

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

WRIT PETITION NO.815 OF 2016

Mahendra Chunilal Doshi	.. Petitioner
Vs.	
Jayesh Chunilal Doshi & Ors.	.. Respondents

Mr.Yogesh Deshpande for the petitioner.
Mr.Satyan N.Vaishnav a/w Ms.Nupur J. Mukherjee i/by M/s.N.N.
Vaishnawa & Co. for the respondent no.1.

CORAM : R.D. DHANUKA, J.
DATE : 12th October 2018

P.C.:

. Matter is placed on board for speaking to the minutes of the order dated 18th September 2018. Both the parties have agreed certain corrections in the said order.

2. The corrected order dated 18th September 2018 reads as under :-

“1. By this petition filed under under Article 227 of the Constitution of India, the petitioner has impugned the order dated 23rd October, 2015 passed by the learned Trial Judge rejecting the application filed by the petitioner for recall of the order “no cross” of the petitioner insofar as the original plaintiff is concerned.

2. It is not in dispute that the suit was filed by the respondent no.2 herein inter-alia praying for dissolution of the partnership firm from the date of filing of the Suit No.2529 of 2007 or from the date of filing the Suit No.2220 of 2009.

3. *The petitioner, who was the original defendant no.2 filed the written statement in the said suit supporting the case of the original plaintiff.*

4. *The petitioner did not cross-examine the plaintiff on 23rd October, 2015 and sought adjournment. The learned trial Judge rejected his application and adjourned the matter to 26th October, 2015 and thereafter adjourned to 30th October, 2015. The petitioner on 30th October, 2015 remained absent before the learned Trial Judge at the time of cross-examination by the defendant no.1. The cross-examination of the petitioner was thus closed. The contesting defendant i.e. the defendant no.1 has thereafter started cross-examining the plaintiff's witness which is at the advanced stage.*

5. *Learned counsel appearing for the petitioner submits that the petitioner could not remain present before the learned Trial Court on one of the date for the purpose of cross-examining the plaintiff's witness on the ground that the mother-in-law of his advocate had expired. The application for adjournment was accordingly made before the learned Trial Court. He submits that the cross-examination of the plaintiff by the defendant no.1 is not concluded and thus an opportunity shall be granted to the petitioner to cross-examine the plaintiff's witness.*

6. *Mr.Vaishnav, learned counsel appearing for the respondent no.1 invited my attention to the prayers in the plaint and also some of the averments made by the petitioner herein in the written statement filed before the learned Trial Court on 28th March, 2011. It is submitted by the learned counsel that the petitioner has supported the case of the plaintiff in the written statement and seeks declaration that the partnership has been dissolved on the date of filing of the Suit No.2520 of 2007. He also*

invited my attention to the part cross-examination of the plaintiff conducted by the defendant no.1 on 30th October, 2015 and would submit that the cross-examination of the plaintiff by the defendant no.1 would clearly indicate that the petitioner and the plaintiffs are supporting each other and are colluding with each other.

7. Learned counsel placed reliance on the judgment of this Court in case of **Sunil Chhatrapal Kedar vs. Y.S. Bagde & Anr., 2004(4) Mh.LJ 620** and in particular paragraphs 8, 9 and 10 in support of his submission that since the petitioner is supporting the case of the original plaintiff, his evidence ought to have been led before the contesting defendant would commence his cross-examination. He submits that after closing of the cross-examination of the defendant no.2 by the learned Trial Court for genuine reasons, his client the defendant no.1 has already cross-examined the plaintiff's witness substantially and the same is at the advanced stage.

8. Learned counsel for the original plaintiff supports the case of the petitioner before this Court also and has no objection if the impugned order passed by the learned Trial Court is quashed and set aside and the order of "no cross" passed by the learned Trial Court so far as the petitioner is concerned be set aside.

9. Learned counsel for the petitioner in rejoinder submits that insofar as the flat in question is concerned, his client claims certain rights in respect of the said flat and if the petitioner is not allowed to cross-examine the original plaintiff, his interest would be affected.

10. A perusal of the prayers in the plaint clearly indicates that the original plaintiff had applied for dissolution of the partnership firm from the date of filing of Suit No.2529 of 2007 or from the date of filing of the

present Suit i.e. Suit No.2220 of 2009. The petitioner herein was the defendant no.2 in the said suit.

11. A perusal of the written statement filed by the defendant no.2 on 28th March, 2011 and more particularly paragraphs 4 to 8 clearly indicates that the defendant no.2 is supporting the case of the plaintiff. In paragraph 5, the defendant no.2 himself has prayed for declaration that the partnership firm be dissolved from the date of filing of Suit No.2529 of 2007 or from the date of the present suit. In paragraph 6, he seeks declaration that flat bearing No.15/1, Shatrunjay Shree Hind Co-operative Housing Society Limited, Sion, Mumbai is an estate of the said partnership firm.

12. A perusal of part of the cross-examination conducted by the defendant no.1 clearly indicates that the respondent no.2 (original plaintiff) has admitted that his relationship with the defendant no.2 is good. It is the plaintiff's contention that the suit flat be given to the defendant no.2 for his residence. The defendant no.2 had filed a suit before the Small Causes Court, Mumbai in connection with the said flat. The plaintiff had contested that the said proceedings before the Small Causes Court on behalf of the defendant no.2.

13. A perusal of the written statement as well as the cross-examination of the plaintiff indicates that the interest of the original plaintiff and the defendant no.2 is common. The petitioner is clearly supporting the case of the original plaintiff.

14. This Court in case of **Sunil Chhatrapal Kedar** (supra) after construing the provisions of Order XX Rule 2 of the Code of Civil Procedure, 1908 has held that the defendant supporting the case of the plaintiff has to commence his cross-examination before commencement

of the cross-examination of the contesting defendants. This Court in the said judgment has adverted to the judgment of the Gujarat High Court in case of **Shah Hiralal Himatlal & Ors. vs. M.G. Pathak & Ors.** The Gujarat High Court in the said judgment has held that in such cases among defendants, the order of leading evidence should be as follows :

- i). Those defendants who fully support the case of the plaintiff;
- ii). Those defendants who partly support the case of the plaintiff ;
- iii). Those defendants who do not support the case of the plaintiff in any part.

15. In my view, the principles laid down by this Court in case of **Sunil Chhatrapal Kedar** (supra) and the principles laid down by the Gujarat High Court in case of **Shah Hiralal Himatlal & Ors.** (supra) clearly applies to the facts of this case.

16. In my view, the learned Trial Court was right in closing the case of cross-examination of the petitioner. The contesting defendant has already cross-examined the plaintiff substantially and the same is at the advanced stage.

17. A perusal of the written statement filed by the petitioner indicates that he is more concerned with the flat bearing Flat No.15/1, Shatrunjay Shree Hind Co-operative Housing Society Limited, Sion, Mumbai and seeks declaration of the said flat as the estate of the partnership firm. The petitioner has already filed a separate suit in respect of the said flat. In my view, the interest of the petitioner being common with the original plaintiff, he ought to have cross-examined the plaintiff first, which he failed to conduct inspite of opportunities granted by the trial Court.

18. In view of the fact that the contesting defendant has already cross-examined the plaintiff substantially, the petitioner cannot be granted any

opportunity to cross-examine the plaintiff at this stage. I do not find any infirmity in the impugned order passed by the learned Trial Court. The petition is devoid of merit and is accordingly dismissed. There shall be no order as to costs.”

3. The order dated 18th September 2018 stands corrected accordingly.

R.D. DHANUKA, J.