

IN THE HIGH COURT OF BOMBAY AT GOA**WRIT PETITION NO.928 OF 2016**

MR. SANTOSH VICTORIO FRANCISCO
LOURENCO LOBO AND ANR.

...PETITIONERS

V/S

EL SHADDAI CHARITABLE
TRUST AND 8 ORS.

...RESPONDENTS

Shri J. Vaz, Advocate for the Petitioners.

Shri Parag Rao, Advocate for Respondents No.1 & 2.

Shri Vishwadh Sardessai, Additional Government Advocate for Respondents No.7 & 8.

CORAM : C.V. BHADANG, J.

Reserved on : 17th OCTOBER, 2016

Pronounced on : 19th OCTOBER, 2016

ORDER :

The petitioners have filed Civil Suit No.1/2012 against the respondents for declaration, mandatory and permanent prohibitory injunction. The respondent nos.1 & 2 are the original defendants nos.8 & 9, while respondent nos.7 & 8 are original defendant nos.5 & 6 before the trial Court.

2. In short, according to the petitioners, they are the owners of chalta no.74 of PT sheet

no.133 of Gaunsavoddo which property is known as "Aradichem Bata". According to the petitioners, Aradichem Bata corresponds to old cadastral Survey No.2250 and 2251 which was shown in the name of Maria Bonifacia and others. Maria Bonifacia is the grandmother of the petitioner no.1. Further, according to the petitioners, the defendant nos.1 & 2 have entered into fraudulent Sale Deed in respect of the property bearing old cadastral Survey No.2252 which is known as "Agalichem Bhat" belonging to erstwhile owner Joao Bernado. In short, according to the petitioners, the old cadastral survey no.2252 does not correspond to the present chalta no.74 of PT sheet no.133. The petitioners are inter alia seeking a declaration that the Sale Deed dated 25/06/2007 and the order of the City Survey Officer dated 31/12/1986 is null and void along with some other reliefs.

3. The respondent nos.1 & 2 (defendant nos.8 & 9) have filed a written statement

contesting the suit. The respondent nos.1 & 2 are staking a claim to the land chalta no.68 of PT sheet no.133 while the respondent nos.7 & 8 (original defendant nos.5 & 6) are claiming 900 square metres of land from out of chalta no.68 of PT sheet no.133.

4. At the trial, on behalf of the respondent nos.7 & 8, DW1 Anand Vaingankar was examined. When the said witness was to be cross-examined on behalf of the petitioners/plaintiffs, it was contended that the respondent nos.7 & 8, who are not supporting the petitioners and in fact had adopted the cross-examination of the petitioners' witness as conducted on behalf of the respondent nos.1 & 2, it is the respondent nos.1 & 2 who had to cross-examine DW1 Anand Vaigankar prior to the cross-examination by the petitioners. In short, according to the petitioners there is a collusion between respondent nos.7 & 8 on one hand and the respondent nos.1 & 2, which would

require the respondent nos.1 & 2 to cross-examine DW1 prior to the cross-examination of the petitioners. This objection was raised on 27/07/2006 and was rejected by the Trial Court. The Trial Court found that it is too early to decide whether there is a collusion between the two sets of the respondents. The Trial Court has further found that in any case if the respondent nos.7 & 8 have adopted the cross-examination of respondent nos.1 & 2 it is a reason to establish that the lis is between the plaintiffs and the two sets of the defendants. The Trial Court has also noticed the submission on behalf of the respondent nos.7 & 8 that the learned Counsel for these respondents had conducted an independent cross-examination of PW1 and in respect of PW2 who was an expert witness he adopted the cross-examination conducted by the respondents nos.1 & 2. Thus, the learned Trial Court has disallowed the objection raised on behalf of the petitioners in view of order 18 Rule 1 of CPC.

5. It appears that the learned Counsel for the petitioners then cross-examined DW1 followed by the cross-examination on behalf of respondent nos.1 & 2 and the evidence of DW1 was concluded on 30/07/2016. Thereafter, the petitioners had filed an application to cross-examine DW1 and to take on record the documents as mentioned in the application exhibit 187. This application was opposed both on behalf of the respondent nos.1 & 2 and 7 & 8. The learned Trial Court by the impugned order dated 21/09/2016 has dismissed the application exhibit 187 which brings the petitioner to this Court.

6. I have heard Shri Vaz, the learned Counsel for the petitioners, Shri Rao, the learned Counsel for the respondent nos.1 & 2 and Shri Sardesai, the learned Additional Government Advocate for respondent nos.7 & 8. With the assistance of the learned Counsel for the parties, I have gone through the records and

perused the impugned order passed.

7. It is submitted by Shri Vaz, the learned Counsel for the petitioners that there is a collusion between the respondent nos.1 & 2 and the respondent nos.7 & 8 which is apparent from the fact that the cross-examination of PW2 by the respondent nos.1 & 2 was adopted by respondent nos.7 & 8. It is submitted that although respondent nos.7 & 8 are government authorities they are acting in collusion with respondent nos.1 & 2 to deprive the petitioners of their legitimate right in respect of the suit property. It is submitted that it is an established principle that defendants having a common interest or those in collusion have to cross-examine first before the plaintiff can be asked to cross-examine the witness. It is submitted that the Trial Court was in error in asking the petitioners to cross-examine DW1 prior to the cross-examination by the respondent nos.1 & 2. On behalf of the petitioners,

reliance is placed on the decision of the Supreme Court in the case of **Rammi alias Rameshwar V/s. State of M.P. (1999) 8 SCC 649, Bhujang Nathuji Daf and Anr. V/s. Ramkrishna Daulat Daf and Ors. 2009 (1) Mh.L.J. 683** and **Smt. Pritabai Suryakant Shetgaonkar & Ors. V/s. Ramchandra Narbarao Sardessai & Ors.** in Writ Petition No.292/2013.

8. On the contrary, the learned Counsel for the respondent nos.1 & 2 has submitted that there is no collusion as such between these respondents and the respondent nos.7 & 8. It is pointed out that on the contrary, the respondent nos.7 & 8 are claiming 900 square metres of land from out of chalta no.68 of PT sheet no.133 which is claimed by the respondent nos.1 & 2. It is submitted that this would show that in fact there is conflict of interest between the respondent nos.1 & 2 and respondent nos.7 & 8. The learned Counsel has pointed out that the respondent nos.7 & 8 had adopted the cross-

examination only so far as the witness PW2 is considered. However, the respondent nos.7 & 8 had independently cross-examined PW1. He submitted that the Trial Court has rightly come to the conclusion that there is a triangular contest and the impugned order does not require any interference.

9. The learned for the respondent nos.7 & 8 has submitted that the Government is claiming about 900 square metres of land from the same land as claimed by the respondent nos.1 & 2 namely Chalta No.68 of PT sheet no.133. It is submitted that it is the petitioners' case that chalta no.68 of PT sheet no.133 corresponds to old cadastral no.2250 and 2251 and, as such, there is a direct conflict between the petitioners and the respondent nos.1 & 2 and 7 & 8. It is submitted that the petitioners had subjected themselves to the order of the Trial Court on 27/07/2016 and had in fact cross-examined DW1 and now cannot seek recall of the

said witness for further cross-examination.

10. I have carefully considered the circumstances and the submissions made. There cannot be any manner of dispute with the proposition that if there is a collusion between two defendants or if the interest of such defendants are common, the plaintiff would be the last to cross-examine the witness of any of such defendants. In other words, a defendant in collusion or having common interest has to cross-examine the witness for the co-defendant prior to the cross-examination by the plaintiffs. This, however, presupposes that there is a collusion or common interest shown between the two co-defendants. Thus, the prerogative of cross-examining the witness of a particular defendant after the co-defendant, cross-examines such witness, can be enjoyed by plaintiff provided such a collusion inter say between the defendants is established. In the present case, the Trial Court has come to the

conclusion that prima facie it is a triangular dispute/contest inasmuch as the respondent nos.7 & 8 are claiming about 900 square metres of land from out of the same property which is exclusively claimed by the respondent nos.1 & 2. If that be so, no exception can be taken to the finding recorded by the Trial Court in this regard. It is significant to note that in the case of **Bhujang Nathuji Daf** (supra), on which strong reliance is placed on behalf of the petitioners, the defendant no.1 was the predecessor in title of the defendant nos.2 & 3 which would be a clear indicator of the interest of the defendant no.1 and those of 2 & 3 being common. Even in the case of **Smt. Pritabai Suryakant Shetgaonkar & Ors.** (supra), on facts, it was held that the interest was common.

11. In the present case, as noticed earlier, there is a dispute between the respondent nos.7 & 8 and the respondent nos.1 & 2 to the extent of 900 square metres of land from out of chalta

no.68 of PT sheet no.133. It would be further significant to note that the petitioner had raised such an objection on 27/07/2016 which was rejected by the Trial Court. The petitioner subjected himself to this order and proceeded with the cross-examination of DW1 which was followed by the cross-examination on behalf of the respondents no.1 & 2 and the evidence of the said witness as well as the evidence on behalf of the respondent nos.5 & 6 was closed on 30/07/2016 when the application exhibit 187 came to be filed. This is an additional reason why I am not inclined to interfere with the impugned order.

12. Reliance placed on the decision in the case of **Rammi alias Rameshwar** (supra) is misplaced. The question in the case of **Rammi alias Rameshwar** (supra) was regarding re-examination of witness under Section 138 of the Evidence Act in which the Hon'ble Apex Court had held that such re-examination is not confined to

clarification of ambiguities arising in cross-examination and new matter can be elucidated with the permission of the Court and the Court must be liberal in granting such permission. There is an apparent distinction between recall of a witness for further cross-examination on the ground of the precedence and sequence of the cross-examination and a case where a party seeks re-examination of its own witness. It is trite that a claim for re-examination is by a party of its own witness and not by an adversary, as in the present case.

13. I have carefully gone through the impugned order and I do not find that it suffers from any infirmity. The petition is without any merit and it is accordingly dismissed with no order as to costs.

C.V. BHADANG, J.

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