

2023 SCC OnLine Bom 1629

In the High Court of Bombay at Goa
(BEFORE M.S. SONAK, J.)

Ramchandra or Rogunata Devasthan Guimonem,
represented by its Attorney Pandurang Bolu
Chari ... Petitioner;

Versus

Vijaya Educational Trust, Constituted by registered
Deed of Trust represented by its Managing
Trustee Ramchandra Anant Garde and Others ...
Respondents.

Writ Petition No. 1953 of 2022 (Filing No.)

Decided on August 4, 2023

Advocates who appeared in this case:

Mr. J.E. Coelho Pereira, Senior Advocate with Mr. B. Fernandes,
Advocate for the Petitioner.

Mr. Siddharth H. Naik, Advocate for Respondent Nos. 1, 2 and 5.

The Judgment of the Court was delivered by

M.S. SONAK, J.:— Heard Mr. Coelho Pereira, learned Senior Advocate
with Mr. B. Fernandes for the Petitioner and Mr. S. Naik, learned
counsel for Respondent Nos. 1, 2, and 5 (contesting Respondents).

2. Even though all the defendants in the suit have been impleaded
as Respondents in this petition, for the proposed order, no notice is
necessary to those defendants. Mr. S. Naik appears for the contesting
Respondents and does not object to the disposal of the rule
immediately.

3. Accordingly, Rule. The rule is made returnable immediately.

4. The challenge in this petition is to the order dated 05.09.2022 at
Exhibit D-160, in which the Petitioner (original plaintiff) applied to
substitute PW1 with present attorney Machidranath Ramesh Chari.

5. Mr. Pereira submitted that Suresh Chari, the earlier attorney of
the Devasthan, filed an affidavit in lieu of examination in chief. He also
produced documents and was partly cross-examined. Mr. Pereira
submits that the said attorney, Suresh Chari, cannot depose any further
in the matter due to ill health. Mr. Pereira pointed out that the medical
and discharge certificates were placed on record.

6. Mr. Pereira submits that given the above predicament, the
Devasthan applied for substituting the evidence of Suresh Chari by
Machidranath Ramesh Chari, the present attorney of the Devasthan. Mr.

Pereira submits that the trial Court should have allowed the application and permitted the substitution in the interest of justice and fair opportunity.

7. Mr. S. Naik submits that the evidence tendered by Suresh Chari cannot simply be discarded. He proposes that the evidentiary value of such evidence can always be looked into at the stage of the final hearing in the suit. However, by adopting the substitution mode, the evidence already tendered by Suresh Chari cannot be struck off of the record. Accordingly, Mr. S. Naik submits that no case is made out to warrant interference with the impugned order.

8. The rival contentions now fall for my determination.

9. The Petitioner, in the application at Exhibit D-160, has pleaded the following concerning the physical and mental status of PW1 Suresh Chari:—

2. The plaintiff state that PW1 Suresh Chari whose evidence is partly recorded is a diabetic patient for the last 35 years and is under constant medication taking treatment from Dr. Shyam Bhandary for last many years.

3. The plaintiff state that on 26/03/2021, said Suresh Chari had a fall in the house and injured his ribs and was admitted to G.M.C. for treatment. That said Suresh Chari is in fact confined to house since then. Annexed hereto as Annexure - A colly are the copies of the medical papers of G.M.C.

4. The plaintiff state that in the meantime the health of said Suresh Chari deteriorated further and being a diabetic patient for last 35 years is now suffering from hypertensive e progressive loss of memory and is unable to take decision and recollect past events. That said Suresh Chari is in fact sick with dementia which is in progressive condition and difficult to improve. The said ailment is a form of insanity which is characterized by mental weakness and a total inability to reason and is an extremely low condition of mental function.

5. That said Suresh Chari is taking treatment from Dr. Shyam V. Bhandary a consultant Physician for last many years and is under constant medication. That due to the said disease of dementia which is in progressive condition said Suresh Chari is not in a position to appear before the Hon'ble Court for giving evidence and or to continue with his cross examination. Annexed hereto as Annexure - B colly are original discharge card of Menezes Polyclinic and certificate of Dr. Shyam V. Bhandary for ready perusal of the Hon'ble Court.

6. The plaintiff state that PW1 Suresh Chari is now confined to the house and not even in a position to come out of the house without

any assistance.

7. *The plaintiff state that PW1 will not be in a position to answer any questions put to him as he has lost memory so also will not be in a position to understand the questions put to him and answer the same due to the said ailment and due to loss of memory."*

10. The application was supported by medical certificates, discharge certificates, etc., from Goa Medical College and private doctors. There is no good reason to reject all such material and the statements made in the Petitioner's application based upon such material.

11. Accordingly, a case is made to allow Petitioner Devasthan to examine its current attorney Machindranath Ramesh Chari. To the extent such leave has been denied, the impugned order warrants interference and modification.

12. However, even the contention of Mr. S. Naik that the evidence of Suresh Chari should not be discarded or struck off of the record will have to be accepted. The issue of the evidentiary value of Suresh Chari's deposition can always be left open for consideration by the trial Court at the final hearing of the suit. But Suresh Chari's testimony cannot be either discarded or struck off the record merely because leave is to be granted to the Petitioner to examine the current attorney.

13. Accordingly, this petition is disposed of by modifying the impugned order. To the extent it denies leave to the Petitioner to examine its current attorney, the impugned order is interfered with. The Petitioner will have the liberty to examine its present attorney. At the same time, Suresh Chari's deposition will be retained on record, and both parties will have the opportunity to argue on the evidentiary value of such testimony at the stage of the final hearing of the suit. Mr. Naik did submit that Machindranath may not be the present attorney. Even this point is left open. The Petitioner's application must be construed as a request to examine the present attorney, whomever he may be.

14. With the above liberty and clarification, the rule in this petition is disposed of. There shall be no order for costs.