

IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO 955 OF 2019.

Ganesh Vishnu Naique and anr. ...Petitioner.

Vs.

Joao D'Cruz Cardozo and others ... Respondents.

Shri S. Desai, Advocate for the petitioner.

Shri J. J. Mulgaonkar, Advocate for respondent no.3.

Coram: DAMA SESHADRI NAIDU, J.

Date: 16th March 2021

P.C.

Facts:

The petitioners, husband and wife, are the plaintiffs in Special Civil Suit No.120/2005/A before the Civil Judge, Senior Division, at Mapusa. They have sued three defendants and sought these reliefs: (a) a declaration that the sale deed the first and second defendants executed in the third defendant's favour is void; (b) a declaration that the plaintiffs are the owners of the suit property through the reversion of the grant; and (c) both perpetual and prohibitory injunctions.

2. As the record reveals, the first and second defendants had a grant of certain properties with an existing house. They sold a piece of that property to the third defendant. The petitioners, as the plaintiffs, contended that there is an absolute prohibition against any sale. They have also contended that there is a clause of reversion in their benefit. So they have assailed the sale. As the pleadings would

reveal, defendants 1 and 2, as the vendors, and defendant no. 3, as the purchaser, sail together. Apparently, there was no conflict of interest between them.

3. In the trial, the first defendant deposed himself as DW1. Then, in terms of Order 18 Rule 2 of CPC, read with Section 137 of the Indian Evidence Act, the third defendant, having no conflict of interest with DW1, had to cross-examine that witness if he chose. But as the third respondent pleads, DW1's evidence in chief revealed nothing adverse against the third defendant. Therefore, he passed up the opportunity of cross-examining DW1.

4. Later, the plaintiff cross-examined DW1. During that cross-examination, according to the third defendant, DW1, though he is a vendor, deposed adverse to his interest—that is, against the purchaser's interest. Because of that development, the third defendant wanted to cross-examine DW1. For that purpose, he has applied to the trial Court. The plea in his application, crisp and concise, is revealing:

2. The interest of Defendant no.3 in the present case was not [adverse] to that of defendant no. 1 and 2. Defendant No.3, therefore, had not examined DW1. Even the Affidavit in evidence of DW1 does not contain any statement adverse to [...] the defendant no.3.
3. However, in examination recorded on 4/6/2019, the witness, i.e. DW1, has made certain statements which are adverse to the interest of Defendant no.3
4. The Defendant no.3 therefore immediately at the end of the cross-examination on 4/6/2019 sought to cross-examine DW1. This was opposed by the

Advocate for the Plaintiff, and Defendant no.3 was asked to make a written application for cross-examination, so that the Plaintiff has an opportunity to give his detailed say on the same.

5. Until DW1 made adverse statements in the cross recorded on 4/6/2019, there was no need for Defendant no.3 to cross-examine DW1. It is only after DW1 made statements which are adverse to the interest of a Defendant no.3, the present application is being filed.

6. *The Defendant no.3 has no objection if the Plaintiff is given the opportunity for future cross-examination after Defendant no.3 concludes his cross.*

(italics supplied)

5. Though it is stoutly opposed by the plaintiffs, the trial Court, through its order dated 15.10.2019, allowed that application. In that process, it has held:

“3. Learned Advocate for defendant no.3 placed reliance on *Ghanshyam Narottam Dodiya and anr. Vs. Yogesh Vijaykumar Dishu and anr.* Writ Petition no.8999 of 2018 that if any adverse statements are made by another defendant, then opportunity has to be given to the other defendants to cross-examine. In the said case, it was directed that plaintiff shall cross-examine defendant no.1, and if any such cross-examination defendant' no.1 makes a statement which should be adverse to the interest of defendant no.2, then defendant no.2 can be permitted to cross-examine defendant no.1.

4. It is the case of defendant no.3 that during cross-examination, DW1 has made statements adverse to the interest of defendant no.3. Considering the same in my opinion, opportunity has to be given to defendant no.3 to cross-examine. However, the interest of the plaintiff should also be kept in mind.

Plaintiff will also get an opportunity to cross-examine if new facts come up during the cross-examination of defendant no.3."

6. Aggrieved, the plaintiffs have come to this Court with this Writ Petition under Article 227 of the Constitution of India.

Arguments:

Petitioners:

7. Shri Desai, the learned counsel for the petitioners, contends that the third defendant did have an opportunity earlier to cross-examine DW1, but he did not avail himself of that opportunity. Later, merely because DW1 spoke a stray sentence, it should not be taken as something adverse to the third defendant's interest. Therefore, such piecemeal cross-examination, as allowed by the trial Court, is impermissible.

8. According to Shri Desai, if this practice is adopted, there will be an endless trial. To support his contentions, he has relied on *Mandabai Ramkrishna Tumsare v. Ramlal Hiramaji Hirwarkar*¹ and *Sunil Chatrapal Kedar v. Y. S. Bagde*.²

Third Respondent:

9. Shri J. Mulgaonkar, the learned counsel for the third respondent, has joined the issue and contended that the third respondent's application filed before the trial Court has contained cogent reasons why the third respondent should cross-examine DW1.

¹ 1986 Mh.L.J 643

² 2004(4) MhLJ 620

Persuaded by those reasons, the trial Court, similarly, passed a reasoned order, brief it may be.

10. In this context, Shri Mulgaonar points out that in the Writ Petition, the High Court was called upon to exercise its supervisory jurisdiction under Article 227 of the Constitution of India. Once the trial Court has exercised its discretion and passed a reasoned order, it is impermissible for this Court to upset that view merely because it may, in the given circumstances, hold a different, even a better, view. Therefore, he has urged this Court not to interfere.

11. Heard Shri S. Desai, the learned counsel for the petitioner; and Shri J. J. Mulgaonkar, the learned counsel for respondent no.3.

Discussion:

12. As I have noted, the third respondent's application to the trial Court is clear and crisp. It has contained sufficient reasons. Verbosity is a vice, and the third respondent's application has avoided it. For that reason, I have extracted the pleadings in good measure. The impugned Order is equally commendable: precise and to the point. In part two of the Order, the trial Court has given sufficient reason why it should allow the third respondent to cross-examine DW1.

13. Indeed, Shri Desai has made strenuous efforts to impress upon the Court that the course the trial court adopted is impermissible. He has placed strong reliance on this Court's judgment in *Mandabai Ramkrishna Tumsare*. In that case, the plaintiffs pleaded that they had purchased the property from the 6th defendant,

but the defendants 1 to 5 had been trying to deny their title and possession. The 6th defendant, as the vendor, filed a written statement supporting the plaintiffs. When he died, his legal representatives came on record and continued to support the plaintiffs, based on their predecessor's written statement.

14. When the parties went to trial, one of the plaintiffs was examined. Defendants 1 to 5 wanted the vendor's legal representatives to cross-examine the plaintiff. According to them, only after that would their turn come to cross-examine the plaintiff. The trial court, however, rejected the application of defendants 1 to 5; it directed them to cross-examine the plaintiff. So those defendants questioned the trial Court's order before this Court.

15. In the above factual backdrop, *Mandabai Ramkrishna Tumsare* has observed that apparently the defendants 6 to 8 fully supported the plaintiffs' case. They are, therefore, not adverse parties; rather, they are proforma defendants. In a case like that, the plaintiff's evidence having been recorded, it would be just and proper for the trial court to ask the proforma defendants 6 to 8 to initially cross-examine the plaintiff and then direct the contesting defendants 1 to 5 to cross-examine the plaintiff.

16. To justify this procedure, *Mandabai Ramkrishna Tumsare* has explained that if the adverse party first cross-examines the plaintiff, it may reveal certain lacunae. Then, the parties supporting the plaintiff may, in their cross-examination, allow the plaintiff to cover those lacunae. It is for this purpose, to meet the ends of justice, the

trial court should permit the contesting defendants to cross-examine the plaintiff last, particularly when the adverse party so desires.

17. I am afraid *Mandabai Ramkrishna Tumsare* does not apply here. There, the defendants 6 to 8 supported the plaintiffs' case. Here, the case, I agree, began the same way as it did in *Mandabai Ramkrishna Tumsare*. So, the third respondent did not choose to cross-examine DW1. But later, when the plaintiffs cross-examined DW1, he deposed adversely against the third respondent. So, he was caught unawares.

18. In *Sunil Chatrapal Kedar*, this Court has observed that the trial Judge is the master of his own proceedings. It is his domain, where he can fix and adjust the scope and mode of cross-examination. Normally, there is no question of interference in such matters, as the discretion, in the facts and circumstances, need to be exercised by the trial Court. *Sunil Chatrapal Kedar*, however, acknowledges that occasionally a party to the proceedings may apply to the trial court to adopt a particular course of the trial, especially as to the order of witnesses to be cross-examined. If that request accords with the statutory and precedential scheme, the trial Court should not regard the request.

19. Then, *Sunil Chatrapal Kedar* relies on *Mandabai Ramkrishna Tumsare*, *Jumphu Bewa v. Sahadeb Rout*³, and *Shah Hiralal Himatlal v. M.G. Pathak*⁴. And, in the end, it declines "to pass any order or any

³AIR 1987 Ori 209

⁴AIR 1964 Guj 26

specific order in the matter”. But it requires the trial court to consider the precedential principles laid down in the above decisions and “accordingly proceed with the trial, without delaying the matter further”.

20. Throughout the trial, until the plaintiff cross-examined DW1, there was nothing adverse in DW1’s pleadings or chief examination against the third respondent. So he had no occasion to cross-examine DW1. Later, when plaintiffs cross-examined DW1, he is said to have testified against the third respondent, his purchaser. In this context, the third respondent required the trial court to permit him to cross-examine DW1. We are aware, a party can cross-examine his own witness if that witness turns hostile. And to be fair, the third respondent in his application has reasoned that his request to cross-examine DW1 does not prejudice the plaintiffs because they could as well further cross-examine DW1 once the third defendant completes his cross-examination. And the trial Court has accepted that. The impugned order, therefore, is just and proper; it suffers from no legal infirmity.

21. I reckon the impugned order causes no prejudice to the petitioners. Nor am I in a position to upset that order exercising my supervisory, discretionary jurisdiction Article 227 with no jurisdictional error or perversity of finding.

I, therefore, dismiss the petition—no order on costs.

DAMA SESHADRI NAIDU, J.

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