

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

WRIT PETITION NO. 1570 OF 2022

Ku. Manisha Wamanrao Meshram,
Aged about 58 years, Occu.: Household,
R/o. In front of Sattu Seth Wada, Gondplot,
Wardha, Tah. & Distt. : Wardha.

.... **PETITIONER.**

// VERSUS //

1. Smt. Rekha Wd/o. Sanjay Shah,
Aged about 46 years, Occ.: Business,
R/o. Manpure Road, Wardha
Tah. & Distt.: Wardha.
2. Ku. Nilu Wamanrao Meshram,
Aged about 45 years, Occ.: Household,
R/o. In front of Sattu Seth Wada,
Gondplot, Wardha, Tah.& Distt.:Wardha.

.... **RESPONDENTS.**

Shri J.R.Kidilay, Advocate for Petitioner.
Shri P.S.Chawhan, Advocate for the Respondents.

CORAM : ANIL S. KILOR, J.
DATED : APRIL 26, 2023.

ORAL JUDGMENT :

1. Heard.

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

3. The order dated 02/03/2022, passed below Exh.70 by the Joint Civil Judge Senior Division, Wardha in Special Civil Suit No.15 of 2016 refusing the petitioner to cross-examine the co-defendant is under challenge in this writ petition.

4. The respondent No.1 filed Special Civil Suit No. 15 of 2016 against the petitioner and the respondent No.2, who are real sisters, for specific performance of contract or in alternative refund of the amount. In the written statement filed by the petitioner and the respondent No.2 they denied the case of the plaintiff. Though the examination-in-chief of the respondent No.2 was as per the written statement, however, in cross-examination she admitted certain facts which were denied in the written statement. She has also admitted that the plaintiff was always ready and willing to perform his part of the contract.

5. After getting the knowledge of such admissions made by the respondent No.2, who is co-defendant of the petitioner, in the cross-examination, the petitioner moved an application for cross-examination of the respondent No.2 on the ground that her admissions are adverse to the interest of the petitioner. The learned trial Court, by impugned order, rejected the said application. Hence, this writ petition.

6. The learned counsel for the petitioner submits that it is a settled law that if the defendant shows that the evidence of the co-defendant would adversely affect his or her interest, cross-examination of such co-defendant is permissible.

7. It is pointed out that the application for cross-examination of the respondent No.2 was moved in continuation of application Exh.66 to set aside the order, fixing the case for final hearing and for permission to lead evidence of defendant No.1/petitioner. In paragraph No.15 of the said application, the petitioner has pointed out how the cross-examination of the

respondent No.2 is adverse to her interest. It is submitted that despite the said fact ignoring the well settled principles of law, the application was rejected.

8. On the other hand, the learned counsel for the respondent No.1 submits that the Court has rightly rejected the application by holding that in the examination-in-chief he has not stated anything which would adversely affect the interest of the petitioner and as far as the cross-examination is concerned i.e. the skill of the lawyer, who has taken out the admissions from the respondent No.2. He, therefore, submits that there is no illegality committed by the trial Court in rejecting the application Exh.70. He accordingly, prays for rejection of the said application.

9. The coordinate Bench of this Court in the case of *Vinod Khimji Lodaya ..vs.. Muljibhai Maujibhai Patel*, reported in **2013(6) ALL MR 732**, while dealing with the question when the defendant be permitted to cross-examine the co-defendant this Court has held thus:

“14. Upon careful perusal of the impugned order, it appears that the Tribunal has not noticed the Judgments of various High Courts except the Judgment of the Punjab and Haryana High Court and rejected the prayer of the applicant i.e. original defendant No. 2, for cross examination of defendant No. 1. The Karnataka High Court in case of Sri Mohamed Ziaulla [supra] while interpreting the provisions of Section 137 and 138 of the Indian Evidence Act, in para Nos. 7 to 9 held thus, :

"Section 137 specifically explains that the examination of a witness by the adverse party is cross examination. Section 138 of the Evidence Act refers to cross examination if the adverse party so desires after the witness is first examined in chief. These two sections of the Evidence Act make it abundantly clear that a party has a right of cross examining his adversary or his witness.

Section 137 and 138 of the Evidence Act do not specifically refer to cross examination of co-defendant's witnesses. But, the courts have to adopt a golden rule that no evidence shall be received against any co-defendant or co-accused who had no opportunity of testing it by cross examination; as it would be unjust and unsafe not to allow a co-accused or co-defendant to cross examine witness called by one whose case was adverse to his, or who has given evidence against him. If there is no dash of interest or if nothing has been said against the other party, there can not be any right of cross examination. A short but, interesting discussion is found in Sarkar's Evidence at Page 1342 13th Edition. Similar opinion is found in Principles and Digest of the Law of Evidence by M.Monir, Third Edition Page 1114.

This very question was debated in the English Courts as far back as in 1920 vide a decision in LORD V. COLVIN 1855, 24 LJ Ch 517, 3 Drew -

222. The learned Judge in the said case after consulting all the equity judges held that before an examiner in Chancery, one defendant might cross examine another defendant's witness. The same right exists between respondent and co-respondent in divorce cases provided either is hostile to the other, for if friendly, eg. where both deny the adultery, each can only be examined as the other's witness and not cross-examined. A defendant may cross-examine his co-defendant who gives evidence or any of his co-defendant's witnesses if his co-defendant's interest is hostile to his own. Therefore, the procedure that has been followed by the Courts in England and in India has not left this question in doubt. Where it is shown that the interest between the defendants' inter-se conflict each other, the other defendant has necessarily to be treated as an adversary and he is certainly entitled to cross examine the other defendant or his witnesses ".

18. The contention of the learned counsel appearing for respondent No. 18 that the provisions of Order XVIII Rule 17 of the C.P.C. only empowers the Court to call the witness for examination and the party has no right to ask for recalling the witness, is required to be appreciated in the light of the Judgment of the Supreme Court in the case of K.K. Velusamy V/s V.N. Palanisamy reported in (2011) 11 SCC 275.: [2011(3) ALL MR 455 (S.C.)]. The Supreme Court has taken a view that, in appropriate cases, the Court can invoke the inherent powers to recall the witness for examination. The inherent powers of the Court are not affected by the provisions of Order XVIII Rule 17 of the C.P.C. Since the provisions of Sections 137 and

138 of the Indian Evidence Act, are interpreted by the Karnataka High Court, Chattisgarh High Court and by this Court also and view is taken that in appropriate cases, where the defendant demonstrates that the co-defendant's evidence would adversely affect his interest, cross examination of such co-defendant is permissible.”

10. In identical matter, the Punjab and Haryana High Court in the case of *Kuldeep Kumar ..vs.. Kanwar Pal Singh and others*, in CR No.7852 of 2015 (O & M), decided on 13/05/2016, has held thus:

“This Court in Ajaib Singh's case (supra) dealt with a similar situation and has observed that in the instant case also, it is apparent from the testimony of defendant No.3 that he has made the statement against defendant no.4 while making admission qua the power of attorney and agreement of sale which he along with defendants No.1 and 2 had denied in the written statement. In this situation, since the interest of defendant No.3 is clashing with defendant No.4, therefore, permission was bound to be given to defendant No.4 to cross examine defendant No.3 to the extent of clash of interest. Further the Court laid down certain guidelines to be followed by the Subordinate Courts and a relevant extract therefrom reads as follows:-

"From the law discussed above, the following guidelines are needed to be imparted to the subordinate courts to face the aforesaid situation.

- 1. Section 138 of the Act imparts the right of cross examination to the adverse party. However, it is up to the adverse party that he may cross examine or not.*
- 2. The party defendant who has no clash of interest with the other defendant has no right of cross examination.*
- 3. The element of one being adverse party could be determined either from the pleadings of the parties or from the evidence so led or being led.*
- 4. The court could declare defendant(s) as adverse party when defendant(s) supporting the case of the other defendant(s) at the time of pleadings, but changes his stand during cross examination.*
- 5. In the absence of any conflict of interest of evidence which may not effect the interest of other defendant(s) then the question of granting the opportunity to cross examine the co-defendant does not arise.*
- 6. The court has been given power to term the co-defendant as adversary for extending permission to cross examine the defendant is to avoid collusion or fraud on the part of one defendant against the other.*
- 7. If a co-defendant during the examination in chief or cross-examination demolishes the case of the other defendant, then it would amount to a case for clash of interest, empowering the court to cross examine the other defendant (having similar interest) to the extent of clash of interest."*

11. In the teeth of the above observations, I revert back to the facts of the present case.

12. In the present matter, admittedly, the petitioner and the respondent No.2 filed joint Written Statement, meaning thereby that there was a common stand taken by them while opposing the

suit filed by the respondent No.1 for specific performance. The examination-in-chief of the respondent No.2 was also in accordance with the written statement. However, in cross-examination, she has given many admissions which are adverse to the interest of the petitioner. The petitioner has pointed out the said fact in application Exh.66 and since application Exh.70 for permission to cross-examine the co-defendant i.e. respondent No.2 was moved in continuation with application Exh.66, the petitioner has stated in paragraph No.3 of the application Exh.70 that the defendant No.1 wants to cross-examine the defendant No.2 for the reasons mentioned in application Exh.66 in detail.

13. After going through the cross-examination of the respondent No.2, I find substance in the submission of the learned counsel for the petitioner that it will adversely affect the interest of the petitioner and therefore, as per the law enunciated by this Court and by the Punjab and Haryana High Court, I am of the opinion that the learned trial Court has committed error in rejecting the application by holding that the respondent No.2 has not stated

anything in the cross-examination which was adversely affect the interest of the petitioner. The said finding is contrary to the record.

14. In the circumstances, I have no hesitation to hold that the impugned order is erroneous and it is liable to be quashed and set aside. Accordingly, I pass the following order:

- i) The writ petition is allowed.
- ii) The impugned order dated 02/03/2022 passed below Exh.70 by Civil Judge Senior Division, Wardha is hereby quashed and set aside and consequently the application Exh.70 is allowed.

Rule is made absolute in the above terms. No order as to costs.

(ANIL S. KILOR, J)

RRaut...