

IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO. 775 OF 2015

1. Nilkanth S. Kandolkar,
son of late Sakharam Kandolkar,
Aged 68 years, married.

2. Swapna N. Khandolkar,
wife of Nilkanth Khandolkar,
Aged about 57 years.

Both resident of H. No.618/18,
Industrial Estate, Murmuse,
Tuem, Pernem, Goa.

3. Gajanan S. Kandolkar, since
deceased and through legal heirs:
(a) Smt. Savita Gajanan Kandolkar,
wife of late Gajanan Kandolkar,
Age 67 years.

(b) Rudraksh Gajanan Kandolkar,
Son of late Gajanan Kandolkar,
Age 32 years.

Both residents of House No. 2,
Kature Tuem, Pernem, Goa.

4. Balchandra S. Kandolkar,
Son of late Sakharam Kandolkar,
Age 71 years.

5. Smt. Bhavana S. Kandolkar,
wife of Shri Balchandra kandolkar,
Age 57 years.

Both resident of Kodal, Wada,
Karapur Tisk, Sanquelim, Goa.

All through Power of Attorney,
Mr. Nilesh Nilkanth Kandolkar,
son of Mr. Nilkanth Sakharam Kandolkar,
Aged 35 years,
R/o H. No.618/18,
Near Tuem Industrial Estate,
Murmuse, Tuem, Pernem Taluka,
District North Goa,
State of Goa.

... Petitioners

Versus

1. Shri Luis Francisco Lobo,
son of Francisco Lobo,
Major of age (age not known).
2. Shri Antonio Lobo,
son of Francisco Lobo,
Major of age (age not known).

Both residents of 1st Floor,
St. Anthony's Building, Feira,
Alta, Mapusa, Bardez, Goa-403 507.

... Respondents

Mr. Abhay Nachinolkar, Advocate for the Petitioners.

Mr. Nigel Da Costa Frias, Advocate for the Respondents.

CORAM:- C. V. BHADANG, J.

DATED:- 6th OCTOBER, 2015

JUDGMENT:

Rule. Rule made returnable forthwith. Mr. Frias, learned Counsel waives service on behalf of the respondents. Heard finally with the consent of the parties.

2. By this petition, the petitioners, who are the plaintiffs are challenging the order dated 22.09.2015, as also two orders passed on 29.09.2015 by the learned Civil Judge Junior Division, Pernem in Regular Civil Suit No. 1/2010. The net result of the impugned order is that the petitioners have been precluded from filing an affidavit-in-lieu of chief examination. It appears that the suit was fixed for evidence on 22.09.2015, on which date on behalf of the petitioners, time was sought on the ground that the Counsel appearing for the petitioners is ill. The learned trial Court after finding that no medical certificate was produced and that the application was very cryptic and without any details, rejected the application. It further appears that in the absence of the Counsel, the learned trial Court recorded the chief examination as also, part cross examination of PW-1 on that day. The suit was adjourned to 29.09.2015 for further cross examination. On that day, on behalf of the petitioners, an application was moved with a request to "discard the chief and cross examination of PW-1 recorded on 22.09.2015 and for granting opportunity to the petitioners to lead fresh evidence". The learned trial Court by an order dated 29.09.2015 found that in the interest of justice, the

petitioners could be allowed to lead further chief by producing the affidavit in evidence and can be allowed to exhibit the documents, with a rider that the same is done on the same day. It appears that on behalf of the petitioners, inability was expressed for such a course of action. In that view of the matter, the learned trial Court rejected the application finding that it is a dilatory tactic. On the same day, the petitioners moved second application for adjournment, which was dismissed and that is how the petitioners are before this Court.

3. I have heard the learned Counsel for the parties and perused the record. It is not in dispute that the petitioner (PW-1) is still under cross examination. The learned Counsel for the petitioners on instructions, submits that the petitioners would produce the affidavit-in-lieu of chief examination alongwith documents (some of which are copies), today itself, when the matter is fixed for further cross examination. The learned Counsel for the respondent has no objection for the same. In so far as the prayer for discarding of chief and cross examination of PW-1, is concerned, the same cannot be granted, as there is no provision under law, under which evidence already recorded by the Court can be discarded. It is thus, needless

to mention that the affidavit-in-lieu of chief examination and cross examination, to be recorded would be in addition to the evidence already on record. In so far as the documents are concerned, the same will be subject to proof, in accordance with law.

4. In such circumstances, the petition is partly allowed. The impugned order to the extent of refusing to allow the petitioners to produce the affidavit-in-lieu of chief examination to be produced on record, is hereby set aside. The petitioners shall produce the affidavit-in-lieu of chief examination alongwith the documents today.

5. Rule is made absolute in the aforesaid terms, with no order as to costs.

C. V. BHADANG, J.

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