

Niti

IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO.685 OF 2019

1. MR. JAGDISH YESHWANTRAO
CHOWGULE,
aged 65 years, married, businessman

2. MRS. VICTORIA JAGDIESH
CHOWGULE,
daughter of Sasankar Mukerji,
aged 61 years,

Both residents of Chowgule House
No.273, Airport Road, Chicalim-Goa.

....PETITIONERS

Versus

1. MR. JAGDEEP YESHWANTRAO
CHOWGULE, aged 65 years,
businessman; and his wife,

2. MRS. SUMITRA J. CHOWGULE,
of major age,
Both residents of Chowgule House No.
273, Airport Road, Chicalim-Goa.

3. MR. DAULATRAO
YESHWANTRAO CHOWGULE,
major of age; and his wife,

4. MRS. GAYATRI D. CHOWGULE,
of major age, Both residents of 60-61,
Alto Mangor, Vasco-da-Gama-Goa.

5. MR. JAYWANT YESHWANTRAO
CHOWGULE, of major age, widowed,
resident of Villa Chowgule, Airport

Road, Chicalim-Goa.

6. DEVAYU JAYWANT CHOWGULE,
son of Jaywant Yeshwantrao Chowgule,
major of age, resident of Villa Chowgule,
Airport Road, Chicalim-Goa.

7. ADITYA J. CHOWGULE,
son of Jaywant Yeshwantrao Chowgule,
major of age, resident of Villa Chowgule,
Airport Road, Chicalim-Goa.

8. MRS. VIDHYA VERNEKAR,
major of age, married; and her husband,

9. MR MILIND VERNEKAR,
of major age,

Both residing at House No. 424,
Ward No.12, St. Joaquim Road, Borda,
Margao-Goa.

10. MS. SHEELA CHOWGULE,
major of age, divorced;

11. MR. SHIVANAND
BALESINGHAM, son of Ms. Sheela
Chowgule, major of age, married;
and his wife,

12. MRS. REENA SHIVANAND
BALESINGHAM;

13. MR. VIVEKANAND
BALESINGHAM, son of Ms. Sheela
Chowgule, major of age,

All residing at No. 34, Lengkok,
Gopeng, Tamangolf, 31350, Ipoh Parak,

WEST MALAYSIA.

....RESPONDENTS

Mr Rohit Bras De Sa with Mr P. Naik, Advocates for the Petitioners.

Mr V.P. Thali with Mr Rajdeep Prabhugaonkar, Advocates for Respondent No.1.

CORAM: M. S. SONAK, J.

DATE : 9th MARCH 2023

ORAL JUDGMENT :

1. Heard Mr Rohit Bras De Sa for the petitioners and Mr Thali for respondent no.1 (contesting respondent).
2. Mr De Sa states that the above position was made clear on 19.08.2019 and based upon the same this Court issued notice only to respondent no.1. Accordingly, leave is now granted to delete the other respondents. Mr De Sa states that amendment will be carried out forthwith.
3. Rule. The rule is made returnable forthwith with the consent of the learned Counsel for the parties.
4. The challenge in this petition is to the order dated 25.06.2019, dismissing petitioners' application seeking leave to lead secondary evidence.

5. The Trial Court perhaps did not have the benefit of the decision of this Court in *Parasanbai Dhanraj Jain & Ors. V/s. Sunanda Madhukar Jain & Ors.*¹. Paragraph 11 of this decision reads as follows:

“11. I have recently set out the law on this and I will say so briefly once again: either secondary evidence is led or it is not led. Either the provisions of Section 65 are met or they are not met. No permission of a Court is required to lead evidence of any kind. No judge in the subordinate judiciary to this High Court will hereafter will insist on any such application under any circumstances whatsoever. I do not think I can put it in any clearer terms than this. Any such order is wholly illegal and liable to be set aside. A copy of this order is now to be circulated to every Civil Judge in the State of Maharashtra. To clarify: in an evidence affidavit under Order 18, a witness may well say of a given document that he cannot prove it by direct evidence and then proceed to adduce the secondary evidence in compliance with Section 65 of the Evidence Act. The trial court is to consider that evidence, viz., the reason given for not leading direct evidence, and the secondary evidence led, and is to then decide whether the secondary evidence led is sufficient. That is all. There is absolutely no question of an application, whether styled as an interim application or a 'MARJI' application, for 'permission' to lead secondary evidence. The Court cannot refuse that permission, and it cannot insist on an application for any such permission.”

¹ 2018 (1) Mh.L.J.

6. Accordingly, it would be appropriate if the impugned order is set aside and liberty is granted to the petitioner to adopt the course provided in *Parasanbai Dhanraj Jain* (supra). At the same time, it is clarified that all contentions of all parties including the respondent no.1 are kept open. This is because Mr Thali, learned Counsel for respondent no.1, contends that in the absence of any factual foundations in the pleadings, secondary evidence should not be looked into by the Court.

7. Therefore, rule is made absolute by setting aside the impugned order and granting liberty to the petitioners to adopt the course provided in *Parasanbai Dhanraj Jain* (supra). There shall be no order for costs.

8. All concerned to act on authenticated copy of this order.

M. S. SONAK, J.

NITI K HALDANKAR
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