

IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO. 240 OF 2016

M/S LAND DEAL, A PARTNERSHIP FIRM
REP. BY ITS PARTNERS SHRI. ELOY
GONSALVES AND ANR.,

... Petitioners

Versus

MRS. OLINDA FERNANDES ALIAS OLINDA
DE SOUZA ALIAS ERMINIA OLINDA DE
SOUZA AND 6 ORS.,

... Respondents

Adv. Ganesh R. Naik for the Petitioners.

Adv. Valmiki Menezes for Respondent nos.2, 4 & 5

Coram:- C. V. BHADANG, J.

Date:- 12th August, 2016

P.C.:

The challenge in this petition is to the order dated 4/2/2016 passed by the learned Senior Civil Judge at Mapusa in Special Civil Suit No.75/2009/A. By the impugned order, application (Exhibit D-86) filed by the petitioners/plaintiffs, for recalling the order dated 19/10/2015 and securing recall of DW.1 has been dismissed.

2. The petitioners have filed the aforesaid suit in which the evidence of DW.1 was recorded before the trial Court. The Roznamas in the suit show that the cross-examination of witness DW.1 Celestino Fernandes, was partly recorded on 16th and 17th October 2015. The suit then fixed on 19/10/2015 on which day, time was sought on behalf of the petitioner to conduct further cross examination on the ground that Advocate Govekar for the petitioner was held up in a

custody matter at Panaji and was therefore, unable to attend the Court. The learned trial Court rejected the said prayer and the evidence of DW.1 was closed. The petitioner filed application Exhibit D-86 for recall of the order dated 19/10/2015 which has been dismissed, which is subject matter of challenge in this petition.

3. I have heard Shri Naik, the learned counsel for the petitioners and Shri Menezes, the learned counsel for the respondent nos. 2,4 and 5.

4. It is submitted by the learned counsel for the petitioner that Advocate Govekar was held up in a custody matter at Panaji. The learned counsel points out that the said matter was a legal aid brief allotted to Advocate Govekar in which no other advocate could have appeared for the accused. It is submitted that Advocate Govekar was prevented on account of the said custody trial from remaining present before the trial Court and conduct further cross examination. It is submitted that in such circumstances, the order of the trial Court closing the evidence and the order refusing to recall the order dated 19/10/2015 needs to be set aside. The learned counsel points out that the petitioner or his counsel was not made aware that DW.1 would be traveling abroad.

5. On the contrary, it is submitted by Mr. Menezes, the learned counsel for respondent nos.2,4 and 5 that the parties were all along aware that DW.1 was staying abroad. It is submitted that as DW.1

was scheduled to go abroad, the matter was fixed on short dates, i.e. from 9/10/2015 to 19/10/2016. He, therefore, submits that the trial Court was justified in closing the evidence and refusing to recall the said order.

6. I have given my anxious consideration to the rival circumstances and the submission made. Normally, this Court would have granted indulgence in the matter and allowed the petitioner to conduct further cross examination on condition of payment of appropriate costs. However that course may not be easily available in as much as DW1 has in the interregnum proceeded abroad. The learned counsel for the petitioner sought time to take instructions whether the petitioner would be willing to pay the costs of the travel of DW.1. However, after taking instructions the learned counsel reverts back saying that the petitioner would not be able to bear the entire costs of the travel of DW.1.

7. Coming back to the merits, it appears from the roznamas that the matter was kept at short intervals from 9/10/2015 to 19/10/2015. It is not in dispute that on 9/10/2015 the Presiding Officer was not available and the copy of the Affidavit-in-Chief of DW.1 was served on the counsel for the respondents at about 4.50p.m. The suit thereafter was fixed on 12/10/22015 on which date the petitioner sought time and requested the Court to adjourn the matter after 31/10/2015. Although that prayer was rejected, the suit was fixed on

13/10/2015 when there was another request on behalf of the petitioners which was granted and the suit was fixed on two dates, namely, 16/10/2015 and 17/10/2015. On these dates, DW.1 was cross examined on behalf of the petitioners and the matter was kept on 19/10/2015. The order sheet dated 19/10/2015 shows that the petitioner was informed in the preceeding week that the witness would be traveling abroad and therefore, the cross examination has to be completed. However, that day again time was sought which was rejected. It can thus be seen from the record that it does appear that the parties were aware that the witness would be traveling abroad and therefore short dates were granted in the suit. In fact as noticed earlier, the suit was fixed for cross examination on two consecutive dates i.e. 16th and 17th October 2014. In such circumstances, in my considered view it was necessary for the petitioners to have cross examined the said witness. As noticed earlier, the petitioner has shown his inability to incur costs in order to enable the witness to travel to India.

8. I have carefully gone through the order dated 4/2/2016 passed by the trial Court and I do not find that it suffers from any infirmity so as to require interference. The petition is without any merit and is accordingly dismissed with no order as to costs.

C. V. BHADANG, J.

ap/-