

IN THE HIGH COURT OF BOMBAY AT GOA**WRIT PETITION NO.42 OF 2017**

1. Shri Agnelo Francisco Xavier
De Maria Mascarenhas,
Son of late Shri Zeferino Mascarenhas,
aged 48 years, Civil Engineer, and his wife,
 2. Smt. Sharon Maria Cabral
Architect (Civil), 37 years of age,
Both resident of A-15,
Sapana Heritage, Monte Hill Road,
Borda, Margao, Goa.
 3. Shri Viberto Santana Citino
De Mascarenhas, son of late
Shri Domingos Xavier De Mascarenhas,
aged 79 years, Businessman, Divorcee,
Resident of "Lotus Crest, 10",
Rua de Goa 2760-065,
Caxias, Portugal.
- Petitioners

V/s

1. Shri Dickson Delfino Almeida
alias Dicson Roque Leandro Almeida,
Son of Shri Delfinao Sacrafamilia
Almeida, Aged about 59 years,
employed and resident of House No.384,
Xatmalem Vaddo, Carmona,
Taluka Salcete, Goa.
2. Smt. Veronica Esther Carmina
Mascarenhas, Daughter of late
Shri Zeferino Mascarenhas,
aged 58 years, Spinster,
nun and residing at
Sacred Heart Convent,
Ahmednagar, Maharashtra, India.
3. Sr. Vilma Mascarenhas,
Daughter of late Shri Zeferino

Mascarenhas, aged 56 years,
Spinster, nun, resident of
Irmas Do Bon Pastor,
C.P. 14748 Kilolo,
Luanda-Angola.

4. Shri Wilfred Mascarenhas,
Son of late Shri Zeferino Mascarenhas,
aged 55 years and his wife,
5. Smt. Conciha Fernandes,
Aged about 44 years, teacher,
Both residents of Lotus Crest,
Sarzora, P.O. Chinchinim,
Salcete, Goa 403 715.
6. Smt. Maria Vera Mascarenhas
Almeida, Daughter of late
Shri Zeferino Mascarenhas,
aged 52 years, Nurse, Resident of 61-49.
Austin Street, Rego Park,
NY (New York) – 11374, USA.
7. Smt. Viola Mascarenhas Heredia,
Daughter of late Shri Zeferino
Mascarenhas, aged 51 years,
Business and her husband.
8. Shri Rudolf Heredia,
Aged 58 years, Musician,
Both residents of 12/A,
Sushila Sadan, Linking Road,
Bandra (West), Mumbai- 400050.
9. Smt. Viveka Maria Mascarenhas
Fernandes, Daughter of late
Shri Zeferino Mascarenhas,
aged 46 years Teacher, and her husband.
10. Shri Oliver Fernandes,
Aged about 49 years, seaman,
Both resident of 201-Miami Apts.,
2nd floor, Vincent street,

Pune-411001, Maharashtra.

11. Dr. Walter Mascarenhas
Son of late Shri Zeferino Mascarenhas,
aged 44 years, Eye Surgeon and his wife.
12. Dr. Rashmi P. Gama Mascarenhas,
Aged about 36 years,
Consulting Gynecologist,
Both resident H.No.18,
Kurtarkar Symphony, Ambaji,
Fatorda, Salcete-Goa 403 602. Respondents

Shri R.G. Ramani, Advocate for the Petitioners.
Shri Sudesh Usgaonkar, Advocate for the Respondents
No.1,11 & 12.

Coram:- NUTAN D. SARDESSAI, J.

Reserved on : 6th JULY, 2018

Pronounced on: 9th JULY, 2018

JUDGMENT :

Rule. Heard forthwith with the consent of the learned Counsel appearing for the parties. Learned Counsel appearing for the respondents no.1,11 & 12 waives service.

2. This petition takes exception to the order dated 12/08/2016 passed by the learned Additional Senior Civil Judge, Margao pursuant to which the learned Judge allowed the application for the restoration of the suit and set aside the order dated 30/01/2015 dismissing the suit and by invoking the supervisory jurisdiction of this Court under Article 227 of

the Constitution of India.

3. Shri R.G. Ramani, learned Advocate came to be heard on behalf of the petitioners who submitted that the suit was filed by the respondent no.1 and alongwith it he had disclosed his address not only in the cause title but in the memo of address apart from setting it out in the plaint. The issues were framed by the Trial Court which were re-cast on 21/11/2014 and on which date there was none present on his behalf. The matter was listed for evidence on 10/12/2014 and at which time too there was none present on behalf of the plaintiff including the plaintiff himself. The matter was referred to the Lok Adalat on 13/12/2014 and at that time too the respondent no.1 plaintiff was absent. The suit was relegated to the Trial Court and on 30/01/2015, the same was called out before the Trial Court when it came to be dismissed for default of the respondent no.1 plaintiff. An application was filed by his attorney for restoration of the suit which came to be restored by the impugned order. The address of the attorney was given as Comba, Margao while the notice of withdrawal given by the advocate showed that it was addressed to one Gangadhar and not the respondent no.1. He adverted to his reply and

submitted that the manner in which the notice was issued was itself dubious. In any event the impugned order suffered from the vice of illegality and therefore it was a fit case to quash and set it aside.

4. Shri Sudesh Usgaonkar, learned Advocate for the respondents no.1,11 & 12 invited attention to the reply filed on behalf of the respondent in which there was due reference to the number of the registered parcel under no.RM49844499-61N though the receipt was in the name of one Gangadhar Anjikhhan. The notice issued to the respondent no.1 by the advocate for withdrawal from appearance showed the same number of the registered parcel as "RM49844499-61N". Therefore at the highest it was a case of some mistake on behalf of the postal Clerk to record an erroneous name of "Gangadhar Anjikhhan" instead of the respondent no.1 and therefore the petitioners could not take any benefit and it had to be necessarily concluded that the notice of withdrawal was duly served on the respondent no.1. The promptitude with which the respondent no.1 moved an application for the restoration of the suit by itself indicated that he was duly served with the notice. The learned Trial Judge had made due

reference to this aspect of the matter and passed the order which did not call for any interference. The petition had therefore to be dismissed.

5. I have heard Shri R.G. Ramani, learned Advocate for the petitioners and Shri Sudesh Usgaonkar, learned Advocate for the respondents no.1,11 & 12 and besides perused the records and in that light proceed to decide the petition.

6. Admittedly, the respondent no.1 who had disclosed his address as "resident of House No.384, Xatmalem Vaddo, Carmona, Taluka Salcete, Goa" had filed the suit for declaration that the Gift Deed in question dated 17/12/1996 was null and void amongst the other reliefs. Materially, he had averred in the plaint that he was employed in New York right from 1996 and mostly stayed at the place of his employment and visited Goa, his native place, once in three years whenever he got leave. The respondent no.1 plaintiff had also disclosed his address in the memo of address as "C/o. R.H. Gama, 203, Carvalho Apartments, Co-operative Housing Society, Damodar College Road, Margao, Goa". Since there was no dispute on the status of the proceedings and

being dismissed on 30/01/2015, no reference is made to those aspects. However, it is equally a matter of record that his advocate had issued a notice of withdrawal to him by registered post A/D bearing his name with the local address on the registered A/D slip and issuer of the notice being the advocate appearing for him and bearing the distinct parcel no.RM49844499-6N.

7. It is another matter that the postal receipt which was issued bore the name of one "Gangadhar Anjikhani" for which the respondent no.1 cannot even be remotely held responsible or deemed to have any control and to all intents and purposes it was an error of the postal clerk who issued such a receipt. The petitioners had otherwise in their reply stated that the notice of withdrawal was a manipulation which was sent by the advocate concerned on 7/01/2015 bearing registration no.RM 49844499-61N which does not stand to reason when seen with the registered parcel number on the A/D card issued alongwith the notice of withdrawal.

8. The respondent no.1 had promptly moved for the restoration of the suit spelling out that he was employed at

New York in 1996 and visiting Goa once in 2 to 3 years. His advocate had issued a notice of withdrawal from appearance dated 7/01/2015 at the address mentioned in the cause title which was duly received by his sister and thereafter had confirmed the status of the proceedings before the Trial Court. His attorney had learnt of the dismissal of the suit on 30/01/2015 and moved the application for restoration within time. The learned Trial Judge had considered the case of the petitioners and the respondent no.1 and clearly recorded a finding that the default on the part of the respondent no.1 was not on account of any negligence, took cognizance of the contention on behalf of the petitioners herein that the receipt produced showed that it was addressed to some other person and instead gave a clear finding that it was issued when the postage is registered and the acknowledgment card signed when it is delivered to the addressee which would prevail over the receipt. The learned Judge therefore did not find favour with the contention on behalf of the petitioners herein and accordingly set aside the order of dismissal.

9. No fault whatsoever can be found with such an order passed by the learned Judge so as to call for an interference

by this Court in exercise of its supervisory jurisdiction under Article 227 of the Constitution of India. In the result, therefore there is no merit in the petition which is hereby dismissed with no order as to costs. Rule accordingly stands discharged.

NUTAN D. SARDESSAI, J.

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