

(1985) 09 BOM CK 0049

Bombay High Court (Nagpur Bench)

Case No: C.R. Application No. 42 of 1982

Mandabai Ramkrishna Tumsare
and others

APPELLANT

Vs

Ramlal Hiranmanji Hiwarkar and
others

RESPONDENT

Date of Decision: Sept. 12, 1985

Acts Referred:

- Evidence Act, 1872 - Section 135, 136, 137, 138

Citation: (1986) MhLj 643

Hon'ble Judges: S.W. Puranik, J

Bench: Single Bench

Advocate: S.G. Ghate, for the Appellant; R.D. Najbale for Opponent No. 1, M.B. Lapkale and V.D. Muley for Opponents 2 (a) to 2(c), for the Respondent

Judgement

S.W. Puranik, J.

An important question regarding the procedure to be adopted while recording evidence of the parties in a civil suit and the order in which cross examination of witnesses is to be recorded, has been raised in this revision.

2. The applicants are original defendants 1 to 5 in Civil Suit No. 112 of 1976 on the file of Civil Judge, Junior Division, Saoner. Non-applicant No. 1 is the original plaintiff, while non-applicants 2(a) to 2(c) are the legal representatives of original defendant No. 6.

3. To appreciate the contention raised on behalf of the applicants, it would be necessary to briefly narrate the facts :

The plaintiff filed a suit for declaration and possession against the applicants-defendants 1 to 5. It was the case of the plaintiff that he purchased a portion of the suit house from Chirkut-original defendant No. 6 and that he placed

the Plaintiff in possession of the same. It is further alleged by the plaintiff that he permitted defendants 1 to 3 to occupy one room out of the said house. However, according to the plaintiff, defendants 1 to 5 forcibly occupied the suit portion and removed the Plaintiffs movable articles described in the suit schedule and hence the plaintiff had filed the suit for possession and declaration against them.

4. The Plaintiffs vendor Chirkut was impleaded as defendant No. 6. He supported the plaintiffs claim in toto. Original defendant No. 6, however, expired and his legal representatives were brought on record. The legal representatives of deceased Chirkut adopted the written statement filed by deceased Chirkut as their own written statement.

5. Thus it transpires that the plaintiffs case is supported by deceased Chirkut and his legal representatives i.e. defendants 6 to 8, while the defendants 1 to 5, the present applicants, are opposing the plaintiffs case.

6. During the course of the proceedings, the parties went to trial and the plaintiff was examined. Defendants 1 to 5 applied before the trial Court that since defendants 6 to 8 are supporting the case of the plaintiff, they should be directed to cross examine the plaintiff first and then the defendants 1 to 5 should be directed to cross-examine the plaintiff. The learned Judge, however, by the impugned order dated 15-12-1981, rejected the application of defendants 1 to 5 and directed that cross-examination of the plaintiff would be done by all defendants in sequence in serial order. It is in the light of this stand that the applicants have come up in this revision.

7. I have heard the counsel of both the parties and perused the impugned order. It is contended that wide powers have been bestowed upon the trial Court while recording evidence under Sections 135 and 136 of the Evidence Act and it would be a sound principle of law and practice that after the proforma defendants cross examine the plaintiff, then alone the contesting defendants should be asked to cross examine the plaintiff.

8. Order 18 Rules 1 and 2 relate to the stage of hearing of the suit and examination of witnesses. Rule 1 of Order 18 states that the plaintiff has the right to begin unless the defendant admits the facts alleged by the plaintiff and 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 the relief which he seeks, in which case the defendant has the right to begin.

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

2. (1) On the day fixed for the 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 may 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 part, 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 plaintiffs case is fully supported by defendants 6 to 8. They are, therefore, not an adverse party to the plaint, but are profound defendants through whom the plaintiff is claiming : 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 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. 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 suit, 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.

11. Since the question raised is of substantial importance in the matter of practice and procedure before the trial Court, I have given my detailed reasons. I find that the order of the trial Court impugned in this revision is erroneous. The order impugned dated 13-12-1981 rejecting the application of the defendants 1 to 5 is quashed and set aside. The trial Court is directed to call upon the defendants 6 to 8 to cross-examine the plaintiff and then call upon the contesting defendants 1 to 5 to cross-examine the plaintiff and his witnesses in that sequence. There shall be no order as to costs. Rule absolute as above.