

IN THE HIGH COURT OF BOMBAY AT GOA**WRIT PETITION NO.232 of 2016**

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,
GAMECO Housing Society,
Bambolim, Tiswadi, Goa.
3. 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.
4. Smt. Shitala Sinai Nagarsenkar,
Wife of Shri. Dattatrai Sinai Nagarsenkar,
age 70 years, resident of H.No.134,
'SHANTIVAN', MHADA, near 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 400601, 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 400601, Maharashtra.

7. Shri. Pundlik Sinai Nagarsenkar,
son of late Shripad Sinai Nagarsenkar,
age 57 years,
8. Smt. Shivangi Sinai Nagarsenkar,
Wife of Shri. Pundlik 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,
H.No.S-5, Dattawadi, Mapusa, Goa.
10. Smt. Sunita Sinai Nagarsenkar,
age 57 years,
resident of Kenkre Residency,
H.No.S-5, Dattawadi, Mapusa, Goa .. Petitioners

(Parties at Sr. 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.AKSPS1136M), resident of
Shantai, Plot No. 35,
GOMECO Housing Society, Bambolim,
Tiswadi, Goa)

V/s

1. Shri. Vishram Krishna Kantik (expired)
Through his legal heirs.

1(a) Mrs. Radha alias Smita Shantanand
Sinai Kantik, major in age,
r/o H.No.558, Bagwada, Curchorem,
Quepem Taluka, Goa.

1(b) Smt. Aruta Rajmohan Sinai Kantik,
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. Kala Rajmohan Sinai Kantik,
major in age,
House No.204, Near Vithal Mandir,
Comba, Margao, Goa.

1(e) Smt. Shobha Vishram Kantik,
d/o late Vishram Krishna Sinai Kantik,

1(f) Shri. Shyam Prabhugaonkar,
major in age,
both c/o Jai Gurudev Distributors,
r/o. No.204, near Vithal Mandir,
Comba, Margao, Goa.

2. Shri. Shantanand Vishram Sinai Kantik,
Son of Vishram Krishna Kantik,
aged 61 years, r/o H.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 Kantak,
age 78 years,
Son of Krishna Kantak,
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., Mapa, Panchwadi, 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.

(respondent nos. 5,7,8, and 9 are represented by their duly constituted power of attorney Shri. Gaurish Haridas Sinai Katak, respondent No.6 herein)

10. Smt. Hemlata Pandurang Sinai Katak,
Age 64 years,
wife of late Pandurang Sinai Katak,
r/o H.No.B185, Mapa, Panchwadi,
Ponda Taluka, Goa.

11. Shri. Kirshnanath 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.B185, Mapa, Panchwadi,
Ponda Taluka, Goa.

(respondent nos.10 and 12 are represented by their duly constituted power of attorney Shri. Krishnanath Sinai Katak, Applicant No.11 herein.) .. Respondents

Mr. M. B. D'Costa, Senior Advocate with Mr. P. A. Kamat, Advocate for the petitioner.

Mr. S. D. Lotlikar, Senior Advocate with Mr. P. S. Lotlikar, Advocate for the respondent nos.1(a) to 1(f) and respondent no.2.

Mr. R. G. Ramani, Advocate for the respondent nos.4 to 9.

CORAM :- C. V. BHADANG, J.

Reserved on : 25th October, 2016.

Pronounced on : 21st November, 2016

JUDGMENT :

On 25/02/2016, a notice indicating that the matter could be heard finally at the admission stage, was issued in this petition. Accordingly, the petition is taken up for final disposal by consent of the parties.

2. The petitioners are the original defendant nos.13 to 22 before the Trial Court in Regular Civil Suit No.109/2010. The respondent nos.1(a) to 1(f) and respondent no.2 are the original plaintiffs. The respondent no.2 was initially the defendant no.3, who was transposed as plaintiff no.2. Respondent no.3 herein i.e. Canacona Municipal Council is defendant no.1 before the Trial Court. The original defendant no.2 Niki Fernandes has since been deleted. The respondent nos.4 to 12 are the defendant nos.4 to 12 before the Trial Court. For the sake of convenience, the parties are referred to in their original capacity

as plaintiffs and defendants.

3. Regular Civil Suit No.109/2010 was filed by now deceased Vishram Katak against the defendant nos.1 and 2 in which, the defendant nos.3 to 22 came to be added subsequently and it was, thereafter, that the defendant no.3 was transposed as plaintiff no.2.

4. The subject matter of suit is property better known as “Collar” admeasuring 97475 square metres of village Nagarcem-Palolem within the Municipal limits of Canacona Municipal Council. The said property is enrolled under Matriz No.529, which is surveyed under various survey numbers, including Survey Nos.36/15 and 36/16. The petitioners claim right, title and interest in respect of land Survey No.36/16 and an area admeasuring 575 square metres from out of land survey no.36/15, which according to them, comprises of 1/16th share of the entire property. Be that as it may, the dispute in the present petition is confined to land Survey No.36/16, which is admeasuring 5575 square metres.

5. The case made out in the plaint is that the said property was

originally owned by Ananta Nagarsekar and his wife Durgabai. After the death of Ananta, the property was allotted to his wife Durgabai in Inventory Proceedings conducted after the death of Ananta, in which 1/8th share was allotted to Durgabai. Incidentally, Durgabai executed a Will dated 22/06/1957 bequeathing 1/6th share to her grandsons, namely Vishram Katak (deceased plaintiff no.1), Haridas Katak (husband of defendant no.5 and father of defendant nos.6, 8 and 9), Pandurang Katak (husband of defendant no.10 and father of defendant no.11), Govind Katak (defendant no.4 and Ananta Katak). Nonetheless deceased plaintiff no.1 Vishram Katak claimed that the property was exclusively possessed, enjoyed and occupied openly by him without interference or obstruction from any other persons. After the death of the wife of Vishram Katak, the said property was allotted in favour of the deceased plaintiff no.1 in Inventory Proceeding instituted upon her death.

6. The further case made out in the plaint is that the plaintiff was permitting various persons to erect temporary structures/ shacks for seasonal business in the said property, for which the original defendant no.1 Municipal Council, Canacona was issuing licences. On

30/10/2009, he found that some other persons had applied for such licences for erection of shacks, which he objected. That was decided by the Municipal Council on 13/11/2009, allowing some such persons to erect stalls / shacks in the respective survey numbers. This prompted the plaintiff Vishram Kantak to file the suit for injunction, compensation and certain consequential reliefs. Incidentally, the plaintiffs sought compensation of Rs.1,30,000/-, apart from other reliefs. The plaintiffs also filed an application for Temporary Injunction (Exh.D-14), restraining the defendant no.1 Municipal Council from issuing any licences to any other persons to erect temporary shacks/ structures on the basis of any agreements except, the one entered into by the plaintiff.

7. The learned Trial Court granted the said application on 14/10/2010, operative part of which, reads as under :

“The application for the temporary injunction at exhibit D-14 is granted.”

Resultantly, defendant no.1 is restrained from issuing any permission to any persons to erect temporary shacks/ structures/ huts etc., in the suit property surveyed under survey no.36/15 and 36/16 of village Nagarcem, Palolem, without the consent of the plaintiff.”

The defendant nos.4 to 12 and 13 to 22, after their addition as party defendants, filed applications under Order XXXIX Rule 4 of Code of Civil Procedure, for vacating the order of injunction. The learned Trial Court, by an order dated 23/08/2013, modified its earlier order and restrained the Municipal Council from issuing any permission to any person to erect the shacks/ structures in the suit property, without the consent / NOC from the co-owners of the suit property. The operative part of which, reads as under :

“The defendant no.1 is hereby restrained from issuing any permission to any persons to erect shacks/ structures/ huts in the suit property surveyed under survey nos.36/15 and 36/16 of village Nagarcem, Palolem, Canacona, without the consent and NOC from all the co-owners to the suit property.”

Feeling aggrieved by the same, the plaintiffs filed Miscellaneous Civil Appeal No.97/2013 before the learned District Judge at South Goa, Margao. The said appeal came to be dismissed on 26/05/2014. The plaintiffs filed Writ Petition No.487/2014 while the

defendant nos.13 to 22 filed Writ Petition No.642/2014 before this Court, challenging the said order. This Court decided both these petition by a common judgment dated 26/06/2015, the operative part of which, reads as under :

“(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.”

It can, thus, be seen that the application for temporary injunction was remitted back to the Trial Court for deciding it afresh so far as property surveyed under No.36/16 is concerned.

8. The learned Trial Court, after hearing the parties, dismissed the application by an order dated 29/10/2016, which was challenged by the plaintiffs before the learned District Judge in Miscellaneous Civil Appeal No.80/2015. The learned District Judge has allowed the appeal vide judgment and order dated 27/01/2016 by partly allowing the application Exh.D-14. The learned District Judge has found that the relief can be moulded in the circumstances of the case and as such, pending the hearing and final disposal of the suit, the Municipal Council is restrained from issuing any permission to any person, without the consent of the plaintiffs and defendant nos.4 to 22 to erect temporary shacks/ huts/ structures in the suit property bearing Survey No.36/16. Feeling aggrieved, the petitioners are before this Court.

9. I have heard Shri D'Costa, the learned Senior Counsel for the petitioners, Shri Lotlikar, the learned Senior Counsel for the respondent nos.1(a) to 1(f) and respondent no.2 and Advocate Shri Ramani, for the respondent nos.4 to 9. There is no appearance on behalf of rest of the respondents.

10. It is submitted by Shri D'Costa, the learned Senior Counsel for the petitioners that although the plaintiffs are basing their claim on the Inventory Proceedings, which were initiated on the death of Anant Nagarsekar, the documents pertaining to the said Inventory Proceedings are not produced. It is contended that Anant had 1/8th share, which allegedly went to Durgabai, his wife. It is contended that as such Durgabai could not have bequeathed 1/6th share, which is in excess of what she had allegedly received in the Inventory Proceedings. It is submitted that Durgabai died on 22/06/1957, the day on which she executed the Will, which raises suspicion as to the bequeathment. It is contended that Pandurang Kantik, the brother of deceased plaintiff no.1, had applied for correction of the revenue record by inclusion of his name and that of the other brothers as co-owners in respect of various properties, including the property survey no.36/15. The said application bearing DC No.435/ Nagarcem Palolem village, was rejected by the Aval Karkun on 17/11/1986, which was challenged in appeal before the Deputy Collector, in which the parties recorded consent terms. The said appeal came to be disposed of in view of the consent terms on 08/07/1996. It is contended that in the consent terms, the property bearing No.36/16 was not included, which would show that the plaintiffs

had not claimed any right in respect of the land Survey No.36/16. It is contended that the consent terms were signed by the deceased plaintiff no.1 along with others. It is contended that the petitioners are in occupation of the suit property as owners and the objection raised to grant of the licence, was rejected by the Municipal Council and the licence was granted on 13/11/2009. It is submitted that the learned Trial Court, after considering all the circumstances, had rightly come to the conclusion in para 25 that the original plaintiff was not in possession of the suit property. It is submitted that in para 29, the learned Trial Court had found that the suit was filed on 02/07/2010 and on 12/11/2010, the deceased plaintiff no.1 made an application to the Chief Officer of the Municipal Council for erection of the shacks in Survey No.36/16. It is submitted that the learned Trial Court has found that this is first MOU specifically mentioning the suit property bearing Survey No.36/16 and the portion is not identified by any plan. It is pointed out that the learned Trial Court had found that MOU dated 17/11/2010 and 18/11/2010 entered into with Santosh Dessai and Jason Rodrigues respectively are in respect of Survey No.36/15. It is submitted that the claim made in the plaint is that 1/6th share in the property bearing Inscription No.15637 (Matriz No.529) corresponds to Survey No.36/16, which is not at all

substantiated. The learned Senior Counsel has then referred to the decision of the Hon'ble Supreme Court in the case of ***Wander Ltd Vs. Antox India (P) Ltd.***; [1990 Supp SCC 727] and in ***Mohammed Mehtab Khan and others Vs. Khushnuma Ibrahim Khan and others***; [(2013)9 SCC 221], in order to submit that the view taken by the Trial Court was a plausible view and in the absence of the discretion exercised by the Trial Court being found to be perverse, the Appellate Court was not justified in interfering with the same. Reliance is also placed on the decision of this Court in the case of ***M/s. Diksha Holding Ltd. Vs. Sita Desai***, [1998(2) Goa L.T. 443], in order to submit that after the promulgation of the survey, the matter would be governed by Section 105 of Land Revenue Code and Section 107 of the Land Revenue Code would show that on and after the promulgation of said survey and existing record of rights shall cease to have any force. It is submitted that apart from the absence of prima facie case, the petitioners have also not demonstrated any irreparable loss in the event injunction is not granted, in as much as the plaintiffs themselves have quantified the loss, which can be compensated in terms of money. It is, thus, submitted that the learned District Judge was in error in holding that the requirements of irreparable loss and balance of convenience are satisfied.

11. Per contra, it is submitted by Shri Lotlikar, the learned Senior Counsel for the respondents that the impugned judgment of the Appellate Court cannot be faulted on the basis of the parameters of permissible interference as laid down by the Hon'ble Supreme Court in the case of *Wander Ltd.* (supra). The learned Senior Counsel has pointed out that the Appellate Court has, in fact, concurred with regard to certain conclusions reached by the Trial Court, which can be seen from the discussion in para 45. It is submitted that the learned Appellate Court has considered additional circumstances and the material, in order to find that a case for grant of Temporary Injunction is made out. The learned Senior Counsel has pointed out that the learned Appellate Court has framed a separate point being point no.4, as to whether interference in the order of the Trial Court is necessary. It is pointed out that the learned District Judge has given cogent reasons while considering point no.4 as to why interference in the order of Trial Court is necessary. It is, thus, submitted that the petitioners cannot place reliance on the decision of the Hon'ble Apex Court in the case of *Wander Ltd.* (supra), in order to assail the impugned judgment. The learned Senior Counsel has pointed out that the Appellate Court has referred to the written statement

filed in the earlier suit, namely RCS No.25/2008 (new RCS No.82/2010), in which the petitioners admit the respondents to be the co-owners. It is submitted that unlike Form No.3, Form No.1 has presumptive value. It is submitted that there are several MOUs and other circumstances considered by the Appellate Court, while reversing the order passed by the Trial Court. It is submitted that the plea raised by the petitioners that a joint written statement was filed in the earlier suit by inadvertence, cannot be accepted. It is submitted that these admissions by the petitioners would override any presumption or inference arising out of the Survey Records and the consent terms. The learned Senior Counsel has pointed out that the MOU dated 25/11/2006 (at page no.86 of the compilation) has been relied upon by the petitioners in the earlier suit. Reliance is also placed on the MOU dated 21/11/2007 (page No.94 of the compilation). He, therefore, submits that no interference is called for in the impugned judgment.

12. Shri Ramani, the learned Counsel for the respondent nos.4 to 9 has supported the petitioners. The learned Counsel has referred to the order dated 23/08/2013 passed by the Trial Court, by which, the earlier order granting an application for Temporary Injunction was

modified. It is submitted that the order of the Appellate Court, in fact, restores the order dated 23/08/2013, which was not challenged by the petitioners before the District Court.

13. I have carefully considered the rival circumstances and the submissions made and I do not find that any case for interference is made out.

14. The Appellate Court appears to be with the petitioners in para 42 and 45 of the judgment, in which the Appellate Court has found that the perusal of Index of lands in Form No.3 brings out that neither the name of the deceased plaintiff no.1 nor his father nor the defendant nos.4 to 12 were recorded as occupants in Survey No.36/16 though their names are recorded as occupants of Survey No.36/15. The Appellate Court has further found on the basis of the consent terms recorded before the Deputy Collector on 08/07/1996 that the consent terms were signed by the deceased plaintiff no.1 along with others and they do not refer to the property surveyed under No.36/16 and has held that this material does raise an inference that the successors of Durgabai had given up their claim in respect of property surveyed under No.36/16. Further

from para 46 onwards, the learned District Judge has considered the copy of notice dated 02/11/2009 addressed by the defendant nos.4, 6, 11 and 13 to the defendant no.1 i.e. Municipal Council, in which the defendants claimed that the said property was their ancestral property. Then there are two NOCs dated 15/10/2009 and 21/10/2009 (at page nos.185 and 186). They are signed by Arvind Nagarsekar (defendant no.13), Gaurish Kantak (defendant no.6), Krishnanath Kantak (defendant no.11) and Govind Krishna Kantak (defendant no.4), giving no objection to issue permission for erecting temporary shacks in land Survey No.36/16. It may not be out of place to mention that all these defendants, which includes defendant no.13 Arvind Nagarsekar, had stated that they are co-owners in possession of property known as “Collar” recorded in land Survey Nos.36/15 and 36/16. Similar is the no objection dated 21/10/2009. Although no objection certificate does not mention that Arvind Nagarsekar was acting as a Power of Attorney, from the perusal of plaint in RCS No.109/2010, it appears that Arvind Nagarsekar (defendant no.13) was acting as a Power of Attorney Holder for defendant nos.14 to 22 i.e. the petitioners herein. It would be further significant to note that the petitioners had placed reliance on MOU dated 25/11/2006 in the earlier suit. To put it shortly, the learned District

Judge has found that the effect of these admissions would outweigh the effect and inference arising out of the consent terms and Form No.3. The learned District Judge has, thus, concluded in para 54 of the judgment that prima facie plaintiffs along with defendant nos.4 to 22 were the co-owners of the land Survey No.36/16 and, therefore, no permission could be granted by the Municipal Council to any person to erect the shacks, without the consent of the plaintiffs.

15. The learned District Judge has then went upon considering the question of irreparable loss and balance of convenience. Finally, the learned District Judge, in considering point no.4, has given certain reasons why interference in the order of the Trial Court is necessary. I have carefully gone through the same and I do not find that a case for interference is made out in the exercise of supervisory jurisdiction under Article 227 of the Constitution of India.

16. There is one more circumstance which needs to be mentioned here and which would be relevant. As noticed earlier, the application for Temporary Injunction was earlier granted by order dated 14/10/2010, by which the defendant no.1 was restrained from issuing

any permission to any persons to erect the temporary shacks / structures in the property surveyed under Nos.36/15 and 36/16, without consent of the plaintiffs. This order was modified on 23/08/2013 on the basis of the application filed by the defendant nos.4 to 12 and defendant nos.13 to 22, in which the defendant no.1 was restrained from issuing any such permission without the consent of the co-owners of the suit property, which includes petitioners. This order was not challenged by the petitioners before the learned District Judge, in as much, as Miscellaneous Civil Appeal No.97/2013 was filed by the plaintiffs alone. It was when the said appeal was dismissed and the order dated 23/08/2013 was confirmed that the petitioners chose to challenge the same before this Court. The order of the Appellate Court would show that it in effect restores the order dated 23/08/2013, whereby the defendant no.1 is restrained from granting licences without the consent of any of the co-owners.

17. Grant of Temporary Injunction is an equitable relief. The plaintiff is required to establish the existence of a prima facie case, balance of convenience and irreparable loss for being entitled to grant of said relief. In the case of *Mohammed Mehtab Khan and others* (supra),

the suit was filed under Section 6 of the Specific Relief Act, in which interim relief of direction to place the plaintiff back in possession, was claimed. The Trial Court had refused to grant such a relief, which order was reversed in appeal by the High Court. Thus, the case basically involves the consideration as to grant of mandatory relief at interim stage.

18. The learned Senior Counsel for the petitioners strenuously urged that the attitude of the plaintiffs is such that it will result into a situation where none of the parties would be able to use the property for erection of the shacks/ temporary structures. It is submitted that such a situation cannot enure to the benefit of the plaintiffs either. In my considered view, the petitioners are justified in saying so. It was in these circumstances that time was granted to the parties to explore possibility of an amicable settlement. However, unfortunately, in spite of efforts, the parties could not reach any agreement in this regard. In my considered view, in such a situation, the law has to take its own course. Thus, I find that no case for interference is made out. However, the suit being of the year 2010 can be expedited. In the result, the petition is dismissed, with no order as to costs.

The Trial Court shall hear and decide the suit as expeditiously as possible and preferably within a period of one year from the receipt of this order. Parties to co-operate for time bound disposal of the suit.

C. V. BHADANG, J.

SMA