

IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO.263 OF 2019

1. Shri Jose Olimpia Martins, of major age, Indian National, resident of C/s. 'O' Cozinheiro, Near Football Ground, Caranzalem, Goa.
 2. Caetano Martins (Expired), resident of Near Football Ground, Caranzalem-Goa (since deceased through his legal heirs and which are transposed as Respondent Nos. 12 to 16 & 18 to 19).
 3. Mr. Armando Martins, son of late Caetano Martins, resident of C/s. 'O' Cozinheiro, Near Football Ground, Caranzalem, Goa.
- Petitioners

Versus

1. State of Goa, through its Chief Secretary, having Office at Secretariat, Porvorim, Bardez-Goa.
2. City Corporation of Panaji, through the Chief Commissioner, Panaji-Goa.
3. Panaji Planning & Development Authority, **through** its Member Secretary, having office at Mala, Panaji-Goa.

4. Inquiry Officer, City Surveyor, Panaji, Collectorate Mamlatdar Building, Panaji-Goa. **Bardez-Goa.**
5. Hermilia Gonsalves (Expired), represented by the Respondent Nos. 7, 10 and 11.
6. Santa Gonsalves (Expired), (represented by Respondent Nos. 7, 10 and 11).
7. Irene Natalia Gonsalves (Expired), (represented by the Respondent Nos. 7, 10 and 11).
8. Joao Camilo Gonsalves (Expired), (represented by the Respondent Nos. 7, 10 and 11).
9. Lizarda Gonsalves (Expired), (represented by the Respondent Nos. 7, 10 and 11).
10. Nicolau Moises Gonsalves; since deceased through his legal **representative**
- 10(a) Mr. Tito Gonsalves, major of age, R/o H. No. 83, near football ground, Borchem bhatt, Caranzalem Goa.
- 10(b) Ms. Mary Lourdes Gonsalves, major of age, R/o H. No. 83, near football

ground, Borchem bhatt, Caranzalem Goa.

- 10(c) Mr. Omeals Gonsalves, major of age, R/o H. No. 83, near football ground, Borchem bhatt, Caranzalem Goa.

11.

All residents of Borchem Bhatt, Caranzalem-Goa, the Legal heirs of Petitioner No. 2 i.e. Caetano Martins and which are transposed as Respondent Nos. 12 to 16 and 18 to 19, are as follows:

12. Mrs. Mauricia Martins, wife of late Caetano Martins, resident of House No. 80/A (Old), Near Football Ground, Borchem Bhatt, Caranzalem-Goa.
13. Mrs. Maria Martins, wife of late Caetano Martins and her husband;
14. Mr. Kevin Martins, son of late Silvano Martins, Both residents of 22, Canapus Street, Bridgeman Downs, Brisbane, Australia, 4035.
15. Miss Sarita Martins, daughter of late Caetano Martins, resident of 2nd Floor, Mandovi River View Complex, St. Pedro, Ribandar, Tiswadi-Goa.

16. Miss Lourdes Martins, daughter of late Caetano Martins, resident of House No. 80/A (Old), Near Football Ground, Borchem Bhatt, Caranzalem -Goa.
17. Mrs. Maria Branca Martins, daughter of Agnelo Dias, resident of Flat No. 501, 5th Floor, Zarina Towers, Near Ganesh Temple, St. Inez, Tiswadi-Goa.
18. Mr. Ralph Martins, son of late Caetano Martins, resident of House No. 80/A (Old), Near Football Ground, Borchem Bhatt, Caranzalem-Goa. Respondents

Shri Rohit Bras De Sa, Advocate for the petitioners.

Shri S.D. Lotlikar, Senior Advocate with Ms. S. Kenny, Advocate for the respondent nos.7 to 11.

Shri A.D. Bhobe, Advocate for the respondent no.2.

Shri Manish Salkar, Government Advocate for the respondent nos. 1 and 4.

Coram:- NUTAN D. SARDESSAI,J.

Reserved on : 15th November, 2019.

Pronounced on : 05th December,2019.

JUDGMENT:

Heard Shri Rohit Bras De Sa, learned Advocate for the

petitioners, Shri S.D. Lotlikar, learned Senior Advocate for the respondent nos.7 to 11, Shri A.D. Bhobe, learned Advocate for the respondent no.2 and Shri Manish Salkar, learned Government Advocate for the respondent nos. 1 and 4.

2. Rule.

3. Ms. S. Kenny, learned Advocate waives service on behalf of the the respondent nos.7 to 11, Shri A.D. Bhobe, learned Advocate waives service on behalf of the respondent no.2 and Shri Manish Salkar, learned Government Advocate waives service on behalf of the respondent nos.1 and 4.

4. The petitioners seek to assail the order dated 18/02/2019 pursuant to which their application to examine the plaintiff under Order XVIII Rule 3A CPC came to be dismissed by invoking the writ jurisdiction of this Court under Article 227 of the Constitution of India.

5. Heard Shri Rohit Bras De Sa, learned Advocate for the petitioners who submitted that the petitioners as the original

plaintiffs had filed the suit for mandatory injunction, declaration and permanent injunction seeking a right by way of prescription. Thereafter he had amended the plaint and led evidence in the matter. He had initially examined the first plaintiff whose examination-in-chief was partly recorded but the same could not be concluded as he expired on 25/08/2015 and thereafter he examined the petitioner no.1 as Pw1. The original defendant no.17 was brought on record as the legal heir of the original plaintiff no.1 and since there was a difficulty in obtaining his Wakaltnama on account of his employment, he was listed as the defendant no.17. He has not filed his Written Statement and there was no conflict of interest. The petitioners sought to examine the said defendant as the original plaintiff's witness no.3 and his affidavit-in-evidence came to be filed. An objection was filed on behalf of the contesting respondents that the defendant no.17 could not be examined as the original plaintiff's witness and an application came to be moved for discarding his affidavit. The learned Trial Court after hearing the arguments allowed the application and discarded the

application for evidence filed by the defendant no.17. The petitioners thereafter filed an application to examine the defendant no.17, who was transposed as the plaintiff, as his witness by moving an application under Order XVIII Rule 3A CPC which came to be dismissed by the impugned order although the learned Trial Court had by its order dated 07/01/2019 allowed the transposition of the defendant no.17 as one of the plaintiffs.

6. Shri De Sa, learned Advocate for the petitioner placed reliance in **Sanjay Narayanrao Barde and another v/s. Sau Vimal Kesharao Bairam and others** [2000 SCC online Bom. 33], **Ravalnath Builders v/s. Sebastiano Escolastica Beatriz Nunes Mendonsa @ Beatriz Mendonca** [2012 (2) Mh.L.J) and **Hari Shrawan Sutar v/s. Ramdas Tukaram Patil** [AIR 1979 Ori 132] to substantiate his case that his application had to be allowed and the impugned order had to be quashed and set aside.

7. Shri Lotlikar, learned Senior Advocate for the contesting

respondent nos.7 to 11 invited attention to order XVIII Rule 3A CPC and then the application moved on behalf of the petitioner which came to be dismissed vide the impugned Order dated 18/02/2019. An earlier order was passed by the Trial Court dated 17/12/2018 pursuant to which the learned Trial Court had discarded the affidavit of the defendant no.17 by recording its clear findings in that regard and particularly holding that the plaintiff no.1 was already examined and a witness who was an expert was examined and therefore the defendant no.17 who was transposed as a plaintiff could not be examined as their witness. He invited attention to the impugned order where there were clear findings by the Trial Court that the plaintiff no.1 had already been examined by the plaintiff and thereafter an expert after discarding the evidence of the defendant no.17. The learned Trial Court had given clear findings why the application could not be allowed for examining the defendant no.17/plaintiff's Legal representative as a witness and therefore no case whatsoever was made out for interference with the order under challenge.

8. Shri A. D. Bhole, learned Advocate for the respondent no.2 and Shri M. Salkar, learned Government Advocate for the respondent nos.1 to 4 submitted that they had no case to put forth on behalf of their respective parties.

9. i would consider the submissions of Shri De Sa, learned Advocate for the petitioner and Shri S.D. Lotlikar, learned Senior Advocate for the respondent nos.7 to 11 and besides the judgment relied upon and in view thereof decide the petition appropriately.

9. Admittedly, the petitioners had examined the first plaintiff as their witness which unfortunately could not be concluded on account of his death. It is equally undisputed that the defendant no.17 was brought on record as the legal heir of the original plaintiff no.1 but was listed as a defendant since his Wakalatnama could not be procured alongwith the other legal heirs. It was not in dispute that pursuant to the order of the Trial Court dated 07/01/2019, the defendant no.17 was allowed to be transposed as the plaintiff and being one of the heirs of

plaintiff no.1. For that matter, it was singularly not in dispute that an expert witness was examined on behalf of the plaintiffs and it is only thereafter that an application was moved on behalf of the petitioners spelling out that the defendant no.17 had not filed his written statement as there was no conflict of interest with the plaintiff, that the relief sought in the suit was beneficial to the legal representatives of the plaintiff no.2 who were arrayed as the defendants and that an attempt to examine him as their witness was jettisoned at the instance of the contesting respondents pursuant to the order dated 18/12/2018 on the objections raised by the contesting defendants. The petitioners had therefore sought leave of the Trial Court to permit the petitioners to examine the defendant no.17 transposed as the plaintiff no.3 as their witness as there was no bar to apply for leave in terms of Order XVIII Rule 3A CPC.

10. Order XVIII Rule 3A CPC provides for the parties to appear before the other witnesses and reads thus "Party to appear before other witnesses—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.” In other words, there is no bar for the party to appear as a witness at a later stage provided he seeks the leave of the Court to examine himself at a later stage i.e. after his witnesses have been examined.

11. In **Sanjay Barde**(supra), a learned Single Judge of this Court formulated questions for consideration whether the provisions of Rule 3A of Order XVIII CPC were wholly mandatory, whether the application made subsequent to the examination of the witnesses could be made by the party for its own examination and thirdly, whether the Court had power to grant such an application. On a consideration of Order XVIII Rule 3A CPC and the judgments of this Court amongst others, the learned Single Judge proceeded to hold that Order XVIII Rule 3A CPC was directory in nature and that the only mandatory provision it incorporated was to the extent of obtaining permission of the Court; the normal Rule laid down

being that the party wanting to examine himself should examine first before any witness is examined and this Rule could be deviated only with the permission of the Court. Such permission of the Court, it is desirable, should be obtained before any witness is examined but such is not a mandate and it could be obtained even at a later stage. It also considered the second point whether it was open to the party to make an application seeking permission of the Court to examine himself at a later stage and on a consideration of Rule 3A of Order XVIII CPC observed that the Court can accord permission for deviating from the general rule that the party should examine himself first and then the witnesses only for the reasons to be recorded. This judgment would squarely support the case of the petitioner unlike the contention of Shri S.D. Lotlikar, learned Senior Advocate to the contrary.

12. **Ravalnath Builders**(supra) held that there is no bar for a party to call his opponent as a witness in the suit while dealing with a petition challenging the order passed by the Senior Civil Judge, Panaji, whereby an application filed by the petitioner to

examine the opposite party/respondent as a witness in the suit came to be rejected. In Hari Sutar(supra), another learned Single Judge of this Court while interpreting Order XVIII Rule 3A CPC held that the said provision lays down the normal Rule that the party as a witness must offer himself as a witness before any other witness is examined. This salutary rule can be departed by the leave of the Court for which reasons are required to be recorded. Once such reasoned order is made, the examination of such a party at a later stage would be quite regular and in keeping with the Rule. It follows from this that but for such leave the party will not be free to examine itself as a witness at a later stage and to that extent the Rule has to be treated as mandatory.

13. Coming back to the facts of the case, no doubt at the stage of examining the defendant no.17 as its witness, the contesting respondents had taken objection to the affidavit and thereupon the Trial Court vide its order dated 17/12/2018 allowed the objection of the contesting respondents and discarded the affidavit of the defendant no.17/ later transposed

as the plaintiff. It is pertinent to note that nowhere in their application opposing the affidavit was it their case that an attempt was made to fill up the lacune in the case of the petitioners by his examination as the plaintiff's witness. Quite on the contrary, a cursory perusal of the objections would indicate that the contesting respondents had conceded to the fact that he was the legal representative of the plaintiff no.2, that he was listed as a defendant in the suit who had not filed his written statement and nowhere taking an objection that his examination was malafide or intended to fill up the lacunae in the plaintiff's case. This aspect of the matter was not at all considered by the learned Trial Court while passing the impugned order and was swayed more by the fact that earlier his affidavit came to be discarded on the application filed by the contesting respondents. The impugned order is per se illegal, arbitrary and perverse calling for an interference. In view thereof, i pass the following :

ORDER

The Writ Petition is allowed. Rule is made absolute. The impugned order is quashed and set aside and leave granted to the petitioners to examine him as their witness.

NUTAN D. SARDESSAI,J.

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