

IN THE HIGH COURT OF BOMBAY AT GOA**WRIT PETITION NO. 711 OF 2015.**

1. Shri Augustinho C. Braganza
Son of Caetano Braganza,
Major, married and
2. Smt. Magdalena Braganza,
Wife of Augustinho Braganza,
Major, Married, Housewife,
Both Indian National,
Residence of H. No. 1104,
Zudo Bairro, St. Cruz, Tiswadi-Goa Petitioners

v/s

1. Shri. Sebastiao C. Braganza
Son of Caetano Braganza,
Major, married, Service and
2. Smt. Carmina Braganza,
Wife of Sebastiao Braganza,
Major, Married, Housewife,
Both Indian national,
Residence of H. No. 1104,
Zudo Bairro, St. Cruz, Tiswadi-Goa. Respondents.

Shri Nilesh Shirodkar, Advocate for the Petitioner.
Shri Joaquim Godinho, Advocate for the Respondents.

Coram:- C. V. BHADANG, J.

Reserved on: 04.04.2016

Pronounced on: 04.05.2016

JUDGMENT

Rule. Rule made returnable forthwith. The learned
Counsel for the Respondents waive service. Heard finally

by consent of the parties.

2. By this petition the Petitioners who are original plaintiffs are challenging the Order dated 30.06.2015 passed by the learned Civil Judge Junior Division at Panaji in Regular Civil Suit No. 3/2006/D. By the impugned order application Exhibit-78 filed by the Respondent/Defendant has been allowed and the suit of the Petitioner is dismissed.

3. The brief facts are that the Petitioners have instituted the aforesaid suit against the Respondents for partition and other reliefs in which the Petitioner No. 1 was examined as PW-1. It appears that the Respondents had moved an amendment in respect of certain document which was permitted to be produced on record. Thereafter, Respondent applied to the learned Trial Court to recall PW-1 for cross-examination which was allowed. Indisputably, the said Order has been confirmed by this Court in Writ Petition No. 492/2014 on 20.02.2015. Be that as it may, in the meantime, PW-1 had taken over overseas assignment and inspite of grant of various opportunites, he did not remain present before the Court

for cross-examination. The Plaintiff No. 2 who is the wife of Plaintiff no. 1 (PW-1) and also his power of attorney holder had shown willingness to examine herself instead of PW-1. The Trial Court found that this only showed that PW-1 had no intention to comply the Order of the Court and is deliberately evading the process. The Trial Court also found that no plausible explanation has come forth from the Plaintiff's side to "hold differently and to take a lenient view of the matter". It was in these circumstances that an application Exhibit-78 filed by the Respondents for dismissal of the suit has found favour with the Trial Court whereby the suit has been dismissed purportedly under Order 39 Rule 11 of CPC. The Trial Court has found that under Order 39, Rule 11 when the Court orders any party to do or not to do a thing during the pendency of suit and the party commits default or contravenes the Order, the provisions of Order 39 Rule 11 can be invoked. The Trial Court has also referred to definition of an 'Order' as appearing under section 2(14) of CPC to mean a formal expression of decision of Civil Court, which is not a decree. The Trial Court has thus found that the Order dated 11.10.2013 by which the PW-1 was recalled, falls within the definition of Order

and it would be an interlocutory Order, breach of which would entail consequences under Order 39 Rule 11 of CPC.

4. I have heard learned Counsel for the Petitioners and the learned Counsel appearing for the Respondents. The learned Counsel for the Petitioner has placed reliance on various decisions as under:

(i) **Sheshrao Raibhan Ingale v/s. Shilpa Sheshrao Ingale**, reported in 2005(2) ALL MR 184.

(ii) **Ramavatrao Surajmal Modi V/s. Mulchand Surajmal Modi**, reported in 2004(1) ALL MR 822.

(iii) **Ganpat Shankar Waghmare v/s. Smt. Anjalibai Rao Waghmare & Anr.**, reported in 2001 (3) ALL MR 149.

(iv) **Sitabai Kerba Deotarse And Ors. V/s. Anil Sabehrao Deotarse And Ors.**, reported in 2006 (5) BomCR 833.

(v) **Ratnakar D. Patade V/s. Smita Pandurang Dalvi And Ors.**, reported in AIR 1996 Bom 69.

He submits that failure to attend in pursuance of an Order of recall cannot lead to the consequences under

Order 39 Rule 11 of CPC.

5. The learned Counsel for the Respondents supports the impugned order. I have considered the rival circumstances and the submissions made and I do not find that the impugned order can be sustained. Normally, it is for the parties to the suit to decide which evidence to be led and which witness to be examined. Section 120 of the Evidence Act shows that the parties to the Civil Suit and their wives or husbands shall be competent witnesses. In the present case the Plaintiff No 2, apart from being the wife is also the power of attorney holder of the Plaintiff No. 1. She had expressed willingness to examine herself on behalf of the Petitioner. The only question is whether a breach of the Order (passed at the instance of the Respondents/Defendants permitting recall of the Plaintiff No. 1 for cross-examination) would entail consequences under Order 39 Rule 11 CPC or the failure to remain present for cross-examination in such case, would only entitle the Court to draw adverse inference if any, as may be permissible in the facts and circumstances of the case. In my considered view, the Order passed at the instance of one of the parties to the

suit seeking recall of a witness of the adversary for subjecting such witness for cross-examination cannot be an Order which is contemplated under Order 39 Rule 11 of CPC. The Court in adversarial litigation only acts on the basis of the request by one of the parties seeking to recall a witness for subjecting such witness for cross-examination. This cannot be said to be an Order by which Court has directed to do or not to do a thing during the pendency of the suit.

6. It is not necessary to express any opinion as to what would be the nature of orders, the breach of which, would entail consequences under Order 39 Rule 11 of CPC. For the present purpose suffice it to mention, that in the present case the only course open to the Respondents/Defendants in this case would be to insist for drawing appropriate adverse inference, if any.

7. In the given facts it would not be necessary to refer to the decisions relied upon in details. In the case of Sheshrao Ingale (supra) it has been held that striking out defence does not necessarily mean that plaintiff's suit automatically stands decreed. In the

case of Ganpat Shankar Waghmare (supra) it has been held that a breach of direction issued by Court results into defence of the defendants being struck off and the defendant would have no right to cross-examine the plaintiff or his witnesses. In the case of Sitabai Kerba Deotarse (supra) there was an Order passed restraining the defendant nos. 4 to 10 from alienating the suit property and there was no serious dispute that subsequent thereto the property was transferred by defendant no. 4 to 10. The case of Ratnakar D. Patade (supra) has been since overruled by the division bench of this Court, in the case of Ramavatar Surajmal Modi (supra). The division bench of this Court holds that the word 'may' in sub-rule (1) of Rule 11 of Order 39 of the CPC merely vests power in the Court to stike of defence. It does not oblige it to do so in every case of default. It can thus be seen that the division bench has held that the power under Order 39 Rule 11 is discretionary and it is not mandatory for the court in every case to pass such order. I find that the impugned order proceeds on the erroneous assumption that breach of the order recalling a witness would entail consequences under Order 39 Rule 11 of the Code of Civil Procedure when, in fact, this may

only result in the Court drawing appropriate adverse inference (in the event the witness remains absent). In the facts and circumstances of the case, I find that the impugned order cannot be sustained and will have to be set aside.

8. In the result, the following Order is passed:

O R D E R

(i) The writ petition is allowed. The impugned order is hereby set aside.

(ii) Regular Civil Suit No. 3/2006/D is restored to file of the learned Civil Judge Senior Division at Panaji for disposal according to law. It would be open for the learned Trial Court to pass appropriate orders closing the deposition of PW-1 in view of his failure to attend for subjecting himself to further cross-examination. However, the Trial Court will have to permit the Plaintiffs to lead any other evidence, if so tendered.

iii) It will also be open for the Trial Court to draw appropriate adverse inference, if any, on account of the failure of the Petitioner to subject

himself to further cross-examination, which can be done at the final disposal of the Suit.

(iii) Rule is made absolute in the aforesaid terms, with no order as to costs.

C. V. BHADANG, J.

msr.