

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO. 5501 OF 2017

Bhagyawati Tarachand Jain & Ors.	...	Petitioners
V/s.		
Hastimal Mannalaji Shah & Ors.	...	Respondents

- Mr.Satyam N. Vaishnav a/w. Ms.Nupur Mukharjee i/b. M/s.N.N. Vaishnawa & Co. for the Petitioners.
- Ms.Vaibhavi Pawar for Respondent No.1.
- Mr.S.S. Redekar for Respondent No.2.

CORAM : DR.SHALINI PHANSALKAR-JOSHI, J.

DATE : 16th JANUARY, 2018.

P.C. :

1] Heard learned counsel for both the parties.

2] By this Writ Petition filed under Article 227 of the Constitution of India, the Petitioners are challenging the order dated 14th December, 2016 passed by the City Civil Court, Mumbai, thereby allowing the Notice of Motion No.1235 of 2016 in Suit No.7786 of 2001.

3] The said Notice of Motion was taken out by the original Defendant No.3 for condonation of delay in filing the written statement and for permission to file the written statement. The trial Court

allowed the same subject to the costs of Rs.10,000/- payable by Defendant No.3 to the Legal Aid.

4] The Petitioners herein are the original Defendant No.1 and 2 in the suit. The suit was filed by the Respondent No.1 Plaintiff for partition and separate possession of his share in the joint family property. Though, the writ of summons was duly served on Defendant No.3 and service affidavit to that effect was also filed on 25th November, 2009 along with the postal acknowledgement, Defendant No.3 did not appear in the suit at that time. However, Defendant No.3 appeared in the suit only after the evidence of the Plaintiff came to be recorded and then the affidavit of evidence of Defendant No.2 came to be filed. As the trial Court has allowed his application for condonation of delay and for permission to file written statement on record, this Writ Petition is preferred.

5] While challenging the impugned order of the trial Court, learned counsel for the Petitioners/original Defendant No.1 and 2 submits that in the written statement, Defendant No.3 has admitted the entire suit claim of the Plaintiff. Hence it is clear that the Defendant No.3 is only a formal Defendant, who is supporting the case of the Plaintiff. At this stage, therefore, after the evidence of the

Plaintiff is completed and even evidence affidavit of Defendant No.2 is also filed on record, if written statement of Defendant No.3 is taken on record, it will result in allowing him to lead, evidence, including the cross-examination of the Plaintiff; hence it would cause grave prejudice to the rights and interests of the Petitioners. It would be also against the order of recording of evidence, as laid down in Order-18 Rule-(1) to (4) of C.P.C.. Therefore, according to him, the impugned order passed by the trial Court needs to be quashed and set-aside.

6] Per contra, learned counsel for the Respondent No.1- the original Plaintiff and learned counsel for Respondent No.2-original Defendant No.3 have supported the impugned order by submitting that the present Petitioner who is Defendant No.2 in the trial Court has no *locus standi* or right to challenge the impugned order passed by the trial Court. Only the Plaintiff could have challenged the same and not the Co-Defendant. Secondly, it is submitted that Defendant No.3 though supports the case of the Plaintiff, at the same time, he has filed written statement seeking to protect his own rights also. Therefore, even if Defendant No.3 may give up his right to cross-examine the Plaintiff, at-least he needs to lead his own evidence to prove his own rights. It is submitted that, recording of evidence of Defendant No.2 is yet not over. He has only filed the affidavit of evidence but yet his

cross-examination is to begin. In such situation, Defendant No.3 may be permitted to lead his evidence first and, thereafter, Defendant No.2's cross-examination can be conducted by the Plaintiff and other Co-Defendants, including Defendant No.3, so that there is no question of any prejudice being caused to Defendant Nos.1 and 2 on account of taking on record the written statement of Defendant No.3.

7] In order to appreciate the controversy involved in the case, the facts of the present case, need to be carefully considered.

8] This is a suit filed by Respondent No.1 for partition and separate possession of joint family property in which all the co-sharers and co-owners of the properties are the necessary parties. It is true that the suit summons was duly served on Defendant No.3 and he failed to remain present in the year 2009 but as rightly considered by the trial Court as Defendant No.3 is a co-owner of the suit property, in order to determine the various questions of controversy involved between the parties, his presence and his written statement is necessary in the suit. One cannot dispute this proposition and the finding arrived at by the trial Court as the joinder of all the co-owners of the properties is necessary in a suit for partition. Hence, even if, such joinder is sought at the belated stage, in order to give finality to

the real controversy between the parties, such joinder of the co-owner needs to be allowed. Accordingly, the trial Court has allowed the same and as it was sought at belated stage, the trial Court has also imposed the costs of Rs.10,000/-.

9] Though, learned counsel for Defendant No.3 submits that the Petitioners who are Co-Defendants have no right to challenge this order of the trial Court allowing Defendant No.3 to file written statement and only the Plaintiff has such right, in this case, as Defendant No.3 is supporting the case of the Plaintiff by accepting his claim, more or less he being a formal Co-Plaintiff is not the aggrieved party. Hence, the Plaintiff will not challenge the impugned order. The real aggrieved party in the suit are the contesting Defendant Nos.1 and 2. Hence, they have definitely a right to challenge this impugned order of the trial Court as it is ultimately to some extent, having bearing on their rights.

10] The real grievance raised by learned counsel for the Petitioners-Defendant Nos.1 and 2 is that now by allowing Defendant No.3 to file written statement, the trial Court may permit Defendant No.3 to cross-examine the Plaintiff and also to lead his own evidence which is ultimately going to affect the rights of Defendant No.2 and as

the cross-examination of the Plaintiff is already completed by Defendant No.2 and at this stage Defendant No.3, who is as good as Co-Plaintiff is allowed to cross-examine the Plaintiff, it will wipe out the effect of cross-examination conducted by Defendant No.2. Moreover, Defendant No.3 being a supporting Plaintiff, his evidence was required to be recorded before recording evidence of Defendant No.2. However, Defendant No.2 has already filed his evidence affidavit on record. Hence, in this view of the matter, grave prejudice is likely to be caused to Defendant No.2 on account of impugned order of the trial Court.

11] By placing reliance on the judgment of this Court in the case of *Sunil Chhatrapal Kedar Vs. Y.S. Bagde, 2004(4) Mh.L.J.620*, it is submitted by learned counsel for the Petitioners that Order-18 Rule-2 of C.P.C. lays down the order in which the evidence is to be led and the said rule is that, the Plaintiff and such of the Defendants who support the case of the Plaintiff, wholly or in part, must address the Court and call the evidence and then the other party i.e. the other Defendants contesting the Plaintiff's claim should address the Court and call their evidence.

12] In the present case, it is submitted that the Plaintiffs case is fully supported by Defendant No.3. Therefore, Defendant No.3 is not

an contesting party to the Plaintiff but only the proforma Defendant through whom the Plaintiff is claiming right over the property and in such situation, it was necessary that the evidence of Defendant No.3 should have been led before the evidence affidavit of Defendant No.2 was filed. If, at this stage, Defendant No.3 is permitted to cross-examine the Plaintiff, it would have the effect of wiping out the cross-examination of the Plaintiff, conducted by Defendant No.2 and it would also amount to filling up lacuna in the Plaintiff's evidence. Hence, it is urged that, as held in the above-said authority amongst the Defendants, the order of leading evidence should be as follows;

- “(i) Those Defendant who fully support the case of the Plaintiff, thereof*
- (ii) Those Defendants who partly support the case of the Plaintiff; and then*
- (ii) Those Defendants who do not support the case of the Plaintiff in any part”.*

13] In the present case, therefore, it is submitted that, Defendant No.3 now cannot be permitted either to cross-examine the Plaintiff or even to lead his own evidence as Defendant No.2 has already filed his affidavit of evidence.

14] Learned counsel for Defendant No.3 fairly states that

Defendant No.3 no more intends to cross-examine the Plaintiff, as already the cross-examination of the Plaintiff is over. No other witness is also examined on behalf of the Plaintiff and the evidence of the Plaintiff thus stands closed. Therefore, the question of wiping out the effect of cross-examination of the Plaintiff or of filling up lacuna in evidence of the Plaintiff does not arise for consideration, in view of this submission made by learned counsel for Defendant No.3.

15] Now, the question arises as to whether Defendant No.3 should be permitted to lead his own evidence, when already the affidavit of evidence is filed by the contesting Defendant No.2. In this respect, one has to consider the fact that Defendant No.3 is not only supporting the claim of the Plaintiff but he also wants to exercise his own independent rights over the suit properties. In paragraph No.3 of his affidavit-in-reply filed before the trial Court, he has stated that the case of Defendant No.1 is that Defendant No.3 has relinquished his rights and, therefore, he wants to establish that he has not relinquished his rights and hence wants to prove his own rights, by leading his own evidence. It follows that, in order to resolve the controversy between the parties finally and completely, evidence of Defendant No.3 is essential. Hence, in order to ensure that no prejudice is caused to the rights of Defendant Nos.1 and 2, who have

already filed affidavit of evidence on record, it can be directed that, prior to the cross-examination of Defendant No.2 which is yet not commenced, evidence of Defendant No.3 and his witness, if any, who is supporting the case of the Plaintiff and in that way is the Co-Plaintiff, should be recorded and thereafter, the cross-examination of Defendant No.2 and recording evidence of his witness, if any, can be proceeded with. It will safeguard rights of all the parties.

16] Accordingly, Writ Petition stands dismissed. The impugned order passed by the trial Court is confirmed. However, it is clarified that, Defendant No.3, as submitted by his learned counsel, will not seek permission of the trial Court to cross-examine the Plaintiff and further Defendant No.3 is to lead his evidence, before cross-examination of Defendant No.2 and his witnesses, if any, commences.

17] Writ Petition stands disposed of in above terms.

[DR.SHALINI PHANSALKAR-JOSHI, J.]