

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

Criminal Writ Petition No. 89 of 2022

Rajnish S/o Rajendrapal Naidu

Versus

Mrs. Neha W/o Rajnish Naidu (Joshi) & one

Office Notes, Office Memoranda of
Coram, appearances, Court's Orders
or directions and Registrar's order

Court's or Judge's Order

Shri Anurag Gharote, Advocate for the petitioner.

Mrs. R.S.Sirpurkar, Advocate for the respondent nos. 1
and 2.

CORAM : ANIL S. KILOR, J.

DATED : 25th FEBRUARY, 2022.

This petition is filed under Articles 226 and 227 of Constitution of India. The challenge is raised to the order below Exh.388 dated 14th December, 2021 passed by the Judge, Family Court No.3, Nagpur rejecting the application preferred by the petitioner for grant of permission to cross-examine the original petitioner/respondent no.1.

2. The brief facts of the present case are as follows:

The petitioner and the respondent no.1 are husband and wife and marriage was solemnized on 18th December, 2011. The respondent filed a petition under Section 125 of the Code of Criminal Procedure claiming grant of maintenance amounting to Rs.35,000/- per month for respondent no.1 and Rs.15,000/- per month for the respondent no.2-child. Due to continuous default in making the payment of interim maintenance granted by the Judge, Family Court No.3, the defence of the petitioner was struck off and the matter was proceeded further. The oral evidence of the respondent no.1 was recorded and thereafter the pursis was filed by the respondent no.1 for closing the evidence. Thereafter, the application for permission to cross-examine was filed by the present petitioner and the same was rejected vide impugned order dated 14th December, 2021. The same is under challenge in this petition.

3. I have heard learned counsel for the respective parties.

4. Shri Gharote, learned counsel appearing for the petitioner submits that the reason given by the learned Family Court for rejecting the application of permission to cross-examine the respondent/original

petitioner is that as the defence of the petitioner was struck off, the petitioner has no right to cross-examine the witness. It is submitted that though the defence of the petitioner is struck off, his right to cross-examine cannot be taken away. To buttress his submission, he has relied upon the judgment of the Hon'ble Supreme Court of India in the case of *Modula India Vs. Kamakshya Singh Deo*¹.

5. On the other hand, Mrs. Sirpurkar, learned counsel appearing for the original petitioner opposes the present petition and submits that looking to the conduct of the petitioner, the defence of the petitioner was struck off and therefore, the Family Court has rightly refused to grant him permission to cross-examine the original petitioner.

6. To consider the rival contentions of the parties, I have perused the record and also gone through the impugned order.

7. The Hon'ble Supreme Court of India in the case of *Modula India Vs. Kamakshya Singh Deo* (Supra):

“18. We agree that full effect should be given to the words that defence against ejectment is struck off. But does this really deprive the defendant tenant of further

1 (1988) 4 SCC 619

participation in the case in any manner? While it is true that, in a broad sense, the right of defence takes in, within its canvass, all aspects including the demolition of the plaintiff's case by the cross-examination of his witnesses, it would be equally correct to say that the cross-examination of the plaintiff's witnesses really constitutes a finishing touch which completes the plaintiff's case. It is a well established proposition that no oral testimony can be considered satisfactory or valid unless it is tested by cross-examination. The mere statement of the plaintiff's witnesses cannot constitute the plaintiff's evidence in the case unless and until it is tested by cross-examination. The right of the defence to cross-examine the plaintiff's witnesses can, therefore, be looked upon not as a part of its own strategy of defence but rather as a requirement without which the plaintiff's evidence cannot be acted upon. Looked at from this point of view it should be possible to take the view that, though the defence of the tenant has been struck out, there is nothing in law to preclude him from demonstrating to the court that the plaintiff's witnesses are not speaking the truth or that the evidence put forward by the plaintiff is not sufficient to fulfill the terms of the statute.

19. To us it appears that the basic principle that where a plaintiff comes to the court he must prove his case should not be whittled down even in a case where no defendant appears. It will at once be clear that to say that the Court can only do this by looking the plaintiff's evidence and pleadings supplemented by such questions as the court may consider necessary and to completely eliminate any type of assistance from the defendant in this task will place the court under a great handicap in discovering the truth or otherwise of the plaintiff's statements. For after all, the court on its own motion, can do very little to ascertain the truth or otherwise of the plaintiff's averments and it is only the opposite party that will be more familiar with the detailed facts of a particular case and that can assist the court in pointing out defects, weaknesses, errors and inconsistencies of the plaintiff's case.

24. For the above reasons, we agree with the view of Ramendra Mohan Dutta, Acting CJ that, even in a case where the defence against delivery of possession of a tenant is struck off under section 17(4) of the Act, the

defendant, subject to the exercise of an appropriate discretion by the court on the facts of a particular case, would generally be entitled:

(a) to cross-examine the plaintiff's witnesses; and

(b) to address argument on the basis of the plaintiff's case.

We would like to make it clear that the defendant would not be entitled to lead any evidence of his own nor can his cross-examination be permitted to travel beyond the very limited objective of pointing out the falsity or weaknesses of the plaintiff's case. In no circumstances should the cross-examination be permitted to travel beyond this legitimate scope and to convert itself virtually into a presentation of the defendant's case either directly or in the form of suggestions put to the plaintiff's witnesses."

8. The Hon'ble Supreme Court of India has observed in clear terms that mere statement of the plaintiff's witnesses cannot constitute the plaintiff's evidence in the case unless and until it is tested by cross-examination. It is further observed that right of the defence to cross-examine the plaintiff's witnesses can, therefore, be looked upon not as a part of its own strategy of defence but rather as a requirement without which the plaintiff's evidence cannot be acted upon. The Court has further observed in clear words that to completely eliminate any type of assistance from the defendant in this task will place the court under a great handicap in discovering the truth or otherwise of the

plaintiff's statements. For after all, the court on its own motion, can do very little to ascertain the truth or otherwise of the plaintiff's averments and it is only the opposite party that will be more familiar with the detailed facts of a particular case and that can assist the court in pointing out defects, weaknesses, errors and inconsistencies of the plaintiff's case.

9. In the above referred judgment in the case of *Modula India Vs. Kamakshya Singh Deo (Supra)* it has further observed that even on striking of the defence of the defendant, the defendant is entitled to cross-examine the plaintiff's witness and to address the argument on the basis of plaintiff's case. The defendant cannot be permitted to travel beyond the very limited objective of pointing out the falsity or weaknesses of the plaintiff's case. In no circumstances should the cross-examination be permitted to travel beyond this legitimate scope and to convert itself virtually into a presentation of the defendant's case either directly or in the form of suggestions put to the plaintiff's witnesses.

10. Thus, it is clear that it is the right of the defendant to cross-examine the petitioner and in any case this right cannot be taken away.

11 In the teeth of the above referred well settled principle of law, I revert back to the findings recorded by the learned Family Court.

12. In paragraph 5 of the impugned order, the learned Family Court has observed that “in this way, respondent has not complied the order of the Hon’ble High Court. Accordingly, his defence is struck off in view of this the further cross-examination of the petitioner is closed by order dated 30/11/2021”.

13. Similarly, in paragraph no.6, the learned Family Court has further observed that “apart from this once the defence is struck off by the Court, the respondents have no right to cross-examine the witness”.

14. The above referred findings are contrary to the provisions of law.

15. The learned Family Court has further committed error in observing that the petitioner has not challenged the order dated 30th November, 2021 whereby cross-examination was closed by the learned Family Court.

16. In view of the well settled principle of law as referred above, the learned Family Court ought to

have allowed the application Exh.388. However, by recording erroneous reason, the learned Family Court has refused the permission to the petitioner to cross-examine the original petitioner. In that view of the matter, I pass the following order.

ORDER

- i. The writ petition is allowed.
- ii. The order below Exhibit 388 dated 14th December, 2021 passed by the learned Family Court, Nagpur in Petition No. E-443 of 2013 is hereby quashed and set aside.
- iii. The petitioner is permitted to cross-examine original respondent no.1.
- iv. The parties shall appear before the Family Court No.3, Nagpur on 28th February, 2022, and if possible the learned Family Court may permit the petitioner to cross-examine the original petitioner/respondent no.1.
- v. For any reason, if it is not possible for the Family Court No.3 to permit the petitioner to cross-examine the respondent no.1 on 28th February, 2022, the Court may fix the date as per its convenience and thereafter record the cross-examination on day to day basis if it continuous for more than a day.
- vi. It is needless to mention that such cross-examination will be permitted within the limits as observed by the Hon'ble Supreme Court of India in the

case of *Modula India Vs. Kamakshya Singh Deo*
(supra)

vii. The writ petition is disposed of. No order as to costs.

[ANIL S. KILOR, J.]

Digitally signed
by
SACHINDANAND
K NAIR
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