

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

WRIT PETITION NO.155 OF 2020

1. Govind S/o. Ballabhdas Gandhi,
Aged about 48 years, Occ.- Business,
R/o. Kelwad, Tah.-Saoner, Dist.-Nagpur.
(Original Def. No.2)

2. Girish S/o. Ballabhdas Gandhi,
Aged about 42 years, Occ.- Business,
R/o. Agyaram Devi Chowk, Ganeshpeth,
Nagpur.
(Original Def. No.3)

....PETITIONERS

---- VERSUS ----

1. Nitin S/o. Dattatray Patil,
Aged about 45 years, Occ. - Business,
R/o. Abdeo Lane, Walker Road, Mahal, Nagpur.
(Original Plaintiff No.1)

2. Gajanan S/o. Trimbak Vaze,
Aged about 62 years, Occ.-Not known,
R/o. Gitakunj Co-operative Housing Society,
B/204, R.C. Thakur Marg, Jogeshwari (East),
Mumbai.
(Original Plaintiff No.2)

3. Santosh S/o. Chandrashekhar Marathe,
Aged about 56 yrs., Occ.- Service,
R/o. C/o. Chandrashekhar Marathe,
Inamdar Wada, Near Railway Station, Malawali,
Malawali N. M. Pune.
(Original Def. No.1)

.... RESPONDENTS

Shri A.A. Bhide, Advocate for Petitioners.
Shri R.S. Gupta, Advocate for Respondent Nos.1 and 2.
Shri Suyog Deshpande, Advocate for Respondent No.3.

CORAM : AVINASH G. GHAROTE, J.

DATE : 11/10/2021.

ORAL JUDGMENT

1. Heard.

2. **Rule.** Rule made returnable forthwith. Heard finally with the consent of the learned counsel for the rival parties.

3. The petitioners are the original defendant Nos.2 and 3. When the examination-in-chief of the plaintiff before the learned Trial Court was over, as the defendant No. 1 and his Counsel were absent, the matter was proceeded without their cross-examination and the cross-examination of the plaintiff for the defendant Nos.2 and 3 began. It was at this juncture when the cross-examination of the plaintiff at the instance of the defendant Nos.2 and 3 was in progress, that the defendant No.1 moved an application for setting aside the no-cross order and permission to cross-examine the plaintiff, which was allowed by the learned Trial Court by the order dated 07.06.2019 passed below Exh.105. It is thereafter, that the defendant Nos. 2 and 3/petitioners filed an application for deferring the cross-examination of the plaintiff, being conducted on their behalf to a point of time after the cross-examination on behalf of the defendant No.1 was over. The said application came to be rejected by the learned Trial Court by the impugned order dated 27.09.2019, which is how this matter is before this Court.

4. Mr. A. A. Bhide, learned Counsel for the petitioners by inviting my attention to the provisions of Sections 135 and 137 of the Indian Evidence Act, 1872 read with Order XVIII Rule 2 and Rule 4(2) of the Civil Procedure Code, 1908 submits that the order of examination and cross-examination of the witnesses, mandates that it is the defendant No.1, who should cross-examine the plaintiff or his witness first and it is only when the said cross-examination is over, that the turn of the defendant Nos. 2 and 3 to cross-examine the plaintiff would arise. He therefore, submits that the learned Trial Court by not following the said procedure, has erred in law, in view of which the impugned order is required to be quashed and set aside and the application for deferring the cross-examination of the plaintiff, being conducted by the defendant Nos. 2 and 3 should be allowed.

5. Mr. R. S. Gupta, learned Counsel for the respondent Nos.1 and 2 and Mr. Suyog Deshpande, learned Counsel for the respondent No. 3, support the impugned order.

6. For examining the controversy in issue, the language of the relevant provisions needs to be looked into, which for the sake of ready reference are quoted as under :-

***“Sections 135 and 137 of the Indian Evidence Act, 1872
read as under :***

Section 135. Order of production and examination of witnesses. — *The order in which witnesses are produced and examined shall be regulated by the law and practice for the time being relating to civil and criminal procedure respectively, and, in the absence of any such law, by the discretion of the Court.*

137. Examination-in-chief. — *The examination of a witness by the party who calls him shall be called his examination-in-chief.*

Cross-examination. — *The examination of a witness by the adverse party shall be called his cross-examination.*

Re-examination. — *The examination of a witness, subsequent to the cross-examination by the party who called him, shall be called his re-examination.*

Order XVIII Rules 2 and 4 (2) of the Code of Civil Procedure :

Rule 2. Statement and production of evidence.—(1) *On the day fixed for the hearing of the suit or on any other day to which the hearing is adjourned, the party having the right to begin shall state his case and produce his evidence in support of the issues which he is bound to prove.*

(2) *The other party shall then state his case and produce his evidence (if any) and may then address the Court generally on the whole case.*

(3) *The party beginning may then reply generally on the whole case.*

(3-A) *Any party may address oral arguments in a case, and shall, before he concludes the oral arguments, if any, submit if the Court so permits concisely and under distinct headings written arguments in support of his case*

to the Court and such written arguments shall form part of the record.

(3-B) A copy of such written arguments shall be simultaneously furnished to the opposite party.

(3-C) No adjournment shall be granted for the purpose of filing the written arguments unless the Court, for reasons to be recorded in writing, considers it necessary to grant such adjournment.

(3-D) The Court shall fix such time-limits for the oral arguments by either of the parties in a case, as it thinks fit.

Rule 4. Recording of evidence.-

(1)

(2) The evidence (cross-examination and re-examination) of the witness in attendance, whose evidence (examination-in-chief) by affidavit has been furnished to the Court shall be taken either by the Court or by the Commissioner appointed by it:

Provided that the Court may, while appointing a commission under this sub-rule, consider taking into account such relevant factors as it thinks fit.”

7. The sequence/order of examination and cross-examination of the witnesses as contained in Sections 135 and 137 of the Indian Evidence Act, 1872 as well as in Order XVIII Rule 2 and Rule 4(2) of the Civil Procedure Code, 1908 cannot be disputed. It is however material to note, that the said order or sequence, naturally requires, that once the cross-examination of a party or a witness commences, the same cannot be stopped in between, or for that matter

be deferred to a subsequent date, for the purpose of cross-examination of the same plaintiff/witness, to be conducted by some other party. That cannot be the mandate of the above provision, as taking such a view, would clearly do violence to the order of recording evidence, which necessarily requires that once a cross-examination of a witness has begun, that cannot be stalled or deferred in between, for some other defendants, who steps in between and permit conducting a cross-examination of the said witnesses or the parties on his own behalf. Once the cross- examination of a party or witness begins, by the other side, the same has to be continuous and the opportunity for another party to the suit to begin with the cross-examination, would only arise after the earlier cross-examination being conducted is over. In that view of the matter, I do not see any infirmity in the impugned order, the petition therefore is without any merits and is accordingly dismissed.

8. Rule is discharged. Pending application(s), if any, stand(s) disposed of.

JUDGE