
(2021) 08 BOM CK 0023
In the Bombay High Court
Case No : Writ Petition No. 5627 Of 2021

Aminuddin And Others

APPELLANT

Vs

Kalyan And Others

RESPONDENT

Date of Decision : 10-08-2021

Acts Referred:

Code Of Civil Procedure, 1908 — Order 26 Rule 10, Order 26 Rule 10(2)
Evidence Act, 1872 — Section 137, 138, 139, 140, 141, 142, 143

Citation : (2021) 08 BOM CK 0023

Hon'ble Judges : Mangesh S. Patil, J

Bench : Single Bench

Advocate : Kasliwal Ajit D., Khizer Patel, Mohammed

Final Decision : Dismissed

Judgement

Mangesh S. Patil, J

1. Heard the learned advocate for the petitioners and the learned advocate for the respondent No. 2. The other respondents have been duly served but have not appeared.

2. Rule. The Rule is made returnable forthwith. With the consent of both the sides the matter is heard finally at the stage of admission.

3. The petitioners who are the original plaintiffs are impugning the order passed by the Trial Court rejecting their application (Exh. 120) whereby they prayed for calling the Court Commissioner for examination under the enabling provision of Order XXVI Rule 10(2) of the Code of Civil Procedure. Apparently, only because they chose to articulate the prayer and were seeking permission to cross-examine the court Commissioner that by the impugned order the Trial Court has rejected the application, however, expressly observing that the petitioners would be at liberty to call the Commissioner for examination strictly in accordance with Order XXVI Rule 10(2) of the Code of Civil Procedure.

4. After hearing the submissions of learned advocate Mr. Kasliwal for the petitioners it appears that the only anxiety being entertained by the petitioners is on account of the situation which he comprehends to be putting the petitioners in some kind of awkward situation, unless they make it clear that they were intending to call the Commissioner for cross-examination.

5. Having considered the rival submissions and after perusal of the impugned order along with the provisions of Order XXVI Rule 10 of the Code of Civil Procedure as also the provisions of Section 137 to 143 of the Evidence Act, the apprehension being entertained by the petitioners does not seem to have any legal foundation.

6. The very fact that Order XXVI Rule 10(2) of the Code of Civil Procedure comprehends a situation where the Court Commissioner submits a report which may go in favour of a party and against the other, in order to extend an opportunity to the party against whom the report is submitted to demonstrate infirmities in the report that an opportunity is provided by the legislature to enable such a party aggrieved by the report of the commissioner to call and examine him. Conspicuously, the word "examination-in-chief" or "cross-examination" has not been used by the legislature. Needless to state that depending upon the replies, taking recourse to the provisions of the Evidence Act mentioned herein above a party may very well in a given state of affairs solicit a permission of the Court to put leading questions to the Commissioner as well. It would be prejudging the issue as to what replies the Commissioner in the matter in hand would be giving after he is called as a witness.

7. It is pertinent that the Trial Court seems to be alive to all such state of affairs and the law and has rightly rejected the application by observing that when the law does not contemplate any cross-examination simplicitor there was no reason to concede to the request of the petitioners. He has been vigilant enough to observe that the petitioners would be at liberty to call the Commissioner for examination in accordance with the provision of Order XXVI Rule 10(2) of the Code of Civil Procedure. In my considered view the impugned order is certainly legal and appropriate and calls for no interference.

8. The Writ Petition is dismissed.

9. The Rule is discharged.