

IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO. 138/2019

The Conservator of Forests & 2 Others		Petitioners
Versus		
Oscar Jeronimo D'Souza (dec) & 36 Others		Respondents

Ms. Susan Linhares, Additional Government Advocate for the Petitioners.

Mr. E. Dias, Advocate for Respondent Nos. 1(a), 1(b) and 2.

WRIT PETITION NO. 920/2019

Oscar Jeronimo D'Souza (dec) & Another		Petitioners
Versus		
State of Goa & 37 Others		Respondents

Mr. E. Dias, Advocate for the Petitioners.

Ms. Priyanka Kamat, Additional Government Advocate for Respondent Nos. 1, 2 and 3.

CORAM:- C. V. BHADANG, J.

RESERVED ON: 18th OCTOBER, 2019

PRONOUNCED ON: 18th NOVEMBER, 2019

COMMON ORDER:

Both these Petitions are between the same parties and basically involve a challenge to the order dated 22.12.2017 (below Exhibit-111), passed by the learned District Judge at Margao in Civil Suit No. 157/2004. As such, they are being disposed off by this common order.

For the sake of convenience, facts are narrated in relation to Writ Petition No. 920/2019.

2. The aforesaid suit is filed by the petitioners (plaintiffs) against the respondents (defendants) therein, for declaration and certain consequential reliefs. According to the respondents nos. 1, 2 and 3 (original defendant nos. 1, 2 and 3), the suit property, which comprises of land Survey No. 73/1 of Darbandora village of Sanguem Taluka, is belonging to the State as it is a forest land. In the said suit, the plaintiffs have examined in all four witnesses including PW-1 Carlene D'Souza and PW-2 Dhananjay Navelkar and have closed their case. At the relevant time, the defendant nos. 1, 2 and 3 were represented by Advocate Milagres Fernandes. It is contended on behalf of the respondent nos. 1, 2 and 3 (who are the petitioners in Writ Petition No. 138/2019) that Advocate Milagres Fernandes was ailing and as such, the cross examination of the witnesses of the plaintiffs was conducted by her junior, Advocate A. Patil, which according to these respondents was inadequate. Advocate Milagres Fernandes has since expired and subsequently, the defendant nos. 1, 2 and 3 were represented by Advocate S. Estibeiro. It is at this stage that these respondents filed an application (Exhibit-111) for

recall of PW-1 and PW-2 for further cross examination. It was contended that the suit property is a vast property and the evidence comprises of several documents, as produced on behalf of the petitioners (plaintiffs) and therefore, it was necessary to cross examine PW-1 and PW-2 extensively so as to bring out the truth. It was contended that on account of her illness, Advocate Milagres Fernandes could not attend the Court and the cross examination conducted by her junior Ms. Patil was inadequate.

3. The application was opposed on behalf of petitioners (plaintiffs). It was contended that the application is filed to delay the disposal of the suit and no case for recall is made out. It was contended that PW-1 and PW-2 have been extensively cross examined by Advocate Patil. It was contended that in any case, the evidence is essentially documentary in nature and therefore, the recall of the witnesses is not necessary.

4. Before the learned Trial Court, reliance was placed on behalf of the petitioners (plaintiffs) on the decision of the Supreme Court in the case of **Ram Rati Vs. Mange Ram (D) through LRs & Others (2016) 11 SCC 296**, in order to submit that the recall of a witness, for further elaboration is

wholly impermissible in law. The learned Trial Court, however, has found that in the interest of justice, the witnesses are required to be recalled. The learned Trial Court, by impugned order dated 22.12.2017, has allowed the application, while directing the recall. The learned Trial Court has directed the respondent nos. 1, 2 and 3 to give the gist of the questions sought to be put to the aforesaid witnesses.

5. It appears that the respondent nos. 1, 2 and 3 gave such gist of questions on 19.01.2018, which was objected to on behalf of the petitioners, on the ground that they are generic in nature and no specific questions were set out. The learned Trial Court by an order dated 25.01.2018, has directed the respondent nos. 1, 2 and 3 to give the proposed questions. It is in these circumstances that the respondent nos. 1, 2 and 3 are challenging the orders dated 22.12.2017 and 25.01.2018 in Writ Petition No. 138/2019, while the petitioners (plaintiffs) are challenging the order dated 22.12.2017, permitting the recall in Writ Petition No. 920/2019.

6. I have heard the learned Counsel for the contesting parties and perused record.

7. Mr. Dias, the learned Counsel for the petitioners has submitted that the recall could not have been allowed. For this purpose, reliance is placed on the decision of the Supreme Court in the case of **Ram Rati** (supra). It is pointed out that in pursuance of the impugned order, PW-1 has in fact been recalled and has been further cross examined on 04.06.2018 and 11.07.2018. The learned Counsel, however, in all fairness states that he has no objection for PW-1, subjecting himself for further cross examination. He, however, has strong objection for recall of PW-2, on the ground that he is suffering from terminal illness, in support of which, a medical report is produced. It is submitted that PW-2 is not in a position, where under he can be subjected to cross examination.

8. It is submitted by Ms. Linhares, the learned Additional Government Advocate for the respondent nos. 1, 2 and 3 that the recall is necessary and has rightly been allowed as PW-1 and PW-2 were not adequately cross examined on account of illness of Advocate Milagres Fernandes. She, however, has taken exception to the part of the impugned order, by which, the Trial Court has directed these respondents to furnish the gist of questions. It is submitted that there is no provision under which, the Court can direct the parties to

furnish the probable questions in advance. It is submitted that this has the effect of the witness coming prepared and/or tutored to answer the said questions, thereby frustrating the whole object of the cross examination.

9. I have carefully considered the circumstances and the submissions made. The Supreme Court in the case of **Ram Rati** (supra), placing reliance on its earlier decision in the case of **Vadiraj Naggappa Vernekar (Dead) Thr. LRs Vs. Sharadchandra Prabhakar Gogate (2009) 4 SCC 410**, has *inter alia* held that the power under the provisions of Order XVIII Rule 17 of CPC, has to be sparingly exercised and not as a general rule. It is held that such recall cannot be allowed merely on the ground that such recall and re-examination would not cause any prejudice to the parties and such power cannot be exercised to enable the parties to fill up lacunae in the evidence.

10. The Himachal Pradesh High Court in the case of **Akash Vs. Gian Singh & Others, 2010 AIR (HP) 93**, has held that a change of Counsel is not a ground for directing recall.

11. There is no provision brought to my notice, under which, the Court can direct the parties to furnish the potential questions in advance, for putting in the cross examination to the witness, as has been done by the Trial Court, while permitting the recall. Ms. Linhares, the learned Additional Government Advocate for the respondent nos. 1, 2 and 3 is right in contending that furnishing of such questions in advance, would alert the witness and the possibility of tutoring cannot be ruled out, thereby frustrating the whole object of the cross examination. Thus, part of the order, directing the respondent nos. 1, 2 and 3 to furnish the gist of questions cannot be sustained.

12. This takes me to the issue of recall. As noticed earlier, in pursuance of the impugned order, PW-1 has already been recalled on 04.06.2018 and 11.07.2018. The learned Additional Government Advocate states that the said cross examination was ineffective as the questions were already served. Be that as it may, in view of the fact that Mr. Dias, the learned Counsel for the petitioners has no objection for recall of PW-1 being further subjected to cross examination, by consent of parties, the recall of PW-1 for further cross examination is permitted. However, I am not inclined to permit

the recall of PW-2, basically for two reasons. First, that no case for recall is made out and secondly, on the ground of terminal illness of the said witness. The medical record, which is not seriously disputed shows that the witness is suffering from cancer with metastatic liposarcoma and has undergone twelve cycles of chemotherapy and ten cycles of radiation. Thus, the learned Counsel for the petitioners is justified in claiming that the said witness is not in a position of being subjected to cross examination.

13. In such circumstances, the Petitions are disposed off, by permitting the recall of PW-1 on the basis of the concession recorded on behalf of the petitioners (plaintiffs).

The order permitting recall of PW-2 is hereby set aside.

In the circumstances, there shall be no order as to costs.

C. V. BHADANG, J.

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