

IN THE HIGH COURT OF BOMBAY AT GOA**WRIT PETITIONS NO.487 & 642 OF 2014****WRIT PETITION NO.487 OF 2014**

- 1 Shri. Vishram Krishna Kantak,
Through Power of attorney
Shri Shantanand V. Kantak
(since deceased, through LR's)
1A. Shantanand Vishram Sinai
Kantak,
major, s/o. Respondent No.1.
1B. Radha Shantanand Kantak,
W/o. R.I.A., major.
1C. Smt. Aruta Rajmohan Sinai
Kantak,
D/o. Rajmohan Sinai Kantak.
1D. Shri Digesh Hemant Pai
Angle,
Major, Both residing at
H.No.110, Opp. Ram Mandir,
Comba-Margao.
1E. Smt. Kala Rajmohan
Kantak,
1F. Rajmohan Kantak,
Both major, Both residing at
H.No.204, Near Vithal Mandir,
Comba, Margao.
1G. Smt. Shobha Vishram
Kantak,
1H. Shri Shyam Prabhu
Gaonkar,
Both residents of H.No.204,
Near Vithal Mandir, Comba,
Margao.
- 2 Shri. Shantanand Kantak,
major of age,
R/o. House No. 558, Bagwada

Curchorem Goa.

.... Petitioners

Versus

- 1 Canacona Municipal Council,
Through its Chief Officer
having Office At Municipal
Building, Canacona, Goa.
- 2 Mr. Niki Fernandes,
s/o Carlos Fernandes,
aged about 35 years, business,
R/o Khadpaban, Ponda- Goa.deleted
- 3 Shri Shantanand Kantik,
major of age,
R/o H.no. 558, Curchorem, Goa.deleted
- 4 Shri. Govind Krishna Sinai
Kantik,
Age 78 years, s/o. Krishna
Kantik, R/o H.no. 189, Mapa,
Panchwadi, Ponda Taluka, Goa.
- 5 Durgabai Haridas Sinai Kantik,
Age 76 years, wife of late
Haridas Kantik, R/o. H.no. 825,
Mapa, Panchwadi, Ponda
Taluka, Goa.
- 6 Shri. Gaurish Haridas Sinai
Kantik,
Age 41 years, Son of late
Haridas Kantik,
R/o. H.no. 825, Mapa,
Panchwadi, Ponda Taluka, Goa.
- 7 Smt. Rakhi Gaurish Sinai

Kantak,
Age 36 years, wife of Gaurish
Sinai Kantak, R/o. H.no. 825,
Mapa, Panchwadi, Ponda
Taluka, Goa.

8 Shri. Shivprasad Haridas Sinai
Kantak,
Age 36 years, Son of late
Haridas Sinai Kantak,
R/o. H.no. 825, Mapa,
Panchwadi, Ponda Taluka, Goa.

9 Smt. Shila Haridas Sinai
Kantak,
Age 42 years, Daughter of
Haridas Sinai Kantak,
R/o. H.no. 825, Mapa,
Panchwadi, Ponda Taluka, Goa.

10 Smt. Hemlata Pandurang Sinai
Kantak,
Age 64 years, wife of late
Pandurang Sinai Kantak,
R/o. H.no. 185, Mapa,
Panchwadi, Ponda Taluka, Goa.
(defendant nos.5,7,8 & 9 are
represented by their duly
constituted power of attorney
Shri Gaurish Haridas Sinai
Kantak defendant no.6, herein).

11 Shri. Krishnanath Pandurang
Sinai Kantak,
Age 37 years, Son of late
Pandurang Sinai Kantak,
R/o. H.no. 185, Mapa,
Panchwadi, Ponda Taluka, Goa.

- 12 Smt. Mita Krishnanath Sinai
Kantak,
Age 36 years, Wife of
Krishnanath Sinai Kantak,
R/o. H.no. 185, Mapa,
Panchwadi, Ponda Taluka, Goa.
(defendant no.10 and 12 are
represented by their duly
constituted power of attorney,
Shri Kashinath Sinai Kantak,
Defendnat no.11, herein)
- 13 Shri Arvind Sinai Nagarsenkar,
Son of late Shripad Sinai
Nagarsenkar, Age 68 years,
retired doctor, Resident of
Shantai, Plot No. 35, Gomeco
Housing Society, Bambolim,
Tiswadi, Goa.
- 14 Smt. Aroona Arvind Sinai
Nagarsenkar,
Wife of Shri Arvind Sinai
Nagarsenkar, Age 68 years,
retired doctor, Resident of
Shantai, Plot No. 35, Gomeco
Housing Society, Bambolim,
Tiswadi, Goa.
- 15 Shri. Dattarai Sinai
Nagarsenkar,
Son of late Shripad Sinai
Nagarsenkar, Age 77 years,
Resident Of H.no.134,
Shantivan, Mhada, Near Link
Road, Extn, Andheri, West,
Mumbai, Maharashtra 400053.
- 16 Smt. Shitala Sinai Nagarsenkar,

Wife of Shri Dattatrai Sinai
Nagarsenkar, Age 70 years,
Resident Of H.no. 134, Extn,
Andheri, West Mumbai
Maharashtra 400053.

- 17 Shri Shailesh Nagarsenkar,
Son of late Shripad Sinai
Nagarsenkar, Age 61 years,
Resident Of Flat No. 401, A
Wing, Vikas Palmo, Dr.
Ambedkar Road, Thane, West
40060, Maharashtra.
- 18 Smt. Mangal Nagarsenkar,
Wife of Shri Shailesh
Nagarsenkar, Age 54 years,
Resident Of Flat No. 401, A
Wing, Vikas Palmo, Dr.
Ambedkar Road, Thane, West
40060, Maharashtra.
- 19 Shri Pundlik Sinai Nagarsenkar,
Son of late Shripad Sinai
Nagarsenkar, Age 57 years.
- 20 Smt. Shivangi Sinai
Nagarsenkar,
Wife of Shri Pundalik Sinai
Nagarsenkar, Age 51 years,
Resident Of Flat No. C-54,
Sonia Apartment,
Swatantrapath, Vasco Da Gama,
Goa.
- 21 Shri. Manguesh Sinai
Nagarsenkar,
Son of late Shripad Sinai
Nagarsenkar, Age 57 years,

Resident Of Kenkre Residence,
House No. S-5, Dattawadi,
Mapusa, Goa.

- 22 Smt. Sunita Sinai Nagarsenkar,
Age 57 years,
Resident Of Kenkre Residence,
House No. S-5, Dattawadi,
Mapusa, Goa.
(Parties at serial no.14 to 22 are
represented by their power of
attorney Shri Arvind Sinai
Nagarsenkar, son of late Shripad
Sinai Nagarsenkar, age 68 years,
retired doctor, resident of
Shantai, Plot No.35, Gomeco
Housing Society, Bambolim,
Tiswadi, Goa.

... Respondents

Mr. S.D. Lotlikar, Senior Advocate with Mr. C. Padgaonkar, Advocate
for the Petitioners.

Ms. R. Pereira, Advocate for Respondent No.1.

Mr. R.G. Ramani, Advocate for Respondents No.4 to 12.

Mr. P.A. Kamat, Advocate for Respondents No.13 to 22.

AND

WRIT PETITION NO.642 of 2014

- 1 Shri Arvind Sinai
Nagarsenkar,
son of late Shripad Sinai
Nagarsenkar, age 68 years,
retired Doctor, Resident Of
Shantai, Plot No 35,
Gomeco Housing Society,
Bambolim, Tiswadi-Goa.

- 2 Smt. Aroona Arvind Sinai
Nagarsenkar,
Wife of Shri Arvind Sinai
Nagarsenkar, age 68 years,
retired Doctor, Resident Of
Shantai, Plot No. 35,
Gomeco Housing Society,
Bambolim, Tiswadi, Goa.
- 3 Shri. Dattatrai Sinai
Nagarsenkar,
Son of late Shripad Sinai
Nagarsenkar, age 77 years,
Resident Of H.no. 134,
'Shantivan', Mhada, Near
Link Road, Extn, Andheri,
West Mumbai Maharashtra
400053.
- 4 Smt. Shitala Sinai
Nagarsenkar,
Wife of Shri Dattatrai Sinai
Nagarsenkar, age 70 years,
Resident Of H.no. 134,
Shantivan, Mhada, Naear
Link Road, Extn, Andheri,
West, Mumbai,
Maharashtra 400053.
- 5 Shri Shailesh Nagarsenkar,
son of late Shripad Sinai
Nagarsenkar, age 61 years,
resident of Flat No.401, A
Wing, Vikas Palms,
Dr. Ambedkar Road, Thane
West 400 601,
Maharashtra.
- 6 Smt. Mangal

Nagarsenkar,
wife of Shri Shailesh
Nagarsenkar, age 54 years,
Resident Of Flat No.401, A
Wing, Vikas Palms, Dr.
Ambedkar Road, Thane,
West 400 061,
Maharashtra.

- 7 Shri. Pundlik Sinai
Nagarsenkar,
Son of late Shripad Sinai
Nagarsekar, age 57 years.
- 8 Smt. Shivangi Sinai
Nagarsenkar,
Wife of Shri Pundalik
Sinai Nagarsenkar, age 51
years,
Resident Of Flat No. C-S4,
Sonia Apartment,
Swatantrapath, Vasco Da
Gama, Goa.
- 9 Shri Manguesh Sinai
Nagarsenkar, son of late
Shripad Sinai Nagarsenkar,
age 57 years, resident of
Kenkre Residency, House
No. S-5, Dattawadi,
Mapusa, Goa.
- 10 Smt. Sunita Sinai
Nagarsenkar,
age 51 years,
Resident Of Kenkre
Fesidence, House No. S-5,
Dattawadi, Mapusa, Goa.
(Parties at serial no.2 to 10

are represented by their
power of attorney Shri
Arvind Sinai Nagarsenkar,
son of late Shripad Sinai
Nagarsenkar, age 68 years,
retired Doctor, (PAN
No.AKPS1136M), resident
of Shantai, Plot No.35,
GOMECO Housing
Society, Bambolim,
Tiswadi-Goa.)

.... Petitioners

Versus

- 1 Shri Vishram Krishna Sinai
Kantak,
Son of late Krishan
Kantak, aged 89 years,
widower,
R/o H. No. 558, Bagwada,
Curchorem, Quepem,
Taluka. Since deceased
through his LR's
- 1(a) Smt. Kala Rajmohan Sinai
Kantak, Major in age, r/o.
H.No.558, Bagwada,
Curchorem, Quepem,
Taluka Goa.
- 1(b) Smt. Aruta Rajmohan Sinai
Kantak, Major in age, r/o.
H.No.110, Opposite Ram
Mandir, Near Damodar
Sal, Comba, Margao-Goa.
- 1(c) Shri Digesh Hemant Pai
angle, Major in age, r/o.
H.No.110, Opposite Ram

Mandir, Near Damodar
Sal, Comba, Margao-Goa.

- 1(d) Smt. Smita Shantanand
Sinai Kantik, Major in
age, r/o. H.No.558,
Bagwada, Curchorem,
Quepem, Taluka Goa.
- 1(e) Smt. Shobha Shyam
Prabhugaonkar, Major in
age, r/o. Kirbhat, Nuvem,
Salcete, Taluka Goa.
- 1(f) Shri Shyam
Prabhugaonkar, Major in
age, r/o. Kirbhat, Nuvem,
Salcete, Taluka-Goa.
- 2 Shri Shantanand Vishram
Sinai Kantik,
Son of Vishram Krishna
Kantik, aged 60 years,
R/o. House No. 558,
Bagwada, Curchorem,
Quepem Taluka Goa.
- 3 Canacona Municipal
Council,
Through its Chief Officer
having Office At
Municipal Building,
Canacona, Goa.
- 4 Shri Govind Krishna Sinai
Kantik,
Age 78 years, Son of
Krishna Kantik,
R/o H.no. 189, Mapa,

Panchwadi, Ponda Taluka,
Goa.

- 5 Smt. Durgabai Haridas
Sinai Kantak,
Age 76 years, wife of late
Haridas Kantak,
R/o. H.no. 825, Mapa,
Panchwadi, Ponda Taluka,
Goa.
- 6 Shri. Gaurish Haridas Sinai
Kantak,
Age 41 years, son of late
Haridas Kantak,
R/o. H.no. 825, Mapa,
Panchwadi, Ponda Taluka,
Goa.
- 7 Smt. Rakhi Gaurish Sinai
Kantak,
Age 36 years, wife of
Gaurish Sinai Kantak,
R/o. H.no. 825, Mapa,
Panchwadi, Ponda Taluka,
Goa.
- 8 Shri Shivprasad Haridas
Sinai Kantak,
Age 45 years, son of late
Haridas Sinai Kantak,
R/o. H.no. 825, Mapa,
Panchwadi, Ponda Taluka,
Goa.
- 9 Smt. Shila Haridas Sinai
Kantak,
Age 42 years, daughter of
Haridas Sinai Kantak,

R/o. H.no. 825, Mapa,
Panchwadi, Ponda Taluka,
Goa.
(respondents nos.5,7,8, and
9 are represented by their
duly constituted power of
attorney Shri Gourish
Haridas Sinai Katak,
respondent no.6 herein)

10 Smt. Hemlata Pandurang
Sinai Katak,
wife of late Pandurang
Sinai Katak,
R/o. H.no. 185, Mapa,
Panchwadi, Ponda Taluka,
Goa.

11 Shri. Krishnanath
Pandurang Sinai Katak,
Age 37 years, son of late
Pandurang Sinai Katak,
R/o. H.no. B185, Mapa,
Panchwadi, Ponda Taluka,
Goa.

12 Smt. Mita Krishnanath
Sinai Katak,
Age 36 years, wife of
Krishnanath Sinai Katak,
R/o. H.no. 185, Mapa,
Panchwadi, Ponda Taluka,
Goa.

.... Respondents

Mr. P.A. Kamat, Advocate for the Petitioners.

Mr. S.D. Lotlikar, Senior Advocate with Mr. C. Padgaonkar, Advocate
for Respondents No.1& 2.

Ms. R. Pereira, Advocate for Respondent No.3.

Mr. R.G. Ramani, Advocate for Respondents No.4 to 12.

CORAM : F.M. REIS, J.

DATE : 26th JUNE, 2015

ORAL JUDGMENT :

Heard Shri S.D. Lotlikar, learned Senior Counsel appearing for the petitioners, Ms. R. Pereira, learned Counsel appearing for respondent no.1, Mr. R.G. Ramani, learned Counsel appearing for the respondents no.4 to 12 and Mr. P.A. Kamat, learned Counsel appearing for respondents no.13 to 22/petitioners in Writ Petition No.487 of 2014.

2. At the request of the learned Senior Counsel appearing for the petitioners in Writ Petition No.487/2014, leave to delete respondents no.2 & 3 is granted. Amendment to be carried out forthwith.

3. Rule. Heard forthwith with the consent of the learned Counsel. Learned Counsel appearing for the respondents waive service.

4. Upon extensively hearing the learned Counsel appearing for the respective parties, the main grievance of Shri Lotlikar, learned Senior Counsel appearing for the petitioners is that the learned Judge by the impugned order whilst exercising jurisdiction under Order 39 Rule 4

of the Civil Procedure Code varied the order of injunction which has attained finality in favour of the petitioners herein. The learned Senior Counsel further points out that the import of the impugned order would be that in the suit filed by the petitioners, the respondents would get an injunction against the petitioners without any prima facie adjudication of their respective claims. The learned Senior Counsel further pointed out that in the suit filed by the petitioners against the Municipal Council for different reliefs, the petitioners prayed for a temporary injunction, inter alia, to direct the Municipal Council not to grant any permission for any shacks in the disputed property without the consent of the petitioners. The said order came to be passed on 14/10/2010. The learned Senior Counsel has further pointed out that after the said order was passed the respondents filed an application to get themselves impleaded in the suit on the ground that they also had an interest in the disputed property. The learned Senior Counsel further pointed out that the subject matter of the property is survey no.36/15, 36/16 of the village of Nagorcem, Palolem. The learned Senior Counsel further submits that in terms of Order 39 Rule 4 of the Civil Procedure Code the respondents could not get an injunction against the petitioners without filing a counter claim or filing an appropriate application in terms of law and

establishing at least prima facie their right to the disputed property. The learned Senior Counsel has thereafter taken me through the impugned order to point out that the learned Judge has erroneously taken a view that co-ownership of the respondents has been admitted, when on the contrary, according to the learned Senior Counsel the respondents no.13 to 22, who are the petitioners in Writ Petition No.642/2014 claim exclusive ownership rights in the suit property. The learned Senior Counsel further submits that even the remaining respondents no.4 to 12 are not entitled for the relief against the petitioners without filing an appropriate application to claim their right. The learned Senior Counsel further points out that the learned Judge whilst passing the impugned order essentially relied upon the findings arrived at the time of considering the application under Order 1 Rule 10 of the Civil Procedure Code which is not at all justifiable in the facts and circumstances of the case. The learned Senior Counsel has thereafter taken me through the judgment passed by the Lower Appellate Court to point out that the Lower Appellate Court has not at all examined the contentions advanced by the petitioners and has erroneously endorsed the findings of the learned Trial Judge. The learned Senior Counsel, as such, points out that the Courts below have erroneously exercised jurisdiction whilst passing the impugned

orders which calls for interference by this Court under Article 227 of the Constitution. In support of his contentions, the learned Senior Counsel has relied upon the judgment of the Gujarat High Court reported in **2012 GLH (2) 61** in the case of ***Padmavati Paradise & Anr. V/s. Kirtiben Dhanesh Kumar Shah***.

5. On the other hand, Mr. R.G. Ramani, learned Counsel appearing for the respondents no.4 to 12 has pointed out that the suit filed by the petitioners is misconceived and according to him an innocuous order has been apparently obtained though it would cause a lot of injustice and prejudice to the rights and contentions of the respondents no.4 to 12. The learned Counsel points out that the suit filed by the petitioners itself is on the wrong premise as according to him it is the contention of the petitioners that they are the exclusive owners of the subject property in view of an allotment in an inventory proceedings when such property belonged to the common ancestor of the petitioners and the respondents no.4 to 12 and the estate leaver was not the exclusive owner of such property. The learned Counsel further points out that the estate leaver in the inventory proceedings had only 1/4th right in the disputed property while the remaining 3/4th belonged to the other co-heirs, which included the respondents no.4 to

12. The learned Counsel thereafter has taken me through the proviso to Order 39 Rule 4 of the Civil Procedure Code to point out that this false statement itself entitles the respondents no.4 to 12 to seek modification and/or setting aside of the order of temporary injunction. The learned Counsel further submits that it is well settled that a co-owner cannot make changes in the property without the consent of the other co-owner and, as such, the order passed by the learned Trial Judge is to advance the cause of justice in terms of law and, consequently, interference of this Court on that count would not at all be justified. The learned Counsel, as such, submits that the above Writ Petition be rejected.

6. Mr. P.A. Kamat, learned Counsel appearing for respondents no.13 to 22 has pointed out that said respondents are claiming an injunction only to a portion of the subject property in the suit. The learned Counsel has pointed out that it is the contention of the said respondents that they are the exclusive owners in possession of the property surveyed under no.36/16 of the same village besides an area of 517 square metres which extends to a portion of the property surveyed no.36/15. The learned Counsel further points out that the property is duly described in the Land Registration Office in favour of

the ancestors of the said respondents and can be traceable from the other documents produced by the said respondents including the matrix record and the revenue documents besides an order passed by the Revenue Authorities. The learned Counsel further points out that as far as the property surveyed under no.36/16 the petitioners nor the respondents no.4 to 12 have any right therein and, consequently, the question of seeking any permission either from the petitioners or respondents no.4 to 12 would not arise at all. The learned Counsel further points out that even in respect of the property surveyed under no.36/15 is concerned the said respondents are claiming an area of 517 square metres therein. The learned Counsel further submits that as such the learned Judge was not justified to pass the impugned order with regard to the property surveyed under no.35/16 and, as such, in the interest of justice the petition filed by the said respondents deserves to be allowed and the temporary injunction obtained by the petitioners dated 14/10/2010 deserves to be set aside. The learned Counsel has thereafter taken me through the impugned order to point out that the learned Judge has erroneously refused the relief sought by the respondents no.13 to 22 with regard to the property surveyed under no.36/16 and an area of 517 square meters from the property surveyed under no.36/15. The learned Counsel, as such, submits that

the petition filed by the respondents no.13 to 22 deserves to be allowed and appropriate orders may be passed accordingly.

7. I have considered the submissions of the learned Counsel and with their assistance, I have also gone through the records. On perusal of the impugned order passed by the Courts below it appears that the learned Judge whilst modifying the order of temporary injunction dated 14/10/2010 has assumed that the claim of co-ownership between the petitioners and the respondents herein was undisputed. But, however, taking into consideration the submission of Mr. P.A. Kamat, learned Counsel appearing for respondent no.13 to 22, it clearly emerges that the case of the said respondents is restricted to the property surveyed under no.36/16 and an area of 517 square metres from the property surveyed under no.36/15. In such circumstances, imposing restriction in the Municipal authorities granting permissions to instal shacks in the whole property surveyed under no.36/15 by the impugned order is not at all justified. This itself shows that the learned Judge has not at all applied his mind whilst passing the impugned order to examine the real rival claims of the parties in the proceedings. As such, the learned Judge was not justified to pass the impugned order and hold that consent of the

respondent no.13 to 22 was required for the purpose of permitting shack in the property surveyed under no.36/15. Mr. Kamat, learned Counsel however fairly accepts that the area of 517 square meters which has been claimed by the said respondents has not been identified in the proceedings before the Trial Court. In such circumstances, I find that the impugned order to the extent it holds that consent of the respondents no.13 to 22 is required to allow shacks in the property surveyed under no.36/15 is concerned cannot be sustained and deserves to be quashed and set aside.

8. With regard to the claim of the respondents no.4 to 12 in respect of the property surveyed under no.36/15, I find that on the basis of the Will of Durgabai who is the common ancestors of petitioners and the respondents no.4 to 12 only $\frac{1}{5}^{\text{th}}$ of $\frac{1}{8}^{\text{th}}$ right of the property came to be devolved upon the ancestors of the petitioners. In such circumstances, prima facie, as far as the claim of the respondents no.4 to 12 that they are also co-owners of the property along with the petitioners stands established and consequently the relief granted by the learned Judge in respect of the property surveyed under no.36/15 in favour of said respondents cannot be faulted and does not call for any interference by this Court.

9. With regard to the rival claim in respect of the property surveyed under no.36/16 is concerned, I find that the learned Judge for the reasons stated herein above was not justified to pass the impugned order without first ascertaining whether prima facie the claim of the respondents no.13 to 22 that they are the exclusive owners of such portion of the property besides an area of 517 square metres is established. In such circumstances, I find that it would be appropriate and in the interest of justice to quash and set aside the order of temporary injunction dated 14/10/2010 to the extent it refers to the property surveyed under no.36/16 is concerned and direct the learned Judge to decide the application for temporary injunction filed by the petitioners afresh in connection with the property surveyed under no.36/16 is concerned, in accordance with law.

10. In view the above, I pass the following order:

O R D E R

- (i) The impugned order dated 14/10/2010 and the subsequent impugned orders passed by the learned Trial Judge dated 23/08/2013 and the Appellate Court dated 26/05/2014 to the extent of property surveyed under no.36/16 are quashed and set aside.

(ii) The learned Judge is directed to decide the application for temporary injunction dated 29/09/2010 in respect of the property surveyed under no.36/16 afresh after hearing the parties in accordance with law within three months from the date of receipt of this order.

(iii) The impugned orders of the learned Trial Judge dated 23/08/2013 and the impugned orders dated 26/05/2014 of the lower Appellate Court in respect of the property surveyed under no.36/15 as far as the respondents no.13 to 22 are quashed and set aside.

(iv) Rule is made absolute in the above terms.

F.M. REIS, J.

NH/-