

IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO. 871 OF 2015

1. Mr. Teodorico Ludovico Camilo Fernandes,
s/o late Caetano Fernandes,
major-in-age, married,
r/o Near St. Anthony Chapel,
Goa Velha, Ilhas, Goa.

2. Mrs. Esperanca Fernandes,
w/o Teodorico Ludovico Camilo Fernandes,
major-in-age, housewife,
r/o Near St. Anthony Chapel,
Goa Velha, Ilhas, Goa.

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Petitioners

V e r s u s

1. Mr. Walter Antonio Otao Fernandes,
s/o late Mr. Caetano Fernandes,
major-in-age, married, and his wife

2. Mrs. Marianinha Fernandes,
d/o Mr. Xavier Cardozo,
major-in-age, housewife,
both r/o H. No.57,
Near St. Anthony Chapel,
Goa Velha, Ilhas, Goa.

3. Mrs. Romalina Cruzinha Fernandes,
d/o Antonio Cleofas Fernandes,
major-in-age, married,
and her husband.

4. Mr. Santana Gloria Dias,
Major-in-age,
Both r/o Firguem Bhat,
Goa Velha, Ilhas, Goa.

5. Mr. Ludovico Antonio Xavier
Agnelo de Loyola Fernandez,
Major-in-age, married,
and his wife.
6. Mrs. Teodolina Piedade Esteves,
Major-in-age, r/o H. No.56/B,
Near St. Anthony Chapel,
Goa Velha, Ilhas, Goa.
7. Mrs. Henriqueta Olivia
Antoneta Fernandes,
Major-in-age, married
And her husband
8. Mr. Moses Florencio Monteiro,
Major-in-age,
Both r/o Near Ana Stores Nagaly,
Taleigao, Goa.
9. Mrs. Ana Maria Fernandes,
Major-in-age, married,
And her husband.
10. Mr. Agnelo Correira,
Major-in-age,
Both r/o Gaunkar Waddo,
Near Fr. Agnel Minor Seminary Batim,
P. O. Goa Velha, Ilhas, Goa.
11. Mrs. Pia Josefa Fernandes,
d/o Antonio Cleofas Fernandes,
major-in-age, married
and her husband,
12. Mr. Menino Moniz,
Major-in-age,
Both r/o Nachinola Zoidar Vaddo,
P. O. Box Aldona, Bardez, Goa.

13. Mrs. Julia Ilda Fernandes,
d/o Antonio Cleofas Fernandes,
major-in-age, married
and her husband,
 14. Mr. Eraldo D'Cunha,
Major-in-age,
r/o Opp. To P.A.P, Behind
Bharat Gas Office,
St. Anthony Waddo,
Goa Velha, Ilhas, Goa.
 15. Miss Cansia Jesolina Fernandes,
d/o Antonio Cleofas Fernandes,
major-in-age, r/o H. No.56/B,
Near St. Anthony Chapel,
Goa Velha, Ilhas, Goa.
 16. Mrs. Maria Lizarda Purificacao
Piedade Fernandes,
w/o late Antonio Cleofas Fernandes,
major-in-age, housewife,
r/o H. No.56/8, Near St. Anthony Chapel,
Goa Velha, Ilhas, Goa.
 17. Mrs. Juliana Fernandes,
w/o late Toto Fernandes alias,
Tito Mariano Rosario Fernandez,
Major-in-age, housewife,
r/o H. No. 56, Near St. Anthony Chapel,
Goa Velha, Ilhas, Goa.
- Respondents

Mr. Cliff Fernandes, Advocate for the Petitioners.

Mr. M. B. Da Costa, Senior Advocate with Ms. S. Chodankar, Advocate for Respondents no.1 and 2.

CORAM: S. B. SHUKRE, J.
DATE: 11TH JANUARY, 2016.

ORAL JUDGMENT:

Heard.

2. Rule. Rule returnable forthwith.

3. Heard finally by consent.

4. This writ petition challenges the order dated 4/9/2015 passed by the First Appellate Court, Court of the District Judge-1, Panaji, which is a common order rendered in Misc. Civil Appeal No.92/2014 and Misc. Civil Appeal No.93/2014.

5. By this common order, the first Appellate Court dismissed Misc. Civil Appeal being Misc. Civil Appeal No.92/2014 and allowed another appeal being Misc. Civil Appeal No.93/2014. These appeals were filed against the common order dated 31/7/2014, passed in Regular Civil Suit No.56/2014/C by the Civil Judge Junior Division, Panaji Goa, thereby rejecting the application of the respondents no.1 and 2 for grant of temporary injunction and also their application for appointment of Court receiver.

6. The respondents no.1 and 2, who are the original plaintiffs have

filed a civil suit for partition against the petitioners, the original defendants no.1 and 2 and several other defendants.

7. It has been contended that a property consisting of survey nos.24/2, 30/1, 29/1, and 24/7 of Goa Velha village comprising coconut trees, mango trees, one chapel of St. Anthony along with a residential house was bequeathed by the original owner and the testator to the respondents no.1 and 2 and the original defendant no.1, by the Will dated 7/7/1964. By virtue of this Will, the usufruct was allotted to Mrs. Henriqueta Fernandes who died on 3/12/1985 and the original defendant no.1 i.e. the petitioner no.1 was appointed as the administrator of the property. As an administrator, the petitioner no.1 had the obligation to maintain the property, to collect the rents, to distribute the income amongst all the legatees including he himself in the proportions mentioned in the will and also to keep for himself certain portion of the income as remuneration as an administrator. It is the case of the respondents no.1 and 2 that the petitioner no.1 failed to discharge his obligation properly and that because of certain actions on his part, such as cutting of two coconut trees and teak wood trees without permission of the co-legatees and not distributing income generated from this property amongst all the co-legatees an irreparable injury is being caused to them. Therefore, the respondents no.1 and 2 filed a suit for partition of the suit property by metes and bounds. In the suit, these respondents also filed an application

under Order 39 Rule 1 for grant of temporary injunction against the petitioners restraining them from dealing with the property in any manner and also another application for appointment of a receiver.

8. Both the applications filed by the respondents for grant of temporary injunction and appointment of Court receiver were strongly opposed by the petitioners. After hearing the contesting parties, the learned Civil Judge by his common order dated 31/7/2014 rejected the applications. However, he directed the petitioner no.1 to render accounts every month, not later than 5th day of the month following the month with respect to which the account would pertain. He further directed the petitioner no.1 to render the first of such accounts within 30 days of the date of the order and the first statement of account shall pertain to last three years ending 31/7/2014.

9. The order dated 31/7/2014 passed by the learned Civil Judge, Junior Division, "C" Court, Panaji was carried by the respondents to the First Appellate Court, that is, the Court of the District Judge-I, Panaji, by filing two separate appeals. Misc. Civil Appeal no.92/2014 was in respect of the order rejecting application for temporary injunction and Misc. Civil Appeal No.93/2014 was against the order rejecting application for appointment of receiver. Both these appeals were commonly heard and were disposed off by a common order dated 4/9/2015 passed by the learned District Judge-I,

Panaji. By this order, the learned District Judge dismissed Misc. Civil Appeal No.92/2014, but allowed the other appeal being Misc. Civil Appeal No.93/2014. While allowing this appeal, the learned District Judge directed the parties to suggest names of persons for appointment of receivership. It is seen that in terms of this direction, there is no dispute either, parties furnished the names of the persons who could be considered for being appointed as receiver. The order appointing one of these persons as receiver, however, is yet to be passed. But, the District Judge-I, on 4/11/2015, passed an order appointing Fr. Emidio Pinto, Parish Priest of Goa Velha as the interim receiver until further orders. As of now, the matter is at the stage of passing of final order regarding appointment of the receiver in pursuance of the order passed on 4/9/2015.

10. Mr. Fernandes, learned counsel for the petitioners submits that the order dated 4/9/2015 passed by the learned District Judge is perverse and arbitrary and it does not take into account well settled principles of law. He submits that it is well settled law that just because another view is possible, it is not open to the Appellate Court, while examining the legality and correctness of the discretion exercised by the trial Court, to upset the view of the trial Court and substitute that view with its own view, unless it is shown that the view of the trial court is perverse or arbitrary or against the well settled principles of law. He submits that it not being the case here, the order

of the appellate court which is impugned here must go. He further submits that even though the teak wood trees were not cut, the appellate court wrongly recorded a finding that the teak wood trees were cut. He further submits that as per Will dated 7/7/1964, petitioner no.1 is in defacto possession of the subject property and when there is no material produced on record by the respondents no.1 and 2 to show that the possession has been abused or misused by the petitioner no.1, there would be no reason for the appellate court to conclude that there is a danger to the property of which petitioner no.1 has been appointed as the administrator. On these grounds he submits that the order of the appellate court is bad in law.

11. Mr. M. B. Da Costa, the learned Senior Counsel submits that there have been vital misses committed by the Trial Court as it ignored important material available on record while forming a view that there was no need for appointment of a receiver and this has been corrected by the appellate Court. He submits that the two coconut trees were cut by the petitioner no.1 without permission of the other co legatees. He further submits that an application seeking permission for cutting of two teak wood trees was made to the Forest Department by petitioner no.1 without taking the other co legatees into confidence. According to him, these two facts amply demonstrate the fact that the petitioner no.1 was maintaining the property in a manner to suit his own needs and was trying to use the property

for his own benefit or otherwise he would have certainly obtained the permission of other co legatees. As such, learned Senior Counsel submits, these acts on the part of the petitioner no.1 amounted to not only endangering the subject property, but also depriving all the other co legatees of their proprietary rights. He further submits that these acts undoubtedly amounted to mismanagement of the property on the part of the petitioner no.1 and these facts not being considered at all by the Trial Court, the Appellate Court has rightly held that the order passed by the Trial Court in not appointing a receiver of the property was perverse. He further submits that the jurisdiction of this Court under Article 227 is limited. According to him, this Court cannot go beyond considering the impugned order in the light of the principles of perversity, arbitrariness or the breach of well settled principles of law and tested on these principles, the impugned order would surely clear the test.

12. With the assistance of the learned counsel for the petitioner and the learned Senior Counsel for the respondents, I have gone through the order of the Trial Court as well as the impugned order and the other documents filed on record which are forming part of this petition.

13. It is seen from the order impugned herein that the First Appellate Court has considered all the facts of the case in their proper perspective and

there is no reason for this Court to deal with those facts once again, as if this Court is sitting in appeal. It is further seen that the view taken by the first appellate court is based upon the material available on record and it has rightly pointed out that while exercising discretion in refusing the application for appointment of court receiver by the trial court, the trial court committed a perversity in the sense that it ignored important material placed on record by the parties. It is particularly seen that the trial court, while accepting the affidavit of one Kamlakant Kundaikar, filed on behalf of the petitioners, ignored the fact that Kundaikar was a mundkar of the petitioners no.1 and 2 and that he had not stated the necessary details in his affidavit. It is further seen that the trial court did not at all consider the material aspect of the case, which related to not obtaining of permission by the petitioner no.1 for cutting of two coconuts trees and also for making an application to the Forest Department for cutting of the teak wood trees from the other legatees. It is true that the first appellate Court wrongly mentioned in the impugned order that the teak wood trees were also cut without permission, but at other places in the impugned order, the first appellate court has mentioned that only permission from forest department was sought by the petitioner no.1. In any case, it does not matter whether the teak wood trees actually were cut or not and what matters is the intention of the petitioner no.1 in cutting the trees without obtaining permission of the other co legatees. This intention has been sufficiently reflected from the application made to the forest department in

that regard by the petitioner no.1. All these facts would certainly show that there was something which the petitioners wanted to keep away from the respondents no.1 and 2 even though they were the co legatees and the co-owners of the property. Such acts on the part of the petitioner no.1 would form sufficient basis for apprehending that the subject property would not be safe in the hands of the petitioner no.1.

14. I have gone through the copies of the accounts rendered for the last three years before 31/7/2014, in pursuance of the order passed by the Trial Court. It is true that although the first appellate court has stated that these are not properly rendered accounts, the first appellate court has not stated any reasons therefore. This is a mistake on the part of the first appellate court. But it is not such a mistake as would make this court find that the conclusion recorded by the first appellate court regarding improper rendering of accounts is perverse or absolutely not supported by the material available on record. If the first appellate court has not given any reason nothing would prevent this Court from making an effort to ascertain if any reasons exists for supporting such a conclusion. If they do not, it would only help boost the contention of the petitioners that the impugned order is erroneous and if not, the contention would meet it's end. Accordingly, I have perused the statements of accounts submitted by the petitioners and I noticed some deficiencies in them. The learned counsel for the petitioners, when asked

about these deficiencies in the statements of accounts could not explain the reason for the deficiencies. One of the deficiencies lies in not properly carrying forward the losses for the previous years to the current year. The other is about picking up selectively a few sums of losses of the previous years and carrying them forward to next year. This should be sufficient for me to find that the accounts rendered by the petitioners are not proper and, therefore, it has to be said that the petitioners have not complied with the order of the Trial Court properly.

15. For all these reasons, I see no error of law or fact in the impugned order and there is no substance in the present writ petition. There is one more reason why do I say so. It lies in the conduct of the petitioner. The petitioners now have also placed before the District Court names of the persons who could be considered for appointment as receiver. This would show that the petitioners have come to terms with the order of the first appellate court impugned herein and now they cannot be permitted to go back on the same.

16. The writ petition, therefore, deserves to be dismissed and it is dismissed accordingly. Rule is discharged. No order as to costs.

S. B. SHUKRE, J.

Ap/-