



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 11024 OF 2023

Anand Vilas Yewankar

...Petitioner

Versus

Ravikumar Manohar Yewankar
and Ors

...Respondents

...

Mr. S. S. Bora, Advocate for Petitioner

Mr. N. R. Shaikh, Advocate for Respondent No. 1

...

CORAM : R.M. JOSHI, J
RESERVED ON : JULY 03, 2024
PRONOUNCED ON : JULY 08, 2024

ORDER

1. Petitioner/Original Defendant in Special Civil Suit No. 56/2013 is aggrieved by order dated 23.06.2023 passed below Exh. 121 whereby the learned Trial Court has exercised its discretion under Section 154 of the Evidence Act and has allowed application filed by the Respondents/Plaintiffs to recall witness PW-3/Vivek Hirachand Yewankar for his cross-examination.

2. Respondent No. 1 filed suit for recovery of possession of suit properties and implementation of will dated 25.03.1988 executed by Manohar Nagesh

Yewankar and Sushilabai Manohar Yewankar to the extent of their share mentioned in the said deed. All Defendants except Defendant No. 7 filed written statement denying the contentions of the Plaintiffs. After framing of the issues, Plaintiff examined himself and also examined Vivek Hirachand Yewankar as third witness in order to prove the execution of will in question. The said witness in examination in chief amongst other statements has denied to have visited along with his uncle Manohar to the office of Sub-Registrar, Nanded. On the date of examination of this witness, no permission was sought by plaintiff to cross-examine him. Defendants also did not cross-examine this witness. After a period of about five months of completion of his evidence, Plaintiff filed application vide Exh. 121 seeking permission to recall this witness for the purpose of cross-examination. This application was opposed by the Defendants, which came to be allowed by passing impugned order.

3. Learned Counsel for the Petitioner raises objection with regard to the entertainment of the application by the Trial Court after lapse of about

five months period from closing evidence of this witness. He drew attention of the Court to the judgments in case of B. N. Chobe vs. Sami Ahmed, LAWS (APH)-1967-12-13 & Mattam Ravi and Ors vs. Mattam Raja Yellaiah and Ors, MANU/AP/0360/2017. According to him, the Court is required to take into consideration the demeanor of the witness in order to permit his cross-examination on the ground that he has not supported the party who has called him as witness. According to him, such exercise cannot be done after lapse of five months. He also drew attention of the Court to the judgment of the Hon'ble Supreme Court in case of Rabindra Kumar Dey vs. State of Orissa, MANU/SC/0176/1976 in order to submit that the evidence of the witness should be regarded as adverse and liable to be cross-examined by the party calling him only when the Court is satisfied that the witness bears hostile animus against the party for whom he is deposing or that he does not appear to be willing to tell truth, he can be permitted to be cross-examined. He also made reference to the judgment of the Hon'ble Supreme Court in case of Dahyabhai Chhaganbhai Thakker vs. State of Gujarat, MANU/SC/0068/1964 to argue that the stage of

cross-examination would be immediately on completion of his examination-in-chief. He also relied upon the judgment in case of State of Bihar vs. Laloo Prasad and Ors, MANU/SC/1259/2001 wherein it is held that if the public prosecutor has not sought permission for cross-examination the witness after examination-in-chief is over, such permission can be refused after the witness is cross-examined by other side. He also drew attention of the Court to the judgment of Calcutta High Court in case of Pran Krishna Das vs. State, MANU/WB/0297/1971 and Madras High Court in case of S. Murugesan vs. S. Pethaperumal, MANU/TN/0057/1999.

4. Learned Counsel for Respondent/Plaintiff opposed the said submissions with the contention that powers under Section 154 of the Evidence Act are discretionary and it is open for the Court to recall and examine witness at any stage of the proceedings. It is his submission that mere demeanor of the witness in the witness box is not relevant for determining as to whether he should be allowed to be cross-examined but the answers given in the examination-in-chief would be more relevant for such determination. It is also

submitted that no particular time has been prescribed by the law as to when such cross-examination is permitted. According to him, if the discretion is used judiciously, then question of interference does not arise. In support of his submissions, he relied upon following judgments: M/s. Shewalkar Developers Ltd vs. Sidartha Singh and Ors, 2018(1) Mh.L.J. 346 & Mr. Howard Miranda and Ors, 2017(5) AIR Bom.R 14.

5. Section 154 of the Indian Evidence Act, reads thus;

*"154. Question by party to his own witness-
[(1)] The Court may, in its discretion, permit the person who calls a witness to put any questions to him which might be put in cross-examination by the adverse party.*

(2) Nothing in this Section shall disentitle the person so permitted under sub-Section (1), to rely on any part of the evidence of such witness."

. This provision indicates that there is discretion vested in any Court to recall witness to put question which might be put in cross-examination. This provision being discretionary does not specify the time or stage at which such witness can be called for cross-examination. Hon'ble Supreme Court in case of Dahyabhai

Chhaganbhai Thakker (supra) has held that the stages mentioned in Section 137 as chief examination, cross-examination and re-examination are not relevant and discretion is vested in Court under Section 154 to call witness. Thus, this section does not confine power of Court at particular stage of examination of witness. Only requirement for such recall is that case is made out to put question to the witness as just in cross-examination.

6. As far as present case is concerned, though application for recalling of the witness has been filed after five months, the Defendants have failed to show any prejudice being caused to them by allowing such application. It is pertinent to note that after the examination-in-chief of the said witness was over, Defendants have chosen not to cross-examine him. As such practically stage of cross-examination of that witness is only completion of examination-in-chief. Thus, no prejudice much less irreparable would cause to the Defendants if Plaintiff is permitted to cross-examine this witness. For the purpose of cross-examination, this Court will have to see as to whether

such cross-examination is necessary in order to extract truth or clarification to statements from the witness. Perusal of the examination-in-chief recorded of this witness on the face of it shows that he has refused the fact of visiting the office of Sub-Registrar, Nanded. Similarly, he gives vague statements in examination-in-chief and for the purpose of getting clarification of vague statements, his cross-examination is necessary. Learned Trial Court, therefore, has rightly taken into consideration the material factual aspects of the case while allowing application Exh. 121 and exercise its desecration.

7. Once the Court has exercised its discretion judiciously, question of calling interference therein in a Writ Petition does not arise. Having regard to the aforestated facts, there is not merit in the Petition. Hence, Petition stands dismissed.

(R. M. JOSHI, J.)

LATER ON

8. Learned counsel for the petitioner submits

that there was stay to the impugned order and hence the same may be extended for a period of six weeks. Learned counsel for the respondents opposes the said contention.

9. Having regard to the facts of the case and observations of this Court while upholding the impugned order, this Court finds no reason to extend the stay further.

(R. M. JOSHI, J.)

Malani