the plaintiffs. The Trial Court needs to reconsider the application and the prayer made in the context of the case made out in the application filed by the respondent nos. 1 and 2, including the fact that according to the plaintiffs, the defendants inter se have conflicting interest and have raised inconsistent defences.

12. The Trial Court also needs to consider whether, the defence of the defendant nos. 1 to 5 is partly in consonance

with the averments in the plaint, while respondent nos. 6 and 7 have taken a completely adversarial defence to that of the plaintiffs. In fact, according to the plaintiffs, the defendants inter se also have conflicting interest, while the Trial Court has observed that the defendants who are not at loggerheads with each other must be directed to cross examine before the plaintiffs. In that view of the matter, it would be appropriate that the Trial Court reconsiders the application and decides the same after hearing the parties.

Thus, both the petitions are partly allowed. The impugned order, in both the petitions, is hereby set aside. The applications filed by the original plaintiffs under Order XVIII of the Code, are remitted back to the learned Trial Court for deciding them afresh in accordance with law, after hearing the parties. Rival contentions of the parties are left open. The parties to appear before the learned Trial Court on 18.01.2019 at 2:30 p.m. In the circumstances, there shall be no order as to costs.

C. V. BHADANG, J.

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