

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 1537 OF 2023.

F. S. Kerr & Co Pvt Ltd.

...Petitioner.

Versus

Khozema Taherbhai Madraswala
and Another.

..Respondents.

*Mr. A. R. Pai, Mr. Atharva Sane, Ms. Prajakta Shingarpure i/b Bina R. Pai
for the Petitioner.*

Coram : Sharmila U. Deshmukh, J.

Date : March 24, 2023.

P. C. :

1. This petition takes exception to the order dated 11th January 2023 passed below Exhibit-85 allowing the application filed by Respondent Nos. 2 and 3 seeking adoption of the evidence adduced in RAD Suit No.434 of 2006 and RAD Suit No. 435/2006 in RAE Suit No.1759/2005.

2. The petitioner is the original Defendant No.1, Respondent No 2 is the original Defendant No 2 and Respondent No 3 is the original Defendant No 3 in RAE Suit No.1759/2005 filed by the Respondent No 1 for eviction. RAD Suit No 435/2006 is filed by the Respondent No 2 and RAD Suit No 434 of 2006 is filed by Respondent No 3 seeking

declaration of tenancy.

3. The suit property in RAD Suit No 434/2006 and RAD Suit No 435/2006 and the suit premises in the eviction suit filed by respondent No.1 are the same premises. The petitioner claims to be tenant of the subject premises, and as such has interest adverse to that of Respondent Nos.2 and 3, who claims to be the subtenants of the suit premises and have instituted declaratory suit for asserting their tenancy rights. In the eviction suit, the evidence of the Respondent No 2 was closed by order dated 04.08.2022 and the evidence of the Respondent No 3 was closed vide order dated 10.11.2022.

4. An application dated 21st December 2022 was filed by the respondent Nos.2 and 3 seeking to set aside the orders of closure of evidence of respondent Nos.2 and 3's evidence and to adopt the evidence adduced in RAD Suit No 434/2006 and RAD Suit No 435/2006 i.e the declaratory suits in the eviction proceedings. By the impugned order, the application came to be allowed, and as such, the petitioner being aggrieved seeks to challenge the same.

5. Learned counsel appearing for the petitioner has taken this

Court through the impugned order. He would further submit that the trial Court has erred in permitting the application in as much as if the evidence is adopted, rights of the petitioner to cross examine respondent Nos. 2 and 3 will be foreclosed. In support of his submission, learned counsel for the petitioner has invited attention of this Court to the observations in paragraph No.5 of the impugned order holding that the respondent Nos.2 and 3 were fully cross-examined by respondent No.1 in the declaratory suits, and as all the three suits were clubbed together, the Respondent No 2 and 3 are adopting the same evidence in the eviction suit.

6. From the material on record, it is evident that the Petitioner had not filed his written reply to the application, however, arguments were advanced during the hearing of the application. From perusal of impugned order, it is not clear as to whether the objection as is now sought to be raised was raised during the hearing of the application. In my view, the impugned order does not deal with the Petitioner's right of cross examination and it does not appear that the impugned order forecloses the Petitioner's right of cross examination. Paragraph 5 of the impugned order considers the right of respondent No.1, i.e. the plaintiff in eviction suit, to cross-examine respondent Nos.2 and 3.

7. The admitted position is that the petitioner has filed application dated 31st January 2023 below Exhibit-90 seeking cross-examination of respondent Nos.2 and 3 under the provisions of section 137 of the Evidence Act. The said application has not yet been decided by the Trial Court. In my opinion, the impugned order dated 11th January 2023 does not deal with the issue as regards the petitioner's right of cross examination. The said issue will be considered by the Trial Court while adjudicating the application dated 31st January 2023 below Exhibit-90. As such I am not inclined to interfere with the impugned order.

8. Considering the above, the writ petition can be disposed of by directing trial court to decide the application below Exhibit-90 expeditiously. Needless to state that the said application be decided on its own merits and in accordance with law, taking into consideration that the interest of the petitioner is adverse to that of respondent Nos.2 and 3.

9. Writ Petition stands disposed of in above terms.

[Sharmila U. Deshmukh, J.]