

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO.6263 OF 2019

**TARINDER MAHENDRA SINGH DHILLON
VERSUS
ZIAUDDIN KHAN MUMTAZUDDIN KHAN AND OTHERS**

...
Advocate for the Petitioner : Shri A. S. Bajaj

...

CORAM : RAVINDRA V. GHUGE, J.

DATED : 24th JUNE, 2019.

...

PER COURT :

1. The petitioner/original defendant No. 18 is aggrieved by the order dated 13/12/2018 passed by the Trial Court allowing defendant Nos. 7 to 10 to cross examine the plaintiff and his witnesses, in RCS No. 1/2010. The petitioner is further aggrieved by the order dated 02/04/2019 passed by the Trial Court rejecting application Exhibit 143 filed by the petitioner under Section 114 of the Code of Civil Procedure and has refused to review its earlier order dated 13/12/2018.

2. The learned Advocate for the petitioner/defendant No.18 has strenuously criticized the impugned orders. He draws my attention to the twelve grounds formulated in the

memo of the petition. Contention is that the petitioner is a purchaser of a portion of the suit land. Defendant Nos. 7 to 10 are the relatives of the plaintiff. Initially the suit proceeded exparte against these four defendants. Eventually, the "proceed exparte" order was recalled and they were permitted to file their written statement. Such written statement has been jointly filed by the four defendants on 13/12/2016.

3. It is submitted that after the plaintiff led evidence through himself and his witnesses, defendant Nos. 7 to 10 initially declared that they did not desire to cross examine the plaintiff. The petitioner then cross-examined the plaintiff and his witness and feels that he has extracted an admission from the plaintiff to the extent that defendant No. 18 has purchased the land from the legal heirs of deceased Zahiruddin and prior thereto, the said land admeasuring 6 Acres in Gat No. 200 was standing in the name of defendant Nos. 11 to 15. The petitioner further feels that he has extracted an admission in the cross-examination of the witness of the plaintiff that the deceased Mumtazuddin gifted Survey No. 136 to Zahiruddin and Naziruddin.

4. The petitioner relies upon the judgment of this Court in the matter of ***Sunil Chhatrapal Kedar Vs. Y. S. Bagde, 2004 (4) Mh.L.J. 620***, to support his contention that in a suit, after the plaintiff leads evidence, those parties who are fully supporting the plaintiff should cross examine him and those parties who are not supporting the plaintiff shall thereafter cross-examine him as and when directed. Reliance is placed upon paragraph 8 of the judgment which reads as under :-

8. Strikingly, this aspect has been already considered by the various courts including our Court, as reported in 1986 Mh.L.J. 643, Mandabai Ramkrishna Tumsare and others vs. Ramlal Hiranmanji Hiwarkar and others, based on the Order 18 Rule 2 of Civil Procedure Code, and section 135 of the Evidence Act. If case is made out then, authorities should consider such judgment, while dealing with such application. Para Nos. 9 and 10 is clear, and the same is reproduced as under :

“9. Rule 2 of Order 18, Civil Procedure Code runs as under :

“2.(1) On the day fixed for hearing of the suit or on any other day to which the hearing is adjourned, the party having the right to begin shall state his case and produce his evidence in support of the issues which he is bound to prove.

(2) The other party shall then state his case and produce his evidence [if any] and may then address the court generally on the whole case.

(3) The party beginning may then reply generally on the whole case.

(4) Notwithstanding anything contained in this rule, the Court may, for reasons to be recorded, direct or permit any party to examine any witness at any stage.”

Reading the two rules of Order 18 together, it is apparent that in a given case where he has admitted the facts alleged in the plaint, the defendant has a right to begin provided he contends that either in point of law or on some additional facts alleged by the defendant, the plaintiff is not entitled to any part of any relief. Further, it is apparent that after deciding which party has a right to begin, the court has to permit that party having the right to begin to state his case and produce his evidence in support of the issues, the burden of which is cast upon him. It is after this stage that “the other party” shall then state his case and produce his evidence and address the Court generally on the whole case. Sub-rule (4) of Rule 2 categorically states, notwithstanding anything contained in this rule, the Court may, for reasons to be recorded, direct or permit any party to examine any witness at any stage. Thus, as to the order in which evidence is to be taken, the rule is that the plaintiff and such of the defendants as support his case, wholly or in the party, must address the Court and call their evidence and then “the other party” i.e. the other defendants contesting the plaintiff’s claim should address the court and call their evidence. Examination-in-chief of a witness, cross-examination by the adverse party and re-examination by the party who called the witness are defined in section 137 of the Evidence Act. Under section 138 of the Evidence Act, 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. It is in the light of these provisions of the Evidence Act and Order 18 of Civil Procedure Code, it appears that the trial Court has to bear in mind which is the party who has a right to begin and which is the adverse party who has a right to cross-examine.”

“10. In the circumstances of the present case, it is apparent that the plaintiff’s case is fully supported by defendants 6 to 8. They are, therefore, not an adverse party to the plaint, but are proforma defendants through whom the plaintiff is claiming a right to the property. In a case like this, the evidence of the plaintiff having been recorded, it would be just and proper to ask the proforma defendants 6 to 8 to initially cross examine the plaintiff and then direct the

contesting defendants 1 to 5 to cross-examine the plaintiff. The reason is simple. For the administration of fair and just trial, it must be noted that the plaintiff's evidence, if cross-examined by the adverse party, may reveal certain lacunae which could be got corrected by the defendants supporting the plaintiff when they cross examined the plaintiff subsequently inasmuch as they are interested in the claim of the plaintiff. By way of cross-examination, the supporting defendants can put leading questions and get the necessary answers. It is for this purpose, to meet the ends of justice, the trial Court should permit the contesting defendants to cross-examine the plaintiff last, particularly when the adverse party so desires. Thus if there are more than one defendant in a such, the order of their cross-examination is a matter which rests on the discretion of the Judge. To put it in other words, cross-examination as defined in section 137 of the Evidence Act, is the examination of the witness by "adverse party" and the defendants who are supporting the plaintiffs case are not an adverse party. Therefore, their formal cross-examination should be brought on record and it is then the "contesting defendants". Which is the "real adverse party" should be directed to cross-examine the plaintiff."

5. Having considered the submissions of the learned Advocate for the petitioner, I find that it is settled law that those defendants, who support the plaintiff are expected to cross-examine the plaintiff first and those who are opposing the suit and the prayers made by the plaintiff, can cross-examine later. For this purpose, it has to be seen as to whether these four defendant Nos. 7 to 10 are supporting the plaintiff either fully or in part or are opposing the plaintiff.

6. They have submitted a joint written statement on 13/12/2016 running into 17 paragraphs. I have considered each paragraph of the said written statement and it appears that these four defendants are opposing the plaint, tooth and nail. They have opposed every contention of the plaintiff, have defended their own share in the suit property and by restricting their defence to their own share, they have prayed that the suit be dismissed with costs of Rs. 50,000/-. From no angle can the said written statement be believed to be either partly supporting the plaintiff or supporting the plaintiff to some extent. In the light of this position, the judgment delivered by this Court in *Sunil Kedar (supra)*, would not be of any assistance to the petitioner.

7. It does appear from the record that initially the four defendants were not inclined to cross-examine the plaintiff. However, subsequently, after the recording of evidence was concluded, they have prayed for leave to cross-examine. The Trial Court has permitted them to cross-examine the plaintiff and his witnesses by imposing costs of Rs. 500/- with a further

direction that they would not seek adjournments in the matter.

8. It is settled law that every litigating side has to be given a fullest opportunity to lead evidence. Cross-examination of the opponent is an integral part of the right to defend. When the written statement filed by defendant Nos.7 to 10 does not indicate even in a single sentence that they desire to support the claim of the plaintiff, I do not find that the impugned order of the Trial Court dated 13/12/2018 or 02/04/2019 could be termed as being perverse or erroneous.

9. This petition, being devoid of merit, is therefore, dismissed.

(RAVINDRA V. GHUGE, J.)

shp/-