

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 6242 OF 2019**

1. Mr. Manji Sama Patel ... Petitioners

2. Mr. Chamaria Rata Sama
Both of them partners of M/s. Star Plus
its address at Shop No.2 & 3, ground floor,
Bindiya Co-op. Housing Society,
51, Hill Road, Bandra (West)
Mumbai – 400 050

3. Mr. Mehul Manji Patel

4. Mr. Bipin Manji Patel

5. M/s. Design Touch
business at Shop No.4 & 5, ground floor,
Bindiya Co-op. Housing Society Ltd.
51, Hill Road, Bandra (West),
Mumbai – 400 050

6. M/s. Star Plus
business at Shop No.2 & 3, ground floor,
Bindiya Co-op. Housing Society Ltd.,
51, Hill Road, Bandra (West),
Mumbai 400 050

V/s.

Bindiya Co-op Housing Society Ltd. ... Respondent

WITH
WRIT PETITION (L) NO. 23570 OF 2019
IN
R.A.E. SUIT NO.566/955/2012
WITH
WRIT PETITION (L) NO. 23571 OF 2019
IN
R.A.E. SUIT NO.567/956/2012
WITH
WRIT PETITION (L) NO. 23572 OF 2019

IN
R.A.E. SUIT NO.568/957/2012

Mr. Manji Sama Patel	... Petitioners
V/s.	
Bindiya Co-op Housing Society Ltd.	... Respondent

Mehul Shah i/b. Bharat Joshi for the Petitioners.

Shailesh C. Naidu a/w. A.M. Sethna, Ms. Ruju Thakkar and Ms. Ritika Jain I/b.
Rafail D'souza for the Respondent.

CORAM : **DAMA SESHADRI NAIDU, J.**

JUDGMENT RESERVED: : **19th AUGUST 2019.**

JUDGMENT PRONOUNCED: : **29th AUGUST 2019.**

Facts:

Rule. Rule made returnable forthwith. Heard finally by consent of the parties.

2. The petitioners 1 and 2 are brothers; petitioners 3 and 4 are also brothers, being the sons of the first petitioner. All these four persons have two partnership firms: the 5th petitioner and the 6th petitioner. That is, the petitioners 1 to 4 are the partners in both the firms. But the 5th petitioner firm is a party in the first two suits: R.A.E. Suit Nos. 566/955 of 2012 and 567/956 of 2012. And the 6th petitioner firm is a party to the remaining two suits: 568/957 of 2012 and 569/958 of 2012. The respondent Society, as the landlord, filed these four suits. All the respondents are the tenants.

3. That said, I must mention here how the Society views its tenants. It regards the 5th and the 6th petitioners as the tenants, and the other petitioners as mere partners of those two tenant-firms.

4. The landlord Society sued the petitioner-tenants for eviction on the grounds of permanent additions and alterations, wastage and damage, subletting

and annoyance or nuisance. Once the issues were framed, the Society, first, in May 2015, filed its examination-in-chief in R.A.E. Suit No.569/958 of 2012. The Society wanted to examine its Secretary as P.W. 1. Before it could file the examinations-in-chief in other cases, the tenants applied under Exhibit No. 22 in R.A.E. Suit No. 566/955 of 2012. They have filed similar applications in the other three suits, too.

5. In these applications, the tenants took the plea that there should be common cross-examination in all four cases. According to them, once the Society knows the tenants' line of cross-examination in one suit, it would have its witness better prepared in other cases for the same questions or similar questions to be asked. The Society resisted these applications. Eventually, the trial Court, through a common order, dated 19th October 2018, dismissed all the four applications. That led the tenants to file these Writ Petitions, invoking Article 227 of the Constitution of India.

Submissions:

Petitioners':

6. Shri Mehul Shah, the learned counsel for the petitioner-tenants, has submitted that though the Society has filed four suits, practically the tenants are the same in all four suits, save the partnership firms. According to him, the Society's grounds of eviction and the tenants' defence are on the same lines in all the four cases. In this context, Shri Shah has taken me through the issues framed by the trial Court. He stressed that even the issues are the same in all the four suits. So the trial Court ought to have acceded, he stresses, to the tenants' request to have a common cross-examination. According to Shri Shah, it will cause no prejudice to the Society.

7. Shri Shah has submitted that the Society's Secretary filed the examinations-in-chief in all cases. He first filed the evidence-in-chief in one case, waited a few months, and then filed in all other cases, too. But soon after the Secretary's filing the evidence in one suit, the tenants applied for the trial Court's

leave to cross-examine the witness compendiously in one go or at a stretch, covering all the four suits.

8. To sum up, Shri Shah maintains that the parties to the suits are the same, the suit properties are identical, the pleadings on either side, too, are identical, and the issues do not differ, either. So it is desirable, he urges, for the tenants to have a common cross-examination. Shri Shah has also submitted that the order impugned is cryptic and devoid of any reasoning. Thus, he wants this Court to set aside the impugned order and allow the tenants to cross-examine PW1 compendiously covering all the four suits.

Respondent's:

9. In response, Shri S.C. Naidu, the learned counsel for the Society, has submitted that this Court may first appreciate that the Writ Petition is under Article 227 of Constitution of India. And this Court would be averse to interfering with the trial Court's order of discretion unless it suffers from perversity. In that context, Shri Naidu has stressed that the order impugned does not suffer from any perversity. Collaterally, Shri Naidu has also pointed out that the tenants, as the defendants in the suits, have been dragging the proceedings under one pretext or another, though the Society's Secretary filed the examination-in-chief over four years ago—in one suit at least.

10. Elaborating on his submission and justifying the impugned order, Shri Naidu has submitted that the parties are different. According to him, the partnership firms are the tenants, and its partners have been brought on record only to comply with the statutory mandate under Order XXX Rule 1 of CPC. To be illustrative, Shri Naidu submits that if one partner retires or resigns from the firm and somebody else gets inducted, the firm's composition changes. But that does not amount to sub-letting, for the partnership firm continues to be the tenant. So it does not lie in the tenants' mouth to contend that the parties to the suit are the same.

11. Shri Naidu has also taken me through the record to painstakingly point out that each case has its own shades of assertion and denial, too. Then, he has

pointed out that the architect's report reveals the tenants' distinct violations of the contractual terms vis-à-vis each suit property. So when the tenants cross-examine the Society's Secretary (PW1) or any other witness—possibly the architect—both the chief examination and the cross-examination do vary from suit to suit.

12. In the end, Shri Naidu has suggested an alternative. According to him, the tenants' apprehension is unfounded. They may have been worried about the Society's anticipating, and even preempting, the tenants' defence in the cross-examination in other cases because of separate cross-examination in each case. In that event, the tenants may cross-examine the Society's witness comprehensively in one case, secure a certified copy of that evidence, and then mark it in other cases for the common facts and law. About the distinct issues of facts not common to all cases, the tenants may as well examine the Society's witnesses in each case, thus complementing the first cross-examination.

13. According to Shri Naidu, this is the practice the courts under Bombay High Court's jurisdiction adopt if there are more suits with variations—however subtle they may be—in facts or minor changes in the party composition. And that practice can be replicated here.

Reply:

14. Shri Shah has submitted that the suggestion, on the face of it, is harmless; but examined deeper, it is both impractical and prejudicial to the tenants. To elaborate, he has submitted that all the questions of, say, additions, alterations, wastage, damage, and so on may have minor variations from case to case. Then, the questions in one case must have to be repeated in other cases. So it is easy for the Society's witnesses to anticipate the questions in other cases and be ready with improved answers.

15. Heard Shri Mehul Shah, the learned counsel for the petitioners, and Shri S. C. Naidu, the learned counsel for the respondents.

Discussion:

16. The facts are not in dispute, and the issue lies in a narrow compass. Can the tenants be allowed to cross-examine a witness comprehensively in one suit

covering the issues in the other three suits, too? What are the parameters the tenants should meet before the trial Court could let them do so? It assumes importance that the suits have not been clubbed or consolidated. And the plaintiff maintains that the parties are different; the facts, too, differ. So we should also examine, to what extent the plaintiff's assertion affects the defendants' claim.

(a) Inherent Powers:

17. In *Manohar Lal Chopra vs Rai Bahadur Rao Raja Seth Hiralal*^[1] the Supreme Court has held that every Court of Law is constituted for the administration of justice between the parties and therefore, "must be deemed to possess, corollary of such powers as may be necessary to do the right and undo the wrong in its administration of justice." It is too well established to be questioned that the court's inherent powers are complementary to the statutory powers. Usually, once a particular procedural arena stands occupied by a particular provision of CPC, the court will not exercise its inherent powers in derogation of that statutory mandate. True, Section 151 of CPC does not confer inherent powers on the civil court; it only recognizes powers inhere in the civil court, guided by the common law traditions. It is well settled that the provisions of the Code, as the Supreme Court^[2] has held, are not exhaustive for the simple reason that the Legislature is incapable of contemplating all the possible circumstances which may arise in future litigation and consequently for providing the procedure for them.

18. That said, we must accept that the inherent powers are neither unbridled nor unanalyzed. They only cover the legislative vacuum, in the interest of justice. Thus, the inherent powers have their justification in the legislative silence and the felt need of the justice delivery system. Lest the Court should remain a mute spectator to any legal shortcoming on the premise that the law is silent on that aspect. Contrasting as it may seem, Benjamin Cardozo has felicitously put how a judge cannot be a knight-errant roaming at will but should draw inspiration only from the consecrated principles of the past. Under the

¹ [1] 1962 AIR 962 SR Supl. (1) 450

² [2] Manohar Lal Chopra v. Rai Bahadur Rao Raja Seth Hiralal, AIR 1962 SC 527

Chapter “The Judges as a Legislator” in the book “The Nature of the Judicial Process”^[3], the oft-quoted American Judge Cardozo has said:

"The judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant roaming at will in pursuit of his own ideal of beauty or of goodness. he is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to "the primordial necessity of order in the social life."

(b) Evidence Taking:

19. With those prefatory observations, I may note that Order 18 of CPC has provided detailed procedural safeguards and directions about how to record the evidence. Yet various procedural aspects still remain uncovered by CPC, expansive as it has been. One such instance is the consolidation of proceedings or clubbing of the suits. In the same vein, we may mention about how the witnesses are cross-examined. Indeed, Order 18 Rule 4 prescribes the mechanism of recording the evidence. Rule 3(a) of the same Order compels the party to the suit to appear before any other witness if he wishes to examine himself.

20. Either between the same parties or parties with minor changes in their composition but with similar interests, it is possible that there can be a series of cases. And those cases may contain substantially the same facts, raise the same questions of law and, therefore, the same or similar issues, and require similar evidence on either side. Not to speak of the relief sought, which too is usually the same or similar. One comprehensive suit may be possible, but that may, perhaps, embarrass the trial on one technicality or another. That occasions a series of cases with minor variations. Some cases may combine all the above features or a few of them.

(c) What is a Firm?:

21. Here, the sole plaintiff, that is Society, operates through its office bearers. As to the defendants, the four partners—the human element—are common in all the four suits. The 5th respondent, a partnership firm, is common in

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□ Cosimo, Inc., New York, 2009, (Original 1921), P.141

two suits; and the 6th respondent, again a partnership firm, is common in the remaining two suits. That said, I must also note that the respondents 5 and 6 are nonlegal entities being partnership firms. The Society made them parties, as it agrees, to comply with Order 30, Rule 1 of CPC. I also acknowledge the contention the Society's counsel has advanced: a partnership firm may not be a legal entity, but it can be a tenant in its own right.

22. A firm is merely a compendious name for the partners constituting it. But Order 30, Rule 1 confers a privilege on the individuals constituting the firm to sue or be sued in the firm's name. A suit can be filed against all the partners individually without naming the firm as one of the tenants. It cannot be bad in law. Conversely, the partners of a firm can as well institute a suit jointly—without the presence of the partnership firm, at that. The Supreme Court has held in *Anokhe Lal v. Radhamohan Bansal*^[4] that Order 30, especially its Rule 4, provides for an exception to the legislative mandate under Section 45 of the Contract Act.

23. The Allahabad High Court in *Pearl Sound Engineer v. Pooran Chand*^[5] has lucidly explained how a partnership firm or its partners may sue or be sued. According to it, Rule 1 of Order XXX of the CPC provides a convenient mode of describing in a suit two or more persons claiming or being liable as partners. The partners may adopt this method and sue in their firm's name. So also they may be sued in their firm's name. A firm is a compendious, collective name for the individual members who constitute the firm. When a suit is instituted by or against a firm, it is in reality a suit by or against all the partners of the firm. The firm name stands for all those persons who were its partners when the cause of action accrued. In other words, when the proceedings are in the firm's name, it amounts to all the partners being before the court.

24. *Pooran Chand* has however stressed that this enabling provision in Rule 1 of Order XXX does not do away with the traditional method of bringing a suit by or against the partners individually. The partners may not choose to sue in the firm's name; they may sue in their individual names either in conjunction with the

⁴ [] (1996) 6 SCC 730

⁵ [] AIR 1975 ALL 207

firm or without the firm as one of the partners. The same procedural ease remains available even when the firm or its partners are the tenants. *Pooran Chand* has gone on to the extent of asserting that “when a suit is filed impleading the firm as well as all its partners, the impleadment of the firm is unnecessary and the firm as a party is merely a surplusage inasmuch as the persons whom it stands for themselves are before the court” in their individual names—that is, as partners.

25. Now, we may put the issue in perspective. The partners in both the firms—respondents 5 and 6—are the same. They are the defendants in all the suits, besides the respective partnership firms. The firms being the tenants, as *Pooran Chand* puts it, is beside the point, for the partners are not different or distinct from the partnership firm and vice versa. A partnership firm continuing to be the tenant even with its composition changed is, I must say, not an absolute proposition. It depends on the intention of the parties to the tenancy agreement. We will leave it at that.

26. The suit properties are tenanted premises. I am given to understand that each partnership firm possesses two rooms. Thus, the entire property in all the four suits comes to four rooms or tenements. Indeed, the tenancy in all four cases concerns similar properties. The Society does not agree that in all the four suits the grounds of eviction are common; according to it, the degree of contract-term violation varies from case to case. Therefore, it does not want the Court to let the tenants have the luxury of one common cross-examination of all its witnesses, beginning with PW1, who has already filed his examination-in-chief.

(d) Which is the Better Course of Action?

27. As I have already mentioned, the Society suggests that tenants can cross-examine the Society's witness in one suit, covering all issues common to all the four suits. In the remaining three cases, the same deposition can be marked, to the extent the issues are common. And, then, on the questions which may be specific to each of the three cases, the tenants can cross-examine the Society's witnesses separately. Thus, the tenants can supplement their first cross-examination and complement the entire evidence.

28. It appears, and I repeat, it appears, practicable. But the tenants have their reservation about the proposal. They contend that the Society has initially accused them of dragging the proceedings, but it suggests on its own a method that is nothing but dilatory—convoluted and time-consuming. That said, the Court looks for a method of evidence-recording that is not only expeditious but also non-prejudicial to either party. To achieve this objective, I must ascertain—and indeed have ascertained—that the parties in all the four cases are the same; they have, on either side, similar interests; all the four cases contain substantially the same facts; they have raised the same questions of law; they contain the same issues; and they require, I reckon, similar evidence on either side. Even the reliefs sought are identical. So we may have to travel a little farther in our discussion to decide which course of action—the one suggested by the Society or the suggested by the defendants—is better.

(e) The Possible Prejudice:

29. About the prejudice that may be caused to the tenants, they maintain that the variations if any in the allegations and counter-allegations are matters of degree. Neither entirely new facts nor entirely new pieces of evidence find a place in all the cases. The same questions getting repeated in each case with subtle variations will put the Society's witnesses on guard; they can foresee or predict questions in other cases, and prepare themselves with improved answers. In other words, a question in one suit will alert the Society's witness in other cases because the same witness gets examined and similar questions will be asked. They can be wiser with experience, so to say.

30. As I have already noted, once a statute is silent, the court invokes its inherent powers, to render complete justice or to meet the ends of justice. The only guiding principle for the court to exercise those inherent powers is that the procedural arrangement it seeks to put it into place must conform to justice and equity, besides satisfying its judicial conscience. Plainly put, while placing on an even keel the competing interests of rival suitors or litigators, the court weighs the

reliefs, compares the hardship, and tries to eliminate prejudice to either party. Here I apply that yardstick.

31. The Society, the landlord, insists that the tenants should examine its witnesses separately in each suit. To cut short the delay that may occur because of this method, they suggested a remedy too. I have already elaborated on it. On the other hand, tenants, I reckon, have successfully demonstrated the prejudice they may suffer on that count. If at all there is a single comprehensive cross-examination in all cases based on the examinations-in-chief the Society already filed, I see no prejudice being caused to the Society. On the contrary, it expedites the trial. That apart, if tenants fail to cross-examine the Society's witnesses about any aspect particular to any suit, that only affects the tenants' interest, and they are prepared to run the risk.

32. True, had the parties, on either side, sought the trial Court to consolidate the proceedings in all the suits, that would have, perhaps, obviated much difficulty and procedural shortcomings, too. But neither did that. Therefore, in these writ petitions under Article 227 of the Constitution of India, the Court does not intend to superimpose an arrangement which neither party has sought.

(f) Does Article 227 of COI Permit the Reversal?

33. Undoubtedly, the petitioners have come to the Court under Article 227 of the Constitution. They want this court to exercise its supervisory jurisdiction. For that purpose, I must examine whether the order impugned suffers from any jurisdictional errors or perversity of findings. The order is cryptic and actually contains no reason whatever. Brevity is a virtue but not barrenness. To demonstrate the perversity of the impugned order, I may quote its material part:

"2. Today, heard both sides and gone through the record. It is clear that parties in R.A.E. Suit No.566/955 of 2012 and R.A.E. Suit No.569/958 of 2012 are similar. In like manner, parties in R.A.E. Suit No.567/956 of 2012 and RAE Suit No.568/957 of 2012 are similar. So, it is very much clear that parties in all the four suits are not the common parties, though they belongs to the same families. Another aspect is that in all four suits, the suit properties are different, even though the grounds for eviction are same. Therefore, even though the grounds for eviction are similar in all four suits, *it is*

not desirable to club them together, for the reason that the cross examination of the witness in one suit by defendant will give hint to plaintiff in other suit about defendants line of cross examination to fill up lacuna. Therefore, the reasons put forth for clubbing the matters do not holds water. In the result, I proceed to pass the following order.”

(italics supplied)

34. The italicized portion is the tenants’ justification for common cross-examination. The trial Court cites it to support its converse conclusion. Perhaps, an instance of non-application of mind.

Result:

I, therefore, set aside the impugned order, dated 19th October 2018, and hold that the trial Court will allow the tenants to cross-examine the Society's witnesses, including PW1, comprehensively covering all four suits. Then, the evidence thus recorded will be read individually in each suit, for the suits have not been consolidated.

All the writ petitions are allowed; no costs.

(DAMA SESHADRI NAIDU, J.)