

IN THE HIGH COURT OF BOMBAY AT GOA**WRIT PETITION NO. 216 OF 2019**

Mrs. Sabina Fernandes, daughter of Incaio de Souza, widow, aged about 68 years, housewife, Indian National, R/o H. No. 21 (Old No. 19), St. Jacinto Island, V.P. Chicalim, Mormugao Taluka, Goa - 403 707.

.... Petitioner

Versus

1. Mr. Anthony Furtado, aged about 50 years, service with MPT and
2. Mr. Lawrence Furtado, aged about 62 years, retired from MPT service.
Both residing in Survey No. 14/7, St. Jacinto Island, V.P. Chicalim, Marmugao Taluka, Goa.

.... Respondents

Mr. Galileo Francisco Teles, Advocate for the Petitioner.

Mr. Zeller De Sousa, Advocate for the Respondents.

CORAM : C.V. BHADANG, J.

DATE : 25th March, 2019

ORAL JUDGMENT:

Rule made returnable forthwith. Mr. De Sousa, the learned Counsel for the respondents, waives service. Heard finally by consent of parties.

2. By this petition, the petitioner being the appellant-original plaintiff, is challenging the order dated 18.01.2019, below Exhibit D-10, passed by the learned Appellate Court in

Regular Civil Appeal No. 80/2017. By the impugned order, the first Appellate Court has dismissed the application, under Order XLI Rule 27 of CPC, filed by the appellant, for production of documents at the appellate stage.

3. Mr. Teles, the learned Counsel for the petitioner has placed reliance on the decision of the Supreme Court in the case of **Jaipur Development Authority Vs. Kailashwati Devi (1997) 7 SCC 297** and **Eastern Equipment & Sales Limited Vs. ING. Yash Kumar Khanna (2008) 12 SCC 739**, in order to submit that the application of the present nature has been taken up for hearing alongwith the appeal.

4. Mr. De Souza, the learned Counsel for the respondents submits that the application is not bonafide as the documents which are now sought to be produced, were within the knowledge and/or possession of the petitioner, during the course of trial of the suit, except the sketch, which has been subsequently prepared by PW-2. The learned Counsel has placed reliance on the decision of the Supreme Court in the case of **J. Balaji Singh Vs. Diwakar Cole & Others (2017) 14 SCC 207**.

5. I have considered the submissions made and I find that the petition has to succeed on a short count. The Hon'ble Supreme Court in the case of **Eastern Equipment & Sales Limited** (supra) has held that the application under Order XLI Rule 27 of CPC has to be taken up at the hearing of the appeal and in that view of the matter, the impugned order, in my considered view, cannot be sustained.

6. In such circumstances, the following order is passed:

ORDER

- (i) The petition is partly allowed.
- (ii) The impugned order is hereby set aside.
- (iii) The application (Exhibit D-10) is restored back to the file of the learned District Judge.
- (iv) The learned District Judge shall hear and decide the application (Exhibit D-10) at the final hearing of the appeal, without being influenced by any of the observations in the impugned order.
- (v) Rival contentions of the parties on merits of the application as well as the appeal are left open.
- (vi) In the circumstances, there shall be no order as to costs.

C. V. BHADANG, J.