

IN THE HIGH COURT OF BOMBAY AT GOA**WRIT PETITION NO. 1211 OF 2018**

Mrs. Clara Patricia Fernandes, major of age, married, r/o Souto Mairo Road, Bazar waddo, Caranzalem, Ilhas, Goa.

Presently residing at 57, Kensington Road, Northolt Middlesex, UB56AN, U.K. Petitioner

Versus

1. Mrs. Olga Maria Rodrigues, Through her duly constituted Power of Attorney Holder, Mrs. Babara R. Rodrigues, r/o H. No. 35/5-B, Aradi, Guirim, Bardez, Goa.
2. Mr. Calisto Rodrigues, major in age, r/o H. No. 35/5-B, Aradi, Guirim, Bardez, Goa.
3. Mrs. Babara R. Rodrigues, major in age, r/o H. No. 35/5-B, Aradi, Guirim, Bardez, Goa.
4. The Sub Registrar of Bardez, Mapusa,
5. The State of Goa, Through its Chief Secretary, Secretariat, Porvorim, Bardez, Goa.
6. Mr. Adolf Philip Fernandes, major of age, married, r/o Souto Mairo Road, Bazar waddo, Caranzalem, Ilhas-Goa, presently residing at 57, Kensington Road, Northolt Middlesex, UB56AN, U.K.

The respondent no. 6 herein is represented by his duly constituted attorney, Mr. Joao Piedade Fernandes, major of age, r/o Bazar Vaddo, Caranzalem, Goa.

.... Respondents

Mr. Nigel Da Costa Frias, Advocate for the Petitioner.

Mr. Rohit Bras De Sa, Advocate for the Respondent Nos. 1, 2 and 3.

Mr. Rajesh Shivolkar, Additional Government Advocate for the Respondent Nos. 4 and 5.

CORAM : C.V. BHADANG, J.

DATE : 7th February, 2019.

ORAL JUDGMENT:

Rule made returnable forthwith. Advocate Bras De Sa, waives service on behalf of the contesting respondent nos. 1, 2 and 3. The State is a formal party. Heard finally by consent of parties.

2. The challenge in this petition, at the instance of the petitioner, who is the plaintiff no. 1 is to the order dated 17.12.2018 (below Exhibit-71), passed by the learned Trial Court in Civil Suit No. 10/2011. By the impugned order, an application (Exhibit-71), filed by the petitioner under Order XXVI, Rule 10A and Order XI, Rule 12 read with Section 151 of the Code of Civil Procedure (Code, for short) has been dismissed.

3. The brief facts are that the petitioner and one Adolf Fernandes have filed the aforesaid suit for directing the private respondents/defendants to hand over the original sale deed dated 30.08.2005, registered in the office of Sub Registrar of Bardez at Mapusa and for certain other reliefs. Presently we are concerned about the relief of handing over of the sale deed to the petitioner.

4. The execution of the sale deed by the defendant no. 2 is not in dispute. According to the petitioner, the defendant no. 2 took delivery of the original sale deed from the office of the Sub Registrar on 05.10.2005 and has been refusing to give the same to the plaintiffs. The defendant no. 2 is claiming that he never received the original sale deed from the office of the Sub Registrar.

5. In support of his claim, the petitioner is relying on two documents, namely, (i) a letter dated 31.01.2008 issued by the Sub Registrar, stating that the original sale deed has been collected by Mr. Carlito Rodrigues, the defendant no. 2 and (ii) the extract of a day book (Exhibit-59), in which, there is signature appearing in column no. 13, showing that the sale deed bearing no. 3728/2005 has been delivered to the person whose signature appears in column no. 13. According to the petitioner, it is the signature of the defendant no. 2, which is again disputed by the defendant no. 2.

6. It is a matter of record that insofar as the letter dated 02.01.2008 is concerned, the petitioner has examined the Sub Registrar, who is the successor in office of the Sub Registrar, who had issued the said letter. According to the

petitioner, the Sub Registrar who had signed the said letter has since retired. Be that as it may, presently, we are concerned only with the extract of the day book (Exhibit-59). The petitioner filed an application (Exhibit-71) for direction to the respondent no. 4 (defendant no. 4) to produce the original day book of the year 2005 and for referring the same to the Government handwriting expert alongwith the admitted signature of the respondent no. 2 (defendant no. 2) on the Vakalatnama.

7. That application was opposed on behalf of the respondents.

8. The learned Trial Court by the impugned order dated 17.12.2018 has dismissed the said application. Hence, this petition.

9. I have heard Mr. Costa Frias, the learned Counsel for the petitioner and Mr. Bras De Sa, the learned Counsel for the contesting respondent nos. 1, 2 and 3. Perused record.

10. On hearing the learned Counsel for the parties and on perusal of record, it appears that as per issue no. 1, the

burden is cast on the plaintiffs to prove that the original sale deed dated 30.08.2005 is in the possession of the defendant nos. 1, 2 and 3. There is an extract of the day book of the year 2005, maintained in the office of the respondent no. 4, produced on record, which bears the signature of the recipient of the document in column no. 13. There is a dispute as to the said signature being of the respondent no. 2 (defendant no. 2). Having regard to the burden of proof as indicated above and having regard to the fact and as has been noticed by the learned Trial Court that the power under Section 73 of the Evidence Act has to sparingly exercised and in order to afford reasonable opportunity to both the parties, it is necessary to allow the petitioner to seek production of the original day book and to send the disputed signature for comparison with the admitted one. The learned Trial Court has come to the conclusion that the application is pre-mature. It is not possible to accept that the application is pre-mature. Atleast, the reasoning in para 19 of the impugned order does not show it to be so. Be that as it may, considering the overall circumstances, the following order is passed:

O R D E R

- (i) The petition is allowed.
- (ii) The impugned order is hereby set aside.

- (iii) The application (Exhibit-71) filed by the petitioner is allowed as prayed.
- (iv) The petitioner to deposit the costs/charges of the hand writing expert within one week from today.
- (v) Rule is made absolute in the aforesaid terms, with no order as to costs.

C. V. BHADANG, J.

EV