

Shailaja

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**  
**CIVIL APPELLATE SIDE JURISDICTION**  
**WRIT PETITION NO. 8675 OF 2017**

M/s. Pahljani Developers Pvt. Ltd. ] Petitioner  
Vs.  
Nidhi Ajaykumar Jhunjhunwalla and others. ] Respondents

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Mr. Udayan S. Jain, for Petitioner.  
Mr. Dattatray P. Adavkar, for Respondents No.4 and 5.

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**CORAM : R.G. KETKAR, J.**

**DATE: 31<sup>st</sup> OCTOBER, 2018.**

**P.C.**

Heard Mr. Jain, learned Counsel for the petitioner and Mr. Adavkar, learned Counsel for respondents No.4 and 5 at length.

2. By this Petition under Article 227 of the Constitution of India, the petitioner, hereinafter referred to as 'plaintiff' has challenged the order dated 17<sup>th</sup> April, 2017 passed by the learned Judge, Court Room No.6 of the Court of Small Causes at Mumbai below Exhibit 69 in R.A.E Suit No.1217/1937 of 2003. By that order, the learned trial Judge rejected the application made by the plaintiff for recalling P.W.1-Amar Ramlakhan Singh, Secretary of the original plaintiffs-East India Cotton Association Limited (for short 'original plaintiffs').

3. In support of this Petition, Mr. Jain has invited my attention to the affidavit of examination-in-chief dated 23<sup>rd</sup> January, 2014 filed by P.W.1-Amar Ramlakhan Singh. He submitted that in paragraph 4, P.W.1 stated that agreement of tenancy dated 8<sup>th</sup> February, 1938 was executed between original

plaintiffs as landlords on one hand and one Seth Brijlal Madanlal carrying on business as sole Proprietor in the name and style of M/s. Brijlal Madanlal as tenant on the other. In paragraph 5, he states that Firm Brijlal Madanlal became tenant of the original plaintiff in respect of the office Rooms No.405 and 406 situate on the then first floor of the New Cotton Exchange Building, Kalbadevi, Mumbai 400 002. Original plaintiff issued rent receipt in respect thereof in the name of the said firm M/s. Brijlal Madanlal. In paragraph 9, it is stated that Radheshyam M. Jhunjhunwala the then sole proprietor of the tenant Firm died on 27<sup>th</sup> April, 1990 leaving behind his son Ajaykumar Radheshyam Jhunjhunwala (defendant No.1) and defendant No.2 (wife of defendant No.1). Defendants No.1 and 2 became partners of the firm Brijlal Madanlal. Defendants No.1 and 2 requested original plaintiff to transfer tenancy in respect of the suit premises to their joint names as successors in interest of the deceased tenant Radheshyam M. Jhunjhunwala. In paragraph 10, it is stated that the original plaintiff accepted defendants No.1 and 2 as tenants by a resolution recorded in the Minutes of the Board of Directors dated 27<sup>th</sup> June, 1997 of the original plaintiffs. In paragraph 11, it is stated that defendants No.1 and 2 expressly undertook to be bound by the terms of the said Tenancy Agreement, Memorandum of Articles of Associations and Bye-laws of the original plaintiff from time to time. Rent receipt continued to be issued in the name of the firm M/s. Brijlal Madanlal. In paragraph 12, it is stated that original plaintiff is entitled to recover Rs. 38,904/- (arrears of rent and service charges for the period from April, 1999 to October, 2003) and the present plaintiffs are entitled to recover future rent from defendants No.1 and 2.

4. Relying on this part of the affidavit of examination-in-chief, Mr. Jain submitted that consistent case of the plaintiffs is that M/s. Brijlal Madanlal was the tenant. Defendants No.1 and 2, partners of defendant No.1 were

accepted as tenants. They were paying rent. However, in the course of cross-examination conducted on 11<sup>th</sup> January, 2016 P.W.1 stated thus;

“Plaintiff has accepted rent from defendant no.3 upto 1999. I have issued rent receipt in the name of original tenant”.

5. Mr. Jain submitted that immediately on the next date of hearing i.e on 9<sup>th</sup> March, 2016, the plaintiffs have filed application Exhibit 69 for recalling P.W.1 for re-examination as per supplementary affidavit of examination-in-chief annexed at Exhibit A to that application or in the alternative, the supplementary affidavit of examination-in-chief be treated as an explanation of the said admission. By the impugned order, the learned trial Judge rejected the application. Mr. Jain relied on Section 138 of the Indian Evidence Act, 1872 (for short 'Act') to contend that re-examination can be directed to the explanations of the matter referred to in the cross-examination. He submitted that in the present case no new matter is sought to be brought on record by way of re-examination. He relied on decision of the Apex Court in **Chanan Singh Vs. The State of Haryana, AIR 1971 Supreme Court 1554** and in particular paragraph 16 hereof where the Apex Court has observed thus;

“The purpose of re-examination is explaining any part of the cross-examination which is capable of being construed unfavourably to the party for whom he has given evidence in chief. Re-examination cannot be allowed for new matters except with leave of the Court”.

6. Mr. Jain submitted that it may be clarified that the so-called admission is explained by way of supplementary affidavit of examination-in-chief at Exhibit A annexed to the application.

7. On the other hand, Mr. Adarkar supported the impugned order. He invited my attention to affidavit in reply dated 28<sup>th</sup> April, 2016 filed on behalf of defendants No.4 and 5 opposing the application. He submitted that P.W.1 faced cross-examination on 29<sup>th</sup> June, 2015, 21<sup>st</sup> December, 2015 and lastly on 11<sup>th</sup> January, 2016. The application is made almost after two months i.e on 9<sup>th</sup> March, 2016. For the reasons recorded in paragraph 8 of the impugned order, he submitted that no case is made out for interfering with the impugned order.

8. I have considered rival submissions advanced by learned Counsel for the parties. I have also perused the material on record. The learned trial Judge has referred to cross-examination of P.W.1 that took place on 11<sup>th</sup> January, 2016. In paragraph 8, the learned trial Judge noted that there is nothing on record to show that due to misunderstanding, answer was given by P.W.1 to the effect that the plaintiffs have accepted rent from defendant No.3 upto 1999. The learned trial Judge thereafter observed that as defendant No.3 has not filed written statement, evidence or admission which is beyond the pleadings is therefore, not admissible. Evidentiary value of the admission will be considered on merits at the time of final hearing of the suit.

9. Mr. Jain relied on section 138 of the Act which reads thus;

**“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”

A perusal of above provision shows that Court has power to order re-examination for explanation of matters referred to in cross-examination. It is also no doubt true that by recalling P.W.1 and re-examining him, plaintiffs are not introducing new matter in re-examination. However, what is material to note is that the learned trial Judge has not concluded the issue. In paragraph 8, the learned trial Judge has observed that as there is no pleading on behalf of defendant No.3 or that there is no pleading on behalf of the defendants that defendant No.3 has paid rent, evidence or admission which is beyond the pleadings is not admissible. Therefore, evidentiary value of the admission will be decided on merits. I do not find that approach of the learned trial Judge in that regard is perverse warranting interference at the hands of this Court under Article 227 of the Constitution of India.

10. Mr. Jain relied on paragraph 16 of the decision of the Apex Court in **Chanan Singh** (supra). I have already extracted that paragraph in the earlier part of the order. Paragraph 16 reiterates contents of section 138 of the Act. I do not find that the said decision in any way assists case of the plaintiffs. Hence, Petition fails and the same is dismissed.

11. It is, however, expressly made clear that where a decree is appealed from by the petitioner, any error, defect or irregularity in the impugned order, affecting the decision of the case, may be set forth as a ground of objection in memorandum of Appeal as contemplated by Section 105(1) of C.P.C.

[R.G. KETKAR, J.]