

IN THE HIGH COURT OF BOMBAY AT GOA**WRIT PETITION NO. 420 OF 2019**

Despamont, Thr. its Partners & 4
Others Petitioners
Versus
Olivio Agnelo Da Cruz Pinto & 16
Others Respondents

Mr. Sandesh D. Padiyar with Mr. Prilam Phadte, Advocates for the Petitioners.

Mr. A.F. Diniz with Mr. Sarvesh Rivankar, Advocates for Respondent Nos. 1 to 4 and 7 to 17.

Mr. Ryan Menezes with Ms. Gina Almeida and Mr. Nigel Fernandes, Advocates for Respondent Nos. 5 and 6.

CORAM:- C. V. BHADANG, J.

RESERVED ON: 4th JUNE, 2019

PRONOUNCED ON: 12th JUNE, 2019

ORDER:

Whether, the Counsel engaged by two sets of defendants (who have filed a common written statement), can be permitted to separately cross examine the plaintiff and his witnesses, is the question, which falls for determination in this petition.

2. The petitioners/plaintiffs have filed Special Civil Suit No. 18/2013/A, against the respondents/defendants for declaration, injunction and consequential reliefs, which suit is pending on the file of the learned Senior Civil Judge at Panaji.

3. The respondents filed a common written statement on 19.06.2013, resisting the suit. The written statement is signed by defendant no. 1 and defendant no. 2 for self and as Power of Attorney holder for defendant nos. 3 to 17. It appears that subsequently, the defendants also filed additional written statement on 03.01.2017. Be that as it may, the respondent nos. 5 and 6 i.e. Mr. Felinto Pinto and Mrs. Maria Braganza (defendant nos. 5 and 6) subsequently engaged another Advocate to represent them in the suit. The petitioners apprehending that both these Advocates i.e. for the respondent nos. 1 to 4 and 7 to 17 and respondent nos. 5 and 6, are considering cross examining the plaintiff's witnesses, filed an application on 05.03.2009, seeking a direction to the respondents to elect any one of the Advocates to cross examine the plaintiff's witnesses and to conduct the suit on behalf of the respondents.

4. That application was opposed by the respondents, as being misconceived and not tenable in law. It was contended that merely because the respondents have filed a common written statement, cannot be a ground to sustain the application.

5. The learned Trial Court, by the impugned order dated 04.04.2019 has dismissed the application. Feeling aggrieved, the petitioners are before this Court.

6. I have heard Mr. Padiyar, the learned Counsel for the petitioners, Mr. Diniz, the learned Counsel for the respondent nos. 1 to 4 and 7 to 17 and Mr. Menezes, the learned Counsel for the respondent nos. 5 and 6. Perused record.

7. Mr. Padiyar, the learned Counsel for the petitioners, submitted that the respondents have filed a common written statement and there is no inter se dispute or conflict of interest amongst them.

Reliance is placed on behalf of the petitioners on Order I, Rule 11 of Civil Procedure Code (CPC, for short) claiming that the word “persons”, as used therein would include both plaintiff/s and/or defendant/s. Reliance in this regard is placed on the decision of the Calcutta High Court in the case of **Tarapada Ghose Vs. Bagala Sundari Basu 1928 AIR(Cal) 143**. It is submitted that the word “persons”, as used in Order I, Rule 11 of CPC cannot be confined to the plaintiff/s alone.

8. Further, reliance is placed on the decision of this Court in the case of **Venkatrao A. Pai & Sons Ltd. Vs. Narayanlal Bansilal 1961 AIR(Bom) 94**, in order to submit that the Court can direct only one of the plaintiff/s or defendant/s, as the Court may think fit to be in charge of the case, irrespective of whether or not, they appoint one of them to appear, act and plead on behalf of all of them.

Reliance is also placed on a foreign judgment in the case of **Chippendale Vs. Masson & Others, 4 CAMP. 172**, in order to submit that in similar circumstances, the Courts have held that where the defendants have filed a common written statement, but, engaged two Advocates, the Advocates cannot separately be permitted to cross examine the witness/s of the adversary. It is submitted that the said principle is in consonance with expeditious, fair and proper disposal of the suit, else otherwise, it would cause complications in the matter of trial of suit, if all such Advocates, representing different sets of defendants, who are otherwise having a common interest, are permitted to cross examine separately.

9. It is submitted that the Trial Court has addressed itself on a wrong point as to whether, there is bar or otherwise on the defendants, who have filed a common written statement,

to “engage” separate Advocates to conduct their case. It is submitted that it is not the question of engaging, separate Advocates, but, conduction of trial by two Advocates. The learned Counsel was at pains to point out that the petitioners have no objection, if, the respondent nos. 5 and 6 have engaged a separate Advocate. The question is about such Advocates being allowed to separately cross examine the plaintiff and its witnesses.

10. Mr. Diniz, the learned Counsel for the respondent nos. 1 to 4 and 7 to 17 has supported the impugned order. It is submitted that the impugned order only decides a procedural aspect, permitting the Advocates for the two sets of the defendants to cross examine the plaintiff's witnesses and such an order cannot act to the prejudice or detriment of the petitioners. It is submitted that for this reason, this Court, should decline to interfere with the impugned order under Article 227 of the Constitution of India. It is submitted that the word “persons” used in Order I, Rule 11 of CPC, cannot include defendant/s, in as much as the said Rule speaks of conduction of the “suit”, which essentially has to be done by the plaintiff/s. It is submitted that quite to the contrary, Order I, Rule 12 of CPC speaks of both, the plaintiff/s as well as

defendant/s. It is submitted that Order I, Rule 11 and Rule 12 of CPC are enabling provisions, which empower the Courts in an appropriate case, to permit one or more party to act on behalf of the others.

11. It is submitted that the decision of the Calcutta High Court in the case of **Tarapada Ghose** (supra) involved a question as to whether, a person, who is stranger can be allowed to conduct the suit. It is submitted that thus, the issue involved in the said case was entirely different. Insofar as the decision in the case of **Venkatrao A. Pai & Sons Ltd.** (supra) is concerned, it is submitted that the said case involved conduction of the suit by two sets of plaintiffs and not defendants, as in the present case and the said case is distinguishable on facts, as has been rightly held by the learned Trial Court. It is submitted that the view taken by the learned Trial Court is a plausible view, which need not be interfered with. It is submitted that the learned Trial Court has adequately protected the interest of the petitioners, as also the requirement of fair trial by observing that the cross examination by two Advocates can be controlled and monitored to see that there is no duplication of questions and unnecessary harassment of the plaintiff and its witnesses.

12. Mr. Menezes, the learned Counsel for the respondent nos. 5 and 6 has also supported the impugned order on similar grounds. It is submitted that a specific statement was made before the Trial Court that the Advocate for respondent nos. 5 and 6 will ensure that there is no repetition or duplication of the cross examination and in any event, the learned Trial Court has observed that the cross examination can be monitored to avoid unnecessary harassment of the plaintiff and its witnesses.

13. The rival contentions now fall for determination. Order I, Rule 11 and Rule 12 of CPC read as under:

“11. Conduct of suit.—The Court may give the conduct of a suit to such person as it deems proper.

12. Appearance of one of several plaintiffs or defendants for others.—(1) Where there are more plaintiffs than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding; and in like manner, where there are more defendants than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding.

(2) The authority shall be in writing signed by the party giving it and shall be filed in Court.”

Rule 11 of Order I of CPC is an enabling provision, authorizing the Court to give the conduct of a suit to such a person as it deems proper. The use of the word “may” would indicate that the Court has a discretionary power to give the conduct of a suit to such a person as it deems proper.

14. Mr. Padiyar, the learned Counsel for the petitioner has strenuously urged that the word “person”, as used in Rule 11 would include plaintiff/s. Reliance in this regard is placed on the decision of the Calcutta High Court in the case of **Tarapada Ghose** (supra). The question before the Calcutta High Court in the case of **Tarapada Ghose** (supra) was whether, the conduct of the defence could have been given to the wife of the defendant, as the defendant was found to be absconding/missing. Thus, essentially, the question in the case of **Tarapada Ghose** (supra) was whether, Order I, Rule 11 of CPC authorizes the Court to give the conduct of a suit to a stranger, who is not a party to the suit and the learned Trial Court had allowed the wife of the defendant to conduct the suit on behalf of her husband. The Calcutta High Court found that the conduct of a suit, could not have been given to a stranger, who was not a party to the suit.

It can thus be seen that the said case turned on its own facts. It is true that there are certain observations in the said judgment to indicate that the word “person” as used in Rule 11 of Order I of CPC, includes both the plaintiff/s as well as defendant/s, however, essentially, the case as noticed earlier, did not involve any such issue. That apart, I find that the question whether, the word “person” as used in Rule 11 of Order I of CPC includes only the plaintiff/s or would also take into its ambit the defendant/s, does not involve in the present petition and thus, it is not necessary to dwell or give finding on the said aspect. This is because the Trial Court has not exercised powers under Order I, Rule 11 of CPC to entrust the conduct of the suit (and for the matter of that, the defence, if at all it is assumed that the word “person” include defendant/s) in this case, to any person.

15. Rule 12 of Order I of CPC provides for a contingency where there are multiple plaintiff/s/defendant/s in the suit and the Rule says that in such a case, one or more of the plaintiff/s can be authorized by rest of the plaintiff/s and similarly, one or more defendant/s can be authorized by rest of the defendants/s to appear/plead for them in any proceeding. Sub-rule (2) of Rule 12 of Order I of CPC provides that such authority has to

be in writing, signed by the parties giving such authority and the authority should be produced in the Court. It is also not necessary to dwell upon Rule 12 of Order I of CPC, in as much as, there is no authority given by any of the defendants, including the defendant nos. 5 and 6 to any of them to appear/plead or act on their behalf. The filing of the common written statement cannot mean that defendant nos. 5 and 6 have so authorized the rest of the defendants to appear, plead or act on their behalf. Sub-rule 2 of Rule 12 of Order I of CPC would indicate that there has to be a specific authority in that regard, filed in the Court. Thus, on facts, as obtaining in the present case, neither Rule 11 nor Rule 12 of Order I of CPC is attracted, in this case.

16. On behalf of the petitioner, strong reliance is placed on the decision of this Court in the case of **Venkatrao A. Pai & Sons Ltd.** (supra), in order to submit that where there are more defendants than one and if, such defendants engage different Advocates, each one of them will not have an authority to cross examine the adversary or his witnesses. In my considered view, reliance placed on the decision of this Court in the case of **Venkatrao A. Pai & Sons Ltd.** (supra) is misplaced as the said case is clearly distinguishable on facts.

The question involved in the case of **Venkatrao A. Pai & Sons Ltd.** (supra) was when more than one person is joined as co-plaintiff in the suit, whether, each of the plaintiff, has an independent right to engage a Counsel and for conducting the suit.

17. This is what is held in para 3 of the judgment.

“3. It is clear that two or more persons would agree to join as co-plaintiffs in a suit only if there is any common question of law or fact between them, and their respective claims arise out of the same transaction. The law permits these different plaintiffs to join in one action by filing one common plaint only with a view to save multiplicity of suits and consequent wastage of time of the Court. If this is the object of allowing several persons to join as plaintiffs in one action, the object would be frustrated if each of these persons is allowed to be represented by a separate counsel and each one of the counsel is also permitted to be in charge of the case for his own client. I fail to see how, if such things are permitted, the wastage of the time of the Court, which is otherwise intended to be saved by allowing several persons to join together as co-plaintiffs in one action, could at all be saved. On the contrary, far more time would be taken and a number of unnecessary complications would arise in trying one such action if every one of the

plaintiffs is allowed to be represented by his own counsel and each counsel is allowed to conduct the case separately for his own client. It may be for this reason that the tradition has taken deep roots both in the courts here as in England that in cases where more persons than one join as co-plaintiffs in one action they should all be jointly represented by one or more counsel. It may be that at some stage or the other of the action some of the plaintiffs might feel that there is a conflict of interest between them and the other plaintiffs. Just for that reason, however, as was held by the Master of the Rolls in the case cited above, such plaintiffs cannot be allowed to engage a different counsel. If they so wish, they might well apply to the Court to transpose them as defendants."

It can thus be seen that this Court found that two or more persons, would agree to join in the suit as co-plaintiffs only where there is common question of law and fact. This Court found that the whole object would be frustrated, if each of these persons is allowed to be represented by a separate Counsel and each one of the Counsel is also permitted to conduct the suit. The Court also found that in an appropriate case, where some inter se dispute or conflict arises between the co-plaintiffs, they can seek their transposition as defendants. None of these principles, would be attracted in a

case of a suit having multiple defendants. No doubt, there are certain observations in the said judgment to indicate that where the defendants have filed a common written statement, the Court has power to direct one of the Advocates to be incharge for all the defendants. However, as noticed earlier, the principal question involved was whether, two Advocates engaged by two sets of co-plaintiffs, can be allowed to separately conduct the suit. It is significant to note that in para 2 of the judgment in the said case, this Court has noticed the long standing practice prevailing on the original as well as the Appellate side of this Court, not to permit more than one Advocate to represent the plaintiff/s to conduct the trial separately.

18. In the decision of this Court in the case of **Geeta R. Hatkar Vs. Nalinibai K. Dhonde & Others** (Writ Petition No. 277/2014 decided on 7th May, 2015), the petitioner, who was defendant no. 3 had challenged an order disallowing her to cross examine the defendant no. 1. In that case, the petitioner (defendant no. 3) alongwith the defendant nos. 2 and 4 had filed a common written statement. The defendant nos. 2 and 4 were represented by an Advocate, while defendant no. 3, the petitioner therein, was appearing in person. This Court found

that the petitioner could not have been precluded from cross examining the defendant no. 1, although, the Advocate for defendant nos. 2 and 4, with whom, the defendant no. 3 had filed a common written statement, had already cross examined the defendant no. 1. Even in that case, reliance was placed on behalf of the petitioner on the decision of this Court in the case of **Venkatrao A. Pai & Sons Ltd.** (supra). This Court found that the observations in the case of **Venkatrao A. Pai & Sons Ltd.** (supra) could not be drawn out of context and found that permitting the petitioner (defendant no. 3) to cross examine the defendant no. 1, would not run counter to any tradition at bar or for that matter would not fall foul of any legal provisions.

19. Mr. Padiyar, the learned Counsel for the petitioner submitted that the decision in the case of **Geeta R. Hatkar** (supra) turned on its own facts, in as much as the plaintiff's had no objection for the petitioner (defendant no. 3) and Advocate for defendant nos. 2 and 4, separately cross examining the defendant no. 1 and further, it was found that no objection was raised when the suit was adjourned for cross examination by the petitioner after the Advocate for defendant nos. 2 and 4 had concluded the cross examination on behalf of defendant

nos. 2 and 4. There was some debate at the bar as to whether, even in the present case, there was any objection raised when the defendant nos. 5 and 6 had engaged a separate Advocate, who had filed his Vakalatnama somewhere in February, 2018. It is not necessary to go into this aspect, as no rule of law or one of practice has been brought to my notice, showing a prohibition for some of the defendants, (engaging a separate Advocate), being permitted to cross examine the witness of the adversary separately. The question in my considered view, would depend upon facts and circumstances of each case. The Court, in an appropriate case, can grant or permit such cross-examination, subject to conditions and can monitor the cross examination, in order to avoid repetition of the cross examination and unnecessary harassment of the witness and shall ensure that it does not affect the fair and speedy disposal of the suit. In the present case, Mr. Menezes, the learned Counsel for the respondent nos. 5 and 6 has submitted that Advocate for respondent nos. 5 and 6 will ensure that there is no repetition of the cross examination. That apart, even the Trial Court has observed that it will monitor the proceedings and shall ensure that there is no duplication of the questions and unnecessary harassment of the plaintiff and his witnesses. In such circumstances, no case for interference is made out.

The petition is without any merit and is accordingly dismissed,
with no order as to costs.

C. V. BHADANG, J.

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