

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.7746 OF 2017

Mishrilal Mahendra Kumar and another ... Petitioners
Vs.
Naharmal Mehta and others ... Respondents

Mr. B. R. Singh i/b. R. B. Singh and Associates for Petitioners.
Mr. Sebin Michael Joseph for Respondent No.3.
Mr. S. Purohit i/b. Mr. Vinod N. Tayade for Respondents No.4 and 5.

CORAM : R. G. KETKAR, J.
DATE : APRIL 6, 2018

P.C. :

Not on Board. At the request of Mr. Singh, taken up for admission.

2. Heard Mr. Singh, learned Counsel for petitioners, Mr. Joseph, learned Counsel for respondent No.3 and Mr. Purohit, learned Counsel for respondents No.4 and 5 at length.

3. By this Petition under Article 227 of the Constitution of India, petitioners, hereinafter referred to as plaintiffs No.1 and 5a have challenged the order dated 30.08.2016 passed by the learned trial Judge, Court Room No.38 of the Court of Small Causes at Mumbai (Bandra Branch) below exhibit-92 in R.A.D. Suit No.1012 of 1995. By that order, the learned trial Judge held that plaintiffs cannot cross-examine defendant No.2(c) as by order dated 19.03.2016, defendant No.2(c) was precluded from cross-examining the plaintiffs' witness on the ground that claim of the plaintiffs and defendant No.2(c) is not adverse to each other and they are supporting each other.

4. In support of this Petition, Mr. Singh submitted that defendant No.2(c) was permitted to file evidence. If defendant No.2(c) has filed

evidence, plaintiffs are entitled to cross-examine defendant No.2(c). He submitted that the learned trial Judge committed error in relying upon the order dated 19.03.2016 by which defendant No.2(c) was precluded from cross-examining the plaintiffs' witness. Merely because defendant No.2(c) has not challenged order dated 19.03.2016, that cannot be basis for denying the plaintiffs to cross-examine defendant No.2(c). He submitted that defendant No.2(c) is not supporting the plaintiffs in the trial Court.

5. Mr. Joseph, learned Counsel for respondent No.3 - defendant No.2(c) submitted that defendant No.2(c) is not supporting the plaintiffs' case and that he wants to bring on record factual aspects.

6. On the other hand, Mr. Purohit invited my attention to the written statement filed by defendant No.2(c) and in particular paragraph 3(b) thereof. He submitted that plaintiffs have instituted Suit for declaration of their tenancy rights. In paragraph 3(b), defendant No.2(c) asserted that "relationship of 'landlord' and 'tenants' thus came to be established between the plaintiffs and the defendant No.1." He also relied upon the order dated 19.03.2016 passed by the learned trial Judge below exhibit-92. The learned trial Judge, after considering the pleadings of the parties, observed that defendant No.2(c) is supporting the plaintiffs. Defendant No.2(c) is not adversary party to the plaintiffs and is adversary party to the defendants No.3, 2(a), 2(b) and 2(d) as per Section 137 of the Indian Evidence Act, 1872 (for short 'Act'), only adversary party has right to cross-examination. He, therefore, submitted that no case is made out to interfere with the impugned order.

7. I have considered the rival submissions advanced by the learned Counsel appearing for the parties. I have also perused the material on record. Plaintiffs have instituted Suit for declaration of relationship of 'landlord' and 'tenants' continues to exist even on and from 01.01.1995

between the defendant No.1 and the plaintiffs. In the alternative, plaintiffs prayed for declaration that the relationship of the landlord and tenants came to be established on and from 01.01.1995 between the defendant No.2 and the plaintiffs. Defendant No.2(c) filed written statement and in paragraph 3(b), it is asserted as under:

“3(b) ... The relationship of 'landlord' and 'tenants' thus came to be established between the plaintiffs and the defendant No.1.”

8. Section 137 of the Act deals with examination-in-chief, cross-examination and re-examination. The examination of a witness by the adverse party is called his cross-examination. In the order dated 19.03.2016, the learned trial Judge has categorically recorded a finding that defendant No.2(c) is not an adversary party to the plaintiffs. It is undisputed that defendant No.2(c) has not challenged the said order. Mr. Singh submitted that merely because defendant No.2(c) has not challenged order dated 19.03.2016, that cannot be basis for denying the plaintiffs to cross-examine defendant No.2(c). I do not find any merit in this submission. In the impugned order also, the learned trial Judge has recorded a categoric finding that defendant No.2(c) is not adversary to the plaintiffs. In fact by cross-examining defendant No.2(c), plaintiffs want to bring on record documents, which are favourable to them. As the claims of the plaintiffs are not adverse to the defendant No.2(c), they have no right to cross-examine defendant No.2(c). I do not find that the learned trial Judge has committed any error in rejecting the Application. Hence, Petition fails and the same is dismissed. 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 the memorandum of appeal as contemplated by Section 105(1) of C.P.C.

(R. G. KETKAR, J.)