

IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO. 746 OF 2017

BENEDITO COSTA (DEC) THR. HIS LRS.
AND ANR.,

... Petitioners

Versus

SEBASTIAO FERNANDES AND 2 ORS.,

... Respondents

Mr. Sudesh Manohar Usgaonkar with Ms. Rosette Pereira,
Advocates for the Petitioners.

Mr. Galileo Teles, Advocate for the Respondent No. 1.

Coram:- C. V. BHADANG, J.

Date:- 9th October 2017

ORAL ORDER:

The challenge in this petition, under Article 227 of the Constitution of India is to the order dated 07.08.2017 (below Exhibit-D/82), by which the Trial Court has allowed the application of the respondent no. 1, (original defendant no. 1), for recalling PW-1 for cross examination.

2. The brief facts are that the petitioners and the respondent nos. 2 and 3 have filed a suit for declaration that the respondent no. 1 has no right to stay in the suit house or the portion thereof and seeking his eviction. The respondent no. 1 filed his written statement and resisted the suit inter alia on the ground that the father of the respondent no. 1 was residing in the portion of the house, with the consent of the plaintiffs. This was much prior to

liberation and it was plaintiff no. 1, who had permitted the father of the respondent no. 1 i.e. Agostinho Fernandes to stay in the suit house as a mundkar.

3. On the basis of the rival pleadings, the learned Trial Court framed as many as eight issues including issue no. 7, as to whether plaintiff no. 1, permitted the father of the respondent no. 1 to reside in the suit house as a mundkar and whether, respondent no. 1 continues to reside therein as such. The said issue was referred to the Mamlatdar.

4. The learned Mamlatdar decided the issue in favour of the respondent no. 1, against which the petitioners preferred an appeal, which was dismissed. Hence, the petitioners filed a revision application against the order of the Mamlatdar, which has been allowed and thus the issue no. 7, stood answered in the negative. The respondent no. 1 has challenged the same before this Court in Writ Petition No. 67/2016, which is pending.

5. Insofar as the present petition is concerned, it appears that the evidence of PW-1 was recorded on 20.07.2015, on which date the learned Counsel for the respondent no. 1 reported that he has no instructions from the respondent no. 1. The matter was adjourned to 29.07.2015, for the evidence of respondent no. 1. On that day, the respondent no. 1 filed an application

(Exhibit-D/58), seeking time to lead evidence. Thereafter again, time was sought on 11.08.2015 when the matter was adjourned to 14.09.2015. On that day, the learned Trial Court after noticing that despite opportunity, the respondent no. 1 has failed to furnish a copy of the affidavit in evidence (of his witness), closed the evidence of the respondent no. 1 and the matter was adjourned for final arguments and thereafter for judgment. The record however discloses that the learned Trial Court allowed the application (Exhibit-D/60) subject to costs and allowed the respondent no. 1 to lead evidence. Subsequently, the plaintiff had filed an application to carry out an amendment, which was allowed. Again, the respondent no. 1 sought time on the same day i.e. on 22.01.2016 to lead evidence. The record also discloses that on 16.12.2016, the petitioners/plaintiffs were allowed to produce certain documents and to reopen their evidence to produce the said documents. It was finally on 28.07.2017 that the respondent no. 1 filed an application (Exhibit-D/82) under Order XVIII, Rule 17 of CPC for recalling PW-1 for cross examination, which has been allowed by the impugned order. Hence, this petition.

6. I have heard Shri Usgoankar, the learned Counsel for the petitioners and Shri Teles, the learned Counsel for the respondent no. 1. Perused record and the impugned order passed.

7. It is strenuously urged on behalf of the petitioners that the respondent no. 1 is leaving no stone unturned to see that the proceedings in the suit are prolonged. It is submitted that the respondent no. 1 was not present, when the evidence of PW-1 was first recorded on 20.07.2015 and his Advocate had reported no instructions. It is submitted that subsequently, the respondent no. 1 sought several adjournments for leading his evidence and then filed application (Exhibit-D/82) on 28.07.2017, seeking recall of PW-1, which ought not to have been allowed. Secondly, it is contended that once the issue of mundkarship is decided against the respondent no. 1, there is no scope for cross examination of PW-1.

8. On the contrary, it is submitted by Shri Teles, the learned Counsel for the respondent no. 1 that the scope of potential cross examination, cannot be considered in deciding whether PW-1 is to be recalled or not. It is submitted that once the Trial Court has exercised the discretion in permitting cross examination, subject to costs, this Court may not interfere unless the exercise of discretion is shown to be perverse.

9. I have carefully considered the rival circumstances and the submissions made. It is true that the respondent no. 1 could have acted with greater expedition and diligence. The record also discloses that the respondent-tenant failed to cross examine

PW-1 and then sought adjournment for leading defence evidence and finally filed an application for recall of PW-1. In fact, the perusal of the roznama and the manner in which the suit has proceeded, leaves much to be desired, particularly, in a suit pertaining to the year 1990. However, at the same time, once the Trial Court has exercised discretion in favour of the respondent no. 1, thereby permitting the recall of PW-1 for cross examination, this Court would normally be slow in interfering with such order, unless the same is perverse and one resulting into manifest injustice. In exercise of supervisory jurisdiction, under Article 227 of the Constitution of India, this Court does not sit as a Court of appeal. The jurisdiction is exercised essentially to ensure that the subordinate Courts and Tribunals act within the bounds of their Authority and the orders do not result into manifest injustice (see the judgment in the case of SHALINI SHYAM SHETTY AND ANOTHER VS. RAJENDRA SHANKAR PATIL, (2010) 8 SCC 329). The Trial Court in para 11 has acknowledged that the matter is old and considerable time has elapsed after recording the chief examination. However, at the same time has observed that in order to ensure that justice is done and in order to avoid a second round of litigation, it would be appropriate to grant opportunity to the respondent no. 1, subject to costs. The possible and probable scope of cross examination would not strictly be relevant in deciding the question whether the concerned witness

is to be recalled or not. The exercise of discretion by the learned Trial Court cannot be said to be perverse and would in fact be in larger interest of doing complete justice.

10. The learned Counsel for the respondent no. 1 submits that the respondent no. 1 shall ensure that PW-1 is cross examined on the next date and no further time is sought for.

11. On this, Shri Usgaonkar, the learned Counsel for the petitioners submits that the suit being of the year 1990, it be expedited.

12. In the result, the petition is dismissed, with no order as to costs. The Trial Court shall proceed to decide the suit as expeditiously as possible and preferably within a period of 12 weeks from the date of receipt of this order. Parties to co-operate for time bound disposal of the suit.

C. V. BHADANG, J.

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