

**IN THE HIGH COURT OF BOMBAY AT GOA****WRIT PETITION NO. 790 OF 2017**

Shri Simon Caldeira  
Son of late Shri Bernard Caldeira,  
Aged 46 years,  
R/o H. NO.184, Divan Bhat,  
Arpora, Bardez, Goa.

.... Petitioner

V e r s u s

1. Mr. Joaquim Caldeira,  
Son of Shri Bernard Caldeira,  
Aged 50 years,  
R/o H. NO.179, Divan Bhat,  
Arpora, Bardez, Goa.

2. Mrs. Sucorina Caldeira,  
Wife of Shri Joaquim Caldeira,  
Aged 49 years,  
R/o H. No.179, Divan Bhat,  
Arpora Bardez Goa.

3. Mrs. Delfina Caldeira,  
Wife of Late Shri John Caldeira,  
79 years of age,  
R/o H. No.184, Divan Bhat,  
Arpora Bardez Goa.

.... Respondents

(the above mentioned addresses are the  
registered addresses)

Shri Gaurish Agni, Advocate for the Petitioner.

Shri Sudin Usgaonkar, Senior Advocate with Ms. V. Palyekar, Advocate for  
the Respondents.

**CORAM: C. V. BHADANG, J.  
RESERVED ON 3RD OCTOBER, 2017.  
PRONOUNCED ON 9TH OCTOBER, 2017.**

**JUDGMENT:**

Rule, made returnable forthwith. Ms. Palyekar, the learned counsel waives service for the respondent nos.1 and 2. Heard finally by consent of parties.

2. The challenge in this petition is to the order dated 11/1/2017 passed by the learned trial court overruling the objection of the petitioner to examine Mrs. Delfina Caldeira, (PW2) as a witness on behalf of the respondent nos.1 and 2/plaintiffs and taking on record and exhibiting document styled as a written statement signed by her.

3. The brief facts are that; the respondent no.1, Joaquim Caldeira and the petitioner Simon Caldeira are brothers. The second respondent Sucorina Caldeira is the wife of Mr. Joaquim. The third respondent, Mrs Delfina Caldeira is the mother of the petitioner and the first respondent. Mr. John Caldeira is their father. The respondent nos.1 and 2 filed a suit for declaration that the Deed of Gift dated 10/8/2007 purportedly executed by Mr. John Caldeira is null and void and for consequential relief of cancellation of the Gift Deed.

4. It appears that all the four defendants i.e Joaquim Caldeira, Mrs. Delfina Caldeira, the petitioner- Simon Caldeira and his wife Mrs. Sucorina Caldeira filed a common written statement resisting the suit. It was contended that the Gift Deed executed by the first respondent is legal and valid.

5. At the trial the respondent nos.1 and 2 sought to examine Mrs. Delfina (the defendant no.2) as a witness on their behalf. She was accordingly summoned and her examination in chief was recorded from 5/4/2014 onwards. In her evidence, Mrs. Delfina claimed that her husband John Caldeira is suffering from paralysis since last 14 years. He is unable to walk, his eye sight has become weak and his mental capacity and faculty is adversely affected on account of his illness. In short, Mrs. Delfina claimed that Mr. John Caldeira, her husband was not in a position to execute any Gift Deed and the Gift Deed (Exhibit C-28) does not bear the signature of her husband. She sought to produce a written statement (Exhibit C-37) purportedly on behalf of herself and her husband John Caldeira (defendant nos. 1 and 2).

6. It appears that the petitioner objected to the same on the ground that already there is a written statement filed by all the defendants including

Mrs. Delfina Caldeira and there cannot be a second written statement on record. The learned trial court while overruling the objection has found that the document can be taken on record considering the provisions of Order XIII rule 1 (3) (a) of the Code of Civil Procedure (CPC). Feeling aggrieved the petitioner is before this Court.

7. I have heard Shri Agni, the learned counsel for the petitioner and Shri Usgaonkar, the learned Senior Counsel for the respondent nos.1 and 2. Perused impugned order.

8. It is submitted by the learned counsel for the petitioner that an adversary cannot be allowed to be called as a witness. Reliance in this regard is placed on the decision of the Kerala High Court in **Mary Francis Vs. Kesavan (1993) 1 KLT 4**. It is submitted that the Kerala High Court while holding that an adversary cannot be called as a witness, has relied upon the decision of this Court in the case of **Pirgonda Hongonda Vs. Vishwanath Ganesh and others**, 1956 0 AIR (Bom) 251, which in turn is based on the decision of the Privy Council in **Kishori Lal vs. Chunni Lal (ILR 31 All 116)**. He therefore submits that the trial court could not have allowed the examination of Mrs. Delfina Caldeira who is the defendant no.2 as a witness on behalf of the petitioners/plaintiffs. Secondly, it is contended that the so

called written statement which is purportedly signed much after the filing of the common written statement on behalf of all the defendants could not have been permitted to be produced on record. It is submitted that the reliance placed on Order 13 Rule 1 (3) (a) is misplaced, as the written statement was not produced for the purpose of cross examination.

9. On the contrary Shri Usgaonkar, the learned Senior Counsel for the respondent nos.1 and 2 has placed strong reliance on the Division Bench judgment of the Patna High Court in the case of **Shri Awadh Kishore Singh and anr. Vs. Shri Brij Bihari Singh and Others AIR 1993 Patna 122** , in order to submit that a party cannot be debarred from examining his adversary as witness on its behalf. It is submitted that in the cases cited on behalf of the petitioner, the party who was called as a witness, had challenged the order which is not the case in the present petition. In so far as the production of the written statement is concerned, it is submitted that in appropriate case the Court can permit such production, notwithstanding the fact that the document is not produced earlier.

10. I have carefully considered the rival circumstances and the submissions made. There are two aspects of the matter. The first is with regard to the competency of the Court and the permissibility to call an

adversary as a witness. The second is with reference to the aspect of the document styled as a written statement being allowed to be produced. The Division Bench of the Patna High Court in the case of **Awadh Kishore Singh (supra)** held that there is no provision under which the party is debarred from examining his adversary as a witness on his behalf. In the case of **Mary Francis (supra)** a learned Single Judge of the Kerala High Court has found that the practice of a party calling his opponent as a witness was disapproved in rather strong terms by Their Lordships of the Privy Council and therefore “as a matter of right the plaintiff cannot have defendant examined as a witness”. However, in para 3 of the judgment it is observed that the Court is not powerless in summoning an opposite party if there are special reasons.

11. The decision of this Court in **Pirgonda Hongonda (supra)** is again based on the decision of the Privy Council in **Kishori Lal v. Chunno Lal, 31 All 116 pg.122** and Circular No.161 issued by this Court in the Civil Manual. As noticed earlier, the Privy Council has found that a party cannot call his adversary as a witness. Without laying down a binding precedent the legal position appears to be that normally a party would not be permitted to call his adversary as a witness but the Court is not powerless to do so, if special circumstances are shown. However, in the present case, I find that it is not necessary to go into this issue for more reasons than one. Firstly, in the

cases on which reliance is placed on behalf of the petitioner it was the party which was called as a witness had challenged the said order. In the present case, none of the petitioners (who continue to be adversaries of the respondent nos.1 and 2) have been so called as a witness. Secondly, from the record it appears that the witness Mrs. Deflina Caldeira (who is the defendant no.3) has since changed alliance and has parted ways with the petitioners. If that be so, Mrs. Deflina Caldeira, strictly speaking cannot be said to be a party who continues to be an adversary of the petitioners. The nature of the evidence led by Mrs. Deflina Caldeira and its effect, the weight to be attached to her evidence and the probative value, is not something which needs to be considered at this stage and the said aspect will have to be gone into by the trial court at the hearing of the suit. The fact remains that from the evidence Mrs. Deflina Caldeira it cannot be said that she still continues to be the adversary of the petitioner. For this reason, I do not find that any exception can be taken to the examination of Mrs. Deflina Caldeira as a witness on behalf of the petitioner.

12. This takes me to the question about production of a document styled as a written statement on behalf of the defendant nos.1 and 2, Mrs. Deflina Caldeira and her husband. The said document, if we can so describe it, was sought to be produced during the chief examination of Mrs. Deflina

Caldeira. Order XIII Rule 1 (3) (a) of C.P.C. carves out an exception and permits production of any document for the cross examination of the witness and declares that, to such production Rule 1 (1) of Order XIII of C.P.C. shall not apply. It is apparent that the written statement was not sought to be produced for the purpose of cross examination. Thus, the part of the order permitting production of the written statement (Exhibit C-37) in my considered view cannot be sustained. In the result, the petition is partly allowed. The impugned order to the extent permitting the production of the written statement (Exhibit C-37) is hereby set aside. Needless to mention that the petitioner shall be entitled to cross examine (PW.2) Mrs. Delfina Caldeira. In the circumstances, Rule is made partly absolute in the aforesaid terms with no order as to costs.

**C. V. BHADANG, J.**

**Ap/**