



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 13812 OF 2022

Mrudula Rohit Oza.

...Petitioner.

Versus

Niraj Rohit Oza and Another.

...Respondents.

*Mr. Bhavesh Parmar, Rahul Gaikwad, Aman Jhawar, Reshma Nair i/b Gravitas
Legal for the petitioner.*

Mr. Kunal S. Vaishnav i/b M/s. N. N. Vaishnawa & co., for respondent No.1.

Coram : Sharmila U. Deshmukh, J.

Date : December 4, 2023.

P. C. :

1. By this petition filed under Article 227 of the Constitution of India, challenge is to the order dated 29th February 2020 passed by the Small Causes Court, Mumbai rejecting the petitioner's application filed under section 151 of Code of Civil Procedure, 1908 for permission to adopt the evidence already led by her in Suit No. 3614 of 2007 before the City Civil Court, Mumbai.

2. The dispute in question has arisen between the members of same family; petitioner being the mother on one hand and respondent no.1 being the son on the other hand and respondent no.2 being the landlord as regards the tenanted premises. In 2007,

proceedings were instituted by the petitioner before the City Civil Court seeking appropriate orders to respondent no.1 and his wife to remove themselves from the suit premises and order of permanent injunction restraining respondent no.1 and his wife from entering upon or remaining upon the suit premises till the time petitioner is in possession thereof without her express consent. In this proceedings, cross-examination of petitioner is over.

3. In the year 2008, respondent no.1 filed a suit before the Small Causes Court, Mumbai against the petitioner, respondent no.1's sister and the landlord, being R.A.D. Suit No.103 of 2008 seeking a declaration of tenancy in respect of the suit premises. In the proceedings before Small Causes Court, an application came to be filed by the petitioner under Section 10 of CPC, which came to be rejected as against which petition filed in this Court was also rejected vide order dated 12th September 2014. In the month of March 2018, the petitioner and defendant no.2 therein were directed to file affidavit of evidence in the R.A.D. Suit, which has not been filed till date. In the year 2018, miscellaneous civil application was filed before this Court to club the 2 suits, i.e., the suit filed in City Civil Court, Mumbai and the suit filed in Small Causes Court, Mumbai. The said application came to be rejected vide order dated 11th September

2018.

4. In the suit before Small Causes Court, an application came to be filed below Exhibit-93 seeking permission to adopt the evidence led before City Civil Court, which came to be rejected. As against the said rejection order, revision application was filed before the Small Causes Court, which also came to be rejected on the ground of maintainability.

5. Heard Mr. Bhavesh Parmar, learned counsel appearing for the petitioner and Mr. Kunal Vaishnav, learned counsel appearing for respondent no.1.

6. Mr. Parmar, learned counsel appearing for the petitioner submits that the subject matter before the City Civil Court as well as before the Small Causes Court is substantially the same and, as such, the provisions of section 33 of Indian Evidence Act, 1872 squarely applies in the present case. He has tendered compilation of documents consisting of copy of plaint filed in the City Civil Court as well as the Small Causes Court and the issues framed therein and would submit that for the purpose of declaration of tenancy, the issue which would arise is as regards the residence of respondent no.1 with the original tenant at the time of his death, which was

substantially the issue before the City Civil Court as regards the lawful possession. He would therefore submit that third proviso to section 33 of the Indian Evidence Act, 1872 will apply. He has invited the attention of this Court to the medical reports of petitioner and the photographs which show that there was amputation of the leg of petitioner, and would submit that she is therefore incapable of giving evidence. He further submits that before the City Civil Court, petitioner was extensively cross-examined for six years and the intention appears to be to harass the petitioner who is an elderly lady, aged 78 years and is further suffering from various ailments.

7. *Per contra* Mr. Vaishnav, learned counsel appearing for the respondent submits that in the petition challenging the order of rejection of suit under section 10 of CPC, this Court has held that the issues in the suit instituted in the City Civil Court seeking relief of injunction cannot be treated substantially the same in issue in the suit filed before the Small Causes Court. He further submits that in the miscellaneous civil application filed for clubbing of two suits, i.e., suits pending before the City Civil Court and the Small Causes Court, this Court vide order dated 11th September, 2018 has held that the matters cannot be clubbed as the jurisdiction of Small Causes Court is different from the jurisdiction of City Civil Court inasmuch as the

Small Causes Court has jurisdiction to determine the issue of tenancy which is not vested with the City Civil Court. He would further submit that the cross-examination in the City Civil Court has already been concluded and he has no objection if the affidavit of evidence is adopted by the petitioner before the Small Causes Court, however, his right to cross examine cannot be precluded. In support of his submissions, relies upon following cases :

[i] Mitthulal v. State of M.P. [(1975) 3 SCC]; and

[ii] Nitin Sitaram Waghmare v. Bala Kanha Gawade [unreported decision of this Court in Civil W.P. No. 4358 of 2022, dtd 17th May 2022.]

8. In rejoinder, Mr. Parmar would urge that it is necessary to take into consideration the medical situation inasmuch as subsequent to the amputation of toes, the petitioner has damaged her knee-cap and is incapable of giving evidence.

9. Considered the submissions and perused the record.

10. The issue which arise for consideration is whether the provisions of section 33 of the Indian Evidence Act, 1872 can be invoked in the present case for adopting the evidence led by the petitioner in the City Civil Court by the petitioner. Section 33 of the Indian Evidence Act, 1872 finds place under the heading "Statement

by persons who cannot be called as witnesses.”

11. Section 33 of the Indian Evidence Act, 1872 provides for relevancy of certain evidence for proving in subsequent judicial proceedings the truth of the facts it states when the witness is dead or cannot be found or is incapable of giving evidence without an amount of delay or expense, which is unreasonable. Section 33 of the Indian Evidence Act, 1872 is subject to three provisos. Firstly, the proceedings is between the same parties or their representatives in interest. Secondly, that the adverse party in the first proceedings had the right and opportunity to cross examine and thirdly the questions in issue were substantially the same in the first and the second proceedings.

12. In the present case, the landlord as well as the sister of petitioner who are parties before the Small Causes Court are not party to the proceedings before the City Civil Court, which is one of the reasons for rejection of the application by the Small Causes Court. To enable the evidence to be adopted by invoking section 33 of the Indian Evidence Act, 1872, the requirement of the three provisos has to be met. The proviso requires that the proceedings were between the same parties. In the present case, neither the landlord nor the defendant no.2 is not party to the proceedings

before the City Civil Court. The third proviso to section 33 of the Indian Evidence Act, 1872 would also come in the way of petitioner, as it cannot be said that the question in issue before the City Civil Court as well as the Small Causes Court are substantially the same. Before the City Civil Court, the relief sought was mandatory injunction against respondent no.1 and his wife restraining them from entering into the premises. The issue in that case would have been limited to the aspect of possession of the suit premises whereas the right to tenancy would be governed by the provisions of section 7(5) of the Maharashtra Rent Control Act, 1999 as regards the residence of the party at the time of death of original tenant. The considerations are contextually different and as such it cannot be said that the questions in issue are substantially the same in both the suits.

13. Before the City Civil Court, the cross-examination of the petitioner is already over and if the same evidence is permitted to be adopted before the Small Causes Court, the rights of respondent no.1 would be seriously prejudiced as he would be precluded from cross-examining the petitioner on the aspect of tenancy. Section 33 of the Indian Evidence Act, 1872 would come into play in the eventuality when the witness is dead or cannot be found or is

incapable of giving evidence or his presence cannot be obtained without an amount of delay or expense. Mr. Parmar insists upon the later part of section 33 of the Indian Evidence Act, 1872 to contend that considering the medical problems faced by petitioner, her presence cannot be obtained without an amount of delay or expense. In my opinion, the said submission cannot be accepted for the reason that the petitioner can be cross-examined through video conferencing facility or Court Commissioner can be appointed for the purpose of recording evidence, which practice is increasingly been adopted by the Courts.

14. It may be possible that limited cross-examination on the aspect of possession in the City Civil Court suit may have been adopted by respondent no.1 as the proceedings before the City Civil Court was for the purpose of injunction whereas in the declaratory suit seeking tenancy, different considerations would apply and the cross-examination may enter different aspects. The cause of action as well as the reliefs sought are distinct and separate and, as such, in my opinion, the provisions of section 33 of the Indian Evidence Act, 1872 cannot be invoked by the petitioner.

15. In the light of above, petition fails and is dismissed.

16. Needless to clarify that the Small Causes Court will ensure that the cross-examination is conducted in timely manner and within a limited period taking into consideration the age and health of petitioner.

[Sharmila U. Deshmukh, J.]