
(2019) 04 BOM CK 0102
In the Bombay High Court
Case No : Writ Petition No. 447 Of 2019

Care Hospitals

APPELLANT

Vs

Nilesh

RESPONDENT

Date of Decision : 08-04-2019

Acts Referred:

Code Of Civil Procedure, 1908 — Order 18 Rule 3A

Citation : (2019) 04 BOM CK 0102

Hon'ble Judges : A.S. Chandurkar, J

Bench : Single Bench

Advocate : C.S. Samudra, R.N. Deshpande

Judgement

A.S. Chandurkar, J.

1. RULE. Heard finally with consent of learned counsel for the parties.
2. The petitioner is the original defendant which is aggrieved by the order passed by the trial Court thereby permitting the plaintiff to examine himself after his Power of Attorney holder was duly examined. The respondent has filed a suit for recovery of amounts to which he was entitled by virtue of services rendered by him at the defendant-Hospital.

For the purposes of prosecuting the said suit, the plaintiff appointed his father as a General Power of Attorney holder in view of the fact that he was required to pursue higher studies. The defendant filed its written statement alongwith a counter claim for recovery of outstanding amount from the plaintiff. After the issues were framed, an affidavit in lieu of oral evidence was filed by the Power of Attorney holder of the original plaintiff. The said Power of Attorney holder was thereafter cross- examined on behalf of the defendant. After his evidence was over the original plaintiff filed an application below Exhibit 50 in which it was stated that though the suit was filed through his Power of Attorney holder, the plaintiff was now present at Nagpur and he desired to examine himself. Necessary permission was accordingly sought by the plaintiff to file evidence and

examine himself. This application was opposed by the defendant on the count that since the plaintiff had adduced evidence of his Power of Attorney holder, he could not now be permitted to improve his case by leading his own evidence. The plaintiff having elected to adduce evidence of his Power of Attorney holder, he could not be now permitted to lead evidence. The trial Court by the impugned order allowed the said application and permitted the plaintiff to adduce evidence in his personal capacity. Being aggrieved, the original defendant has challenged the said order.

3. Shri C.S. Samudra, learned counsel for the petitioner submitted that the trial Court committed an error in allowing the application in question thereby permitting the plaintiff to examine himself after his Power of Attorney holder had been duly examined. Referring to the provisions of Order XVIII Rule 3A of the Code of Civil Procedure, 1908 (in short, 'the Code'), it was submitted that under said provisions where the party himself wishes to appear as witness he has to so appear before any other witness on his behalf has been examined. The Court may however for reasons to be recorded permit him to appear as his own witness at a later stage. It was submitted that the Power of Attorney holder having submitted his affidavit in lieu of evidence and having examined himself, it was not permissible for the plaintiff to thereafter seek permission to lead his own evidence. Prior permission of the trial Court ought to have been sought by the plaintiff in that regard. By permitting the plaintiff to examine himself after his Power of Attorney holder had been so examined, it was clear that there was an opportunity to the plaintiff to fill in the lacuna that was left after examining his Power of Attorney holder. Relying upon the decisions in *V.Jayakannan & Others Versus V.K.Sampath alias V.K. Sampathkumar* [1991(2) Mad. L.J. 77], *Ayyasami Gounder & Others Versus T.S. Palanisami Gounder* [AIR 1990 Madras 237], *Marappa Gounder & Others Versus Seliappa Gounder & Others* [AIR 1985 Madras 183], *Raosaheb D.Desai Versus Diridharlal Mohanlal Gangani* [2012(2) Mh.L.J. 332] and *Umakant B. Kenkre & Another Versus Yeshwant P.Shirodkar & Others* [1999(4) CLJ 365], it was submitted that the trial Court erred in granting such permission and therefore the impugned order was liable to be set aside.

4. On the other hand, Shri R.N. Deshpande, learned counsel for the respondent supported the impugned order. According to him, the impugned order was passed by the trial Court in exercise of discretion that was vested in it and the same did not call for any interference. He submitted that under provisions of Order XVIII Rule 3A of the Code, such request could be made even after a witness had been examined on behalf of the plaintiff. A discretion has been conferred on the Court to consider such request and after recording reasons it can permit the plaintiff to appear as his own witness at a later stage. It was submitted that in the present case, the plaintiff had given good reasons for examining himself after the deposition of his Power of Attorney holder in view of the fact that the plaintiff was undertaking studies abroad and after returning back he desired to record his evidence. He referred to the decision in *Vijaysingh Gordhandas & Others Versus Dwarkadas Mulji* [2001(4) Mh.L.J. 735] in that

regard.

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.

8. If the impugned order is viewed in the aforesaid context it is found that the trial Court was justified in allowing the application in question and permitting the plaintiff to examine himself. At the same time, it would be for the trial Court to consider the scope of examination of the plaintiff keeping in mind that such permission cannot be used as an opportunity to fill in the lacuna in the light of the evidence already led on his behalf. That aspect is kept open for consideration by the trial Court. In that view of the matter, it is found that there is no jurisdictional error has caused.

9. Subject to the aforesaid observations, rule stands discharged leaving the parties to bear their own costs.