

Andreza

**IN THE HIGH COURT OF BOMBAY AT GOA
WRIT PETITION NO. 1014 OF 2016**

MR VINAYAK M DESSAI,
56 years of age,
resident of Flat No.E-G-52,
Durgawadi Co-operative
Housing Society Limited,
Durgawadi, Taleigao, Goa.

...Petitioner

V E R S U S

1. **MR. ULHAS N. NAIK,** [Deleted as per
Major of age, order dt. 06.02.17]
2. **MRS. SUREKHA ULHAS NAIK,**
Major of age,
Both residents of B-25,
Nishigandha, Lane 4, [Deleted as per
La Campal Colony, order dt 06.02.17]
Miramar, Panaji, Goa.
3. **DURGAWADI CO-OPERATIVE HOUSING
SOCIETY LIMITED,**
Through its Chairman,
Mr. K. V. Sreekrishnan,
Major of age,
r/o. Flat no. A-F-6,
Durgawadi Co-operative
Housing Society Limited,
Durgawadi, Taleigao, Goa.
4. **MR LAXMIKANT N. MAHLE,**
major of age, Secretary,
Durgawadi Co-operative
Housing Society Limited,
Durgawadi, Taleigao, Goa.

_____ ...Respondents

Mr Joaquim Godinho, Advocate, *for the Appellant.*
Mr D. J. Pangam, Advocate *for the Respondent nos.3 and 4.*

CORAM: NUTAN D. SARDESSAI, J
Reserved for Judgment on : 18th August 2017
Judgment Pronounced on : 15th September, 2017

JUDGMENT

1. This Petition takes exception to the order dated 28.09.2016 passed by learned Civil Judge, Junior Division, at Panaji, pursuant to which she allowed the production of the document at the instance of the Defendant to confront the Plaintiff in the course of his cross examination by overruling the objections raised by the Plaintiff that such course of action was not permissible in law.

2. Heard Shri J. Godinho, learned Advocate for the Petitioner who raised a poser whether the Defendant could be allowed to produce documents in the course of the cross examination of the Plaintiff. In that context, he referred to Order XIII Rule 1(3)(a) of the Civil Procedure Code which reads thus :

"1. Original documents to be produced at or before the settlement of issues.-

...

(3) Nothing in sub-rule (1) shall apply to documents -

(a) produced for the cross examination of the witnesses of the other party;

Order XIII of the Civil Procedure Code mandates the parties or their pleader to produce on or before the settlement of issues, all the documentary evidence in original where the copies thereof have been filed alongwith the plaint or written statement. He next referred to Order VII Rule 14 of the Civil Procedure Code which deals with the production of documents on which the Plaintiff sues or relies and to sub-rule (4) in particular reading that nothing in this rule shall apply to the document produced for cross-examination of the Plaintiff's witness or handed over to a witness merely to refresh his memory. He further adverted to Order VIII Rule 1-A CPC which casts a duty on the Defendant to produce document upon which relief is claimed or relied upon by him and then to the application moved on behalf of the original Defendant and the reply filed by him opposing the application for leave to produce the document. It was his contention further that there was ample opportunity to the defendant to produce the document earlier and the same could not be produced to confront the plaintiff in the course of the cross-examination on a proper reading and construction of Order VII Rule 14, Order VIII Rule 1-A and Order XIII Rule 1(3)(a) of the Civil Procedure Code. He relied in *Purshottam vs. Gajanan* [2012 (6) Mh. L. J. 648], *Union of India & anr. vs. B. D. Sharma*, [AIR 1989 NOC 183 (J & K)] and *Laxmikant Sinai Lotlekar & anr. vs. Raghuvir Sinai Lotlekar* [1984 Mh. L.J. 938], to substantiate his case and to press for a reversal of the impugned Order.

3. Shri D. J. Pangam, learned Advocate for the Respondents-Defendants, at the outset, raised a rhetoric that in case the plaintiff was not a witness as sought to be canvassed on behalf of the Petitioner, the whole system of recording evidence would collapse. On his part, he invited attention to Order XIII Rule 1, 2 and 3(a) of the Code of Civil Procedure with emphasis on Rule 3(a) in particular which mandates a party to appear before the other witnesses and reading as "where a party himself wishes to appear as a witness, he shall so appear before any other witness on his behalf has been examined unless the Court for reasons to be recorded, permits him to appear as his own witness at a later stage." It was thus his contention that there was no distinction between a party and a witness and that a party to the proceeding on examination was akin to a witness and therefore the objection raised on behalf of the Petitioner was without any basis. His next contention was that the Judgment in *Purshottam vs, Gajanan* (supra) holding that a party was not a witness by relying on the Judgment in *Union of India & anr. vs. B. D. Sharma* (supra) was per incuriam since it did not consider the provisions of Order XIII Rule 3(a) of the Civil Procedure Code. He next adverted to what is meant by "evidence" as defined in Section 3 of the Indian Evidence Act, 1872, meaning and including all statements which the Court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry. Therefore, it was his further submission that in case a party was not a witness, his testimony would not tantamount to evidence and which would be a disastrous interpretation.

4. Shri D. Pangam, learned Advocate for the Respondents, next referred to Section 118 of the Evidence Act contained in Chapter IX as to who may testify and read thus :

“118. Who may testify.- All persons shall be competent to testify unless the Court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind.”

Reference was also made to Section 120 of the Evidence Act where parties to the Civil Suit and their wives or husbands or husband or wife of person under criminal trial were to be treated as competent “witnesses”. Further, reference was made to Section 137 of the Evidence Act dealing with the examination in chief, cross examination and re-examination to buttress his case that if an interpretation was accepted that the party was not a witness, Section 137 would not apply to a party and such interpretation would defeat the very purpose of examination and cross examination. He placed reliance in *Miss T. M. Mohana vs. V. Kannan* [AIR 1984 MADRAS 14]. In the alternative, he submitted that there were two options available to this Court namely to hold that the Judgment in *Purshottam vs, Gajanan* (supra), was delivered per incuriam or otherwise to refer the matter to a larger Bench. On facts, he adverted to the pleadings in the plaint

and the cross-examination of the Plaintiff and submitted that the Judgment in the case of *Laxmikant Sinai Lotlekar & anr.* (supra) did not at all advance the case of the Petitioner. Finally, he relied in *M. P. Sharma & Ors. vs. Satish Chandra* [AIR 1954 S. C. 300] on the interpretation of "witness" though in the context of a criminal proceeding and concluded that there was no reason to interfere with the impugned Order and the Petition was liable for dismissal.

5. i would first advert to the relevant provisions of the Civil Procedure Code, the Evidence Act and the Judgments relied upon by both of them before considering whether it is a fit case to make a reference or otherwise and ultimately to decide the fate of the Petition.

6. Order VII Rule 14 reads thus :

"14. Production of document on which plaintiff sues or relies.-

(1) Where a plaintiff sues upon a document or relies upon document in his possession or power in support of his claim, he shall enter such documents in a list, and shall produce it in court when the plaint is presented by him and shall, at the same time deliver the document and a copy thereof, to be filed with the plaint.

(2) Where any such documents not in the possession or power of the plaintiff, he shall, wherever possible, state in whose possession or power it is.

(3) A document which ought to be produced in Court by the plaintiff when the plaint is presented, or to be entered in the list to be added or annexed to the plaint but is not produced or entered accordingly, shall not without the leave of the Court, be received in evidence on his behalf at the hearing of the suit.

(4) Nothing in this rule shall apply to document produced for the cross examination of the plaintiff's witnesses, or, handed over to a witness merely to refresh his memory."

While Order VIII Rule 1-A which is para materia reads thus:

"1A. Duty of defendant to produce documents upon which relief is claimed or relied upon by him.-

(1) Where the defendant bases his defence upon a document or relies upon any document in his possession or power,

in support of his defence or claim for set off or counter claim, he shall enter such document in a list, and shall produce it in court when the written statement is presented by him and shall, at the same time, deliver the document and a copy thereof, to be filed with the written statement."

7. Order XIII Rule 1 provides that original documents are to be produced on or before the settlement of issues. It mandates the parties or their pleader to produce on or before the settlement of issues all the documentary evidence in original where the copies thereof have been filed alongwith the plaint or written statement. Sub-rule (2) reads that the Court shall receive the documents so produced; provided that they are accompanied by an accurate list thereof prepared in such form as the High Court directs. Sub-rule (3) is material which reads that nothing in sub-rule (1) shall apply to documents, (a) produced for the cross-examination of the witnesses of the other party; It is the interpretation of Rule 3(a) which would materially dominate the fate of these proceedings and whether the document produced for the cross-examination of the witnesses as contemplated in Rule 3(a) would exclude the party Plaintiff/Defendant from being confronted with a document which was otherwise not produced in the list alongwith the plaint or the written statement as required in terms of Order VII Rule 14 and Order VIII Rule 1-A of the Civil Procedure Code.

8. *Purshottam* (supra), took exception to the Order passed by the learned Civil Judge, Junior Division, Chopda, allowing the application filed under Order XIII Rule 1(3)(a) of the Civil Procedure Code. In the brief facts, the Respondent no.1 had filed the suit for partition against the Petitioner and the other Respondents. The Petitioner appeared in the suit and while he was under cross examination, the Respondent no.1 sought to produce documents contending that it was reserved for cross-examination of the Petitioner and objected to by the Petitioner. The said application was rejected and the same came to be challenged in a Writ Petition which was allowed by the Court holding that no document could be reserved for cross-examination of a party. The Respondent no.1 by way of another application dated 13.11.1998 tried to introduce the very same documents contending that it were received late and allowed by the Trial Court without hearing the Petitioner who challenged the Order in the Revision Application which was disposed off with liberty to file a Writ Petition. The Writ Petition was allowed quashing and setting aside the Order and remanding the matter for a fresh decision. The Trial Court had thereafter rejected the application filed by the Respondent no.1 who filed a Writ Petition challenging the Order which was allowed on 17.06.2009. The Petitioner filed a Review Petition for a review of the Order on the ground that the Respondent no.1 had suppressed from the Court the Order passed in the earlier Writ Petition and accordingly the Review Petition was allowed and the Order was recalled with liberty to the Respondent no.1 to file a fresh application giving rise to the Order under challenge.

9. In *Purshottam* (supra), the learned Single Judge of this Court had adverted to Order XIII Rule 1(3)(a) of the Civil Procedure Code and in that context, observed at paragraph 6 that on a plain reading of the said provision, it was abundantly clear that such production of document which was at a later stage of proceedings and not prior to the framing of the issues and could be produced in the cross-examination of the witnesses of the other party but the said Rule did not contemplate that the said document could be produced for the cross-examination of the party. The learned Judge had relied upon the Judgment in *Union of India* (supra), and had taken a view that there is a distinction in the term 'witness' and a party to the suit and the party to the suit cannot be equated with the witness and cannot be confronted with a document by casting surprise upon him particularly when the documents were not filed by the plaintiff alongwith the list of documents which he was going to rely upon. Therefore, on a plain reading of this Judgment there is no force in the contention of Shri D. Pangam, learned Advocate for the Respondents, that the Judgment in *Purshottam* (supra) was per incuriam since it did consider Order XIII Rule 1(3)(a) of the Civil Procedure Code unlike his contention to the contrary. Whether the learned Single Judge did or did not correctly interpret Rule 3(a) to the extent that it applied only to the witnesses and not to the party is a matter which was not considered in the context of the relevant provisions of the Indian Evidence Act earlier adverted to.

10. In *Union of India* (supra), it was held that the term 'witness' for the purpose of producing a document by surprise in cross-examination of the plaintiff, cannot be stretched to the extent of giving liberty to the defendant to introduce a document by surprisingly taking up the plaintiff, which was neither set up in the list of reliance nor the copy of which was produced alongwith the written statement. It was further observed that an adverse party cannot be taken by surprise in a Civil Suit and therefore the legislature in its wisdom left the liberty of introducing a document during the cross-examination of the witness only which term does not include the plaintiff to that extent.

11. The Judgment in *Laxmikant Sinai Lotlekar & anr.* (supra), dealt with an interesting question of law as to the interpretation of Order XIII Rule 2(2) of the Civil Procedure Code. The question at large before the learned Single Judge of this Court was whether any document could be produced during the cross-examination of a witness under sub-rule (2) of Rule 2 of Order XIII of the Civil Procedure Code. In the brief facts of the case, the Plaintiff no.1 was being cross examined when the Advocate appearing for the Defendants sought to introduce in evidence two letters one written by Smt. Laxmibai Sinai Lotlekar to the Panchayat and the other by the Panchayat to the first Plaintiff as also eight house tax receipts issued in favour of the first Defendant in the Suit. This was opposed on behalf of the Plaintiffs and ultimately the learned Civil Judge rejected the application of the Defendants on the ground that the document did not bear the signature of

the witness. It was contended on behalf of the Plaintiffs that the impugned Order was erroneous inasmuch as the learned Trial Judge had not borne in mind the provision of Order XIII Rule 2(2) of the Civil Procedure Code and the Petitioners were entitled to confront the Plaintiffs with any documents during the course of cross-examination by virtue of the aforesaid provision of law. Quite on the contrary, it was contended on behalf of the Respondents that the provision to sub-rule (2) of Rule 2 of Order XIII of the Civil Procedure Code was not omnibus and, as such, it was not permissible to the parties to introduce all kinds of documents during the course of cross examination. Furthermore to hold to the contrary would amount to make nugatory the provisions of Order VII Rule 18 and Order VIII Rule 1 of the Civil Procedure Code and on the premise that the provisions of Order VII and VIII of the Civil Procedure Code required the Plaintiff and the Defendant respectively to either produce the documents in their possession or to give a list of documents which they would rely to prove their cases.

12. In *Laxmikant Sinai Lotlekar* (supra), the learned Single Judge of this Court considered Order XIII Rule 2(1) of the Civil Procedure Code as also Rule 2(2) and observed that it would appear from a reading of the said provisions that it would be permissible to produce for cross-examination of a witness of the other party any kind of document provided of course that such document was admissible. At the same time, he went on to observe that these provisions of law had to be read in the context of Order VII and VIII of the Civil Procedure Code. It

was further observed on a reading of Order VII Rule 18 and Order VIII Rule 1 alongwith Order XIII Rule 2(2) of the Civil Procedure Code would make these provisions nugatory if a liberal interpretation was given to Order XIII Rule 2(2) of the Civil Procedure Code. The learned Single Judge went on to hold that the provisions of Order XIII Rule 2(2) of the Civil Procedure Code had to be read in a restrictive manner and that it applied only to some classes of documents a party intends to produce by way of cross-examination and not all the documents otherwise though admissible in evidence. This Judgment further interpreted Order XIII Rule 2(2) of the Civil Procedure Code in the context of Order VII Rule 18 and Order VIII Rule 1-A of the Civil Procedure Code without in any manner making a distinction whether a witness provided for thereunder also included the party Plaintiff/Defendant.

13. In *M. P. Sharma* (supra), an eight Bench of the Hon'ble Apex Court while underlining the principle on the scope and extent of fundamental rights under Article 20(3) of the Constitution of India examined the extent of testimonial compulsion as visualised as a guarantee in Article 20(3) of the Constitution. In that context, the Apex Court dealt with the expression 'to be a witness' used in Article 20(3) of the Constitution and observed that a person can be a witness not merely by giving oral evidence but also by producing documents or making intelligible gestures as in the case of a dumb witness or the like. 'To be a witness', is nothing more than to furnish evidence and such evidence can be furnished through the lips or by production of a thing or of a document

or in other modes. So far as production of documents is concerned, no doubt Section 139 of the Evidence Act says that a person producing a document on summons is not a witness. But that section is meant to regulate the right of cross-examination. It is not a guide to the connotation of the word "witness", which must 'be understood in its natural sense, i.e., as referring to a person who furnishes evidence.

14. In *Miss T. M. Mohana* (supra), the original Defendant had preferred the Civil Revision Petition directed against the Order of the Court below holding that the Petitioner could not confront the Respondent herein with the document not filed or disclosed earlier in the course of his cross-examination as Pw.1 without obtaining the prior leave of the Court by filing an application received after notice by the Respondent. In the suit, the Respondent had prayed for the relief of recovery of money against the Petitioner being the value of the construction work done by him and also the costs of materials stated to have been unlawfully taken by the Petitioner and any other incidental reliefs. This claim was denied by the Petitioner in her written statement on several grounds. During the course of cross-examination of the Respondent no.1, as Pw.1, the Petitioner's Counsel confronted the Respondent with a document then produced by the Petitioner to which an objection was raised by the Respondents that the document was not brought before the Court or to the notice of the Court in accordance with the provisions of Order VIII Rule 1(2) of the Civil Procedure Code and that the Petitioner could not bypass those mandatory provisions by resorting to Order XIII

Rule 2(2)(a) of Civil Procedure Code and in any event the Petitioner should have obtained the leave of the Court in Order VIII Rule 5 of Civil Procedure Code with which Pw. 1 was confronted. The Court below upheld this objection holding that the Petitioner was not entitled to confront the Respondent examined as Pw.1 with the document during his cross-examination without filing an application to receive that document after notice to the Respondent.

15. In *Miss T. M. Mohana* (supra), it was contended on her behalf that the document intended to be produced or produced during the course of cross-examination of the Respondent need not be included in the list of documents annexed to the written statement either under Order VIII Rule 1(2)(a) or Order VIII Rule 1(2)(b) of the Civil Procedure Code and a failure to do so, would not result in such a document not being received in evidence without the leave of Court under Order VIII Rule 1(5) of the Civil Procedure Code. It was further contended that Order VIII Rule 1(6) of the Civil Procedure Code specifically excludes the applicability of Order VIII Rule 1(5) of Civil Procedure Code to documents produced for the cross-examination of the witnesses of the Plaintiff or in answer to any case set up by the plaintiff subsequent to the filing of the plaint or handed over to a witness for the purpose of refreshing his memory. Quite on the contrary, it was contended on behalf of the Respondent that the newly introduced provisions in Order VIII Rule 1(2) to (4) and Order VIII Rule 8-A(1) of the Civil Procedure Code, contemplated disclosure by the Defendant of his documents so as to prevent

the Defendant from concealing the contents of the document and later springing a surprise on the Plaintiff and that was why if a document was not disclosed in the list, it could not be received in evidence without the leave of the Court and that the rigour of those provisions cannot be nullified by resorting to Order XIII Rule 2(2)(a) of the Civil Procedure Code.

16. In *Miss T. M. Mohana* (supra), the learned Judge of the Madras High Court considered Order VIII Rule 1(2) and (6), Order VIII-A(1) and (3) and Order XIII Rule 2(2) of Civil Procedure Code and observed at Para 8 thus :

"8. Thus it is seen from the provisions of O. VIII R. 1 (2) and (6) O. VIII R. 8-A (1) and (3) and Order XIII, Rule 2 (2) C.P.C. that at every stage at which the defendant is called upon to produce the documents, an exception is always made with reference to the documents produced for the cross-examination of the plaintiff's witnesses or the cross-examination of the witnesses of the other party or in answer to a case set up by the plaintiff subsequent to the filing of the suit or with a view to refresh memory. In other words, the obligation to produce the documents relied upon by the defendant at the stages contemplated under O. VIII, R.1 (2), O. VIII R.8-A (1)

and by both parties under O. XIII R.1 C.P.C. has been done away with in all those cases with reference to documents produced for cross-examination. That would mean that a defendant in the suit confronting the plaintiff's witnesses, as in this case, need not disclose the document in the list or produce the document at an anterior point of time or even seek and obtain the leave of Court for tendering such a document in the course of the cross-examination of the witness of the other side."

17. Evidence in terms of Section 3 of the Evidence Act, 1872 means and includes all statements which the Court permits or requires to be made before it by witnesses in relation to matters of fact under inquiry; such statements being called oral evidence and all documents including electronic records produced for the inspection of the Courts being the documentary evidence. Section 118 of the said Act provides for the persons who may testify and reads that all persons must be competent to testify unless the Court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind. Section 120 provides that parties to the civil suit and their wives or husbands or husband or wife of person under criminal trial

shall be competent witnesses while Section 137 deals with the examination in chief of a witness by the party who calls him for his examination, the cross examination being by the adverse party and re-examination being subsequent to cross examination by the party who called him. However, a discussion of these relevant provisions of the Evidence Act no doubt substantiate the contention of Shri Pangam, learned Advocate for the Respondents, that if a party is not a witness, it would lead to a disastrous interpretation and even to the extent that Section 137 of the Evidence Act may not apply to a party and which could defeat the purpose of examination and cross examination. Nonetheless, the discussion on the point is purely academic looking to the law on the point namely Order VII Rule 14, Order VIII Rule 1 and Order XIII Rule 1 of the Civil Procedure Code. Besides, if an interpretation as canvassed by Shri Pangam is accepted, the provisions of Order VII, Order VIII and Order XIII would be rendered nugatory and as observed in *Laxmikant Sinai Lotlekar* (supra). The learned Trial Court therefore was in jurisdictional error to disallow the objections raised by the petitioner-plaintiff contrary to the mandate of Order VIII Rule 1 and Order XIII Rule 1(3)(a) of the Civil Procedure Code. The Respondents had to follow the mandate as contained in Order VIII Rule 1 of the Civil Procedure Code and could not seek to produce such documents directly during the cross examination of the plaintiff which it had to otherwise rely upon in a list of documents as required by law. The learned Trial Court therefore committed a jurisdictional error and therefore the impugned Order calls for an interference.

18. In the result, the Petition is allowed and the impugned Order is quashed and set aside. It goes without saying that there is no need of any reference of the matter to the Chief Justice for referring to a larger Bench in view of the decision in *Purshottam* (supra) and *Laxmikant Sinai Lotlekar* (supra). There shall be no order as to costs.

(NUTAN D. SARDESSAI, J)