

IN THE HIGH COURT OF BOMBAY AT GOA**WRIT PETITION NO.145 OF 2014**

1. Narayan alias Vijay Shivram
Kerkar (deceased) through his legal
representative Petitioner No.2.

2. Smt. Shyamal Narayan Kerkar,
of major age, housewife,

Resident of 'Radha',
First floor, Ambaji vaddo,
Margao, Salcete, Goa.
Represented through her
power of attorney holder
Shri Vishwesh Atchut Kamat,
r/o. 1/S-2, Shantaban Housing Complex,
Merces, Ilhas, Goa.

.... Petitioners

V/s

1. Shri Gabriel Francisco Fernandades,
of major age, married, business.

2. Smt. Bella Gabriel Fernandes,
of major age, housewife,

Both residents of Khalchawada,
Arambol, Pernem, Goa.

3. Smt. Agnes Pascoal Lobo,
of major age, widow,
r/o. H.No.658, Khalchawada,
Arambol, Pernem, Goa.

.... Respondents

Mr. V. Parshekar, Advocate for the Petitioners.

Mr. D. Pangam with Mr. S.P. Munj, Advocate for Respondents No.1 & 2.

Mr. M. Mhamal, Advocate for Respondent No.3.

CORAM : C.V. BHADANG, J.

DATE : 2nd APRIL, 2016

ORAL JUDGMENT :

Rule. Rule made returnable forthwith. The learned Counsel for the respective respondents waive service. Heard finally by consent of the parties.

2. By this petition, the petitioners/original plaintiffs are challenging the order dated 18/02/2014 passed by the learned Civil Judge, Junior Division, Pernem in Regular Civil Suit No.40/2005. By the impugned order, the evidence of the petitioners has been closed.

3. The brief facts of the case are that the petitioners had filed the aforesaid suit for declaration and permanent and mandatory injunction and certain consequential reliefs. When the suit was fixed on 18/02/2014, the Commissioner appointed for recording evidence submitted her report (Exhibit D-97). It further appears that the petitioners orally prayed for time, which prayer was rejected and the evidence of the petitioners was closed and the suit was fixed for evidence of the respondents/defendants. It is this order which is subject matter of challenge in this Writ Petition.

4. I have heard the learned Counsel for the petitioners and the learned Counsel appearing for the respondents.

5. It is submitted by the learned Counsel appearing for the petitioners that the impugned order is unreasoned and without assigning any reason the evidence of the petitioners has been closed. He further submits that the impugned order be set aside and the petitioners be allowed to lead their evidence.

6. On the contrary, it is submitted by the learned Counsel for the respondents that in the suit a Commissioner was appointed for recording the evidence. It is submitted that on behalf of the petitioners repeatedly time was sought before the Commissioner to lead evidence and in such circumstances, the Court Commissioner was required to file a report (Exhibit D-97). It is submitted that no case has been made out for interference.

7. I have considered the submissions and perused the record. A perusal of the report Exhibit D-97 shows that the Commissioner had fixed three days for recording the evidence i.e. on 18/01/2014, 10/02/2014 and 17/02/2014. The report further discloses that it is only

on two occasions i.e. on 18/01/2014 and 10/02/2014 there was no appearance on behalf of the petitioners/plaintiffs. In so far as 17/02/2014 is concerned, the Commissioner was not available as the Commissioner (who is a practicing advocate) had some matter before the Court. It can thus be seen that it was only on two occasions that on account of the absence of the petitioners/plaintiffs that the evidence could not be recorded. The impugned order shows that no reasons are recorded for rejecting the oral prayer. This is not a case where the learned Trial Court has found that inspite of repeated and sufficient chances and opportunities the petitioners had failed to lead evidence. In the absence thereof, to my mind, the evidence of the petitioners could not have been closed.

8. The learned Counsel for the parties pointed out that the evidence of the defendants has not started as yet.

9. The learned Counsel for the respondents had alternatively submitted that appropriate conditions may be imposed in the event this Court is inclined to grant the petitioners an opportunity to lead evidence. In the circumstances, I find that the petitioners/plaintiffs can be granted opportunity to lead evidence subject to payment of appropriate costs.

10. In the result, the following order is passed:

O R D E R

- (i) The petition is allowed.
- (ii) The impugned order dated 18/02/2014 is quashed and set aside subject to costs of Rs.3,000/- to be paid to the respondents on or before 18/04/2016.
- (iii) The petitioners/plaintiffs are allowed to lead their evidence in the suit, subject to payment of costs aforesaid.
- (iv) The parties to appear before the Trial Court on 18/04/2016 at 10.00 a.m.
- (v) Rule is made absolute in the aforesaid terms.

C.V. BHADANG, J.

NH/-