

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**  
**NAGPUR BENCH, NAGPUR**

**WRIT PETITION NO.6473 OF 2019**

**Petitioner**

**:** **Namdeorao s/o Gajananrao Khobragade,**  
Aged about 92 years, Occupation : Nil,  
Resident of New Yashwant Nagar,  
Near Hanuman Mandir, Hinganghat,  
District Wardha.  
Power of Attorney Holder  
Mrs. Vijay s/o Namdeorao Khobragade.

Original  
Defendant No.1

**-- Versus --**

**Respondents**

- : 1] Mrs. Kusumtai Prabhakar Rao Rahate,**  
Aged about 74 years, Occupation: Housewife,  
R/o Reshimoli, Itwari, Nagpur.
- 2] Smt. Anjanabai Shriramji Shendre,**  
Aged about 84 years, Occupation: Housewife,  
R/o Nimkheda, Tahsil Mouda, District Nagpur.
- 3] Mrs. Janabai w/o Radheshyam Bhandarkar,**  
Aged about 65 years, Occupation: Housewife,  
R/o Plot No.15, Behind Sai Mandir,  
Ayodhyanager, Nagpur - 24.
- 4] Smt. Kantabai wd/o Vijayanand Phulbandhe**  
Aged about 61 years, Occupation: Housewife,  
R/o Quarter No.4, Z.P. Colony, Vidyanagar,  
Bhandara, Tahsil & District Bhandara.
- 5] Smt. Sumanbai wd/o Vilasrao Shegaonkar,**  
Aged about 71 years, Occupation: Housewife,  
R/o V-173, Vijayanand Society,  
Narendra Nagar, Nagpur.
- 6] Manohar s/o Gajanan Khobragade,**  
Aged about 81 years, Occupation: Retired,  
R/o Near Gajanan Mandir,  
New Subhedar Layout, Nagpur - 24.

Respondent  
Nos.1 to 5/  
Original Plaintiff  
Nos.1 to 5

Respondent  
Nos.6 to 9/  
Original Defendant  
Nos.2 to 5

**7] Gulabrao s/o Gajanan Khobragade,**

Aged about 80 years, Occupation: Retired,  
R/o Kadambari Apartment,  
Near Swamy Samarth Mandir, Besa Road,  
Besa, Nagpur.

**8] Motiram s/o Gajanan Khobragade,**

Aged about 77 years, Occupation: Retired,  
R/o Gajanan Mandir Road, Rukmini Road,  
Nagpur -24.

**9] Chhaganrao s/o Gajananrao Khobragade,**

Aged about 68 years, Occupation: Retired,  
R/o Pipe Factory, Rajiv Nagar, Bela,  
Tahsil & District Bhandara.

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*Shri A.K. Choube, Advocate for the Petitioner.*  
*Shri A.K. Neware, Advocate for Respondent No.4.*  
*Shri N.R. Bhisikar, Advocate for Respondent No.6.*  
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**CORAM : S.M. MODAK, J.**  
**DATE : 1<sup>st</sup> OCTOBER, 2021.**

**ORAL JUDGMENT :-**

Rule. Rule made returnable forth. Heard learned Advocate Shri A.K. Choube for the petitioner/defendant No.1, learned Advocate Shri A.K. Neware for respondent No.4/plaintiff No.4 and learned Advocate Shri N.R. Bhisikar for respondent No.6/defendant No.2 finally by consent. Respondent Nos.1 to 3, 5 and 7 to 9 though served of this writ petition, have not appeared.

02] As observed in the order dated 23/09/2021, learned Advocate Shri Choube has produced typed copy of the order dated 03/02/2021. The trial Court was directed to proceed with the hearing of the suit. It is true that the hearing of the suit was stayed as per the order passed by this Court in the present petition on 25/09/2019. It is true that the duration of the said order was not extended and the trial Court on the basis of the observations made by the Hon'ble Supreme Court in the case of Asian Resurfacing Road Agency vs. Central Bureau of Investigation passed on 17/07/2020 in Criminal Appeal Nos.1375 & 1376 of 2013, was pleased to resume hearing of the suit. For that reason, urgent circulation is sought and the matter was heard on the last date.

03] The trial Court was pleased to reject the application filed by defendant No.1 as per the order dated 29/07/2019. It was passed below Exh.46. By the said order, defendant No.1 has requested the trial Court to set aside 'No Cross Order' passed on 05/02/2019.

04] If the impugned order dated 29/07/2019 is perused, we may find that the trial Court has rejected the request mainly for two reasons. Firstly, in spite of giving opportunities earlier to cross-examine, defendant No.1 has not exhausted that remedy and that is

how the order of no cross was passed on 05/02/2019. There is no dispute that earlier also, there was 'no cross order' passed on 16/01/2018. It was set aside as per the order passed below Exh.39. The cross-examination could not be conducted and, hence, second order of no cross was passed on 05/02/2019. Secondly, the trial Court rejected the request made vide Exh.46 for the reason that the plaintiff and defendant No.1 have settled the dispute and the trial Court referred to rule of prudence that "the supporting defendants are expected to cross-examine the plaintiff prior to the contesting party i.e. defendant Nos.2 & 3". The trial Court observed, if defendant No.1 is permitted to cross-examine, it will cause prejudice to defendant Nos.2 & 3.

05] It is a matter of record that the defendants have earlier filed a common written statement through one learned Advocate representing all of them. Subsequently, there were talks of compromise and all have decided to settle the dispute except defendant No.2. It is referred by the trial Court in paragraph 3 of the impugned order.

06] Today, it is submitted before me that defendant No.1 has appointed new Advocate. So also, defendant Nos.2 & 3 have

appointed new Advocate. Today, it is also submitted before me that defendant Nos.2 & 3 have even amended the written statement with leave of the Court. By way of amendment, they have pleaded certain new facts, which were not pleaded in the original written statement. The learned Advocate for respondent No.1/plaintiff submitted that in the original written statement filed by all the five defendants, the claim of the plaintiff is almost admitted.

07] This Court feels that even though these defendants were earlier granted an opportunity to cross-examine vide order passed below Exh.39, the trial Court ought to have given an opportunity to these defendants to cross-examine the plaintiff. When the reasons quoted in the application below Exh.46 are perused, one can say that there were convincing reasons for defendant No.1 for not conducting the cross-examination, even though permitted as per the order passed below Exh.39. An order refusing opportunity to cross-examine has got drastic consequences. The trial Court could have imposed costs and then permitted to cross-examine. The order refusing cross-examination cannot be said to be passed by taking judicious approach.

08] When defendant No.1 is supporting the plaintiff, as observed in paragraph 4 of the impugned order, in fact the trial Court

ought to have permitted defendant No.1 to cross-examine the plaintiff first. By doing that, the trial Court could have avoided to cause prejudice to defendant Nos.2 & 3. Unfortunately, on one hand, the trial Court observed that permitting defendant No.1 to cross-examine the plaintiff will amount prejudice to defendant Nos.2 & 3 and on other hand, on factual aspect, defendant No.1 was refused permission.

09] If the trial Court could have taken judicious approach about the reasons quoted in the application, certainly, an opportunity ought to have been given to defendant No.1 to cross-examine the plaintiff. It seems that the trial Court was more influenced by not exhausting an opportunity granted to defendant No.1 earlier. Even though, opportunity was granted earlier, it may happen that due to circumstances beyond control, the party may not conduct the cross-examination. It does not mean that the right to cross-examine can be denied totally.

10] Hence, this Court feels that the order passed on 29/07/2019 cannot be sustained in the eyes of law. In fact, when the written statement was amended by defendant Nos.2 & 3, the trial Court ought to have considered the request of defendant No.1 to conduct cross-examination independently. The trial Court was very

much aware about the leave granted to defendant Nos.2 & 3 to amend the written statement. This fact does not find place anywhere in the impugned order. For that reason also, the order cannot be sustained. It needs to be set aside.

11] Respondent No.1/plaintiff through her Advocate has consented for allowing the writ petition. Prior to disposing of the writ petition, this Court wants to observe that in view of the changed circumstances, if defendant No.1 wants to carryout the amendment of the written statement, he is at liberty to seek leave of the Court and the Court may decide it on merits. These observations are made, because defendant Nos.2 & 3 have amended the written statement. It is, therefore, necessary to fix certain time limit for conducting of the matter. In view of that, the following order is passed :

**ORDER**

- [I] The writ petition is allowed
- [II] The impugned order dated 29/07/2019 passed by the learned 10<sup>th</sup> Joint Civil Judge Senior Division, Nagpur below Exh.46 in S.C.S. No.689/2014 is set aside.
- [III] Defendant No.1 is permitted to cross-examine the plaintiff.

- [IV] It is made clear that if defendant No.1 wants to amend the written statement, he is at liberty to file an application within 10 days from the date of appearance before the trial Court and the trial Court is directed to decide that application within two months after securing replies of the concerned parties. If such amendment application is moved, defendant Nos.2 & 3 are at liberty to oppose that application.
- [V] If defendant No.1 does not want to carry out amendment in the written statement, he is directed to complete the cross-examination within a period of 15 days.
- [VI] All the parties are directed to appear before the trial Court before 8<sup>th</sup> of October, 2021, when the matter is already fixed by the trial Court.
- [VII] The trial Court is directed to dispose of the suit as early as possible.
- [VIII] With these observations, the rule is made absolute with no order as to costs.

**(S.M. MODAK, J.)**