

IN THE HIGH COURT OF JUDICATURE AT BOMBAY**CIVIL APPELLATE JURISDICTION****WRIT PETITION NO.7770 OF 2021**

Deluxe Polymers Pvt. Ltd. ... Petitioner
V/s.
Satish Dhirajlal Vithlani and Ors. ... Respondents

WITH
INTERIM APPLICATION (St.) NO. 23290 OF 2021
IN
WRIT PETITION NO.7770 OF 2021

The Raghuvanshi Complex Management
Association And Ors. ... Applicants

In the matter between :

Deluxe Polymers Pvt. Ltd. ... Petitioner
V/s.
Satish Dhirajlal Vithlani and Ors. ... Respondents

Mr. Bharat Joshi i/b. Mr. Dinesh Kumar Jain for Petitioner in WP/7770/2021.

Mr. Sharan Jagtiani, Sr. Advocate a/w Ms. Apurva Manwani & Mr. Niranjana B. Amin i/b. M/s. B. Amin & Co. for the Applicants in IAST/23290/2021.

Mr. Y. S. Jahagirdar, Sr. Advocate a/w Ms. Ranjana Parikh, Ms. Prabha Rathod & Mr. Suraj Shah for Respondent Nos.1 to 4.

CORAM : A.S. GADKARI, J.
DATE : 3rd DECEMBER, 2021.

PC. :

1. By the present Petition, under Article 227 of the Constitution of India, the Petitioner/Original Defendant No.156 has impugned Order dated

29th October 2021 passed below Exh.1244 in T.E. & R. Suit No.5/6 of 2008, thereby allowing the said Application filed by the Plaintiff No.1 - Mr. Satish D. Vithalani, permitting him to be further re-examined in respect of proof of 'Exhibit No.1242.

2. Record indicates that, the Plaintiff No.1 is being cross examined by Advocate Mr. Bharat Joshi for the Petitioner/original Defendant No.156 and other defendants namely Nos.79, 86 and 93. When the said witness was under cross examination, realizing that the document in question i.e. Exhibit-1242 was not produced by the said witness and was not brought on record as an Exhibit, the Advocate for Plaintiff made an oral application before the Trial Court for re-examination of Plaintiff No.1, which was allowed. In his re-examination the following evidence has been recorded:-

'Re-examination by Advocate Mr. Suraj Shah:-

The arrears of the rent was not adjusted with Rs.2.25 Crore as the said amount was obtained for due performance of lease deed Exhibit-1160. The said amount was obtained by writing dated 26.12.2005. I am filing the said writing along with Exhibit-1241. The said writing bears my signatures. The contents thereof are correct. It is at Exhibit-1242."

3. Learned Judge of the Trial Court thereafter adjourned the matter for further cross-examination on re-examination on the next date. A roznama dated 22nd October 2021 has been accordingly prepared by the Trial Court.

On 25th October 2021, the Plaintiff No.1 filed an application below Exh.1244 for granting permission to be further re-examined, which has been allowed by the Trial Court by its impugned Order dated 29th October 2021.

4. Section 137 of the Indian Evidence Act prescribes the mode in which evidence of witness is to be recorded. It prescribes firstly examination-in-chief then cross examination of the concerned witness and thereafter re-examination of a witness, subsequent to the cross-examination by the party who called him. Section 138 of Evidence Act prescribes for Order of examinations. Section 138 of Evidence Act also postulates that, 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 the matter.

5. In the present case, it clearly appears that, the Trial Court has not followed the said mode and sequence prescribed under Sections 137 and 138 of the Evidence Act and has committed an error in allowing the oral application of the learned Advocate for the Plaintiff No.1 to permit him to re-examine the said witness in the midst of the cross-examination being conducted by the learned Advocate for the Defendant Nos.79, 86, 93 & 156. The Trial Court has also adopted an unusual mode of permitting the Advocate for the said Defendants for further cross-examination 'on re-examination on

the next date', at the end of re-examination of Plaintiff No.1.

6. Mr. Joshi and Mr. Jagtiani, learned Advocates appearing for the Defendants submitted that, without their being an application or pleadings referring to Exhibit No.1242, by seeking oral permission from the Trial Court, the Plaintiff was successful in re-examining himself, thereby filling up certain *lacunae* in his evidence, which were brought on record in the cross-examination by the concerned witnesses.

7. It is a fact on record that, till 22nd October 2021 there was no pleading nor an application filed by the said plaintiff, seeking permission to produce the said Exhibit No.1242 before Trial Court.

As noted earlier, after completion of re-examination of the said witness, the Trial Court had adjourned the case for further cross-examination on re-examination of the said witness, i.e. Plaintiff No.1, meaning thereby that the re-examination of Plaintiff No.1 was completed on that day.

8. In view thereof, filing of application by Plaintiff No.1 below Exh.1244 seeking permission to record his further re-examination is not tenable in the eyes of law. As there is an error committed by the Trial Court while permitting the Plaintiff to record his re-examination on 22nd October 2021 and allowing his application below Exh.1244, it is necessary to set aside re-examination of Plaintiff No.1 recorded on 22nd October 2021 and the impugned Order dated 29th October 2021 passed on Exh.1244. As a

consequence thereof, the document Exhibited as 1242 is de-exhibited and removed from the record of Trial Court. The roznama dated 22nd October 2021 recorded on production of Exhibit No.1242 and consequential observations made thereof in the same are also necessary to be set aside and are hereby set aside. Petitioner accordingly succeeds.

9. It is however made clear that, the Respondent No.1/original Plaintiff No.1 will be at liberty to file an application as contemplated under last part of Section 138 of Evidence Act before Trial Court with a request to permit him to re-examine himself after the cross-examination of Advocate for Defendant Nos.79, 86, 93 and 156 is completed.

It is further made clear that, the witnesses who have already cross-examined Plaintiff No.1 will not be permitted to cross-examine Plaintiff No.1 after the cross examination by Defendant No.79, 86, 93 and 156 and remaining Defendant Nos.4, 8, 10, 36, 42, 74, 76, 79, 80, 115 & 151 is completed and he is re-examined, if the Trial Court grants permission in that behalf. The Trial Court will consider the said application on its own merits without being influenced of the fact that, the earlier permission granted has been set aside by this Court by the present Order.

10. As noted earlier, the re-examination on 22nd October 2021 and the Order dated 29th October 2021 passed below Exh.1244 are set aside as this Court found that, the Trial Court did not follow the Order of

Examinations as contemplated under Section 138 of the Indian Evidence Act and the law laid down by the Apex Court in that behalf.

The earlier Orders passed by the Trial Court prior to 22nd October 2021 regarding recording of evidence of P.W.-1 shall hold the field as those are not interfered with by this Court.

11. Petition is allowed in the aforesaid terms.

12. In view of allowing Writ Petition No.7770 of 2021, Interim Application (St.) No.23290 of 2021 does not survive and is accordingly disposed off.

13. Mr.Jahagirdar, learned Senior counsel for the Respondent Nos.1 to 4 submitted that, in furtherance of the re-examination recorded on 22nd October 2021 and the admission given by the Respondent No.1/original Plaintiff No.1, the Defendant Nos. 79, 86, 93 and 156 have filed an application below Exh.1248 under section 340 of Cr.PC. for Perjury. As this Court has set aside the re-examination of Plaintiff No.1 recorded on 22nd October 2021 and the Order dated 29th October 2021, the said Exhibit No. 1248 will not survive and is accordingly disposed off. The Trial Court is requested to put a note in the record to that effect.

[A.S. GADKARI, J.]