

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

WRIT PETITION NO. 443 OF 2020

1. Mrs. Minal Rohit Shah
of Mumbai, Indian Inhabitant,
having her address at “Green Lawns
High School” at No.81/83,
Bhulabhai Desai Road,
Bombay 400 036.

2. Mr. Rohit V. Shah of Bombay
as Trustees of Public Charitable Trust
known as C.U.Shah Education
Foundation having its registered
office at Hague Building,
1st floor, Sprott Road,
Ballard Estate, Bombay 400 038.

..Petitioners

v/s.

1. New Sagar Darshan Co-operative
Housing Society Ltd, registered under
the Maharashtra Housing Co-operative
Societies Ac, 1960, having its
registered office at Sagar Darshan Building
No.81/82, Bhulabhai Desai Road,
Bombay 400 036.

2. Apurva Ajay Doshi.

3. Asha Kirit Shah
102, Landmark Building,
Carmichal Road, Gr. Mumbai 400 026

being the legal representative of the
deceased Nandlal Talakshi Doshi,
Defendant No.1 (since deceased)

4. Ajit Ramniklal Doshi,
of Bombay, Indian Inhabitant,
res. At Flat No.62, 9th floor,
Sagar Darshan, New Sagar Darshan
Co-op. Hsg. Soc. Ltd.,
81/83, Bhulabhai Desai Road,
Mumbai 400 026.
being the heirs and legal representatives
of or next kin of the deceased
Mahendra Ramniklal Doshi,
Defendant No.2 (Since deceased).

5. M/s. T. Manek & Co.
a firm carrying on business at
Ali Chambers, Tamarind Lane
Nagindas Master Road,
Fort, Bombay 400 023.

6. Sudha Dushyant Shah
of Bombay, Indian Inhabitant
res. At 'Kumkum' S.V.Road,
Vile Parle (West)
Next to Nanawati Hospital,
Mumbai 400 056

7. Krantikumar Durlabh
of Bombay, Indian Inhabitant,
the heir and legal representative
of the deceased Durlabhji G. Sampat
residing at "Sindhula"
Gamadia Road,
Bombay 400 028.

8. Sushila Lalit Gandhi

9. Mahendra Rasikll Kamdar
All of Bombay, Indian Inhabitants,
And having address of Respondent
Nos.7, 8 and 9 at
“Green Lawns High School”
at No.31/83
Bhulabhai Desi Road,
Bombay 400 036.

..Respondents

Mr. Surel S. Shah a/w. Shri D.V.Deokar, Sachin Pandey, Jaylaxmi
Gaud i/b. Miss. Parimal K. Shroff & Co. for the Petitioners.

Ms. Simantani Mohite a/w. Vaishali Chaturvedi i/b. Solomon & Co.
for the Respondent No.1.

Mr. Darshan R. Mehta i/b. M/s. Dhruve Liladhar & Company for the
Respondent Nos.2 to 5.

CORAM : ANUJA PRABHUDESSAI, J.
RESERVED ON : 18th MARCH, 2021
PRONOUNCED ON : 26th AUGUST, 2021.

JUDGMENT.

1. Heard. Rule. With consent Rule made returnable forthwith.
2. The Petitioners, who are Defendant Nos.14A and 16 in Civil
Suit No.9773 of 1982 have by this Writ Petition filed under Article
227 of the Constitution of India, challenged the Order dated 2nd
November, 2019 rejecting the Notice of Motion for permission to

cross-examine D.W.1 Mr. Ajit Doshi, the witness examined by co-defendant Nos.1 to 7 mainly on the ground that that the interest of the Petitioners is not adverse to the interest of Defendant Nos.1 to 7.

3. Heard learned Counsel for the Petitioners and the Respondents. Perused the records. The only question for consideration is whether the Petitioners have right to cross examine the witness examined by the co-defendants.

4. Section 137 of the Evidence Act defines the terms examination-in-chief, cross-examination and re-examination. The term 'Cross-Examination' as defined under this Section means the examination of a witness by the adverse party. Section 138 of the Indian Evidence Act, which provides the order of examination stipulates that the witness 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. A plain reading of these two provisions clearly indicate that the right of cross-examination has been given only to the 'adverse party'. In other words, the right to cross-examine a

witness has been given only to the party having adverse interest in the matter.

5. In *Piroja Ghadiali vs. Pestonji Ghadiali 1946 (48) Bom.L.R. 36* a suit for divorce was filed by the husband on the ground of adultery by the wife with the co-defendant. After the cross-examination of the Defendant wife by the Plaintiff and re-examination, the co-defendant sought leave to cross-examine the Defendant wife. This Court had observed that:

“The Indian Evidence Act gives the right of cross-examination only to the adverse party. In the present case the defendant and the co-defendant have both denied the adultery, and, so far as the written statements put in by them go, their defences are identical. There is nothing in the evidence given by the defendant which can in any way be said to be adverse to the co-defendant. The general rule is that a defendant may cross examine his co-defendant who gives evidence, or any of his co-defendant’s witnesses, if his co-defendants interest is hostile to his own: Halsbury 2nd

Edn, Vol. XIII, P.75 and also Vol.X, pp. 736-737. It is only where the evidence of a co-defendant or a co-respondent is adverse to 'the defendant or the respondent that the defendant or respondent can claim the right to cross-examine. There would be very obvious disadvantages if in this case, where the contentions of the defendant and the co-defendant are identical, the co-defendant were allowed to cross-examine the defendant, who for all practical purposes may be regarded as the request to cross-examine is made after the real adverse party, the plaintiff has finished his cross-examination. The co-defendant, if allowed to cross-examine the defendant, will be able to practically nullify the effect of the plaintiff's cross-examination and to get in additional evidence to fill up any gaps which may have been disclosed by the plaintiff's cross examination, and to do so by putting leading questions which could not have been permissible in examination in chief."

6. In ***Sri Ramachandra and Anr. vs. Sri Vithal & Ors. 2009 (9) Kar***

LJ 110, the Circuit Bench of Karnataka High Court while considering the object and scheme of cross-examination has held thus:

“ The right of cross examination is that of the adverse party. It is left of his discretion. He cannot be compelled to cross examine. If he so desires, he can exercise that right. If a party do not hold the position of an adverse party, he has no right to cross examination. The condition precedent for giving an opportunity to cross examine a opposite party is that, either from the pleading of the parties or in the evidence, there should exist conflict of interest between the parties. It should be shown that the evidence on record adversely affect his interest and that his interest is adverse to the interest of the party who has given evidence and therefore, he is in the position of an adverse party. Once it is demonstrated that the interest is common, there is no conflict of interest, and no evidence is adduced affecting the interest of the defendant, then there is no question of giving an opportunity to such a party to cross examine the opposite party. The main object of such cross examination is to demolish the case of the opposite party and if

possible to substantiate the defence. If there is no conflict of interest, there is no claim there is no evidence, and there is nothing to be demolished in the case set up, there is no adverse party and the opposite party has no right to cross examine. Only when the opposite party stands in the shoes of an adverse party, he has a right to cross examination.”

7. A similar question was raised before the Honourable Karnataka High Court in ***Sri Mohamed Ziaulla vs. Mrs. Sorgra Begum & Anr.*** ***1997 SCC Online KR 17.*** It has been held thus:

“6. It is undisputed that no special provision is made in the Evidence Act for cross examination of the co-accused or co-defendant's witnesses. The only relevant provision of law is Section 137 and 138 of the Evidence Act. Section 137 refers to examination-in-chief and cross examination of a witness by the adverse party. The examination of an adverse party is the cross examination. The question is who is an adverse party so far as the witness is concerned. The very object of cross-examination is to test the evidence.

Dictionary of law by Curzon 4th Edition defines 'adversary' as witness who disappoints the party calling

them i.e. they are unfavourable and hostile witnesses. The new Webster Dictionary of English Language has explained the word 'adverse' as going in contrary direction; counter action; opposing, calamitous, unprosperious etc.

7. Section 137 specifically explains that the examination of a witness by the adverse party is cross examination. Section 138 of the Evidence Act refers to cross examination if the adverse party so desires after the witness is first examined in chief. These two sections of the Evidence Act it abundantly clear that a party has a right of cross examining his adversary or his witness.

8. Section 137 and 138 of the Evidence Act do not specifically refer to cross examination of co-defendant's witnesses. But, the courts have to adopt a golden rule that no evidence shall be received against any co-defendant or co-accused who had no opportunity of testing it by cross examination; as it would be unjust and unsafe not to allow a co-accused or co-defendant to cross-examine witness called by one whose case was adverse to his, or who has given evidence against him. If there is no dash of interest or if nothing has been said against the other party, there cannot be any right of cross-examination. A short but, interesting discussion is

found in Sarkar's Evidence at Page 1342 13th Edition. Similar opinion is found in Principles and Digest of the Law of Evidence by M. Monir, Third Edition Page 1114.

9. This very question was debated in the English Courts as far back as in 1920 vide a decision in LORD v. COLVIN 1855, 24 LJ Ch 517, 3 Drew 222. The learned Judge in the said case after consulting all the equity judges held that before an examiner in Chancery, one defendant might cross examine another defendant's witness. The same right exists between respondent and co-respondent in divorce cases provided either is hostile to the other, for if friendly, eg. where both deny the adultery, each can only be examined as the other's witness and not cross-examined. A defendant may cross-examine his co-defendant who gives evidence or any of his co-defendant's witnesses if his co-defendant's interest is hostile to his own. Therefore, the procedure that has been followed by the Courts in England and in India has not left this question in doubt. Where it is shown that the interest between the defendants' inter-se conflict each other, the other defendant has necessarily to be treated as. an adversary and he is certainly entitled to cross examine the other defendant or his witnesses.

8. The learned Single Judge of this Court in ***Vinod Khimji Lodaya vs. Muljibhai s/o. Manujibhai Patel & Ors. (2013) SCC Online Bom. 704*** referred to and relied upon the aforesaid decision of the Honourable Karnataka High Court, as well as the decision of Chatisgarh High Court in ***Smt. Taruni Thakur & Ors. vs. Kamendra Singh & Ors. (Writ Petition No.3052 of 2010)***, and reiterated that in appropriate cases, where the Defendant demonstrates that the co-defendants evidence would adversely affect his interest, cross-examination of such Defendant is permissible. It is thus well settled that the Defendant has right to cross examine the co-defendant only in case of conflict of interest between the Defendant and the co-defendant.

9. In the instant case, the dispute is in respect of the “School Building” constructed by Defendant No.7 firm in land under C.S.No. 689 at Malabar and Cumballa Hill Division. The pleadings indicate that the original owner- Lady Frainy Dhunjibhai Bomanji had entered into an Agreement for Sale with Respondent No.5 (Original Defendant No.7 firm and its partners) in respect of the said property.

Pursuant to the said agreement, the Defendant No.7 constructed three buildings viz. “Sagar Darshan”, “Sagar Tarang” and “Sagar Darshan School Building” in the said property and sold the flats and garages from the said buildings to different persons on ownership basis.

10. The Respondent No.1 (Original Plaintiff) is a registered co-operative society formed by the purchasers of the flats and garages of these three buildings. It is the case of the Plaintiff that by Conveyance Deed dated 29.06.1966, the original owner and Defendant No.7 builders as confirming party conveyed the said property and the three buildings in their favour. The Plaintiff therefore claims to be the owner in possession of the entire plot of the land along with the three buildings.

11. It is the case of the Plaintiff that as per the terms recorded in agreement dated 29.06.1966 the Defendant No.7 firm became nominal member of the Plaintiff society and was entitled to use “Sagar Darshan School Building” for the purpose of Housing School,

subject to the bye laws and Rules and Regulations of the Plaintiff society. It is the grievance of the Plaintiff that without their knowledge and consent, the Defendant No.7 firm entered into an lease agreement with the said Green Lawns High School and leased the said school building for a period of 50 years. It is alleged that the Defendant Nos.14 and 15 who are the trustees of a public charitable trust named as C.U.Shah Gandhi Education Foundation, whose main object is to manage educational institutions, more particularly Green Lawns High School, have constructed three additional floors over the existing school building. The Plaintiff claims that the Defendant Nos.1 to 7 have no title to the school building or the land thereunder and have no right to enter into a lease agreement. It is further alleged that the Defendant Nos.10 to 15 have no right to continue to occupy or run the school in the said building. Based on these pleadings the Plaintiffs have sought declaration that they are lawful owners of the school building. They have also sought declaration that the lease deed dated 29th June 1966 executed between the Defendant Nos.10 to 14 is illegal and void. The Plaintiffs have also sought permanent injunction seeking

to restrain the Defendants from trespassing into the school building or continue to run the said school building.

12. A perusal of the written statement filed by the Defendant No.7 and its partners as well as the written statement filed by these Petitioners clearly indicate that the Petitioners are not claiming any independent right over the said school building or land thereunder. These Petitioners claim to be in possession of the school building and claim to have right to run the school building on the basis of the lease deed dated 23.04.1966 executed in their favour by the Defendant No.7 firm. This is also apparent from the statement made in paragraph 2.9 of the petition wherein it is specifically stated that these Petitioners are claiming right through Respondent Nos.2 to 8 (Defendant Nos.1 to 7.)

13. It is also pertinent to note that the Petitioners herein had filed a Suit No.7718 of 1976 against the Plaintiff (Respondent No.1) and the partners of Defendant No.7 firm alleging that they are entitled to use and enjoy the school building including the three additional floors

constructed thereon. The Defendant No.7 firm had filed its written statement in the said Suit wherein it was specifically averred that they had at no point of time interfered with these Petitioners right to enjoy the said school building leased as per agreement dated 23.04.1966 or to use and enjoy the three additional floors constructed thereon. The Defendant No.7 had in fact supported the case of the Petitioners and had claimed that the Plaintiff/Respondent No.1 is not entitled to interfere with the right of these Petitioners to use the said building and had claimed that these Petitioners were entitled for reliefs against the Plaintiff/Respondent No.1 Society.

14. The pleadings therefore clearly indicate that there is no conflict of interest between the Defendants interse. On the contrary it is evident that the defence raised by Defendant Nos.1 to 7 and the Petitioners is identical and common. Hence the Petitioners cannot be termed as 'adverse party' and consequently, they have no right to cross-examine the witness examined by the Defendant Nos.1 to 7. Moreover, the witness has also not made any statement adverse to the interest of the Petitioners. The learned Judge was therefore

justified in holding that the Petitioners are not entitled to cross-examine the witness. In the result, the Petition is devoid of merits and is accordingly dismissed.

15. Rule is discharged. There shall be no order as to costs.

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(ANUJA PRABHUDESSAI, J.)