

H COURT OF BOMBAY AT GOA**WRIT PETITION NO. 871 OF 2017**

Urcelino Almeida (dec.) & 2 Ors.

.... **Petitioners**

Versus

Felix Almeida (dec.)
through his legal heirs & 16 Ors..... **Respondents**

Mr. Vinod K. Daniel, Advocate for the petitioner.

Mr. John A. Lobo, Advocate for the Respondents no. 1(a) to 1(g) and
Respondent no. 2.**Coram :- C. V. BHADANG, J****Date : 06th November, 2017.****ORDER:**

The challenge in this petition under Article 227 of the Constitution of India is to the Order dated 11.09.2017 (below Exhibit D-163) passed by the learned Trial Court by which, an application filed by the petitioners/plaintiffs for production of two documents, namely, a Deed of Will dated 30.05.1980 and Deed of Succession dated 18.01.2005, has been refused.

2. The brief facts are that the Petitioners have filed a Suit for declaration that the Petitioners are the exclusive owners in possession of Plot 'A' and 'D' which are part of the property under Survey no. 373/15 and for a direction to the Survey authorities to partition the said plots and to grant separate Survey numbers to the same. It may be mentioned that the evidence of both the parties in the Suit is over and the Plaintiffs have also concluded their arguments and the Suit is said to

be at the stage of hearing arguments of the Respondents/Defendants.

3. In the Suit, a contention is raised on behalf of the Respondents that the suit is bad for non-rejoinder of necessary party , namely, Flora Almeida who is the sister of the deceased defendant no. 1-Felix and the daughter of now deceased Tomacinha Almeida. It appears that a specific issue no. 3 has been framed by the Trial Court as to whether the original defendant no. 1 and 2 prove that the suit is bad for non-rejoinder of necessary party, i.e. heirs of late Xavier Almeida and his wife. Xavier Almeida happens to be the father-in-law of Tomasiana Pereira.

4. The Petitioners filed an application for production of the aforesaid documents on 29.08.2017 on the ground that the original defendant no. 2 accidentally met Mr. Roy Antao who is the son-in-law of late Flora Almeida and in the course of the conversation Mr. Roy Antao disclosed that there exists a Deed of Will dated 30.05.1980 under which all the rights to the various properties are bequeathed by late Tomacinha Almeida in favour of the original defendant no. 1, except the portion of the property at Malbhat. It was contented that subsequently the Plaintiff no. 2 obtained a copy of the Deed of Will and Deed of Succession which copies were received by the Plaintiff no. 2 on 23.08.2017 following which the application for production came to be filed.

5. The application was opposed on behalf of the Respondents, inter alia, on the grounds that the documents are not relevant for deciding the controversy in the suit.

6. The learned Trial Court in the impugned order has found that the Public Will and the Deed of Succession are not relevant for deciding the controversy in the suit and, in particular, in deciding the issue no. 3 as above. The learned Trial Court has found that there exists subsisting right in favour of Flora in respect of the non-disposal of quota of late Tomacina and thus, the Deed of Will shall not come to the rescue of the Petitioners in order to show that Flora is not a necessary party. In so far as the Deed of Succession is concerned, the learned Trial Court has found that the deceased Defendant no. 1-Felix has admitted the execution of the above Will. However, that Deed of Succession is executed unilaterally without the concurrence of his sister, namely, Flora and as such said declaration is not binding on his sister, Flora. In that view of the matter the application for production has been dismissed.

7. I have heard Shri Daniel for the Petitioners and Shri John Abreu Lobo, for Lrs of the Respondents no. 1(a) to 1(g) and Respondent no. 2. Perused records.

8. It is contended on behalf of the Petitioners that the documents are relevant for establishing that Flora is not a necessary party and the suit is not bad for non-rejoinder of necessary party. Learned Counsel points out that both the documents are the documents of the defendants and as such the production of the same ought to have been allowed. On behalf of the Petitioners reliance is placed on the decision of this Court in the case of **Smt. Chitrakala Fal Desai versus Shri Balu Marathe alias Mane 2006(5) ALL MR 438** and **M/s. BGC International Pvt. Ltd. & Anr v/s. M/s. Shree Mallikarjun Shipping & Anr 2016(1) ALL MR 900** and the decision of the Madras High Court in the case of **S. Rathinaswamy v/s. S. Bhanumathi; AIR 2006 Mad 221**. It is submitted that the Court has to be liberal in granting leave to produce documents. Learned Counsel points out that in the case before the Madras High Court the documents were sought to be produced at the stage of arguments and still the same was allowed.

9. On the contrary, it is submitted by Mr. Lobo, learned Counsel for the Respondents that nowhere in the application the Petitioners have averred that they were not knowing about the existence of the Deed of Will as well as Deed of Succession. It is submitted that the Suit is of the year 2004 and the arguments of both the parties are over and after the arguments of the Petitioners were over the application came to be filed which has rightly been rejected.

10. I have carefully considered the rival circumstances and the submissions made and I do not find that any case for interference in made out.

11. It would appear that the only reason for which the production of the documents is sought is to show that the suit is not bad for non-joinder of necessary party. In this regard it would be significant to note that the primary burden to establish that the suit is bad for non-rejoinder of necessary party is cast on the Respondent-Defendants and not on the Plaintiffs. Be that as it may, the application does not show that the Petitioners were not aware of the two documents. Prima facie, the Trial Court has held that the Public Will cannot cover the non-disposal quota of late Tomasina and has further found that the Deed of Succession is a unilateral document executed by the late Defendant no.1 – Felix. Considering the fact that the suit is at the stage of arguments and further considering the fact that the primary burden in establishing the issue no. 3 is on the Respondent, I am not inclined to interfere with the impugned order.

12. In the case of **Chitrakala Fal Desai** and **M/s. BCG International Pvt Ltd.**(supra), the evidence of the parties was not over and this Court found that the production of the documents would not cause prejudice to the other side, who would get an opportunity to cross examine the witnesses. Even in the case of **S. Rathinaswamy**

(supra), the suit was for a declaration that there was no other cremation ground and the documents sought to be produced were public documents/Revenue Records, namely Village Plan and the Survey records. It was also found that the said documents were within the knowledge of the Petitioner and whose authenticity could not be doubted. Thus in my view the facts are distinguishable. The Petition is accordingly dismissed with no order as to costs. Needless to mention that the learned Trial Court shall independently decide issue no. 3 without being influenced by the observations in the impugned order or the observations herein.

13. In the circumstances, there shall be no order as to costs.

C. V. BHADANG, J

msr.