

IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO. 637 OF 2015

PIE DADE FERNANDES.

... Petitioner

Versus

CHARLENE LEITAO.

... Respondent

Mr. C. A. Coutinho, Advocate for the petitioner.
Mr. Sudin Usgaonkar, Senior Advocate with Mr. A. Borkar,
Advocate for the respondent.

Coram:- C. V. BHADANG, J.

Date:- 7th October, 2015

P.C.

By this petition, the petitioner/ original defendant is challenging the order dated 23/07/2015, passed by the learned Senior Civil Judge at Margao in Regular Civil Suit No.51/2010/A. By the impugned order, the Trial Court has dismissed the application filed by the petitioner, for recalling the plaintiff (PW1) for further cross-examination.

2. The brief facts are that the respondent has filed a suit against the petitioner for the relief of injunction and alternatively, for recovery of possession and that suit was decreed. The said judgment and decree was challenged by the petitioner in Regular Civil Appeal No.482/2010. It appears that during pendency of the appeal, the petitioner filed an application for amendment of the written statement, inter alia, incorporating a defence that the birth registration

certificate of Charlene Fernandes as Charlene Leitao (at Exh.32) was obtained by fraud and misrepresentation. That application was dismissed by the Appellate Court. However, in W.P.no.357/2011, by an order dated 07/10/2011, the amendment application came to be allowed by this Court. Subsequently, the Appellate Court, by a judgment and order dated 07/01/2012, allowed the appeal and while setting aside the impugned judgment and order dated 31/07/2010, passed by the learned Trial Court, directed the Trial Court to allow the parties to lead further evidence and decide the suit along with issues, which may arise on account of the amendment.

3. It appears that after the remand, the learned Trial Court framed the following three additional issues :

- "1. Whether the defendants prove that the birth registration of Charlene Fernandes as Charlene Leitao at exbt.32 was obtained by misrepresentation and fraud?
2. Whether the defendants prove that Executive Magistrate did not have the power, jurisdiction and authority to order registration of Birth?
3. Whether the defendants prove that Charlene born on 2.5.1981 being daughter of Conceicao Fernandes and Joseph Fernandes is the same Charlene Leitao, the plaintiff wrongly shown to him the daughter of Conceicao Leitao and Maria Candida?"

4. The petitioner thereafter filed an application for recall of PW1, with a contention that in view of framing of the additional issues, it is necessary to recall PW1, so as to subject him for further cross-examination. The learned Trial Court, by the impugned order dated 23/07/2015, has dismissed the application on the ground that burden to prove the additional issues lay on the petitioner and Order XVIII, Rule 3 of C.P.C. enables the plaintiff to lead such evidence only in rebuttal to the evidence led by the defendant on such issues. Feeling aggrieved, the petitioner is before this Court.

5. I have heard Shri Coutinho, the learned Counsel for the petitioner and Shri Usgaonkar, the learned Senior Counsel for the respondent. With the assistance of the learned Counsel for the parties, I have perused the copies of the relevant record and the impugned order.

6. It is submitted by Shri Coutinho, the learned Counsel appearing for the petitioner that earlier cross-examination of PW1 was restricted to the issues which arose in the suit prior to the amendment of the written statement. It is submitted that once the amendment to the written statement was allowed and three additional issues were framed, it was necessary for the Court to permit further cross-examination of PW1. The learned Counsel would submit that although the burden to prove these issues lay on the petitioner, a party can discharge such burden both on the basis of cross-examination of the adversary as also by leading independent

evidence. In short, it is submitted that in such circumstances, the permission to cross-examine could not have been denied only on the ground that burden lay on the petitioner.

7. On the contrary, it is submitted by Shri Usgaonkar, the learned Senior Counsel for the respondent that under Order XVIII, Rule 3 of C.P.C., a party can justifiably close its leading case, leaving it for the adversary to lead evidence in respect of the issues, the burden of which lies on the said other party. It is submitted that once the Trial Court has found that the burden to prove all the three additional issues lay on the petitioner, the petitioner could not justifiably insist for PW1 being recalled for cross-examination.

8. I have considered the rival circumstances and the submissions made. I have also perused the additional issues, which arise for determination.

9. It is evident that the burden to prove all these issues lies on the petitioner, who is the original defendant. Section 102 of the Indian Evidence Act which provides for burden of proof, it is provided that the burden in a suit or proceedings lies on that person, who would fail, if no evidence at all were given by either side. In a sense, the right to begin and the aspect about burden of proof are interconnected, in as much as the party on whom the burden of proof lies to prove a particular issue, will have to begin its evidence on

such an issue. Merely because the additional issues have arisen on account of the amendment to the written statement being allowed at the appellate stage, in my considered view, would not entitle the petitioner at this stage, to insist for recall of PW1 before the petitioner leads his evidence on the issues framed.

10. I have carefully gone through the impugned order and I do not find that it demonstrates any irregularity as to exercise of jurisdiction, so as to warrant interference in extraordinary jurisdiction under Article 227 of the Constitution. However, it would be open to the petitioner to seek such recall after the petitioner leads evidence and if any such application is made, the respondent would be entitled to contest the same on all available grounds and the Trial Court shall decide any such application, if filed, on its own merits. With this, the Writ Petition is dismissed, with no order as to costs.

C. V. BHADANG, J.

SMA