

IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO. 700 OF 2015

1. Mr. Marcos Brazinha Fernandes
Alias Mark Fernandes, alias Marc Fernandes alias
Marcus Brazinha Fernandes alias Marquis
Felix Fernandes, Major, Indian National.

2. Mrs. Maria Fernandes,
Wife of Mr. Marcos Brazinha Fernandes
Major, Indian National
Both resident of G-2 “Meghna”,
Near Salgaonkar Law College,
Miramar, Goa.

..... Petitioners

V e r s u s

1. Irene D'Souza,
Major of age, Indian National,
Widow of late Ashley D'Souza,
R/o No. 401, New Gold Coin,
I. C. Colony, Road No.3,
Borivlim (W)
Mumbai 4001103.

2. Lieta D'Souza,
Major, Indian National.

3. Nilofer D'Souza,
Major, Indian National,
Both r/o H. No.401, New Gold Coir,
I. C. Colony, Road No.3,
Borivlim (W),
Mumbai 400103.

..... Respondents

Mr. R. J. Pinto, Advocate for the Petitioners.

Mr. A. R. Kantak, Advocate for Respondent No.1.

CORAM: C. V. BHADANG, J.
DATE: 21ST OCTOBER, 2015.

ORAL JUDGMENT:

Rule. Rule made returnable forthwith. Mr. Kantak waives service for respondent no.1. Heard finally by consent.

2. Heard Mr. Pinto the learned counsel for the petitioners and Mr. Kantak, the learned counsel for respondent no.1.

3. By this petition, the petitioners who are the original defendants are challenging the order dated 31/7/2015 and order dated 3.9.2015 (below Exhibit D-69), passed by the learned Civil Judge Senior Division, Mapusa in Special Civil Suit No.42/2004/A by which, the application for adjournment for leading evidence, was rejected by the Trial Court. It appears that the petitioners filed an application (Exhibit D-69), purportedly under section 151 of C. P.C. for reopening the defence evidence. The learned trial Court has rejected the said application by order dated 3/9/2015 on the ground that it is in the nature of a review and in the absence of there being any error apparent on the face of the record, no case for review of the order dated 31/7/2015 is made out. It was found that said application Exhibit D-69 was yet another

attempt by the petitioner to gain time.

4. It is submitted on behalf of the petitioners that the fact that the matter was adjourned earlier at the instance of the petitioners need not be strictly relevant. Reliance is placed on the decision of the Hon'ble Supreme Court in the case **State Bank of India Vs. Km. Chandra Govindji, reported JT 2000 (Suppl.2) SC 433** and the decision of the **Rajasthan High Court and in the case of Rajveer Singh Vs. Smt. Jagnesh Singh and anr., Writ Petition No.14079/2011**. It is submitted that the petitioner no.1 (defendant no.1) is ailing and the petitioner no.2, who is his wife has to look after the petitioner no.1. It is submitted that a medical certificate was produced on behalf of the petitioner. It is also submitted that the petitioners have shown willingness to examine the petitioner no.2 (defendant no.2) on their behalf, which has also not been acceded to by the learned Trial Court. He therefore submits that in the interest of justice and for a fair trial, the impugned order be set aside and the petitioner be granted opportunity to lead evidence.

5. On the contrary it is submitted by Mr. Kantak, the learned counsel for the respondent no.1 that the Trial Court has rightly refused to grant adjournment on 31/7/2015. It is submitted that the Trial Court has rightly refused to recall, the said order in an application which was purportedly filed under section 151 of C.P.C.. It is submitted that in the absence of there being

any error of jurisdiction, this Court may not interfere. Alternately it is submitted that this Court may pass appropriate orders, as may be deemed fit.

6. I have considered the rival circumstances and the submission made. The decision in the case of **State Bank of India Vs. Chandra Govindji** was cited before the learned Trial Court. In the case of **State Bank of India**, it has been inter alia held that normally, the Court shall not go beyond the date on which adjournment is sought, in considering the prayer for grant of further time. This is because the earlier adjournments, if any, granted, would certainly be for reasonable grounds and that aspect need not be once again examined. The learned Trial Court has observed that notwithstanding the fact that the earlier adjournments cannot be examined, the same would be relevant to look into the conduct of the party, to see if the party is interested in getting the proceedings delayed by adopting dilatory methods.

7. On consideration of the rival circumstances, I find that the petitioners now intend to examine Defendant no.2 as their only witness. The learned counsel for the petitioners also undertakes that the petitioners would not seek further adjournment and would ensure that the Defendant no.2 is examined on the next date. In such circumstances and having regard to the fact that ordinarily in such case, the Court would not look into the earlier adjournment sought and granted. I find that in the interest of justice and fair trial an

opportunity can be granted to the petitioner to lead evidence subject to the condition of payment of costs. In such circumstances, the following order is passed:

- (i) The petition is allowed.
- (ii) The impugned orders dated 31/7/2015 and 3/9/2015 are hereby set aside subject to payment of costs of Rs.5000/- (Rupees five thousand only) to be paid to the respondents.
- (iii) The petitioners are permitted to examine the petitioner no.2 (defendant no.2) as their witness.
- (iv) The parties shall remain present before the Trial Court on 16/11/2015 at 10.a.m.
- (v) The costs shall be paid to the respondents on or before 16/11/2015.
- (vi) The learned counsel for the petitioner undertakes to serve a copy of the affidavit-in-lieu of chief examination to the respondents or their counsel at least a week before 16/11/2015.
- (vii) The petitioners shall keep the defendant no.2 present before the Trial Court on 16/11/2015 for the purpose of cross-examination.
- (viii) Rule is made absolute in the aforesaid terms, with no order as to costs.

C. V. BHANDANG, J.

Ap/-