

IN THE HIGH COURT OF BOMBAY AT GOA**WRIT PETITION NO. 183 OF 2019**

1. Smt. Inacina Jacinta Souza e Rodrigues,
widow of late Antonio Rosario
Rodrigues, of major age, housewife,
 2. Smt. Airina Pereira e Rodrigues, widow
of late Shri Filip Rodrigues, of major
age, housewife,
 3. Miss Santan Rodrigues, daughter of late
Shri Filip Rodrigues, of major age,
employed and her brother
All residents of House No. 1(old) and
House No. 642 (new), Fatrade, Varca,
Taluka Salcete, Goa.
- Petitioners

Versus

1. Confraria de Santissima Trindade St.
Rock Fatrade Varca,
Represented through its Managing
Committee
 - (a) The Vicar Church of Varca,
Being President of the Confraria
 - (b) Treasurer Shri Stanley Rodrigues
 - (c) Attorney Shri Jose Alfonso alias Francis
Afonso
 - (d) Member Shri Gregorio C. Rodrigues
 - (e) Member Shri Emelinao Furtado
All having office at Church of Varca,
Taluka Salcete, Goa.
 2. Shri Remedio Rodrigues, son of late
Filip Rodrigues, of major age, employed,
resident of House No. 1(old) and House
No. 642 (new), Fatrade, Varca, Taluka
Salcete, Goa.
- Respondents

Mr. Shambu S. Kakodkar, Advocate for the Petitioners.

Mr. C.A. Coutinho with Mr. Shailesh Redkar, Advocates for
Respondents Nos. 1, 1(c), 1(d) and 1(e).

CORAM:- C. V. BHADANG, J.

RESERVED ON: 20th JUNE, 2019

PRONOUNCED ON: 24th JUNE, 2019

JUDGMENT:

Rule made returnable forthwith. The learned Counsel for the respondent nos. 1, 1(c), 1(d) and 1(e), waives service. Heard finally by consent of parties.

2. The first respondent has filed Regular Civil Suit No. 48/2015/C, against the petitioners and the second respondent for a declaration, which suit is pending on the file of the learned Civil Judge Junior Division Margao. In that suit, Mr. Jose Afonso (PW-1) was examined on behalf of the first respondent on 08.10.2018. It appears that Advocate Ms. C. Rodrigues for petitioner nos. 1 and 2 (defendant nos. 1 and 2) sought time, in order to enable the petitioners to engage another Advocate. On this, the learned Trial Court passed following order on 08.10.2018:

“On the last date of hearing, Advocate Ms. C. Rodrigues prayed for time to withdraw her appearance. Hence more than two weeks time was granted for that purpose. Today the learned Advocate orally informs the Court that the Defendant nos. 1 and 2 have already collected the file from her office and that her office has already issued a NOC to

the Defendant nos. 1 and 2 to engage a new Advocate.

However Advocate Ms. C. Rodrigues orally informs the Court that yesterday she received a phone call from the Defendant nos. 1 and 2 informing her that due to a personal difficulty, the Defendant nos. 1 and 2 were unable to engage a new Advocate and they requested the Advocate Ms. C. Rodrigues to seek another 15 days time for them to engage a new Advocate.

From the version set out by Advocate Ms. C. Rodrigues, it is very clear that Advocate Ms. C. Rodrigues no longer holds vakalatnama for the Defendant nos. 1 and 2.

The Defendant nos. 1 and 2 are not present in the Court. They have also not sent any application, in writing, seeking time. No reason has been also set out to justify the adjournment being sought through their former Advocate Ms. C. Rodrigues. Hence the oral request of Ms. C. Rodrigues for further 15 days time for the Defendant nos. 1 and 2 to engage a new Advocate is rejected.

Cross nil."

3. Insofar as petitioner no. 3 and the second respondent (original defendant nos. 3 and 4) are concerned, the Court passed the following order:

"None present for Defendant nos. 3 and 4. Order has been passed on exhibit 1 today, marking them ex-

parte.

Deposition completed.”

4. The petitioner nos. 1 and 2 filed application Exhibit-31, seeking recall of PW-1, on the ground that on earlier occasion, the petitioner no. 1 could not remain present, as she was unwell on account of a frozen shoulder and was under the medical treatment of Dr. Shishir R. Chodankar. The application was accompanied by a medical certificate issued by Dr. Chodankar.

5. The application was opposed on behalf of the first respondent. A perusal of the roznama dated 22.10.2018 shows that the respondent no. 1/plaintiff was directed to keep PW-1 present on the next date and the Advocate for the petitioners/defendants was directed to come prepared for the cross examination on the next date i.e. 03.11.2018. The order sheet would show that for all practical purposes, the Trial Court had decided to recall PW-1 for cross examination. However, subsequently, it appears that the Trial Court entertained a doubt about the genuineness of the medical certificate. The learned Trial Court, therefore, conducted an independent enquiry, in which, the petitioner no. 1 examined herself as AW-1 along with Dr. Chodankar as AW-2. The learned Trial Court, by a

detailed order dated 30.11.2018, dismissed the said application with costs of Rs.2,500/- finding that the case made out by the petitioner nos. 1 and 2 in application Exhibit-31 is false, contemptuous and intended to obstruct the progress of the suit.

6. The petitioner nos. 3 (defendant no. 3), filed an application Exhibit-37, for condonation of delay in filing an application for setting aside ex-parte order dated 08.10.2018 along with application Exhibit-38, for setting aside the said ex-parte order and for recall of PW-1 for cross examination. The learned Trial Court dismissed these applications by separate orders dated 23.01.2019.

7. All these orders that is dated 08.10.2018, 30.11.2018 and the two orders dated 23.01.2019, are subject matter of challenge in this petition.

8. I have heard Mr. Kakodkar, the learned Counsel for the petitioners and Mr. Coutinho, the learned Counsel for the respondent nos. 1, 1(c), 1(d) and 1(e). With the assistance of the learned Counsel for the parties, I have gone through the impugned orders.

9. Mr. Kakodkar, the learned Counsel for the petitioners, has submitted that Advocate Ms. C. Rodrigues had not formally withdrawn her appearance and she was not formally discharged from appearance. It is submitted that she had sought time of two weeks and this was on the very day on which PW-1 had entered into the witness box. It is submitted that the Trial Court could not have closed the cross examination of PW-1, in such a case. Even so far as petitioner no. 3 is concerned, it is submitted that Ms. C. Rodrigues was also representing defendant nos. 3 and 4 and thus, they could not have been proceeded ex-parte on the said date.

10. Insofar as order dated 30.11.2018 is concerned, it is submitted that the learned Trial Court has disbelieved the medical certificate dated 13.10.2018 on a hyper technical view of the evidence and the said finding is based on conjectures and surmises.

11. Lastly, insofar as the two orders dated 23.01.2019 are concerned, it is submitted that both the applications at Exhibits-37 and 38, ought to have been allowed in the facts and circumstances of the case. It is submitted that in the interest of justice and fair trial, the orders be set aside permitting the

petitioners to take part in the proceedings.

12. Mr. Coutinho, the learned Counsel for the respondent nos. 1, 1(c), 1(d) and 1(e) has supported the impugned orders. It is submitted that the case made out by the petitioner no. 1, for her absence on medical ground has been found to be false and thus, the petitioners are not entitled to any relief, as prayed. The learned Counsel has taken me through the order dated 30.11.2018, to show that the learned Trial Court, on threadbare consideration of the evidence of AW-1 and AW-2 has rightly found that the medical certificate was fabricated and as such, the view taken by the learned Trial Court is legal and proper.

13. I have carefully considered the rival circumstances and the submissions made. I find that the impugned orders need to be set aside for the following reasons.

Till 08.10.2018 and even thereafter, Advocate Ms. C. Rodrigues has not been formally discharged. Merely because the brief is returned and the Advocate gives no objection to the party to engage another Advocate is not sufficient to discharge the Advocate. In a given case, a party may be intending to engage another Advocate, without intending to discharge the earlier one. Even in such a case, no objection of the earlier

Counsel would be required and both of them would be jointly representing the party. The law does not prohibit a party from engaging more than one Advocate. What is necessary to emphasize is that mere giving of no objection by an Advocate to his client to engage another Advocate, does not necessarily lead to the inference that the party wanted to discontinue the engagement of the earlier one. In this case, although, Ms. C. Rodrigues had earlier informed that she wanted time to withdraw her appearance formally, she was never discharged. The rules *inter alia* provide for the Advocate to issue a formal notice to his/her client and then seek discharge, which has to be allowed by the Court on production of proof of such notice and its service on the concerned party. The fact remains that in this case, Ms. C. Rodrigues was never formally discharged from appearance. Thus, the learned Trial Court could have seen the request made by her on 08.10.2018, as a request simplicitor for time to enable the party to engage another Advocate and to cross examine PW-1. It is necessary to note that the said request was made on the very day, on which the PW-1 had entered into the witness box. This is not to suggest that a party can as of right claim such adjournment on the first day. However, what is significant to note is that this is not a case where there were several adjournments sought and granted for

cross examination of PW-1. A little lenient and broad view in the interest of fair trial would have avoided all further complications.

14. Even so far as defendant nos. 3 and 4 are concerned, the learned Trial Court has noticed that Ms. C. Rodrigues was appearing for them also. The Court has observed that Ms. C. Rodrigues chose not to cross examine on behalf of the defendant nos. 3 and 4. If that be so, the learned Trial Court instead of closing the cross examination, even on behalf of the defendant nos, 3 and 4, chose to pass an ex-parte order against them. Even assuming that there was no appearance on behalf of these defendants on 08.10.2018 (as according to the learned Trial Court Ms. C. Rodrigues did not bring to notice of the Court that she was appearing for these defendants also and failed to cross examine PW-1 on their behalf), the Trial Court could have closed the cross examination and fixed the matter for further evidence of either the plaintiff (if the plaintiff had any other witness) or else for the defence evidence. For this reason itself, the order dated 08.10.2018, setting the defendant nos. 3 and 4 as ex-parte cannot be sustained. Although, defendant no. 4 has not formally challenged the said order, if the basis on which, it is passed is found to be not sustainable, the order has to go,

both in respect of the defendant nos. 3 and 4. In such circumstances, I am inclined to set aside the subsequent orders dated 23.01.2019.

15. Coming to the order dated 30.11.2018, I have carefully gone through the said order and I am constrained to say that the Trial Court has appreciated the evidence, as if trying a criminal case.

16. The Trial Court appears to have taken a moralistic view of the entire matter, resulting into the requirement to hold an independent enquiry, by recording of evidence of two witnesses and writing of a detailed order drifting the attention from the main controversy involved in the suit.

17. It is necessary to emphasize that the Courts are there to enforce law and to dispense justice in accordance with law and not to enforce morality. This is not to suggest that the Court would ignore any patent or a palpably false plea taken. The Court should carefully evaluate the circumstances and should be circumspect while acting on a plea, which is allegedly false or is taken to impede the cause of justice. Without claiming to be exhaustive, the Court would normally take such a

matter seriously, if the false plea is taken in relation to the material controversy involved in the suit and if the party has made an attempt to obtain or has obtained substantive relief, main or interim, on the basis of such a plea, resulting into serious prejudice to the adversary. In this case, the entire matter started with the learned Counsel for the petitioner seeking two weeks time to enable the petitioner nos. 1 and 2 to engage another Advocate and to cross examine PW-1. At the cost of repetition, it needs to be noted that this was on the very day on which PW-1 had entered into the witness box and his further chief examination was recorded. In my considered view, at the highest this was case for the Trial Court to have imposed costs for granting such adjournment.

18. In the result, the following order is passed:

O R D E R

- (i) The petition is allowed.
- (ii) The impugned orders dated 08.10.2018, 30.11.2018 and the two orders dated 23.01.2019, are hereby set aside, subject to payment of costs of Rs.5,000/- to the respondents, within two weeks from today.
- (iii) The applications Exhibits 31, 37 and 38, shall stand allowed as prayed, subject to payment of such costs.

(iv) Rule is made absolute in the aforesaid terms.

C. V. BHADANG, J.

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