

(2004) 06 BOM CK 0084

In the Bombay High Court

Case No : Writ Petition No. 2142 of 2004

Sunil Chhatrapal Kedar

APPELLANT

Vs

Y.S. Bagde and Another

RESPONDENT

Date of Decision : 17-06-2004

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 18 Rule 2

Citation : (2005) 1 ALLMR 38 : (2005) 1 CivCC 99 : (2004) 4 MhLj 620

Hon'ble Judges : Anoop V. Mohta, J

Bench : Single Bench

Advocate : Shyam Dewani, for the Appellant; M.V. Samarth and M.B. Agasti, for the Respondent

Judgement

Anoop V. Mohta, J.—Heard learned Counsel for the Parties. Very small controversy is raised in this petition as to which defendant's should be allow to cross examine first, those who support the plaintiff or those who opposes the plaintiff.

2. The petitioner herein, the Ex-Chairman, along with others Ex-Directors of the Nagpur District Central Co-operative Bank, respondent No. 2 herein, are charge-sheeted under the provisions of Maharashtra Co-operative Societies Act, 1960 and Maharashtra Co-operative Societies Rules, 1961 (for short "the Act" and "the Rules" respectively).

3. An application has been filed by the petitioner to cross-examine the witnesses of respondent Bank, after the completion of cross-examination of other respondents. The respondent No. 2 and other respondents have resisted the same basically, on the ground that, initially when the matter was fixed for the cross-examination there was no such objection from the petitioner, to proceed with the matter with such a mode of cross-examination. However, on the date of the cross examination itself, such application was filed. The whole purpose of such application and/or conduct of the petitioner was to prolong the matter. There were various other applications filed to delay the proceedings and same

were disposed of from time to time.

4. In the present matter, therefore, after hearing all the parties by an order dated 15-5-2004, the said application of the petitioner was rejected. While disposing of the said application the learned respondent No. 1, even though referred the cases cited by the petitioner, but failed to take into consideration the basic purpose and finding as declared in those judgments, in support of the issue, i.e. who should cross examine first, amongst the respondents. The respondents are, as contended, one way or the other some are supporting and some are opposing the contesting parties.

5. There is no doubt so far as the trial or such proceedings are concerned, that, the trial Judge is the master of his own proceedings. It is his domain, where he can fix and adjust the scope and mode of cross-examination. Normally there is no question of interference in such matters, as the discretion, in the facts and circumstances of the case, need to be exercised by the concerned trial Court. It is expected that such trial Court in view of the settled provisions and of principles of natural justice, or even otherwise normally, accommodate the concerned Advocates as well as, the parties, subject to convenient and availability. The Court normally proceed with the matter and allow the available parties to cross-examine.

6. However, if such application is made and if case is made out, based on the judgments cited by the petitioner's counsel, in my view there is no reason to discard such application totally. The other contesting respondent or respondents can, if facts and circumstances permit, proceed to cross examine. One cannot overlook the fact that there are more than 29 respondents in this matter. The enquiry is quite serious. Therefore, the matter could have been proceeded for cross-examination by the other respondents, to avoid further delay of the said proceeding,

7. One cannot overlook the conduct of the petitioner. Initially it was agreed unconditionally to proceed with the matter. However, at the later stage, such application was filed. The observation in the order dated 15-5-2004, speaks for itself.

8. Strikingly, this aspect has been already considered by the various courts including our Court, as reported in 1986 M.L.J. 643, Mandabai Ramkrishna Tumsare and Ors. v. Ramlal Hiranmanji Hiwarkar and Ors., based on the Order 18 Rule 2 of Civil Procedure Code, and Section 135 of the Evidence Act. If case is made out then, authorities should consider such judgment, while dealing with such application. Para Nos. 9 and 10 is clear, and the same is reproduced as under :

"9. Rule 2 of Order 18, CPC runs as under :

"2.(1) On the day fixed for hearing of the suit or on any other day to which the hearing is adjourned, the party having the right to begin shall state his case and

produce his evidence in support of the issues which he is bound to prove.

(2) The other party shall then state his case and produce his evidence [if any] and many then address the court generally on the whole case.

(3) The party beginning may then reply generally on the whole case.

(4) Notwithstanding anything contained in this rule, the Court may, for reasons to be recorded, direct or permit any party to examine any witness at any stage."

Reading the two rules of Order 18 together, it is apparent that in a given case where he has admitted the facts alleged in the plaint, the defendant has a right to begin provided he contends that either in point of law or on some additional facts alleged by the defendant, the plaintiff is not entitled to any part of any relief. Further, it is apparent that after deciding which party has a right to begin, the court has to permit that party having the right to begin to state his case and produce his evidence in support of the issues, the burden of which is cast upon him. It is after this stage that "the other party" shall then state his case and produce his evidence and address the Court generally on the whole case. Sub-rule (4) of Rule 2 categorically states, notwithstanding anything contained in this rule, the Court may, for reasons to be recorded, direct or permit any party to examine any witness at any stage. Thus, as to the order in which evidence is to be taken, the rule is that the plaintiff and such of the defendants as support his case, wholly or in the party, must address the Court and call their evidence and then "the other party" i.e. the other defendants contesting the plaintiffs claim should address the court and call their evidence. Examination-in-chief of a witness, cross-examination by the adverse party and re-examination by the party who called the witness are defined in Section 137 of the Evidence Act. u/s 138 of the Evidence Act, witnesses shall be first examined in chief, then [if the adverse party so desires] cross-examined, then [if the party calling him so desires] re-examined. It is in the light of these provisions of the Evidence Act and Order 18 of Civil Procedure Code, it appears that the trial Court has to bear in mind which is the party who has a right to begin and which is the adverse party who has a right to cross-examine." "10. In the circumstances of the present case, it is apparent that the plaintiff's case is fully supported by defendants 6 to 8. They are, therefore, not an adverse party to the plaint, but are proforma defendants through whom the plaintiff is claiming a right to the property. 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 plaintiff's 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 examined the plaintiff subsequently inasmuch as they are interested in the claim of the plaintiff. By way of cross-examination, the supporting defendants can put leading questions and get the necessary answers. It is for this purpose, to meet the ends of justice, the

trial Court should permit the contesting defendants to cross-examine the plaintiff last, particularly when the adverse party so desires. Thus if there are more than one defendant in a such, the order of their cross-examination is a matter which rests on the discretion of the Judge. To put it in other words, cross-examination as defined in Section 137 of the Evidence Act, is the examination of the witness by "adverse party" and the defendants who are supporting the plaintiffs case are not an adverse party. Therefore, their formal cross-examination should be brought on record and it is then the "contesting defendants". Which is the "real adverse party" should be directed to cross-examine the plaintiff."

9. The issue in respect of preference in leading evidence is also decided in *Jhumpa Bewa and Others Vs. Sahadeb Rout and Others*, . In the facts and circumstances of the case, the court can consider to allow or refuse the particular defendants to cross-examine before other defendants, basically on the principle that the party supporting the plaintiff should first lead the evidence, before the defendants opposing the plaintiff. The relevant para No. 4 is reproduced as under:

"4. According to the scheme of Rule 2, Order 18 of the CPC ("Code" for short), on the day fixed for the hearing of the suit or any other day to which the hearing is adjourned, the party having the right to begin shall state his case and produce his evidence in support of the issues which he is bound to prove. Thereafter, the other party shall state his case and produce his evidence, if any, and may then address the court generally on the whole case. A further opportunity is given to the party beginning the case to reply generally on the whole case. According to this scheme, the plaintiff of a suit leads evidence on the day of hearing. After he closes his evidence, if there are several defendants and they independently contest the suit, they lead evidence one after the other. But according to the rule of prudence there is an exception. The exception has been best illustrated by a decision reported in *Shah Hiralal Himatlal and Others Vs. M.G. Pathak and Others*, ."

10. Lastly, in the basic judgment as reported in *Shah Hiralal Himatlal and Others Vs. M.G. Pathak and Others*, , while dealing with the provisions of Order 18 Rule 2, in cases where there are several defendants, some supports the plaintiff and some opposes the same, what should be the order of leading evidence or cross examination amongst such defendants, the principle as laid down is reproduced as under :

"4. So far as the defendants go, the question which of the defendants should begin has not been dealt with in Order 18, Civil Procedure Code. But on general principle, if any of the defendants supports the plaintiff in whole or in part, then he should address the court and lead his evidence first before the other defendants who do not support wholly or in part the plaintiffs case. The order in which the defendants lead evidence becomes important only when some of them support the case of the plaintiffs in whole or in part while the others do not. If all the defendants completely oppose the plaintiff's case, then the question of order of leading evidence amongst the defendants is immaterial. It is only when the

defendants are divided into two groups, one group consisting of the defendants supporting the plaintiff's case in any part, that the question of order of leading evidence becomes important. In such cases among defendants the order of leading evidence should be as follows :

1. Those defendants who fully support the case of the plaintiff;
2. Those defendants who partly support the case of the plaintiff;
3. Those defendants who do not support the case of the plaintiff in any part."

11. I am of the view that, admittedly the petitioner was the Ex-Chairman of the respondent Bank at the relevant time. Whatever may be the consequences of the charges framed against all other respondents, ultimate corporate responsibility and endorsement of Ex-Chairman, cannot be overlooked. Therefore it is expected that such Authorities should consider the principles as referred in the judgments delivered by the High Courts, while conducting the trial.

12. In view of this, I am declined to pass any order or any specific order in the matter.

13. However, as observed above, the learned Authority respondent No. 1, should take into consideration above principles and if case is made out by the parties and should accordingly proceed with the trial, without delaying the matter further.

14. Petition was filed on 21-5-2004 and above named two respondents were only made party. Notice was issued for final disposal of the petition, and accordingly the matter is being heard.

15. It may be noted that an application bearing Civil Application No. 3533 of 2004, for addition of parties and amendment has been filed on 7-6-2004, for adding other respondents/Ex-Directors, as party in the cause title of the petition. At this stage I am declined to pass any order on this belated and afterthought application, as main petition itself is disposed of as observed above. As objected by the respondents, this will again lead to delay the proceeding, therefore, without going into further controversy on this application, in view of the above circumstances, the said application is rejected.

16. With these observations the petition itself is disposed of. No order as to cost.

17. Steno copy of this order, duly authenticated be furnished to the learned Advocates for the parties.