



IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

13 WRIT PETITION NO. 493 of 2019

Sanjog Bhushan Birla

....Petitioner

VERSUS

Bhushan Pandharinath Birla & others

.....Respondents

.....

Mr. R. R. Sancheti, Advocate for the Petitioner.

Mr. N.T. Tribhuwan, Advocate for Respondent Nos. 1 and 3.

Mr. G. S. Rane, Advocate for Respondent Nos. 4 and 5.

CORAM : R. M. JOSHI, J.

DATE : 15th JULY, 2024.

PER COURT :

1. Heard finally at admission stage by consent of both sides.
2. This Petition takes exception to the order dated 06.12.2018 passed in Special Civil Suit No 35/2014 whereby application Exhibit 89 filed by Plaintiff is rejected.
3. Plaintiff was directed to cross-examine Defendant No. 1 and thereafter Defendant No. 2 who has not filed written statement may cross-examine Defendant No. 1. It is after cross-examination of these Defendants is over, Defendant Nos. 4 and 5 were permitted to conduct cross-examination of Defendant No. 1.

4. Plaintiff filed Special Civil Suit No. 35/2014 for partition and separate possession of his share. Respondent Nos. 4 and 5 filed suit for specific performance of contract against Respondent Nos. 1 and 2 alleging that Plaintiff had agreed to sell part of the suit property to them. These Respondents were not added as party Defendants and hence they applied for the same. Their application was allowed. Pursuant to the order passed by the Trial Court, they are added as Defendant Nos. 4 and 5 to the suit. This order is not challenged by Plaintiff or any other Defendant.

5. Trial began with examination of Plaintiff and his witnesses. Thereafter Defendant No. 1 filed affidavit in lieu of examination-in-chief. At this stage, an application is filed by Plaintiff vide Exhibit 89 calling upon Defendant Nos. 4 and 5 to cross-examine Defendant No. 1 first. This application is rejected. Hence, this Petition.

6. Learned counsel for Petitioner/Plaintiff alleges that Defendant Nos. 4 and 5 are in collusion with Defendant No. 1 and as such they are required to be called upon to cross-examine Defendant

No. 1 in the beginning. Similar allegation is made by the Defendants against each other of being in collusion with Plaintiff. Learned counsel for Petitioner has placed reliance on judgments of this Court in case of Mandabai Ramkrishna Tumsare & others vs Ramlal Hiranmanji Hiwarkar & others, **1986 BCI 95** and Bhujang Nathuji Daf & another vs. Ramkrishna Daulat Daf & others, **2009(2) Bom.C.R. 165**. It is his submission that having regard to the nature of defence of each Defendants, it would be in the interest of justice that Defendants are called upon to cross-examine Defendant No. 1 first and thereafter Plaintiff be permitted to cross-examine him.

7. This submission is opposed by learned counsel for Defendant Nos. 4 and 5 by drawing attention of the Court to the fact that Defendant No. 1 filed suit for specific performance of contract in respect of agreement entered into with other Defendants in respect of portion of suit property. It is his submission that these Defendants were not joined as party to the suit however, on their application now they are added as Defendants. These Defendants allege against other Defendants of being in collusion with Plaintiff.

8. This Court in case of Mandabai (supra) has made following observations :-

“10.In a case like this, the evidence of the plaintiff having been recorded, it would be just and proper to ask the proforma defendants 6 to 8 to initially cross-examine the plaintiff and then direct the contesting defendants 1 to 5 to cross-examine the plaintiff. The reason is simple. For the administration of fair and just trial, it must be noted that the plaintiffs evidence, if cross-examined by the adverse party, may reveal certain lacunae which could be got corrected by the defendants supporting the plaintiff when they cross-examine the plaintiff subsequently inasmuch as they are interested in the claim of the plaintiff.....”

Similarly, in case of Bhujang (supra), this Court has observed that as the interest of Defendant Nos. 2 and 3 was common to certain extent with Defendant no. 1, the Trial Court should have permitted them to cross-examine Defendant No. 1 first and should have called upon Petitioner/Plaintiff to cross-examine Defendant No. 1 at the end.

9. Reverting back to the facts of the present case, Plaintiff is son of Defendant No. 1 who has executed agreement to sale in respect

of portion of suit property with Defendant Nos. 4 and 5. In respect of said agreement to sale, Defendant Nos. 4 and 5 have filed suit for specific performance of contract. The said fact shows that these Defendants have interest adverse to Defendant No. 1, in respect of property covered by said agreement, which is undisputedly subject matter of present suit. Present suit is for partition and having regard to its nature, Defendants except Defendant Nos. 4 and 5 are also to be treated as Plaintiffs, having claim in the share of alleged joint family property. It is thus clear that Plaintiff and Defendant Nos. 1 to 3 are having common interest which is not so with Defendant Nos. 4 and 5. Thus, calling upon Defendant Nos. 4 and 5 to cross-examine first would lead to the situation that cross-examination of Plaintiff and other Defendants at later stage would permit them to fill up lacunas appearing from the cross-examination of contesting Defendant Nos. 4 and 5, who have apparent conflict of interest against Plaintiffs as well as other Defendants.

10. Having regard to these facts and the law laid down by this Court in the judgments cited supra, it is a fit case wherein the Plaintiff should be called upon to cross-examine Defendant No. 1 first, thereafter other Defendants and lastly Defendant Nos. 4 and 5.

Any course other than this if adopted de hors basic tenets of rules of evidence and it would also lead to causing of injustice to Defendant Nos. 4 and 5. Having regard to the facts and circumstances of the case, this Court finds no fault on the part of the Trial Court to pass such order. There is no merit in the Petition. Hence, the Petition stands dismissed.

(R. M. JOSHI)
Judge

dyb