

IN THE HIGH COURT OF BOMBAY AT GOA**WRIT PETITION NO.734 of 2016**

1. Mrs. Antonette Machado,
Widow of Mr. Lino Machado,
Aged about 65 years, widow,
Indian National, presently
residing at House No.291 (part)
Next to St. Ann's Church,
Ward Aradi, Parra, Bardez, Goa
2. Mr. Manuel Machado,
Son of the late Mr. Lino Machado,
Aged about 46 years, unmarried,
Business, Indian National,
Presently residing at House
No.291(part), Next to St. Ann's
Church, ward Aradi, Parra,
Bardez, Goa.
3. Mr. Simon Machado,
Son of the late Mr. Lino Machado,
Aged about 44 years, married,
Business, and his wife;
4. Mrs. Philomena Machado,
Aged about 38 years, married,
Housewife, both Indian Nationals
and Presently residing at House
No.291(part), Next to St. Ann's
Church, Ward Aradi, Parra, ... Petitioners.
Bardez, Goa. (Original Defendants)

V/s.

1. Mrs. Santan Andrade,
Widow of the late Mr. George
Andrade, Aged about 65 years,
widow housewife, Indian National,
resident of House No.291,
Parra, Bardez, Goa.
2. Mr. Abel Andrade,
Son of the late Mr. George
Andrade, Aged about 43 years,

married, business, And his wife.

3. Mrs. Perpetua Fernandes,
Wife of Mr. Abel Andrade,
Aged about 35 years, married,
housewife, both Indian Nationals
and Residents of House No.291
Parra, Bardez, Goa.
4. Mr. Simon Andrade,
Son of the late Mr. George
Andrade, Aged about 48 years,
married, Business, and his
wife;
5. Mrs. Lima Andrade,
Wife of Mr. Simon Andrade,
Aged about 46 years, married,
Housewife, both Indian Nationals
And residents of House No.291,
Parra, Bardez, Goa.
6. Mr. Rafael Andrade,
Son of the late Mr. George
Andrade, Aged about 50 years,
married, business, and his wife;
7. Mrs. Cynthia Andrade,
Wife of Mr. Goerge Andrade,
Aged about 50 years, married,
housewife, both Indian Nationals
and residents of House No.291, .. Respondents
Parra, Bardez, Goa. (Original Plaintiffs)

Mr. Jagannath Jayant Mulgaonkar, Advocate for the
petitioners.

Mr. J. Abreu Lobo, Advocate for the respondent nos.1
to 7.

CORAM :- C. V. BHADANG, J.

DATE :- 13th October, 2016

ORAL ORDER :

By this petition, the petitioners are challenging the order dated 28/06/2016, by which the learned Trial Court has deleted issue no.4, which reads thus :

" Whether the defendant nos.1, 2 and 3 prove that they are the mundkars in respect of the suit house?"

2. It is contended on behalf of the petitioners that there were sufficient pleadings on record to make out a *prima facie* case for framing of the aforesaid issue and for its referral to the Mamlatdar. It is submitted that the ratio in the decision of this court in **Mitra of Archdiocese of Goa and Daman Vs. K. Vijayadharan**, 1999(2) Goa L. T. 97, is not applicable. It is submitted that merely because no documents were produced, the Trial Court could not have deleted the issue, once framed. The learned Counsel also points out that the application filed by the respondents, was not for deletion of the issue, but it was for not referring the issue to the Mamlatdar.

3. On the contrary, the learned Counsel for the respondents has submitted that the pleadings are not sufficient for framing of the issue. Reliance is placed on the decision of this Court in the case of **Shri Mahabaleshwar Pandurang Halankar Vs. Damodar Pandurang Halankar**, AIR BOMR 2012 2 94 and the decision of the Supreme Court in the case of **Thomas Antony Vs. Varkey Varkey**, AIR 2000 SC 1. It is submitted that the petitioners are claiming that one Edward, who was their uncle and who was a bachelor, was allowed to stay in the house. It is submitted that at any rate, the Court is not obliged to frame the issue for the asking, when no case is made out.

4. I have carefully considered the submissions made.

5. The Hon'ble Supreme Court in the case of **Tomas Antony** (supra) has held thus in para 16 of the judgment :

"16. While making a reference to the Tribunal mandatory the legislature cannot

be said to have intended that even a patently frivolous, mala fide and illegal plea of tenancy taken by a party merely to delay the proceeding and to remain in possession of the property is also to be referred to the Tribunal. The statutory provisions, in our considered view, envisage a case where a bona fide and legally sustainable plea of tenancy is taken by the party, that question shall be referred to the Tribunal."

6. A Division Bench of this Court in the case of **Pulmati Shyamlal Mishra and anr. Vs. Ramkrishna Gangaprasad Bajpai and Ors**; BCI (1981)25, arising out of the provisions of Tenancy Act, has observed thus in paras 34 to 36 :

"34. It is also not correct to assume that the Court is under any obligation to frame and remit the issue of tenancy mechanically, merely on of its necessity and justification. Cases can be conceived, when tenancy plea may appear to be patently frivolous, fraudulent and part of the dilatory strategy, and may not by itself attract sections 85 and 85A of the Tenancy Act. The remittance of any such tenancy issue and the trial thereof by the

Mamlatdar and higher authorities in appeal and revision, is known to have become a long winding and time consuming process. This delay enures for the benefit of the person in possession of the land. This, not unnaturally, prompts and tempts him to claim to be the tenant out of sheer anxiety to perpetuate his unmerited possession, even if no basis exists for the claim. Nothing can thus prevent a defendant from claiming to be tenant (1) even if his plea to that effect is overruled specifically or constructively by the Tenancy Court in some earlier proceedings in between himself and the landlord or their predecessor-in-title or (2) even if the plea so set up happens to be irreconcilably inconsistent with his defence of being mortgagee, purchaser or owner of the land by inheritance or adoption, in the earlier stage of the same proceedings or in the earlier round of another litigation. A plea to that effect as an integral part of any other fraudulent defences is yet another specie of the same category. Unwarranted remittance of such issue for trial in literal and mechanical compliance with the above provisions, enables the litigants to abuse the process of the Court and cause grave miscarriage of justice. This indeed makes mockery of the judicial process causing damage to the

confidence of the litigating public in its efficacy and utility.

35. This only highlights the danger of any literal or mechanical construction of these provisions in disregard of their content and context and any casual approach in the matter. Order 14 of the Code of Civil Procedure contemplates framing of issues by the Court on application of mind, not only to the pleading but also to the documents produced, while Rule 4 thereof empowers it to examine any person and enforce production of additional documents for that purpose. These provisions thus enable the Courts to (1) seek clarification of the bald pleadings, (2) insist on production of documents in doubtful cases, and (3) get explanation for the adverse factors even where the litigant is driven to rely on oral evidence, with a view to frame correct issues and restrict the trial of the case only to the same. There is nothing in section 85 or 85A or in any other provisions of the Tenancy Act, robbing the Courts of these powers so indispensable for the effective adjudication and, relieving it or its duty imposed thereunder. These sections provide for remittance of issues only if and when the same are framed on being found to arise on such scrutiny and

it is after that stage that the Civil Court ceases to have jurisdiction with regard to the same till the finding is certified by the Tenancy authorities. The process contemplated under Order 14 does not contemplate any trial of such issue but it does involve nipping of any such plea in the bud, if the Court, subject to any contrary decision in appeal and revision, judicially concludes against its framing and raising. This is implicit in the separate provision for framing issues and the trial thereof. This process does not thus involve any conflict between Order 14 of the Code of Civil Procedure or sections 85 and 85A of the Tenancy Act nor any question of any lack or excess of jurisdiction. Such scrupulous compliance with these provisions alone can prevent such possible abuse of its process.

36. The Court has thus a duty to examine the substance and refuse to frame and remit any such issue if the same appears to be demonstrably frivolous and mala fide. It is obviously not easy to draw a dividing line between such frivolous and mala fide pleas on the one hand and the ones turning out to be false at the end of the trial on the other. Facts of a given case, however, would rarely fail to furnish the required

indication to the judicially trained mind. Facts of the present case, in our opinion, leave no manner of doubt that tenancy plea is a part of the fraudulent defence strategy and does not call for any remittance for trial. The approach could not have been different even if the Defendant No. 5 had pleaded the tenancy specifically. The same picture would have emerged in the careful scrutiny at the preliminary stage contemplated under Order 14 of the Code of Civil Procedure."

(Emphasis supplied)

It can, thus, be seen that framing and remittance of such issues involves a conscious exercise by the Court, to find that *bonafide* such an issue arises. Thus, mere raising of such a plea cannot preclude the Court from examining the pleadings and to find out whether the plea is *bona fide* and legally sustainable, as held by the Supreme Court in the case of **Thomas Antony** (supra).

7. I have carefully gone through the written statement filed by the petitioners. In para 2 of the written statement, it is claimed that the husband of defendant no.1 was allowed to occupy part of the suit

house by Mrs. Conceicao Andrade and other co-owners somewhere in the year 1970-71. Since then, the family of defendant no.1 is residing in the said part of the suit house with fixed habitation as mundkar. It is contended that somewhere in the year 1975, late Edward, the brother-in-law of defendant no.1 started staying with her family and late Edward was allowed to stay with the family of the husband of defendant no.1 as he was a bachelor. Except this, there is nothing in the written statement. The Trial Court has found and to my mind rightly so, that there are no documents produced to *prima facie* show that the plea of mundkarship arises in the suit.

8. On carefully going through the impugned order, I do not find that it suffers from any infirmity, so as to require interference. The petition is without any merit and is, accordingly dismissed, with no order as to costs.

C. V. BHADANG, J.

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