

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

WRIT PETITION NO. 7080 OF 2018

PETITIONERS: 1 Mohammad Fazal s/o Haji Yunus Sardaria,
Aged 52 years, Occ. Business,

2 Mohammad Afazal s/o Haji Yunus Sardaria,
Aged 50 years, Occ. Business,

Both R/o. House No. 126, Khojakhana Road,
Gandhibag, Nagpur-02

...VERSUS...

RESPONDENTS: 1. Smt. Shirin w/o Sajid Daud,
Aged 68 years, Occ. Housewife,
R/o. House No. 126, Khojakhana Road,
Gandhibag, Nagpur-02

2. Dr. Smt. Duriya @ Zarine w/o Javed Hasan,
Aged 58 years, Occ. Doctor,

3. Dr. Javed Hasan s/o Khurshid Hussain,
Aged 53 years, Occ. Doctor

Both 2 and 3 R/o. 110, Central Avenue Road,
Gandhibag, Nagpur-02

4. Rakesh s/o Ramesh Kumar Pandey,
aged about 50 years, Occ. Business,
R/o. Shanti Niketan Colony,
Pratap Nagar, Nagpur.

Shri S.I.Khan, Advocate with Ms. Shabana Khan, Advocate, for
petitioners

Shri Sachin Gupta, Advocate for Respondent No. 1

Shri O.A.Ghare, Advocate for Respondent Nos. 2 and 3

CORAM : AVINASH G. GHAROTE, J.
DATE : 12/08/2021.

1] Heard Shri S.I.Khan, learned counsel for the petitioners.
Shri Gupta, learned counsel appearing for Respondent No. 1 and Shri
Ghare, learned counsel appearing for Respondent Nos. 2 and 3.

2] Rule. Rule made returnable forthwith. Heard finally by
consent of the learned counsel appearing for the parties.

3] The present petition challenges the impugned order
dated 01.10.2018, passed below Exh. 112, whereby, the application
filed by defendant No. 3 for discarding the cross examination of the
defendant Nos. 3 and 4's witness, namely Tasneem w/o Sajid Hasan,
under Exh. 107, on the ground that, on the said date when it is so
claimed to have been recorded i.e. on 4.9.2018, the witness was not
present in the Court, has been rejected.

4] It is an admitted position that in Special Civil Suit No.
795/2012, the examination-in-chief of the witness Tasneem w/o

Sajid Hasan was recorded on 03.08.2018 and her cross was recorded on 08.08.2018.

5] In the connected suit i.e. Special Civil Suit No. 66/2013, her affidavit-evidence was filed below Exh.107 on 28.08.2018, on which date itself, her chief was recorded. Since the counsel for plaintiff was absent, no cross order was passed on the same day. On an application for setting aside 'no cross' order, the same was allowed on 30.08.2018 and the matter was posted on 04.09.2018, on which date the cross of Tasneem w/o Sajid Hasan, as recorded in Special Civil Suit No. 795/2012, was adopted as the cross examination having been recorded in Special Civil Suit No. 66/2013. It is material to note that Mr. Gupta learned counsel for Respondent No.1 admits that on 04.09.2019, the said witness was not present in the Court.

6] It is, therefore, apparent that without the witness being present in the Court, her cross examination in Special Civil Suit No. 795/2012 could not have been recorded as her cross examination in Special Civil Suit No. 66/2013. That being the position, the

impugned order cannot be sustained. The same is quashed and set aside. The application Exh. 112 is accordingly allowed and the cross examination so recorded below Exh. 107 is expunged/discarded.

7] The learned counsel for the petitioners, however, undertakes to keep the said witness present before the trial Court on 23.08.2021, on which date her cross examination shall be recorded. The petition is accordingly allowed. No order as to costs.

JUDGE

Rvjalit