

IN THE HIGH COURT OF BOMBAY AT GOA**WRIT PETITION NO. 104/2015**

1. Yeshwant Laxman Pai Raikar,
s/o. Laxman Pai Raikar, major in age,
married, businessman,

2. Smt. Pushpa Yeshwant Pai Raikar,
w/o. Yshwant Pai Raikar,
Housewife, major in age,
Both r/o. Bandora, Ponda, Goa.

..... Petitioners.

V/s.

1. Laxman V. Singbal,
major of age, married,

2. Dr. Uday Laxman Singbal,
s/o. Laxman Singbal, major in age,
married, medical practitioner,

3. Sanjay L. Singbal,
s/o. Shri Laxman Singbal,
major in age, married.
All residents of Near Almeida
High School, Ponda, Goa.

..... Respondents.

Shri Abhay Nachinolkar, Advocate for the petitioners.

Shri Vilas P. Thali, Advocate for the respondents.

CORAM :- F.M. REIS, J.

Date : - 12th June, 2015.

ORAL JUDGMENT :

Heard Shri A. Nachinolkar, learned Counsel appearing for the petitioners and Shri V.P. Thali, learned Counsel appearing for the respondents.

2. Rule. Heard forthwith, with the consent of the learned Counsel. Learned Counsel appearing for the respondents waives service.

3. The above petition takes exception to an order dated 11th December, 2014 whereby an application filed by the petitioners to lead secondary evidence came to be dismissed.

4. Shri Nachinolkar, learned Counsel appearing for the petitioners has pointed out that the suit filed by the respondents is for specific performance of an agreement and the case of the petitioners, inter alia, is that the agreement which is sought to be relied upon by the respondents is a sham agreement and that such an agreement was

executed for a specific purpose. The learned Counsel further points out that in support of their defence, the petitioners have also relied upon a document which is styled as Addendum to the Agreement dated 1st August, 2003 which, according to him, supports the stand taken by the petitioners in their written statement. The learned Counsel further points out that the said document has an endorsement of a Public Notary from Ponda and, in fact, the Notary was in the witness box as a witness on behalf of the respondents herein. The learned Counsel further points out that during the course of the evidence, the petitioners had cross examined the said Notary with regard to the said document who, according to him, admitted the existence of the said document and that it was duly signed before him. The learned Counsel further points out that the Notary was also cross examined based on the endorsement recorded in the Register of the Notary about the said disputed document. The learned Counsel has, thereafter, taken me through the evidence of the said Notary to point out that the existence of the said document has, in fact, been established and, as such, the learned Judge was not justified to refuse the production of the said document. The learned Counsel further submits that besides the said document, an affidavit signed by the petitioners and executed before the same Notary was also sought to be produced as secondary

evidence. The learned Counsel further points out that these documents are very material for the defence raised by the petitioners and consequently, the learned Judge was not justified to pass the impugned order. The learned Counsel has, thereafter, taken me through the impugned order to point out what weighed in the learned Judge in refusing the relief sought by the petitioners is the stand taken by the respondents that the documents are fabricated and forged which, according to him, would have to be established on merits. The learned Counsel has further submitted that whether the said documents are fraudulent and fabricated documents, then it is a matter which has to be examined upon appreciation of evidence and, as such, the learned Judge was not justified to pass the impugned order based on such considerations.

In support of his submissions, the learned Counsel has relied upon a Judgment of the Apex Court in (1999) 4 SCC 413 in the case of *Nawab Singh vs. Inderjit Kaur* and a Judgment of the learned Single Judge of this Court in 2009 (1) ALL MR 677, in the case of *Satyanarayan Ramnarayan Totla & Anr. vs. Rahul Hiralal Munot & Anr.*

5. On the other hand, Shri V. P. Thali, learned Counsel

appearing for the respondents has vehemently opposed the above petition. Shri Thali has pointed out that the said document is a forged and fabricated document and its existence is being seriously disputed by the respondents herein. The learned Counsel further points out that unless and until the existence of the document is not established, the question of granting leave to the petitioners to lead secondary evidence in terms of Section 65 of the Evidence Act would not arise at all. The learned Counsel further submits that the document itself is irrelevant, nor has any evidentiary value as, admittedly, it discloses that the respondents have not even signed such a document. The learned Counsel has also taken me through the endorsement of the Notary to point out that only the signatures of the petitioners have been authentic as endorsed by the said Notary. The learned Counsel further points out that even in the original written statement filed by the petitioners, existence of such document was not pleaded and, as such, this conduct of the petitioners itself suggests that the document is suspicious and a fabricated one. The learned Counsel further points out that the document is not at all binding on the said respondents and consequently, the learned Judge has rightly refused to grant leave to lead the secondary evidence in terms of Section 65 of the Evidence Act. The learned Counsel further points out that unless and until there

is foundation laid by the petitioners to lead secondary evidence and establish the existence of the document by disclosing the person in whose custody of the original thereof is held, the question of granting leave to lead secondary evidence is not at all justified. The learned Counsel further points out that it is well settled that best evidence is a primary document and, as such, the question of granting leave to lead secondary evidence in respect of the document which ex facie discloses that such a document is fraudulent and fabricated document, would not at all be justified.

In support of his submissions, learned Advocate Shri Thali, relied upon a Judgment of the Apex Court in (2013) 2 SCC 114, in the case of *U. Sree vs. U. Srinivas*. The learned Counsel has extensively taken me through the said Judgment to point out that the Apex Court has taken a view that unless and until there is foundation laid by the applicant to lead secondary evidence, the question of grant of such a prayer does not arise at all.

6. I have given my thoughtful consideration to the rival contentions and with the assistance of the learned Counsel, I have also gone through the record. The stage of the suit is stated to be to record evidence of the petitioners. The fact that the documents which are

sought to be relied upon by the petitioners were, in fact, referred to in the written statement which came to be amended after filing of the suit, has not been disputed. The correctness or otherwise of such a defence raised by the petitioners, is a matter which the learned Trial Judge will have to examine on its own merits at the time of appreciating the evidence of the parties. At this stage, the only aspect to be examined is whether in terms of the provisions of the Evidence Act, the petitioners are entitled for leave to lead secondary evidence.

7. There can be no quarrel with the proposition advanced by Shri Thali, learned Counsel appearing for the respondents that existence of the document has to be prima facie established before any leave is granted to lead secondary evidence. In the present case, the Notary who was examined as PW.2, has clearly admitted that such a document was in fact executed in his office. Apart from that, to corroborate the said aspect, the records of the register also disclose that such a document was in fact executed before the said Notary. Particulars shown in the said register, a copy of which was produced before this Court, clearly suggests that the particulars of the said document match with the records in such register.

8. In such circumstances, it cannot be said that the petitioners have not prima facie established the existence of such a document. As such, the contention of Shri Thali that the existence of the document has not been established, cannot be accepted. It is the case of the petitioners that the originals of both the documents were with the respondents. This aspect has been seriously disputed by Shri Thali, learned Counsel appearing for the respondents. But, however, at this stage, the petitioners have filed an affidavit in support of their application to contend that the originals of the documents were with the respondents. This aspect can always be kept open to be examined by the learned Judge after completion of the evidence of the respective parties.

9. The contention of Shri Thali, learned Counsel appearing for the respondents that the document is fraudulent, fabricated, and forged document, is a matter which can be examined only after the conclusion of the evidence. This view has also been taken by the Apex Court in the Judgment in the case of *Nawab Singh vs. Inderjit Kaur* (supra), as well as by the learned Single Judge of this Court in the case of *Satyanarayan Ramnarayan Totla & Anr. vs. Rahul Hiralal Munot & Anr.* (supra).

10. In the peculiar facts and circumstances of the case, keeping all the contentions of the respondents open with regard to validity, authenticity or otherwise of the documents, which can be assessed on its own merits at the time of appreciating the evidence on record, I find that the learned Judge was not justified to refuse to grant leave to the petitioners to lead secondary evidence. Mere production of a document, by itself, does not conclusively establish the authenticity and the contents of the document. This aspect will have to be established by the petitioners, in accordance with law. Keeping all these contentions open to be examined at the proper stage, I find that the impugned order dated 11/12/2014 passed by the learned Civil Judge, Senior Division, Ponda in Special Civil Suit No.13/2006/A cannot be sustained and deserves to be quashed and set aside. Needless to say, as it is brought to my notice that the evidence of the respondents/plaintiffs has been concluded, the respondents/plaintiffs would be entitled to lead rebuttal evidence, if any, after the evidence of the petitioners/defendants is concluded. Hence, the leave to lead secondary evidence is granted to the petitioners subject to payment of costs of Rs.4,000/- as condition precedent.

11. In view of the above, I pass the following :

O R D E R

(I) The impugned order dated 11/12/2014 passed by the learned Civil Judge, Senior Division, Ponda in Special Civil Suit No.13/2006/A is quashed and set aside.

(II) The petitioners are permitted to lead secondary evidence in the light of the observations made herein above and subject to payment of costs of Rs.4,000/- as condition precedent.

(III) All contentions of the respondents with regard to the validity, authenticity, etc., of the said documents are expressly left open to be examined by the learned Judge, while deciding the suit on merits.

Rule is made absolute in the above terms.

F.M. REIS, J.

ssm.