

IN THE HIGH COURT OF BOMBAY AT GOA**WRIT PETITION NO. 102 OF 2019**

Mrs. Ida Tereza Synnott,
alias Mrs. Ida Tereza Viegas,
aged 78 years,
daughter of late Mr. Leo Manuel Viegas,
original resident of Carmona, Salcette, Goa,
presently based in Dublin, Ireland,
through her Power of Attorney,
Ramos Colaco, aged 65 years,
son of Rolino Colaco,
resident of Velim, Salcette, Goa.

.... Petitioner

v e r s u s

1. Mrs. Leocadia Pereira,
resident of House no.574/2,
Alemão, Xirro, Carmona,
Salcette, Goa.
2. Mrs. Filomena Versevi Viegas,
wife of late Antonio Viegas,
Indian National,
resident of Zaino,
Velim, Salcette, Goa.
3. Mr. Elvis Viegas,
son of late Antonio Viegas,
Indian National, resident of Zaino,
Velim, Salcette, Goa.
4. Mr. Evellin Viegas,
daughter of late Antonio Viegas,
resident of Zaino,
Velim, Salcette, Goa.

.... Defendants.

Adv. Dharmanand R. Vernekar for the Petitioner.

Adv. Almeida Coutinho Cleofato Garrett Respondent nos.1,2 & 3.

Coram:- C. V. BHADANG, J.

Date:- 26th April 2019.

Oral Order:

By this petition, the petitioner/plaintiff, is challenging the order dated 30/11/2018 passed by the learned trial court in Regular Civil Suit no.41/2015/C. By the impugned order, the learned trial court has dismissed an application (Exhibit 38) filed by the petitioner for examining herself after her Power of Attorney, Mr. Ramos Colaco has been examined as PW.1.

2. The petitioner has filed Regular Civil Suit no.41/2015 against the respondent which is pending before the learned Civil Judge, Junior Division at Margao. The petitioner is residing in Dublin, Ireland and the suit is filed through her Power of Attorney holder, Mr. Ramos Colaco.

3. It appears that on 11/8/2017, when the cross examination of Mr. Ramos Colaco (PW.1) was underway, the petitioner filed an application before the learned trial court claiming that she would be coming down to India and would be available in Goa from 6/9/2017 to 8/9/2017. She had requested for fixing the suit for evidence, on these dates, as it would be difficult for her to travel from overseas, as she is a senior citizen aged about

81 years. The record discloses that said application was subsequently not pressed. The learned counsel for the applicant submitted that this was on account of the fact that the court was not inclined to accede to the request of the petitioner to fix the suit for evidence on the aforesaid dates and the cross-examination of PW1 was proceeded with and was concluded.

4. On 12/11/2018, the petitioner filed an application seeking three weeks time to enable the petitioner to come down to Goa and to examine herself in the suit.

5. The application was opposed by the respondent/original defendant nos. 2 to 4, claiming that the petitioner ought to have examined herself, prior to examination of any witness on her behalf and if the application is allowed, the petitioner would try to improve upon her case, which would cause prejudice to the respondent.

6. The learned trial court by the impugned order has dismissed the said application after referring to the provisions of Order XVIII Rule 3-A and Order XXVI, Rule 5 of CPC. In the opinion of the learned trial court, it was for the petitioner to have sought leave of the Court under Order XVIII Rule 3-A C.P.C and/or to have examined herself through video conferencing in as

much as, the use of technology, is being encouraged in the courts in Margao.

7. I have heard Shri Vernekar, the learned counsel for the petitioner and Shri Coutinho, the learned counsel for the respondents.

8. On behalf of the petitioner, reliance is placed on the decision of this Court in the case of **Sanjay Narayanrao Barde and another Vs. Sau Vimal Kesharao Bairam and others 2000 (Supp.) Bom. C.R 513**. It is submitted that the provisions of Order XVIII Rule 3-A of C.P.C have been held to be directory, except the requirement to obtain leave of the Court. It is submitted that such a leave can even be obtained subsequent to the examination of any witness and it is not necessary that such leave has to be obtained prior to the plaintiff's commencing his/her evidence. It is submitted that the petitioner may be permitted to file a properly constituted application under Order XVIII Rule 3-A making out grounds, which the trial court may decide on its own merits.

9. Mr. Coutinho, the learned counsel the respondent has submitted that the examination of the Power of Attorney would tantamount to the examination of the petitioner/plaintiff herself, in as much as, the suit is filed through the Power of Attorney holder. It is submitted that the earlier

application filed on 11/8/2017, when the evidence of PW.1 was partly recorded, was not pressed and the subsequent application dated 12/11/2018 does not make out any case for examination of the petitioner subsequent to that of the examination of her witness PW.1. It is submitted that the petitioner would try to improve upon the case, if she is now permitted to examine herself.

10. I have carefully considered the rival circumstances and the submissions made.

11. This Court in the case of **Sanjay Barde (supra)**, after placing reliance on its earlier decision in the case of **Nagorao Nilkanthrao Deshmukh and anr. Vs. Keshao Govind Patil, 1979 Mh.L.J. 809**, has held that Rule 3 of Order XVIII of C.P.C is directory in nature and it is mandatory only to the extent of obtaining permission of the Court. The normal rule is that the party intending to examine himself/herself should examine him/her first before any witness is examined. This rule can be deviated only with the permission of the Court. Although it is desirable that such permission should be obtained before any witness is examined, but that is not the mandate of the rule, inasmuch as such permission can even be obtained at a later stage.

12. Coming to the present case, it appears that when the evidence of PW.1 was partly recorded and he was under cross examination, an application was made by the petitioner to examine herself during the period from 6/9/2017 to 8/9/2017, when she was supposed to come down to Goa. By the said application, the petitioner had even prayed for discarding the evidence of the Power of Attorney holder. Be that as it may, the said application was subsequently not pressed. According to the learned counsel for the petitioner, it was not pressed as the Court was not inclined to fix the suit during the aforesaid period. It is not necessary to go into this aspect, for the reason that as held by this Court in the case of **Sanjay Barde (supra)**, the leave under Order XVIII, Rule 3-A of C.P.C can even be obtained in an appropriate case after examination of any witness. Admittedly, no formal application under Order VIII, Rule 3-A of C.P.C was filed by the petitioner subsequent to the conclusion of the evidence of PW.1. An opportunity to lead evidence of a party, goes to the root of the matter and normally, the Court would lean in favour of granting such opportunity. I would have to add that indeed this would depend upon facts and circumstances of the case. In the present case, the learned counsel for the petitioner submitted that he would file a properly constituted application under Order XVIII, Rule 3-A of C.P.C, which the trial court can decide on its own merits. I find that in the interest of justice and a fair trial, the petitioner needs to be granted such an opportunity.

13. In the result, the petition is disposed off with liberty to the petitioner to file a properly constituted application under Order XVIII, Rule 3-A of C.P.C., if so advised, making out a case for examination of the petitioner after the examination of her Power of Attorney holder, PW.1. If such an application is filed, the learned trial court shall decide the same, on its own merits and in accordance with law, without being influenced by the observations made in the impugned order. Rival contentions of the parties in this regard are left open. In the circumstances there shall be no order as to costs.

C. V. BHADANG, J.

ap/-