

IN THE HIGH COURT OF BOMBAY AT GOA**WRIT PETITION NO. 380 OF 2015**

1. Mr. Roger Franco, s/o late Vicent Franco, major of age, bachelor,
2. Mrs. Julie Franco, widow of late Roy Franco, major of age,
Both r/o House No. 143, Royal Hotel, Umta Vaddo, Calangute, Bardez, Goa. Petitioners

Versus

Mrs. Leonara Fernandes, major of age,
R/o House No. 142/B, Umta Vaddo, Calangute, Bardez, Goa. Respondent

Mr. Melwin Viegas, Advocate for the Petitioners.

Mr. Devidas Pangam with Mr. S.P. Munj, Advocates for the Respondent.

CORAM:- C. V. BHADANG, J.

RESERVED ON:- 1st APRIL, 2016

PRONOUNCED ON:- 16th APRIL, 2016

JUDGMENT:

Rule. Rule made returnable forthwith. Mr. Pangam, learned Counsel waives service on behalf of the respondent. Heard finally, by consent of the parties.

2. By this petition, the petitioners are challenging the judgment and order dated 24.09.2013, passed by the Deputy Collector and S.D.O., Mapusa in Appeal No. DC/MND/MAP/APL/BAR-11/3/2011. By the impugned judgment, the application filed by the petitioners seeking leave to challenge the order of registration dated 14.05.1986, passed by the Joint Mamlatdar of Bardez, has been refused.

3. The brief facts are that the land bearing survey no. 175/19 of village Calangute, Bardez, Goa is subject matter of the dispute. According to the petitioners, the said land was belonging to their ancestors, Mrs. Rosalina Fernandes, who passed away in the year 1982. Rosalina had a son, Mr. Andrew Fernandes and two daughters, Mrs. Catherine Franco and Mrs. Pedrinha Pereira. Vicent Franco was the husband of Catherine Franco. Vicent Franco and Catherine Franco are the parents of the petitioner no. 1-Roger Franco and parents-in-law of petitioner no. 2-Mrs. Julie Franco. Catherine Franco died in the year 1986, while Vicent Fernandes died in the year 1987. The respondent-Leonara Fernandes had filed an application under Section 29(4) of the Goa, Daman and

Diu Mundkars (Protection from Eviction) Act, 1975, (the Act, for short), against Andrew Fernandes for registration of her name as a mundkar in respect of the dwelling house bearing no. 5/142-B situated in the aforesaid land under survey no. 175/19. The learned Joint Mamlatdar has allowed the said application vide order dated 14.05.1986, directing registration of the respondent as a mundkar. A perusal of the said order shows that the opponent therein, namely Andrew Rodrigues had admitted the claim of the respondent being a mundkar.

4. The case made out by the petitioners is that although, their parents were co-sharers in respect of the aforesaid land, in which the mundkarial house is situated, the petitioners were not made party in the registration proceedings. The petitioners for the first time learnt about the said order, on or about 08.12.2010 on receipt of a notice in the purchase proceedings. It is contended that the respondent was not declared as mundkar. The registration proceedings were *non est*, in absence of the co-sharers, being made party thereto.

5. Sometime in the year 1990, inventory proceedings were instituted by Mr. Reuben Franco being Inventory Proceedings No. 27/1990/C, before the Civil Judge Senior Division at Mapusa. It is contended that on the basis of an application under Article 1414 of the Portuguese Civil Code, various lists of assets were modified and item no. 1 was divided into five plots. It is contended that the plot 'A' of item no. 1, which was consisting of 300 square metres of the alleged mundkarial house, was not allotted to anybody and was kept in common. It was contended that as per the chart of allotment dated 24.03.2006, plots 'B' and 'D' of item no. 1, were allotted to Pedrinha Pereira, while plot nos. 'C', 'E' and 'F' of item no. 1, were allotted to petitioner no. 1 and his brothers. Thus, leaving plot 'A' of item no. 1, in common.

6. In the meanwhile, on receipt of the notice in the purchase proceedings, on or about 08.12.2010, the petitioners filed an appeal before the Deputy Collector challenging the order of registration passed on 14.05.1986. That appeal was accompanied by an application seeking leave to challenge the said order and an application for condonation of delay, in as much as the petitioners

were not parties in the registration proceedings. The learned Deputy Collector by the impugned order has rejected the application for seeking leave and consequently, the appeal and the application for condonation of delay, which is subject matter of challenge in this petition.

7. I have heard the learned Counsel for the petitioners and the learned Counsel appearing for the respondent.

8. It is submitted on behalf of the petitioners that appeal could not have been decided/dismissed on merits, in the absence of the application for condonation of delay, being allowed in the first instance. It is submitted that the petitioners had filed written arguments on condonation of delay application and as such, the impugned order, which dwells, on merits of the appeal, needs to be set aside. The petitioners have placed reliance on the decision of the Hon'ble Supreme Court in the case of **Noharlal Verma Vs. District Co-operative Central Bank Limited, (2008) 14 SCC 445**, in order to submit that limitation goes to the root of the matter and unless and until the delay is condoned, merits of the

matter could not have been gone into. The learned Counsel has also relied upon the judgment dated 19.10.2012 of the Allahabad High Court passed in Civil Miscellaneous Writ Petition No. 54502/2012, in the case of **Parbhu and Another Vs. Deputy Director of Consolidation, Ghazipur and Others**, and the order dated 21.07.2000 of Madhya Pradesh High Court passed in Writ Petition No. 1189/2000, in the case of **Dinesh Chandra Sharma Vs. Yashveer Singh Ghuraiya and Others**, in this regard.

9. It is submitted that the Deputy Collector erroneously came to the conclusion that plot 'A' of item no. 1, where the mundkarial house was situated was allotted to Pedrinha Pereira. It is submitted that consequently, the finding of the Deputy Collector that the petitioners have no *locus standi* to challenge the order, is incorrect. It is submitted that the petitioners came to know of the registration proceedings only in the year 2010, on receipt of the notice in the purchase proceedings and thereafter, the appeal was filed. It is therefore, prayed that the impugned order be set aside and the matter be remanded back to the Deputy Collector, for disposal according to law. There is also an alternate prayer for

setting aside the order passed by the Joint Mamlatdar, in registration proceedings and remanding the matter for deciding it afresh.

10. The learned Counsel for the respondent has supported the impugned order. It is submitted that the Deputy Collector has considered the application for leave to appeal, in as much as the petitioners were strangers/third party, in so far as the registration proceedings are concerned. It is submitted that thus, it was obligatory on the Deputy Collector to first consider the *locus standi* of the petitioners to challenge the order of registration. The learned Counsel would submit that after considering the record in the inventory proceedings, the Deputy Collector has rightly come to the conclusion that plot 'A' of item no. 1 was allotted to Pedrinha Pereira and as such, the petitioners had no interest or concern with plot 'A' of item no. 1, in which the mundkarial house is situated. He submitted that even otherwise, there is no merit in the challenge, which is lodged in the year 2012 to an order which was passed in the year 1986.

11. I have considered the rival circumstances and the submissions made. Admittedly, the petitioners were not parties to the registration proceedings, in which only Andrew Rodrigues was the respondent. The petitioners are claiming through Mrs. Catherine Franco, who is the mother of petitioner no. 1 and mother-in-law of petitioner no. 2. The property originally belonged to Rosalina Fernandes. The submission on behalf of the petitioners is that the impugned order was passed by the Deputy Collector without first considering the application for condonation of delay, cannot be accepted. This is because the learned Deputy Collector was first obliged to consider the issue of grant of leave. Unless and until it is found that the petitioners are aggrieved persons in relation to the order passed in the registration proceedings, no appeal at their instance could lie. A perusal of the impugned judgment clearly shows that the petitioners had filed written arguments on condonation of delay and oral submissions were made, insofar as the application seeking leave to file appeal is concerned. The perusal of the impugned order further shows that basically on account of rejection of leave, the appeal and the application for condonation of delay were rejected. The learned

Deputy Collector has considered the record in the inventory proceedings and has found that as per the allotment at page no. 835 of the inventory proceedings, plot 'A' of item no. 1 where the mundkarial house, is situated was allotted to Pedrinha Pereira, who was married to Felix Pereira. On perusal, it is further found that Mrs. Julie Franco, Roy Franco and Roger Franco were allotted plots 'C','E' and 'I' of item no. 1. The learned Deputy Collector has then went upon to consider the definition of mundkar under Section 2(P) of the Mundkar Act and has found that it contemplates the consent of the landlord or person acting or purporting to act on behalf of the landlord. It has also been found that the description of plot 'A' of item no. 1 in the inventory proceedings and the existance of the mundkarial house, has been acknowledged. The inventory proceedings were initiated in the year 1990 and were finally decided in the year 2006, while the purchase proceedings by the respondent were initiated in the year 2002 and the application alongwith the appeal seeking leave to challenge, the order of the year 1986 in the registration proceedings, was filed in the year 2011. It is in these circumstances that the leave was refused. The existence of the mundkarial house in the property

which is subject matter of inventory proceedings is not disputed. As such, it cannot be said that the petitioners were not aware of the same.

12. A copy of the application under Article 1414 of the Portuguese Civil Code (Exhibit-78) shows that the Cabeça-de-Casal and the interested parties had arrived at an amicable settlement about the mode of partition of the assets of the deceased. It appears that the item no. 1 of list of assets revised as per the orders of the inventory Court was to be divided into plots 'A' to 'F'. Plot 'A' of the item no. 1 admeasures 300 square metres. Paragraph 3 of the application sets out the area of plots 'A' to 'F' and then mentions that the access/road admeasuring 405 square metres for the common enjoyment of the Cabeça-de-Casal and the interested parties. If we read otherwise, paragraph 3 and the subsequent paragraphs cannot be read harmoniously. Thus, it can be seen that it is the access/road which is in common enjoyment. To put it otherwise, if the portion of access/road which admeasures 405 square metres, which is for the common enjoyment of the Cabeça-de-Casal and the interested parties, is applicable to plots

'A' to 'F' also. The contents of the subsequent paragraphs would be contrary to paragraph 3. Thus, reliance placed on the application (Exhibit-78), in my considered view is misplaced.

13. The contention that the appeal could not have been decided on merits (in the absence of the delay being condoned), can lie at the instance of the respondent (in the appeal) if, the same is allowed. Assuming that the Deputy Collector has dwelt upon the merits of the appeal, the petitioners cannot possibly contend or can be aggrieved, by the non-consideration of the application for condonation of delay. As noticed earlier, the petitioners had filed written arguments on the application for condonation of delay and had also advanced oral arguments, insofar as the application seeking leave to appeal is concerned. The learned Deputy Collector has refused to grant leave and has proceeded to dismiss the application for condonation of delay. In such circumstances, in my humble opinion, the decisions on which reliance is placed would not be applicable, as the facts in the present case are clearly distinguishable. I do not find that any case for exercise of discretion in the extra ordinary jurisdiction of

this Court is made out. In the result, the petition is hereby dismissed.

Rule is discharged, with no order as to costs.

C. V. BHADANG, J.

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