

IN THE HIGH COURT OF BOMBAY AT GOA**WRIT PETITION NO. 145 OF 2018
AND
WRIT PETITION NO. 55 OF 2018****WRIT PETITION NO. 145 OF 2018**

- 1) Wilson Themudo,
Aged 44 years,
Son of Antonio J. Themudo
and his wife
- 2) Tracy Fernandes e Themudo
Aged 37 years,
daughter of Rafael Fernandes,
Both residents of House No.1027,
Modsai, Margao, Goa.
Represented by their
Power of Attorney Holder
Mr. Eusebio Procopio Dulces De
Braganca a.k. a. Eusebio Braganza
Resident of H. No. 583, Mazilvaddo Raia. Petitioners

V e r s u s

1. Mr. Nascimento Fernandes (Expired)
Aged about 65 years,
House No.295, Modsai
Margao, Goa and his wife
(Amendment carried out as per Order dated
18.06.2014)
2. Mrs. Cristalina (Irene) Fernandes
Aged about 60 years,
House No.295, Modsai,
Margao, Goa. Respondents

Mr. Jagannath Jayant Mulgaonkar, Advocate for the Petitioners.

Mr. Tarshish Leo Pereira, Advocate for the Respondents.

WRIT PETITION NO. 55 OF 2018

1. Mr. Nascimento Fernandes (Expired)

Aged about 65 years,
House No.295, Modsai,
Margao Goa; and his wife

2. Mrs. Cristalina (Irene) Fernandes

Aged about 60 years,
House No.295, Modsai,
Margao, Goa.

.... Petitioners

V e r s u s

1. Wilson Themudo

Aged 35 years,
Son of Antonio J. Themudo
and his wife

2. Tracy Fernandes e Themudo

Aged 28 years,
Daughter of Rafesh Fernandes,
Both resident of House No.1027,
Both resident s of House No.1027,
Modsai, Margao, Goa.

.... Respondents

(All parties are Indian National & above addresses are registered addresses of the parties)

Mr. Tarshish Leo Pereira, Advocate for the Petitioners.

Mr. Jagannath Jayant Mulgaonkar, Advocate for the Respondents

Coram:- C. V. BHADANG, J.

Date:- 31st January 2018.

ORAL JUDGMENT:

Rule in both the petitions. Rule made returnable forthwith. The learned counsel for the respective respondents waive service. Heard finally by consent of parties.

2. A suit filed in the year 2010 is said part heard and both these petitions merely involve a dispute regarding deletion/recasting of certain issues, which were framed as far back as 10/9/2009. To add to it this is the second round of litigation between the parties on the dispute regarding deletion/modification of issues, before this Court.

3. The brief facts are that; the petitioners have filed Special Civil Suit No.57/2008/C for eviction of the respondents from the suit house which is described as a 'shop', bearing no.11/1028 of Margao Municipal Council. According to the plaintiffs the said shop is situated in chalta no.36 of P.T.S no.138. The case made out in the plaint is that the respondents were allowed to occupy the suit premises on humanitarian ground and they have failed to vacate the same, inspite of being required to do so.

4. The respondents resisted the suit inter alia questioning the sale deed dated 5/1/2001. In the written statement as originally filed on 4/7/2008 there were some general allegations made about the respondents/defendants being the mundkars of the suit premises which they claim to be a 'dwelling house'.

5. On the basis of the rival pleadings the learned trial court framed issues. Presently we are concerned with issue nos. 4 and 5, which are as under:

4. Whether the defendants prove that the plaintiff no.1 got the property transferred in his name without the knowledge and consent of the defendants and by playing fraud on the mother/mother in law of the defendants as such the deed of sale and the deed of rectification is null and void?

5. Whether the defendants prove that the house and the property appurtenant to the house was originally a mundcarial house of defendants' parents?

6. The record discloses that the respondents filed an application (Exhibit 21/D) for recasting of issue no. 5 and for framing of an additional issue. The recasting of issue no.5 was sought in the following manner:

It appears that the plaintiffs also filed an application Exhibit 22 for deletion of issue nos.4 and 5.

Whether the defendants prove that they are mundkars of house no.295 (old) and 322 (new).?

7. The learned trial court by separate orders dated 17/8/2010 allowed the application filed by the respondents and rejected the application filed by the petitioners. This was challenged by the petitioners before this Court in W.P. No.773/2010, which was decided on 24/3/2011. This Court found that the impugned order to the extent, dismissing the application filed by the plaintiffs for deletion of issue no.5 was not substantiate. This part of the order was quashed and set aside and the trial court was directed to decide the application to the said extent only after considering the judgment in the case of **Mitra of Archdiocese of Goa and Daman represented by the Patriarch of the East Indies, Rev. Dr. Raul Nicolau Gonslaves Vs. K Vijayadharan 1999 (2) Goa L. T. 97** and other relevant judgments.

8. It appears that after this, the respondents filed an application for amendment of the written statement seeking to add certain portion to para 39 of the written statement. In short, the defendants sought introduction of particulars of their claim that they are in possession of the suit property as mundkars. The amendment sought was that the house bearing no.322 which is renumbered as 1027/2011 is a mundkarial house in which the defendants are residing with fixed habitation.

9. The learned trial court by an order dated 5/9/2011 dismissed the application. The defendant made an unsuccessful attempt to get the said order reviewed. The learned trial court refused to condone the delay in filing the application for review by an order dated 11/5/2012. The matter has not been carried any further by the defendants. The net result is that the order rejecting the application for amendment has attained finality. Normally after this, the trial court should have taken up the application Exhibit 22 for disposal as directed by this Court. However, an order was passed in the roznama on 15/4/2013 recording that there is no need to pass a separate order on application Exhibit 21/D. Although the rozanama or does not explicitly say so, what the trial court meant is that once the application for amendment of the written statement was rejected by a speaking order, there was no necessity to pass a separate order on Exhibit 21/D. After this the respondent/ defendant no.2 filed an application Exhibit 106 for amendment of the written statement and yet another application Exhibit 107 for recasting of issue no.5. The learned trial court passed two separate orders on 14/11/2017. By a common order below Exhibits 22 and 107, the application at Exhibit 22 is allowed, while the application at Exhibit 107 is dismissed. The trial court while deleting the issue no.4 has recast issue no.5 as under:

“ Whether the defendants prove that the western part of the property is in possession of the defendants

along with the western portion of the mundkarial house bearing no.295 (old) and 322 (new)?

10. By a separate order below Exhibit 106 the application for amendment filed by the defendant no.2 has been allowed. These are the two orders which are subject matter of challenge in W.P. No.145/2018.

11. I have heard the learned counsel for the parties and perused record.

12. First, I would propose to deal with the aspect of deletion of issue no.4. In this regard it is significant to note that the earlier application filed by the plaintiffs for deletion of issue nos.4 and 5 was rejected, which was challenged before this Court in W.P. no.773/2010. That writ petition was decided on 24/3/2011. Paragraph 14 of the said judgment reads thus :

14. In the result, therefore, impugned orders to the extent the trial court dismissed the application filed by the plaintiffs for deletion of issue no.5 and allowed the application of defendants for recasting issue no.5 is concerned are quashed and set aside. The Trial Court to decide the applications to this extent only after considering the judgments in the case of K. Vijayadharan and all other judgments that may be cited by both sides.”

It can thus be seen that that the dispute regarding recasting of issue no.5 was remitted back to the trial court. In other words, this Court had not interfered with the order refusing the deletion of issue no.4. In such circumstances it is difficult to understand as to how the trial court could have again gone into the said aspect and directed the deletion of issue no.4. The order clearly shows non application of mind to the order of this court under which the order so far as the refusal to delete of issue no.4 was not interfered with.

13. Now coming to the aspect of the deletion/recasting of issue no.5. Here again, while the plaintiffs are seeking deletion of issue no.5, the defendants want the issue to be recast. In this regard it would be significant to note that after this Court had remitted the application back, the defendants had sought amendment of their written statement, which application was rejected. That order has attained finality. That application was rejected inter alia on the ground that the claim of mundkarship refers to a different structure than to the suit shop from which the petitioners are seeking eviction of the respondents. Once this order had attained finality it was not again open for the respondent/defendant no.2 to seek modification or recasting of the issue no.5. In such circumstances in my considered view the impugned order cannot be sustained.

14. This takes me to the aspect of the amendment. Once the trial court had found while rejecting the application for amendment of the written statement that the claim of the defendants refers to a different structure than the one for which the plaintiffs are seeking eviction, it is difficult to understand as to how the amendment could have been allowed that too after the commencement of the trial. The impugned order below Exhibit 106 does not show that the trial court has considered the effect of the proviso to Order 6 Rule 17 of C.P.C.. For this reason the said order also will have to be set aside. Consequently W. P. No.145/2018 is hereby allowed. The impugned orders below Exhibits 22 and 107 and the impugned order below Exhibit 106 are hereby set aside. Rule is made absolute in the aforesaid terms with no order as to costs. The suit pertains to the year 2000 and is said to be part heard. The trial court shall proceed to decide the suit as expeditiously as possible and preferably within a period of one year from the date of receipt of this order.

C. V. BHADANG, J.

Ap/-