

IN THE HIGH COURT OF BOMBAY AT GOA.

WRIT PETITION NO.635 OF 2016.

Shri Joaquim Joseph Monteiro,
Son of Dr. Inacio Francisco
Monteiro, Major of age,
Resident of H. No. 1014,
Vanxem, Loutolim, Salcete,
Goa.

..... Petitioner.

V/s

1 Shri Camilo Ferrao, Major
of age, married,

2 Smt. Piedade Ferrao
(since deceased through
her legal representatives)

2(a) Shri Diago Ferrao, Son of
Camilo Ferrao, Major of
age,

2(b) Shri Bosco Ferrao, Son of
Camilo Ferrao, Major of
age,

2(c) Shri Damian Ferrao, Son
of Camilo Ferrao, Major of
age,

2(d) Shri Sujata Ferrao, Son of
Camilo Ferrao, major of
age,
All residing in H. No.891,
Vanxem, Loutolim,
Salcete, Goa.

..... Respondents.

Shri Sudesh Usgaonkar and Ms. R. Pereira, Advocates for the
petitioner.

Shri Pundalik N. Raikar, Advocate for the respondent no.2(a).

CORAM : F.M. REIS, J.

DATE : 7th December, 2016.

ORAL JUDGMENT

Heard Shri S. Usgaonkar, learned Advocate appearing for the petitioner and Shri P. Raikar, learned Advocate appearing for the respondent no.2(a).

2. Rule.

3. Heard forthwith with the consent of the learned Counsel appearing for the respective parties.

4. The learned Counsel appearing for the respondent no.2(a) waives service.

5. The challenge in the above petition is to a judgment /order dated 25.2.2016 passed by the learned Tribunal disposing the Mundkar Revision No.12/2012 whereby the revision preferred by the respondents was partly allowed and the matter was remanded to the learned Mamlatdar to examine the claim of the respondents nos.1 and 2 afresh.

6. Shri Sudesh Usgaonkar, learned Counsel has submitted that the claim of the respondent nos.1 and 2 is that they are mundkars of the subject dwelling house on the basis that they were co-mundkars with one Margarida Vaz. The learned Counsel further submits that it is also the contention of the respondents that they are the legal heirs of the said Margarida Vaz and as such, entitled to inherit the right of mundkarship. The learned Counsel further submits that the learned Mamlatdar as well as the Deputy Collector on the basis of the material produced before the respective authorities had come to the conclusion that the respondents did not have fixed habitation of the dwelling house and as such, rejected the claim of the respondents as mundkars. The learned Counsel further points out that when the matter was pending before the learned Tribunal, in view of the judgment passed by this Court in **Writ Petition No. 457 of 2010** in the case of **Mrs. Henriqueta D'Souza Vs Shri Mangesh D. Mishal and others,** by judgment dated 18.12.2013, the petitioner produced the said judgment to contend that based on the findings of fact arrived at by the authorities below wherein it was clearly held that the respondent nos.1 and 2 were not residing in the subject dwelling house, the

claim of the respondents itself has no basis. The learned Counsel further points out that without adverting to the judgment passed by this Court the learned Tribunal on the spacious consideration that there was no specific findings as to whether the respondent nos. 1 and 2 were living at the time of the death of the original mundkar in the dwelling house, proceeded to remand the matter to the learned Mamlatdar to decide the matter afresh. The learned Counsel further points out that the learned Tribunal has erroneously invoke the provisions of Order XLI Rule 31 of CPC to hold that the Appellate Court has not framed the point for determination nor examined the material on record to come to the conclusion that the claim of the respondents was justified. The learned Counsel has thereafter taken me through the findings of the authorities below as well the impugned judgment of the learned Tribunal to point out that the learned Tribunal was not justified to give a second inning to the respondents to have the matter re-adjudicated by the learned Mamlatdar when the fact findings authorities had clearly held that the respondents were not residing in the subject dwelling house nor the respondents have established any relationship with the deceased Margarida Vaz. The learned

Counsel further points out that the impugned order passed by the learned Tribunal be quashed and set aside.

7. On the other hand the learned Counsel appearing for the respondents submits that no prejudice would occasion to the petitioner in case the impugned judgment/order passed by the Tribunal is allowed to stand, as according to him, the petitioner can raise all their contentions before the learned Mamlatdar while deciding the reference by the Civil Court. The learned Counsel further points out that the core issue in the matter with regard to the claim of the respondents is that they were residing in the subject dwelling house alongwith said Margarida Vaz which has been misconstrued by the authorities below while coming to the conclusion that the respondents have failed to prove their case. The learned Counsel further submits that the right of Margarida Vaz as a mundkar of the subject dwelling house has been inherited by the respondents and as such, the respondents are entitled to claim that they are mundkars of the subject property. The learned Counsel thereafter taken me through the judgment of the learned Tribunal to point out that there is no injustice caused to the petitioner in case the matter is

decided by the learned Mamlatdar afresh as the petitioner would be given a hearing before the matter is finally adjudicated. The learned counsel as such submits that there is no case made out for invoking jurisdiction in the present case in terms of the Article 227 of the Constitution of India.

8. I have duly considered the submission of the learned Counsel and I have also gone through the records.

9. The claim of the respondents that they are mundkar of the subject dwelling house is on two folds i.e one that they are co-mundkar's of the subject house and the other that they have inherited mundkarial rights of the said Margarida Vaz. It cannot be disputed that both the situation cannot co-exist as one would exclude the other claim put forward by the respondents.

10. In such circumstances, the learned Mamlatdar and the learned Deputy Collector while examining the said claim as co-mundkars have categorically given a finding that the respondents were not residing in the said subject house in the year 1975 when the Mundkar Act came into force. As such,

without unsettling the said finding, the learned Tribunal was not justified to remand the matter for fresh consideration by the learned Mamlatdar.

11. Apart from that there are concurrent findings by the learned Mamlatdar as well as by the learned Deputy Collector that the respondents have failed to establish any right of inheritance of Margarida Vaz which has devolved upon the respondents. The learned Tribunal without examining the correctness or otherwise of such findings of fact was not justified to remand the matter for re-consideration before the learned Mamlatdar, when the respondents have not brought any conclusive material on record to establish their claim that they were the legal representatives of deceased Margarida Vaz. The learned Counsel for the respondent no.2(a) submitted that the respondents will produce the birth certificate though it was not produced before the authorities below. As admittedly no documents to that effect were produced, the question of examining the veracity or otherwise of such claim in the present Writ Petition under Article 227 of the Constitution of India would not at all be justified.

12. In such circumstances, unless the learned Tribunal examine the correctness of the findings of fact arrived at by the authorities of such aspects, the question of remanding the matter for reconsideration afresh to the learned Mamlatdar would not at all be justified.

13. Apart from that the learned Tribunal was not justified to invoke the provisions of Order XLI Rule 31 of CPC on the ground that points for determination were not framed by the learned Deputy Collector. On perusal of the order passed by the learned Deputy Collector, the essential issue which arose in the appeal were considered by the Deputy Collector whilst coming to such conclusion. As such, I find that the impugned judgment/order passed by the learned Tribunal cannot be sustained and deserves to be quashed and set aside and matter be remanded to the learned Tribunal to decide the revision preferred by the respondents no.1 and 2 afresh after hearing the parties in accordance with law.

14. In view of the above, I pass the following:-

O R D E R

- (i) The impugned judgment order dated 25.2.2016 passed by the learned Tribunal is quashed and set aside.
- (ii) Mundkar Revision No.12/2012 is restored to the file of the learned Tribunal.
- (iii) The learned Tribunal is directed to decide the revision afresh after hearing both the parties in accordance with law. All the contentions of both the parties on merits are left open.
- (iv) Parties are directed to appear before the learned Tribunal on 27.1.2017 at 10.30a.m.
- (v) Rule stands disposed off accordingly.

F.M. REIS, J.

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