

(2019) 11 BOM CK 0121
In the Bombay High Court
Case No : Writ Petition No. 7537 Of 2019

Kalpana Navneet Samarth & Another

APPELLANT

Vs

Dr. Seema Arun Mankar & Another

RESPONDENT

Date of Decision : 15-11-2019

Acts Referred:

Provincial Small Causes Courts Act, 1887 — Section 26A
Evidence Act, 1872 — Section 137, 138
Code Of Civil Procedure, 1908 — Order 18 Rule 2

Citation : (2019) 11 BOM CK 0121

Hon'ble Judges : A.S. Chandurkar, J

Bench : Single Bench

Advocate : P.A. Markandeywar, Gopal Sawal

Final Decision : Dismissed

Judgement

The question that arises for consideration in this writ petition is whether the sequence of cross-examination of a witness is to be determined solely on the basis of the pleadings as raised or whether the stand taken by that party till the stage his evidence is to be recorded has to be taken into consideration.

The petitioners are the original defendant nos.2 and 3 in the suit that has been filed by the respondent no.1 herein. It is the case of the plaintiff that she is the owner of an open plot admeasuring about 30 meters X 15 meters. The said plot was given on monthly lease to the defendant no.1 in October-1993. As the plaintiff was in need of that open plot she terminated the tenancy of the defendant no.1 by issuing a notice on 28.07.2011. The defendant no.1 admitted the tenancy with regard to the open plot. It was pleaded that the defendant no.1 had entered into a partnership with the defendant nos.2 and 3. Those defendants were carrying on business on the said open plot in the capacity of sub-tenants. On the basis of this the plaintiff filed the aforesaid suit for eviction of the defendant no.1 and the defendant nos.2 and 3 jointly and severally.

In the written statement filed by the defendant no.1, the description of the suit

property as an open plot was not disputed. It was further not disputed that rent payable was Rupees Five Thousand per month when the suit was filed. The defendant no.1 admitted that he was not running any business and with the defendant nos.2 and 3 in partnership were undertaking a restaurant on the suit property.

The defendant nos.2 and 3 in their written statement denied the case of the plaintiff. It was denied that any open plot was let out to the defendant no.1. The entire case of the plaintiff was thus denied.

After the plaintiff completed her evidence, the defendant no.1 filed an affidavit in lieu of evidence. In that affidavit it was denied that the defendant no.1 was inducted as a tenant on any open plot. It was stated that the defendant no.1 was inducted as a tenant of a constructed structure. It was further denied that he had inducted the defendant nos.2 and 3 as sub-tenants. After that affidavit was filed on record, the defendant nos.2 and 3 moved an application below Exhibit 166 in which it was prayed that the trial Court should decide the sequence as regards the manner in which the cross-examination of the defendant no.1 should be conducted. According to the defendant nos.2 and 3, as the defendant no.1 in his written statement had supported the case of the plaintiffs, she was not ready to cross-examine the defendant no.1 and had insisted that the defendant nos.2 and 3 should proceed with the cross-examination of the defendant no.1 first. Reply was filed to the aforesaid application by the plaintiff opposing the same. It was denied that the plaintiff and the defendant no.1 were in collusion with each other. As the defendant no.1 was not supporting the case of the plaintiff it was necessary for the defendant nos.2 and 3 to cross-examine the defendant no.1 first. The trial Court by its order dated 19.09.2019 observed that all the defendants in the suit had common interest and their interest was adverse to that of the plaintiff. It was therefore necessary for the defendant nos.2 and 3 to cross-examine the defendant no.1 before the said witness was cross-examined by the plaintiff. The trial Court accordingly directed the defendant nos.2 and 3 to first cross-examine the defendant no.1 before he could be cross-examined by the plaintiff.

The defendant nos.2 and 3 filed an appeal under Section 26A of the Provincial Small Causes Courts Act, 1887 and challenged that order. The Appellate Court by its judgment dated 30.09.2019 confirmed the order passed by the Small Causes Court and held that the defendant nos.2 and 3 ought to cross-examine the defendant no.1 prior to his cross-examination by the plaintiff. Being aggrieved, the defendant nos.2 and 3 have challenged the said order.

Shri P.A. Markandeyawar, learned counsel for the defendant no.2 and 3 submitted that from the written statement filed by the defendant no.1 at Exhibit 9, it was clear that the defendant no.1 was supporting the case of the plaintiff. It was admitted by the defendant no.1 that the suit property was an open plot and rent of Rupees Five Thousand per month was being paid. The nature of tenancy was not disputed nor was it disputed that the defendant no.1 had constructed a

temporary structure to protect his goods from rains. He therefore submitted that considering these admissions in the written statement it was clear that the defendant no.1 was supporting the case of the plaintiff. It was thus necessary for the plaintiff to first examine the defendant no.1 after which the defendant nos.2 and 3 who had opposed the plaintiff's suit could cross-examine the defendant no.1. To substantiate this contention it was submitted that the pleadings of the parties were material and merely because the defendant no.1 in his affidavit in lieu of evidence had disputed some of the averments as made in the plaint it would not mean that the defendant no.1 was opposing the claim of the plaintiff. The evidence which was contrary to the pleadings was liable to be ignored and therefore the Courts erred in directing the defendant nos.2 and 3 to first cross-examine the defendant no.1 before the defendant no.1 could be cross-examined by the plaintiff. Placing reliance on the decisions in *Hussens Hasanali Pulavwala Versus Sabbirbhai Hasanali Pulavwala & Others* [AIR 1981 Gujarat 190], *Sunil Chhatrapal Kedar Versus Y.S. Bagde & Another* [2004(4) Mh.L.J.620], *State of West Bengal Versus Rama Devi & Others* [AIR 2002 Calcutta 235] as well as the judgment of the Patna High Court in *Jaldhari Sah & Others Versus Most. Paro Devi & Others* [Civil Miscellaneous Jurisdiction No.616 of 2016] dated 05.01.2018, the learned counsel submitted that the impugned orders were liable to be set aside. He also referred to the provisions of Sections 137 and 138 of the Indian Evidence Act, 1872 (for short, 'the said Act') as well as the provisions of Order XVIII Rule 2 of the Code of Civil Procedure, 1908 (for short, 'the Code'). It was thus submitted that the plaintiff ought to be directed to cross-examine the defendant no.1 prior in time.

Shri Gopal Sawal, learned counsel for the plaintiff on the other had supported the impugned order. According to him, the defendant no.1 was not supporting the case of the plaintiff. Referring to the written statement of the defendant no.1 it was submitted that what was admitted was merely the description of the suit property and the quantum of rent payable. Referring to the averments in paragraphs 6, 7, 11, 13 and 14 it was submitted that the averments therein clearly indicated that the defendant no.1 was duly opposing the suit as filed. The defendant no.1 had in fact sought dismissal of the suit and therefore as it was the case of the plaintiff that the defendant no.1 had sub-let the suit property to the defendant nos.2 and 3, none of the defendants were supporting the case of the plaintiff. It was his submission that the sequence of cross-examination was not liable to be determined merely on the basis of the pleadings of the parties but it was necessary to take into consideration the conduct of the parties till such evidence was recorded. Since the defendant no.1 in his affidavit in lieu of evidence had denied the case of the plaintiff in its entirety it was clear that the defendant no.1 alongwith the defendant nos.2 and 3 was opposing the entire suit. He referred to the decision of the learned Single Judge in *Shrikant R. Shirdokar Versus Xabirabi Shaik Kadar & Others* [1997 AIHC 1363] to buttress his submission that the sequence of the cross-examination is not dependent only on the pleadings of the parties but all factors which take place at different stages

of the trial have to be considered. The Courts therefore rightly found that since all the defendants were opposing the suit it was necessary for the defendant nos.2 and 3 to cross-examine the defendant no.1 first after which the plaintiff could be called upon to cross-examine the defendant no.1. He therefore submitted that no interference was called for with the impugned orders.

I have heard the learned counsel for the parties at length and I have given due consideration to their respective submissions. I find that the learned Judge of the Small Causes Court has rightly held that as all the defendants were opposing the claim as made by the plaintiff, the defendant nos.2 and 3 ought to first cross-examine the defendant no.1.

Perusal of the pleadings of the plaintiff and the defendant no.1 indicate that the plaintiff has pleaded that an open plot was let out to the defendant no.1 who in turn inducted the defendant nos.2 and 3 as sub-tenants. After determination of the tenancy, the plaintiff sought possession from the defendants jointly and severally. In the written statement of the defendant no.1, he has not disputed the description of the suit property and the quantum of rent payable. He has however disputed/denied the contents of paragraphs 6, 7, 11, 13 and 16 of the plaint averments. He has in fact sought dismissal of the suit. On a reading of the entire written statement, it cannot be said that the defendant no.1 was entirely supporting the case sought to be made out by the plaintiff.

Perusal of the affidavit in lieu of evidence tendered by the defendant no.1 indicates that he has denied that he was inducted as a tenant of any open plot and he has sought to state that he was inducted as a tenant of the constructed portion. The stand taken by the plaintiff has been denied entirely by the defendant no.1 in that affidavit. According to the defendant nos.2 and 3, it is only the pleadings that are material for determining the sequence of cross-examination of a witness while on the other hand, according to the plaintiff besides pleadings, other factors available on record till the stage of evidence as recorded have to be taken into consideration.

Under Section 138 of the said Act, a witness has to be first examined in chief and then if the adverse party so desires that witness can be cross-examined. Under provisions of Order XVIII Rule 2 of the Code, the manner in which the party has a right to begin on the day fixed for hearing of the suit has been laid down. It is a settled practice that the defendants who support the case of the plaintiff are not treated as adverse parties. It is therefore necessary that the parties supporting the plaintiffs are required to first cross-examine the plaintiff after which the adverse party gets a right to cross-examine the plaintiff. This position is clear from the decisions relied upon by the learned counsel for the petitioner as well as the decision in *Bhujang Nathuji Daf vs. Ramkrishna Daulat Daf* [1986 Mh.L.J. 643]. There can be no quarrel with the said proposition.

In the present case however in the pleadings the defendant no.1 has not entirely supported the case of the plaintiff. He merely admits the nature of the suit

property that was let out to him and the quantum of rent agreed to be paid. It is on this basis that the defendant nos.2 and 3 urge that the plaintiff should first the defendant no.1. However in the affidavit in lieu of evidence filed by the defendant no.1 he has opposed the case as set out by the plaintiff entirely. The defendant no.1 therefore cannot be called a proforma defendant. In this factual situation, the ratio of the judgment of learned Single Judge in Shrikant R. Shirdokar (supra) applies to the case in hand. One of the questions considered in that decision was whether the pleadings alone could be treated to be the determinative factor for deciding the sequence of cross-examination. It was held that the sequence of cross-examination cannot be determined solely on the basis of the pleadings and that other factors which take place during the course of trial till the stage the evidence is recorded also have to be taken into consideration. I find that the question as posed has to be answered on this basis. In a given case after filing the written statement, the defendant who has initially sought to support the plaintiff may during the course of the trial take a different stand as is evident in the present case. In that situation, it would be open for the plaintiff to contend that as the said defendant no longer supports the case of the plaintiff, his conduct in that regard is liable to be taken into consideration. Neither the provisions of Section 138 nor the provisions of Order XVIII Rule 2 of the Code restrict the consideration only to the pleadings of the parties. I find that all factors which have come on record during the trial are liable to be taken into consideration to determine as to who is an adverse party while determining the sequence of cross-examination.

In the light of the aforesaid, it is found that the learned Judge of the Small Causes Court and thereafter the learned Judge of the Appellate Court have rightly found that as the defendant no.1 was an adverse party insofar as the plaintiff was concerned, it was necessary for the defendant nos.2 and 3 to first cross-examine the defendant no.1. There is thus no case made out to interfere with the impugned orders. The writ petition is dismissed. In the facts of the case, the trial Court shall take necessary steps to decide the suit by the end of March-2020. No order as to costs.