



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

916 WRIT PETITION NO. 9733 OF 2024

SUMANBAI MADHUKARRAO BODADE
VERSUS
SAMBHAJI ANNAJI DESHMUKH JADHAV

...

Mr. G. V. Wani, Advocate for the Petitioner
Mr. M. M. Bhokarikar, Advocate for Respondent

...

CORAM : AJIT B. KADETHANKAR, J.

DATE : 12.03.2026

PER COURT :-

1. In a suit for declaration and perpetual injunction, the plaintiff authorised her son to contest the suit on her behalf, including the authority to lead evidence as a Power of Attorney Holder on the basis of a Power of Attorney. The petitioner, namely Jitendra Madhukar Bodade, examined himself and was also subjected to cross-examination.

2. Subsequently, before the other witnesses could be examined from the plaintiff's side, the plaintiff moved an application below Exhibit-84 under Order XVIII Rule 3-A of the Code of Civil Procedure, thereby seeking leave to enter into the witness box and depose in respect of the suit. The said application was contested by the defendant.

3. Upon hearing the parties, the learned Trial Court observed that though a party may lead evidence by examining herself, the same must be strictly in accordance with Order XVIII Rule 3-A. The learned Trial Court, while rejecting the application, recorded a finding that the application did not disclose convincing reasons for grant of such leave. It was further observed

that no medical documents were placed on record to infer that the petitioner was suffering from any medical difficulty in entering the witness box. The Trial Court also noted that the application appeared to be an attempt to fill up lacunae in the evidence.

4. Mr. G. V. Wani, learned counsel for the petitioner submits that the learned Trial Court ought to have appreciated that, in the given circumstances, the plaintiff, who had already deposed through her Power of Attorney Holder, can be permitted to enter the witness box and depose in support of the pleadings. He submits that the only reason recorded by the Trial Court is that the explanation offered was not convincing and that medical documents were not filed along with the application. He further submits that the petitioner would produce the relevant medical documents along with her examination-in-chief, if permitted. He submits that consideration of the petitioner's evidence would depend upon such documents placed on record.

5. In view of this, Mr. Wani, learned counsel for the petitioner relies upon the judgment rendered by this Court Bench at Nagpur in the case of Care Hospitals, Ganga Care Hospitals Limited, through Its Managing Director Dr. Varun Bhargava vs. Dr. Nilesh s/o Digambar Thakre, through his power of attorney holder Digambar Pundalikrao Thakre reported in 2019 (3) MhLJ. 955. It was a case wherein in the identical circumstances, a party has sought leave of the Trial Court to allow to enter in the witness box and deposed in respect of the pleadings, while the Power of Attorney Holder for the said party has already completed his evidence. In that case the Trial Court after considering the law and considering the objection raised by the other side had allowed the application. As such, the similarly situated party was allowed to take recourse to Order XVIII Rule 3-A of CPC. The defendants therein had approached this Court while discussing the issue at length. This Court

observed thus :

“5. I have heard the learned counsel for the parties at length and I have given due consideration to their respective submissions. It is not in dispute that initially the plaintiff had examined his Power of Attorney holder by placing on record his affidavit in lieu of his evidence. After that witness was examined, he sought permission to examine himself as his witness. The situation is governed by the provisions of Order XVIII Rule 3A of the Code. The said provision reads as under:-

"XVIII-Hearing of the Suit and examination of witnesses:

3A. 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."

A perusal of Rule 3A of the Code indicates that ordinarily where a party wishes to appear as a witness he has to so appear before any other witness on his behalf has been examined. However, power has been conferred on the Court to permit such party to appear as his own witness at a later stage by recording reasons for accepting such request. The aforesaid provisions have been considered in various decisions referred to by the learned counsel for the petitioner. In *V. Jayakannan and Others (supra)*, it has been held that permission of the Court has to be obtained by a party who desires to examine himself as a witness prior to the evidence of such other witnesses being adduced. It has been further held that in a given case, if a party does not apply to the Court for permission to examine himself before other witnesses are examined which would only mean that the party has defaulted with regard to what he has been required to do at the trial. In other words, it has been held that prior permission has to be obtained as contemplated by Rule 3A before any other witness is examined. Similar view has been taken in *Ayyasami Gounder & Others (supra)*. It has been reiterated that such permission from the Court under provisions of Order XVIII Rule 3A of the Code has to be obtained before commencement of the examination of other witnesses on behalf of the party seeking such permission and not later.

Learned Single Judge of this Court (A.M. Khanwilkar, J. as his Lordship then was) in *Vijaysingh Gordhandas & Others (supra)* has held that the provisions of Rule 3A are an exception to the rule that the plaintiff has to first enter the witness box before he can examine any other witness as his witness. It was observed that in view of the plain language of the said provision, there was no prohibition to permit examination of the

party after he had examined other witnesses as his witnesses. Same is within the discretion of the Court. In the said case, the plaintiff had moved an application seeking permission to lead evidence after the evidence of their witnesses was already recorded. The trial Court rejected application in view of the fact that the constituted Attorney of the plaintiff had been examined and therefore it was not open for the plaintiff to give evidence thereafter. Setting aside the order passed by the trial Court it was held that it was within the discretion of the Court to permit the party to enter the witness box at a subsequent point of time provided that the Court was satisfied that there existed sufficient material for taking such a course of action.

6. It is to be noted that the provisions of the Code are for facilitating the fair conduct of proceedings. The Code acts as the handmaid of justice. By keeping in mind the observations of Krishna Iyer, J. in *The State of Punjab Versus Shamlal Murari & Another* AIR 1976 SC 1177 as under, the issue arising can be considered.

"8.We must always remember that processual law is not to be a tyrant but a servant, not an obstruction but an aid to justice. It has been wisely observed that procedural prescriptions are the hand-maid and not the mistress, a lubricant, not a resistant in the administration of justice. Where the non-compliance, tho' procedural, will thwart fair hearing or prejudice doing of justice to parties, the rule is mandatory. But, grammar apart, if the breach can be corrected without injury to a just disposal of the case, we should not enthrone a regulatory requirement into a dominant desideratum. After all, Courts are to do justice, not to wreck this end product on technicalities. Viewed in this perspective, even what is regarded as mandatory traditionally may, perhaps, have to be moderated into wholesome directions to be complied with in time or in extended time....."

7. Under Rule 3A of Order XVIII, it is ordinarily necessary for a party to examine himself first before he examines any other witness on his behalf. A discretion has been conferred on the Court to permit such party to appear as his own witness at a later stage. The words 'at a later stage' would have to be given the ordinary meaning to mean that there is no prohibition for a party to seek such permission even after other witnesses have examined on his behalf. Restricting the application of Rule 3A to situations only where prior permission of the Court is taken by a party for examining himself before other witnesses on his behalf have been examined would amount to reading such restriction in Rule 3A of the Code which has not been provided. It is ultimately for the Court to grant such permission in the facts of the case. There could be a situation as the present case where the plaintiff was unavailable when

he was required to lead evidence and after his Power of Attorney holder was examined as his witness, the plaintiff was available for leading his evidence. The Court if it finds it necessary to permit such party to be examined after his other witnesses have been examined can always permit such examination subject to the rider that such examination would not be for the purposes of filling in any lacuna that is sought to be filled in by such subsequent examination. It does not appear from a plain reading of Rule 3A of Order XVIII that only if a party seeks prior permission before any other witness on his behalf has been examined that the Court can consider such request and that the hands of the Court would be tied if such request is made later on. The fact that the power to grant such permission at a later stage by exercising discretion and permitting a party to examine himself as a witness at a later stage is conferred on the Court would imply that such permission could be sought in a given case after other witnesses on his behalf have been examined. The discretion having been conferred on the Court, it goes without saying that such discretion would have to be exercised in a judicious manner in the light of the facts of the case and obviously to prevent any mischief or filling up of any lacuna on the part of such party by examining himself at a later stage. The Court is also empowered to restrict such evidence in a given case as the facts demand. It is therefore not possible to agree with the position that if no application is made under provisions of Order XVIII Rule 3A of the Code seeking permission by the party prior to other witnesses being examined by such party, the opportunity is lost forever. On the other hand, the trial Court in exercise of its discretion can regulate the manner in which as well as the extent to which such party can be permitted to appear as his own witness at a later stage.”

With due respect, I have gone through the judgment cited by Mr. Wani, learned counsel. I find that the case of the present petitioner is squarely covered by the judgment rendered by this Court in the case of Care Hospital (supra).

6. Mr. M. M. Bhokarikar, learned counsel for the respondent would rely on the judgment rendered by this Court in the case of Mrs. Anju Toshniwal and Ors. vs. Expat Properties India Ltd reported in 2019 (5) ABR 726. In the said case, it has been observed that where a party deliberately withholds herself from entering the witness box at an earlier stage with a view

to fill up lacunae, the discretion under Order XVIII Rule 3-A cannot be exercised. Such is not the case in the present matter.

7. The petitioner has made a candid statement before this Court that she will not go beyond what her son, i.e., the Power of Attorney holder, has deposed before the learned Trial Court. There is nothing on record to suggest that the present application is a deliberate attempt by the petitioner to keep herself away from the evidence proceedings and to be presented at a later stage after the examination of other witnesses. Hence, in my view, the said judgment will not help to the respondent.

8. Mr. Bhokarikar, learned counsel also placed reliance on another judgment in the case of **Sanj Dainik Lokopchar An evening daily v. Gokulchand Govindlal Sananda** reported at **2018 (6) ALL MR 393**. It will not come to the help of the respondent for the reason that the facts of the cited case are different from the present case. Suffice it to say that, in the said judgment also, this Court has observed that Order XVIII Rule 3-A cannot be allowed to be pressed into service by a party to fill up the lacuna. It is further held that leave cannot be granted under Order XVIII Rule 3-A to fill up the lacuna in the evidence that was tendered by the Power of Attorney holder of the petitioner.

9. Mr. Bhokarikar, learned counsel for the respondent, advances an alternative argument that, in the event the petition is allowed, a rider be put on the petitioner that her evidence shall not go beyond the evidence of the Power of Attorney holder, and the learned Trial Court be directed to examine whether the evidence of the petitioner is intended to fill up any lacuna in the evidence tendered by the Power of Attorney holder.

10. Considering the impugned order passed by the learned Trial Court and in the interest of justice, I deem it appropriate to allow the petitioner to

file an application before the learned Trial Court seeking leave to examine herself in support of the pleadings. The statement made by Mr. Wani, learned counsel for the petitioner, that the evidence of the petitioner shall be confined only to the evidence that is laid by the Power of Attorney holder, is taken on record as an undertaking.

11. In view of this, I pass following order :

ORDER

- a. The writ petition stands allowed.
- b. The impugned order dated 05.04.2024 passed by learned 3rd Joint Civil Judge, Junior Division, Jalgaon in Regular Civil Suit No.248 of 2016 below Exhibit-80 and 84 is quashed and set aside.
- c. The petitioner is permitted to file a fresh application under Order XVIII Rule 3-A of the Code of Civil Procedure before the learned Trial Court, if so advised. The evidence sought to be adduced by the petitioner shall not go beyond the evidence already tendered by the Power of Attorney Holder. The learned Trial Court shall pass an appropriate order thereon in the light of above observations.
- d. The defendants are at liberty to cross examine the witness.
- e. The writ petition stands disposed of.

[AJIT B. KADETHANKAR, J.]