

IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO. 885 OF 2016

1. Mrs. Lisa Rodrigues e Mendonca
Daughter of late Mr. Macario Rodrigues,
Aged 47 years, housewife,
Resident of Flat No.T-4, Block III,
Salkar Residency, Adarsh Nagar,
Behind VidyaMandir Primary School,
Off Airport Road, Chicalim Goa 403 711,
2. Mr. Valerian Mendonca,
son of Mr. Gabriel Mendonca,
Aged 49 years, service,
Resident of Flat No.T-4, Block III,
Salkar Residency,
Adarsh Nagar,
Behind VidyaMandir Primary School,
Off Airport Road,
Chicalim Goa. 403 711. ... Petitioners

Versus

1. Mr. Eugenio Rodrigues,
Son of late Mr. Macario Rodrigues,
Aged 46 years, Landlord,
r/o Sea Breeze Garden,
SNS Developers,
2nd ward, Colva, Salcete Goa
2. Mrs. Sarita Rodrigues,
Wife of Mr. Eugenio Rodrigues,
Major in age, Advocate,
r/o Sea Breeze Garden,
SNS Developers,
2nd ward, Colva, Salcete Goa

3. Mena S. Rodrigues e Quadros,
Daughter of late Mr. Macario Rodrigues,
Aged 48 years, Teacher,
Resident of House No.119,
Amboi, St. Mathias,
P.O. Piedade, Ilhas Goa 403 403,
To be served through :
Adv. Gauresh Korgaonker,
Sapana Terraces Building,
Swatantra Path,
Vasco-da-Gama, Goa.

4. Mr. Neves Quadros,
son of Nelson Quadros,
Age 51 years, service,
resident of House No.119,
Amboi, St. Mathias,
P.O. Piedade, Ilhas Goa 403 403,
To be served through :
Adv. Gauresh Korgaonker,
Sapana Terraces Building,
Swatantra Path,
Vasco-da-Gama, Goa.

... Respondents

Mr. Thalmann Pradeep Pereira, Advocate for the petitioners.

Mr. L. Raghunandan, Advocate for the respondent nos. 1 and 2.

Coram:- F. M. REIS, J.

Date:- 14th December, 2016

ORAL JUDGMENT

Heard Mr. T. Pereira, learned counsel appearing for

the petitioners and Mr. L. Raghunandan, learned counsel appearing for the respondent nos. 1 and 2.

2. Rule. Heard forthwith with the consent of the learned counsel.

3. Mr. L. Raghunandan, learned counsel appearing for the respondent nos. 1 and 2 waives service.

4. The challenge in the above petition is to an order dated 11.08.2016 whereby an application filed by the petitioners to lead secondary evidence in respect of the share certificate standing in the name of the deceased estate leaver came to be dismissed.

5. Mr. T. Pereira, learned counsel appearing for the petitioners submits that the petitioners have in their possession a xerox copy of the concerned share certificate which copy was

handed over to the petitioners by the deceased estate leaver. It is further pointed out that as the whereabouts of the original share certificate was not traceable, the petitioners after due inquiry filed an application for leave to produce secondary evidence. The learned counsel further pointed out that the respondent nos. 1 and 2 have opposed the said application and by the impugned order dated 11.08.2016, the learned Judge dismissed the application filed by the petitioners. The learned counsel further submitted that the petitioners have satisfied the requirements of Section 65 of the Evidence Act which would clearly show that the petitioners have made out a case to lead secondary evidence. It is further pointed out that the Cabeça de Casal has not opposed the said application and as such the question of objecting to such an application by the respondent nos. 1 and 2 is erroneous and does not deserve any consideration. The learned counsel thereafter has taken me through the provisions of the Evidence Act as well as the impugned order to point out that the learned Judge has erroneously dismissed the application filed by the petitioners.

6. On the other hand, Mr. L. Raghunandan, learned counsel appearing for the respondent nos. 1 and 2 has disputed the said contention. The learned counsel pointed out that unless and until the petitioners have made an inquiry with the concerned company about the existence or otherwise of such share certificate, the question of allowing the petitioners to lead secondary evidence would not be justified. The learned counsel further pointed out that the learned Judge has rightly refused the application filed by the petitioners as the action expected of the petitioners has not been complied with. The learned counsel further pointed out that in terms of Section 65(c) of the Evidence Act, it is incumbent upon the petitioners to first comply with the requirements therein before filing an application to lead secondary evidence. The learned counsel further submitted that unless and until the petitioners have established the existence of such share certificate, the question of leading any secondary evidence would not at all be justified. The learned counsel as such submits that the petition be accordingly rejected.

7. I have given my thoughtful consideration to the rival contentions and I have also gone through the records. On perusal of the reply filed by the respondent nos. 1 and 2, the only contention therein is that they do not admit the contents of paras 1 to 7 and there is no specific denial to the contents therein. On perusal of the averments at paras 1 to 7, it is the case put forward by the petitioners that the subject xerox copy of the share certificate was handed over to the petitioners by the estate leaver. What can be deduced from such averments is that the fact that the share certificate sought to be produced by the petitioners stands in the name of the estate leaver and that during his lifetime, the xerox copy of the share certificate was handed over to the concerned petitioners by the estate leaver has not been seriously disputed.

8. Be that as it may, the Inventory Proceedings are governed by the provisions of the Portuguese Civil Procedure Code which stipulates the procedure to be followed in such

proceedings. In terms of the provisions, it is the duty of the Cabeça de Casal to submit the list of assets of the estate leaver. Such statements are given on oath by the Cabeça de Casal. Whenever shares are to be enlisted, the provisions of para 2 of Article 1377 of the Portuguese Civil Procedure Code clearly provides that the shares can be enlisted by stating the respective number of such shares in the concerned company. In the present case, the learned Judge while passing the impugned order has noted that the Cabeça de Casal has no objection for enlisting the said shares in the concerned Inventory Proceedings. No doubt, enlisting or making them part of the assets itself would not lead to the description of the property as the interested parties are at liberty to dispute the existence or otherwise of such assets. In the present case, during the course of the inquiry, the petitioners desire to produce the xerox copy of the share certificate which was in their possession. The averments in the application which are supported by an affidavit which clearly states that such copy was handed over by the estate leaver and the whereabouts of the

originals are not traceable. As pointed out herein above, though the original share certificate has not been produced, the existence of such share has not been seriously disputed by the respondents. Mr. Pereira, learned counsel appearing for the petitioners however submits that the present application is only to seek leave of the Court to lead secondary evidence as according to him the petitioners shall call upon the concerned company to produce or furnish a certified copy thereof of the relevant records in the register of share holders of such company. Merely permitting the production of the xerox copy would not by itself establish the correctness of the contents thereof which the party relying upon such copy would have to establish on its own merits in accordance with law. On perusal of the impugned order, I find that the learned Judge has not examined the relevant provisions governing the Inventory Proceedings while rejecting the application filed by the petitioners. This has resulted in a jurisdictional error committed by the learned Judge while passing the impugned order which would call for interference by this

Court in exercise of jurisdiction under Article 227 of the Constitution of India.

9. Subject to the above, I find that the petitioners are entitled to produce the xerox copy of the concerned share certificate. Needless to say, the petitioners would have to prove the contents thereof in accordance with law. Rule stands disposed of in the above terms. The petition stands disposed of accordingly.

F. M. REIS, J.

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