

IN THE HIGH COURT OF BOMBAY AT GOA**WRIT PETITION NO. 1047 OF 2017**

1. Smt. Caetana Souza,
Daughter of late Esperanca da Costa,
Major of age, housewife,
2. Shri Donald Souza,
Son of Caetana Souza,
Major of age, Occupation: Service
Through P.O.A Caetana Souza,
Petitioner no.1.
3. Smt. Benzeeta Souza,
Daughter of Caetana Souza,
Major of age, Occupation: Service,
All residents of H. No.512,
Guirdolim, Chandor,
Salcete- Goa.
Through P.O.A. Caetana Souza,
Petitioner no.1.

..... Petitioners

V e r s u s

1. Smt. Paulina Rodrigues,
Wife of Mariano Rodrigues,
65 years of age, housewife,
R/O H. No.444, Guirdolim,
Chandor, Salcete, Goa.
2. Smt. Sebastiana Dias (deceased)
Through her legal heirs
 - a. Mr. Alex Dias,
Husband of late Sebastiana Dias,
Major of age, housewife,
R/o H. No.1635, Guirdolim,
Chandor, Salcete, Goa.
 - b. Shri Caetano Dias,

Son of late Sebastiana Dias,
Major of age,
R/o H. No.1635-2,
Agxem Curtorim,
Salcete-Goa, 403709.

c. Shri Manuel Dias,
Son of late Sebastiana Dias,
Major of age,
R/o H. No.1635-2,
Agxem Curtorim,
Salcete-Goa, 403709.

d. Smt. Milagrina Dias,
Wife of Manuel Dias,
Major of age,
R/o H. No.1635-2,
Agxem Curtorim,
Salcete-Goa, 403709.

3. Mr. Minguel Peixoto,
Son of Sebastiao Peixoto,
Major of age, Agriculturist,
R/o Guirdolim, Chandor,
Salcete-Goa.

4. Comunidade of Guirdolim,
Through its Attorney, Guirdolim,
Chandor, Salcete, Goa.

5. Administrator of Comunidade,
Comunidade Building,
Margao Salcete, Goa.

..... Respondents

Mr. Galileo Francisco Teles, Advocate for the Petitioners.

Mr. Devidas J. Pangam, Advocate for Respondent no.1, 2 (a) to (d) and 3.

Coram:- C. V. BHADANG, J.

Date:- 12th March 2018.

ORAL JUDGMENT:

Rule, made returnable forthwith. Shri Pangam, the learned counsel waives service on behalf of the contesting respondents no.1, 2 (a) to (d) and 3. Heard finally by consent of parties.

2. The petitioners are the original defendants no.1, 2 and 3 in a suit filed by the respondents nos.1, 2 and 3 for injunction simplicitor. The respondents nos.4 and 5 are the original defendants no.4 and 5 before the trial court. The petitioners are challenging the order dated 31/10/2017 by which the trial court has appointed a Commissioner to find out the nature and character of the suit property, namely, whether it is a paddy field or it is a hilly/sloppy terrain where paddy cannot be cultivated.

3. Admittedly, the land was belonging to the respondent no.4. The petitioners claim to be the owner of the land by virtue of an order passed by the Mamlatdar under the Agricultural Tenancy Act. According to the respondent nos.1 to 3/plaintiffs that declaration is obtained by the petitioners as the suit land cannot be a paddy field as it is hilly/sloppy terrain, whose paddy cannot be cultivated. The respondents no.1 to 3/plaintiffs claim to be in possession of the land on the basis of a oral lease. Admittedly, the Form No. I and XIV shows the name of the petitioners as the occupants. In the suit,

the issues are yet to be framed. At this stage, the respondent nos. 1 to 3 filed an application under Order XXXIX Rule 7 of C.P.C. for appointment of a local Commissioner “to verify and ascertain whether the suit property is a paddy field or not and whether on a hilly terrain paddy can be grown.” The application was opposed on behalf of the petitioners. The learned trial court found that it is necessary to appoint a commissioner since there is a dispute as regards the nature of the land and in that view of the matter has proceeded to appoint a commissioner.

4. On hearing the learned counsel for the parties and on perusal of the record, I do not find that the impugned order can be sustained. It is trite that under Order XXXIX Rule 7 of C.P.C., the Court may on an application of any party and on such terms as it thinks fit, make an order for the detention, preservation or inspection of any property which is the subject matter of such suit, or as to which any question may arise therein. It is now well settled that such inspection or appointment of a commissioner, cannot be ordered for the purpose of collecting evidence. Looking to the nature of the suit filed it is a suit simplicitor for injunction where the plaintiffs will have to show that they are in possession of the suit property on the basis of some status. In the present case they are claiming to be tenants on the basis of an oral agreement. It is evident that the civil court cannot go into the legality or otherwise of

order passed by the learned Mamlatdar under the Agricultural Tenancy Act. Shri Pangam, the learned counsel for the respondents nos. no.1, 2 (a) to (d) and 3 submitted that the respondents have challenged the said order before the Dy. Collector. Shri Teles, the learned counsel for the petitioners points out that the appeal has been dismissed by the learned Dy. Collector which order has been confirmed in revision by the learned District Judge. He submits that the order passed by the Mamlatdar has attained finality. If that be so nothing turns upon the nature of the land as to whether it is a paddy field or a hilly terrain. The Civil Court cannot sit in appeal over the order passed by the learned Mamlatdar under the Agricultural Tenancy Act. The principle question which the trial court has to address is as to whether the respondents nos.1 to 3 are shown to be in possession of the land as tenants. In my considered view the impugned order clearly shows exercise of jurisdiction with material irregularity, when the trial court has appointed a commissioner even before the issues are framed, the application for temporary injunction is heard and the trial commences. In such circumstances, the petition is allowed. The impugned order is hereby set aside. Rule is made absolute in the aforesaid terms with no order as to costs.

C. V. BHADANG, J.

ap/-