



IN THE HIGH COURT OF BOMBAY AT GOA
APPEAL FROM ORDER NO. 19 OF 2026

Dr. David Achutha Menon
Son of Late Unikat Sivasankara Menon
70 years of age, married, retired,
British Citizen of Indian Origin,
Holding OCI card, Resident of 8 Byfeld
Gardens Barnes, London SW13
9 HP United Kingdom and presently
residing at Flat No.E-703, Adarsh Co-
Operative Housing Society, Caranzalem,
Panaji, Goa
Represented by duly constituted attorney
Mr. Mihir Vardhan

... APPELLANT

V/S.

1. **Mr. Vijay Kumar Mishra**
(Since Deceased through his Legal
Heirs)
- 1(a) **Mrs. Suchita Mishra**
W/o. Late Vijay Kumar Mishra
Major of age, R/o. House No.838,
Homestead B/256, Plot A-1,
Opp Hotel Solmar, Miramar, Panaji,
Goa – 403 001
- 1(b) **Miss Pavitra Mishra**

Daughter of Late Vijay Kumar Mishra
Major of age, R/o. House No.838,
Homestead B/256, Plot A-1, Opp
Hotel Solmar, Miramar, Panaji, Goa –
403 001

... Respondents

Mr. Ajay Menon, Advocate for the Appellant.

Mr. Matlok D'Souza, Advocate for the Respondents.

CORAM	:	VALMIKI MENEZES, J.
RESERVED ON:		21st August, 2026
PRONOUNCED		
ON	:	8 th October, 2026

JUDGMENT:

1. This Appeal from Order challenges order dated 09.01.2026 passed by the Civil Judge Senior Division at Panaji on an application dated 05.08.2025 (Exhibit D-100) filed under Order 39 Rule 4 CPC for modification and variation of order dated 23.11.2021 passed by the said Court; the impugned order rejects the Appellants request for modification and variation and directions to Respondent No.1(a) and 1(b) to hand over him the

keys to the bungalow to use, possess and occupy the suit premises being a co-owner. The trial court has allowed the Plaintiff to take inspection of the suit bungalow and has further directed that pending the Plaintiff's and Defendant's claims being decided, they have to bear in equal measure the costs of the maintenance of the structure and maintenance works are to be carried out after obtaining prior permission of the trial court. The trial court has in fact rejected the Plaintiff's request for a direction to Defendant's No.1 (a) and (b) to hand over keys of the bungalow and to permit the use for occupation of the premises.

FACT

2. The present Appellant is the original Plaintiff in Special Civil Suit No.60/2014/B before the Civil court at Panaji. He claims to be the only child of late Unikat and late Mrs. Angelica Menon. The Plaintiff avers that the suit plot A1 was purchased by his parents on 18.03.1975 through a Deed of Sale after which a bungalow was constructed thereupon by his parents. This is the suit property which bears Chalta no.17 of PT Sheet 119 of City survey Panaji, which was in occupation of Plaintiff's parents. The plaintiff further avers that the Plaintiff's father expired on

04.05.1992, intestate leaving the Plaintiff and his mother as joint owners of the property. His mother expired on 20.12.2011 after executing a Will dated 12.08.2011 bequeathing her share in the suit property equally, in favour of the Plaintiff and one Vijay Kumar Mishra (Defendant No.1). The Plaintiff claims that the Will is a product of fraud and undue influence, obtained from the Plaintiff's mother during her advanced age of 82 years and therefore seeks it to be declared as a nullity. The plaint also avers that on the basis of the Will the Defendant Vijay claimed occupation of the suit property on the demise of the Plaintiff's mother, and as a consequence of declaring the Will a nullity, the Court declare the Plaintiff the only successor of his parents. The plaint also seeks a Decree against the Defendant to hand over possession of the suit bungalow.

3. Subsequent to filing of the plaint and written statement being filed by the Defendant Vijay, he expired and the Defendant 1a (his Wife Suchita) and his daughter Defendant 1b (Ms. Pavitra) were impleaded as Defendants. According to the written statement filed by Vijay, he was working as a security guard with the plaintiff's mother since 1996 and since then has been staying at the suit property. He claims that the late Angelica executed

the Will which is under challenge, bequeathing her half share of the suit property in favour of the Defendant. The written statement does not deny the fact that the suit property was acquired and owned jointly by the Plaintiff's parents or that the Plaintiff is the only child of his parents or that the Plaintiff is a successor of his father's estate. The written statement also does not raise a plea that the Defendant, who commenced residing at the suit property in 1996 has adverse possession of the suit property or has ousted the Plaintiff's title.

4. On an application for temporary injunction filed by the Plaintiff, the trial Court, by its order dated 11.08.2016 granted the Plaintiff a restraint order, restraining the Defendant from creating any third party rights or inducting any third party or parting with the possession of the suit property or altering its nature. Subsequently, the trial Court also granted the Plaintiff inspection of the suit bungalow vide order 23.11.2021. In all these orders, the trial Court has noted that the right of the Plaintiff to have possession of the bungalow would be decided on merits.

5. The Plaintiff then filed an application seeking modification of the injunction order for directing to the Defendants to hand over keys of the bungalow for the use of the Plaintiff. This application was styled as one under Order 39 Rule 4 CPC. The application was partly granted on 09.01.2026 in the terms mentioned in paragraph 1 herein above and is challenged before this Court as the impugned order.

6. The main contentions raised in arguments before me by Advocate for the Appellant Mr. Ajay Menon are as follows:

A. The trial Court ought to have proceeded on the principle that “even if the Plaintiff does not admit the execution of the Will as genuine” that the Plaintiff and Defendants, prima facie were co-owners, and the Plaintiff as the co-owner could not be restrained from enjoying the suit property. On this premise, the Plaintiff was entitled to the key to the suit premises.

B. It was contended that the trial Court having granted the application partly and allowing the Plaintiff to carry out maintenance work with the permission of the Court, it

ought to have granted the relief of handing over the keys to the premises, without which the relief granted by the Court would be rendered meaningless. Reliance was placed on *Mohd.Baqar and Ors v/s Naim-Un-Nisa Bibi and Ors* reported in (1955) 2 SCC 499, *Tanushree Basu and Ors v/s Ishani Prasad Basu and Ors* reported in (2008) 4 SCC 791 and *Bhaguji Bayaji Pokale and Ors v/s Kantilal Baban Gunjawate and Ors* (1998) (1) Mh.L.J.276

C. Opposing the appeal, learned Advocate for the Respondents Mr. Matlock D'Souza submitted that an application under Order 39 Rule 4 was not maintainable and the trial Court ought to have dismissed the application in its entirety. It was further argued that grant of the application insofar as handing over keys of the premises are concerned, would amount to handing over possession thereof to the Plaintiff, when the Plaintiff's right is yet to be determined. Reliance is placed on *Priti Roy v/s Jaya Naskar*, reported in 2011 SCC OnLine Cal 2321, *P.A Shukla v/s Shirubhai Karsanbhai Thakker* reported in 2001 SCC OnLine Guj 222 and

Bank of Baroda v/s Union Bank of India and Ors
reported in 2022 SCC OnLine Del 531.

CONSIDERATIONS

7. The Respondents main objection is that the trial Court ought not to have entertained an application seeking modification of the original order of temporary injunction dated 11.08.2016. As such an application was not maintainable under Order 39 Rule 4 CPC.

Without going into which provision of the Code could be invoked for seeking the relief of direction to the Defendants for handing over one of the keys to the premises, suffice it to state that the Defendants have not independently challenged the impugned order. In the absence of such a challenge, the Appellate Court would examine the correctness of the impugned order dated 09.01.2026, on the touchstone of Order 43(1) (u) CPC.

8. The Application filed by the Plaintiff is for a relief to direct the Defendants to handover the Plaintiff the keys of the bungalow

and to permit the Plaintiff the use and occupation of the premises to exercise his rights to the said premises; the other relief sought is for a direction to restore possession of the suit house to the Plaintiff pending final disposal, to safeguard the personal belongings and valuable records of the Plaintiff. The second prayer is premised upon the principle that a co-owner is entitled to enjoy the possession and use of the immovable property along with all other co-owners, and one co-owner has no right to interfere or disposes the other co-owner from the immovable property.

9. In its earlier order dated 23.11.2021, the trial Court has observed that it would decide the question of possession during the course of the trial. In the impugned order dated 09.01.2026, the trial Court has held that the Plaintiff, as a co-owner has a right to ensure that the suit property does not deteriorate, and consequently has granted an order allowing the Plaintiff to inspect the suit property and bungalow and to take steps to carry out maintenance thereof with permission of the Court; the trial Court has specifically directed that the cost of maintenance would jointly borne by the Plaintiff and the Defendants.

10. In *Tanushree Basu* (supra), the Supreme Court has observed that there cannot be any dispute as a general proposition of law that possession of one co-owner would be treated as possession of all. In this judgment, the Supreme Court has made reference in the earlier Judgment of Bombay High Court in *Bhaguji Bayaji Pokale* (supra) where it has held that where parties to an action are co-sharers, and as under the law, possession of one co-sharer is possession of all co-sharers, it cannot be adverse to them, unless there is denial of their right, to their knowledge, by the person in possession, and exclusion and ouster following thereon, for the statutory period are claimed.

11. In the present case, the Plaintiff is undisputedly the co-owner of the suit property by succession, on the death of his father and in addition his mother, vide Will dated 12.08.2011 has bequeathed half of her share to the Plaintiff. Though the Will has been challenged by the Plaintiff, till the fate of that Will is decided by the trial Court, undisputedly, the Plaintiff is a major shareholder of the ownership right in the suit property which includes the bungalow. The original Defendant claims to be a legatee under the said Will to the extent of half of the share of the mother of the Plaintiff. Proceeding on the assumption that the

Plaintiff and Defendants, for the moment are co-sharers and the Plaintiff holds a major share in the suit property, he cannot be denied the right to enjoyment of the suit property and be excluded therefrom by the Defendants. In any event, the Defendants have neither filed a suit nor counter claim to make such claim, and the pleadings in the written statement do not dispute the Plaintiff's right as successor of his father's share or as a legatee under his mother's Will.

12. Perusal of the written statement reveals that the Defendants have not set up a plea of ouster or exclusion of the Plaintiff from the suit property, as they claim they commenced to reside in the suit property in the year 1996 along with the mother of the Plaintiff. The mother of the Plaintiff expired on 20.12.2011. The Will therefore takes effect on that date and the original Defendant could claim co-ownership only from 20.12.2011. As on the date of filing of the suit which is 20.11.2014 the Defendants claim to co-ownership has been only 3 years. The Defendants therefore could never set up a plea of ouster as they had no exclusive possession of the suit property for requisite period.

13. In the light of these facts, and applying the principle enunciated by the Supreme Court in *Tanushree Basu* and the Bombay High Court in *Bhaguji Bayaji Pokale* (supra), the Plaintiff must be held to be in joint possession of the suit property, and would therefore be entitled to own, possess and enjoy the same without impediment and without being excluded therefrom by the other co-owner, the original Defendant through whom the Defendants No.1a and 1b claim a right.

14. On this premise alone, the impugned order, insofar as it grants inspection and right to maintenance of the suit property cannot be faulted and is therefore upheld. However, once it is held that the Plaintiff and Defendants, are co-owners of the suit property, subject of course to the Will dated 12.08.2011 being tested in evidence, the Plaintiff would be entitled to have access to the suit property and bungalow and to maintain it jointly with the Defendants. The Trial Court has passed its order and restricted the relief to the Plaintiff, without giving full effect to the basic principles of law which are referred to in the preceding paragraphs as it once proceeds on the basis that the parties are co-owners, it must allow them to possess and enjoy the co-owned property in full measure. To that extent, the Trial Court has committed a

basic error of law, which cause for interference in the limited appellate jurisdiction under order 43 Rule 1(u) CPC.

15. Consequently, the impugned order dated 09.01.2026 in addition to the directions issued by it, shall stand modified, to include a direction now issued to the Defendant No.1a and 1b to handover to the Plaintiff one set of keys of the bungalow to permit the Plaintiff to use the suit premises / property. The keys shall be deposited within one week from the passing of this order in the Registry of the Trial Court and the Trial Court shall, on a plain application filed by the Plaintiff release such key to the Plaintiff; it is made clear that the Defendants shall in no manner cause any impediment to the Plaintiff to the use and occupation of the suit property and the premises, and such use shall be joint with the Defendants. The Plaintiff is put to terms that grant of this relief will in no manner permit him to use any force or coercive method in evicting the Defendants.

16. The appeal is partly allowed in terms of the directions incorporated in paragraph 15 above.

VALMIKI MENEZES, J.