

IN THE HIGH COURT OF BOMBAY AT GOA**WRIT PETITION NO. 471 OF 2016**

1. Mr. Caxinata Fernandes alias Bhomkar, Major of age, married, Indian National (Since deceased represented through their legal heirs)
- 1(a) Smt. Urmuthe Pandurang Karmalkar, wife of Pandurang Karmalkar, major in age, married, housewife, Indian National, R/o 466 Sakhebbhat, Carambolim, Goa.
- 1(b) Mrs. Laxmi Yeshwant Pereira, wife of Yeshwant Pereira, major in age, married, housewife, Indian National,
- 1(c) Mr. Yeshwant N. Pereira, son of Nauso Pereira, married, major in age, fisherman, Indian National, Both resident of 152, Kankra, Goa University Campus, St.Cruz Village Panchayat, Tiswadi-Goa.
- 1(d) Mr. Shambu C. Fernandes alias Bhomkar, son of late Caxinata Fernandes alias Bhomkar, 46 years of age, married, self employed, Indian National,
- 1(e) Mrs. Ganga S. Fernandes alias Bhomkar, wife of Mr. Shambu C. Fernandes alias Bhomkar, major in age, married, housewife, Indian National,
- 1(f) Mr. Chimno C. Fernandes alias Bhomkar, son of late Caxinata Fernandes alias Bhomkar, major in age, married, service, Indian National,

1(g) Mrs. Samli C. Fernandes alias Bhomkar, wife of Mr. Chimno Fernandes alias Bhomkar, major in age, married, housewife, Indian National, 1(d) to 1(g) are resident of House No. 404, Khandiwada, Carambolim, Ilhas-Goa.

2. Mrs. Vatsal Caxinata Fernandes alias Bhomkar (Deceased) wife of Caxinata Fernandes alias Bhomkar, major of age, Indian National, r/o House No. 404, Khandiwada, Carambolim, Tiswadi-Goa. Petitioners

Versus

1. Mr. Damodar Parvatkar, son of Mr. Parvatkar, of major age, Indian National, residing at Khandiwada, Carambolim, Tiswadi, Goa.

2. The Sarpanch, Carambolim Village Panchayat, Carambolim, Goa. Respondents

Mr. Nilesh V. S. Shirodkar, Advocate for the Petitioners.

Mr. Suresh Govinda Palkar, Advocate for Respondent No. 1.

Mr. Joaquim Godinho, Advocate for Respondent No. 2.

CORAM:- C.V. BHADANG, J.

DATE:- 26th September, 2016.

ORAL JUDGMENT:

Rule made returnable forthwith. The learned Counsel for respondent no. 1 and respondent no. 2, waive service. Heard finally by consent of parties.

2. This petition takes exception to the order dated 31.08.2015 passed by the learned Civil Judge Junior Division at Panaji in Civil Miscellaneous Application No. 11/2015 in Regular Civil Suit No. 31/2007/D, by which the application under Order IX, Rule 9 of the Civil Procedure Code (CPC, for short) has been dismissed. The petitioners are also challenging the order dated 14.01.2015, by which the evidence of the petitioners was closed and the suit was dismissed.

3. The brief facts are that the petitioners have filed the aforesaid suit against the respondents for declaration, injunction etc. The suit was fixed on 14.01.2015, when the Trial Court passed the following order:

"Called out today.

None present for the plaintiff.

Adv. S. Palkar present for the defendants.

On perusal of roznama, various opportunities were given for the plaintiff to remain present, but plaintiff failed to remain present, hence evidence of the plaintiff stands closed and suit is dismissed.

Proceeding closed."

4. The petitioners filed Civil Miscellaneous Application No. 11/2015 under Order IX, Rule 9 of CPC, which has been dismissed by the Trial Court as not maintainable. The learned Trial Court has found that the suit was dismissed on account of closure of the evidence of the plaintiff and as

such, the application under Order IX, Rule 13 of CPC was not maintainable. The Trial Court has noticed various dates on which the suit was fixed and opportunity was granted to the petitioners, in para 10 of the impugned order.

5. It is submitted by the learned Counsel for the petitioners that there were certain amendments carried out in the suit. It is also contended that the entire house of the petitioners has collapsed and the petitioners were prevented on account of circumstances beyond their control. It is submitted that the examination of chief of the petitioner is recorded partly.

6. The learned Counsel for the contesting respondent no. 1 submitted that appropriate orders be passed. Respondent No. 2, (defendant no. 2) is a formal party and the learned Counsel has nothing much to say.

7. On hearing the learned Counsel for the parties, I find that it would be appropriate if, the petitioners are granted an opportunity to lead evidence, subject to payment of costs.

For this reason, the following order is passed:

O R D E R

(a) The petition is allowed.

(b) The impugned order dated 14.01.2015, is set aside.

(c) The suit is restored to the file of the learned Civil Judge Junior Division at Panaji for disposal in accordance with law, subject to payment of costs of Rs.10,000/- by the petitioners, within a period of two weeks from today.

(d) The costs to be paid to the respondent no. 1.

(e) It is made clear that the payment/deposit of costs, is a condition precedent for restoration of the suit.

(f) The parties to appear before the Trial Court on 13.10.2016.

(g) Rule is made absolute, in the aforesaid terms, with no order as to costs.

C. V. BHADANG, J.

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