

IN THE HIGH COURT OF BOMBAY AT GOA**FIRST APPEAL NO. 142 OF 2018**

Mr. Issac Fernandes,
Son of late Augustino Fernandes,
49 years of age, married,
Resident of H. No.7/33D-2,
Sauntavaddo,
Calangute, Bardez, Goa.

..... Appellant

V e r s u s

1. Mr. Cruz Agostinho Fernandes,
Son of late Mr. Salvador Fernandes
Major of years,
and his wife
2. Mrs. Magdalena Fernandes,
Wife of Mr. Cruz Agostino Fernandes,
Major of years,
Both resident of Cobra Wado,
Calangute Bardez Goa.
3. State of Goa,
Through Chief Secretary,
Having his office at Secretariat,
Porvorim Bardez Goa.
4. The Member Secretary,
Goa Coastal Zone Management Authority,
Department of Science, Technology & Environment,
3rd floor, Dempo Towers, Patto Panaji Goa.
5. The Chief Town Planner,
Town & Country Planning Department,
Government of Goa, Panaji Goa.
6. The Deputy Collector,
of North Goa having his office

at Government complex at
Mapusa Bardez Goa.

7. Village Panchayat of Calangute,
Represented by its Secretary,
having its office at Panchayat house,
Calangute Bardez Goa.
8. Inspector of Survey and Land Records,
Having its office at Land Survey Department,
Government Complex, Mapusa Bardez Goa. ... Respondents

Adv. Rama Gajanan Rivankar for the Appellant.

Adv. R. G. Ramani for the Respondent nos.1 and 2.

Ms. Priyanka Kamat, Additional Government Advocate for Respondent nos.
3, 4, 5, 6 & 8.

Adv. Kapil D. Kerkar for the Respondent no.7.

Coram:- C. V. BHADANG, J.

Date:- 14th March 2019.

Oral Order:

By this appeal, the appellant/plaintiff, is challenging the order dated 10/9/2018 passed by the learned trial court in Civil Suit No.16/2018, by which an application filed by the respondent nos.1 and 2 for rejection of the plaint, under Order VII Rule 11 of C.P.C has been allowed and the plaint is rejected.

2. The petitioner claims to be a mundkar in respect of a dwelling

house/hut situated in land survey number 244/5-A of village Calangute which admeasures 3010 sq.mtrs. An application for declaration of his mundkarial right filed by the petitioner is pending before the learned Mamlatdar. It appears that the entire property was earlier belonging to Sodder Family which was sold by them to M/s. Twinkle Hotels Pvt. Ltd under a registered sale deed dated 19/6/1981. M/s. Twinkle Hotels Pvt. Ltd. sold the same to Mr. Navnit Ray Trivedi under a registered sale deed dated 29/3/21988 and the respondent nos.1 and 2 have purchased the said property from Navnit Trivedi under the registered sale deed dated 19/9/2001. Be that as it may, the petitioner filed the aforesaid suit against the respondents for permanent and mandatory injunction for restraining the respondent nos.1 and 2 and/or anybody on their behalf, from doing any illegal construction in the suit property bearing survey no.244/5-A of village Calangute and to demolish all the illegal constructions/structures erected therein and to restore the suit property to its original condition.

3. The respondent nos.1 and 2 filed an application under Order VII Rule 11 of C.P.C claiming that the suit is barred by section 41 (h) and (j) of the Specific Relief Act 1963 in as much as the petitioner has no personal interest in the suit property and secondly he has an alternate remedy to obtain the relief before the Mamlatdar under the provisions of the Goa, Daman and Diu

Mundkars (Protection from Eviction) Act 1975.

4. The application was opposed on behalf of the petitioner claiming that the provisions of section 41 (h) and (j) of the Specific Relief Act cannot be called into aid while deciding an application under Order VII Rule 11 of C.P.C and the suit is maintainable.

5. The learned trial court by the impugned order has found that the petitioner has no personal interest and has also an alternate remedy before the Mamlatdar and in that view of the matter the trial court has found that the plaint is barred by provisions of section 41 (h) and (j) of the Specific Relief Act. Hence this petition.

6. I have heard Shri Rivankar, the learned counsel for the appellant, Shri Ramani, the learned counsel for the respondent nos.1 and 2, Ms. Kamat, the learned Additional Government Advocate for the respondent nos.3, 4, 5, 6 and 8 and Mr. Kerkar, the learned counsel for the respondent no. Primarily the respondent nos.1 and 2 are the only contesting respondents.

7. It is submitted by Shri Rivankar, the learned counsel for the appellant that the appellant is a mundkar in whose favour there is an order of

registration of his mundkarial rights and an application for declaration is pending before the Mamlatdar. It is submitted that in order to protect his right in so far as the suit dwelling house and the adjoining area is concerned, the appellant is not precluded from approaching the Civil Court and the provisions of section section 41 (h) and (j) of the Act cannot be called into aid, for rejection of the plaint as being barred by law. For this purpose, the learned counsel for the appellant has placed reliance on the decision of this Court in the case of **Joaquim L. Dias, S/o Mr. Jose Dias and anr. Vs. Baptist Coelho, S/o Mr. Joao Xavier Coelho and others 2012 5 AIR (Bom) (R) 202.**

8. On the contrary, Mr. Ramani, the learned counsel for the respondent nos.1 and 2 has submitted that the appellant has not made out any case that any construction is allegedly being carried out by the respondent nos.1 and 2 which encroaches on the area which the appellant may eventually be entitled to purchase in the event he obtains an order of declaration. It is thus submitted that the appellant is not entitled to file the suit which is clearly barred by provisions of section 41 (h) and (j) of the Specific Relief .

9. I have considered the submissions made.

10. A bare perusal of the plaint shows that the appellant has not made out any case as to whether the proposed construction of the respondent no.1 affects or encroaches or interferes with the dwelling house of the appellant or the adjoining area which the petitioner would be eventually entitled to purchase, in the event he obtains a declaration from the Mamlatdar. The entire area of survey no.244/5-A is 3010 sq.mts. Mr. Rivankar, the learned counsel for the appellant during the course of the arguments at bar submitted that in the event the appellant succeeds and obtains a declaration, the appellant shall be entitled to purchase the dwelling house and the total adjoining area to the extent of 300 sq.mts.

11. Mr. Ramani, the learned counsel for the petitioner submits that the respondent nos.1 and 2 have purchased the suit property way back in the year 2001 and some repairs were made to the existing structure long back and presently there is no construction being carried out in the suit property.

12. Section 41 of the Specific Relief provides for situations when injunction can be refused under section 41 (h) and (j) when equally efficacious relief can be obtained by any other usual mode or proceeding, and secondly when the plaintiff has no personal interest in the matter, the Court can refuse injunction. It is not necessary to go into the question

whether in all cases these provisions can or cannot be called into aid while rejecting the plaint. Confining to the present case, in my considered view Mr. Ramani, the learned counsel for the respondent no.1 is right in contending that the plaint is entirely silent as to whether the construction which the petitioner is allegedly making encroaches or interferes with the dwelling house or the 300 sq.mtr area which the petitioner is entitled to purchase if he succeeds to obtain a declaration .

13. In the case of **Joaquim (supra)**, there was a dispute whether the plaintiff had any personal interest in the disputed area and therefore this Court found that the same will have to be adjudicated by the learned trial court on merits. This was the reason why this court refused to accept that the plaint could be rejected under section 41 (b) of the Specific Relief Act.

14. In the present case it is not in dispute that the appellant would at the highest be entitled to purchase an area of 300 sq.mts and for the rest of the area the petitioner has no personal interest. It also can be seen that the petitioner has an efficacious remedy to protect his possession of the dwelling house and the adjoining area in as much as, as per the definition of a dwelling house under section 2 (i) of the Mundkar Act it also includes the adjoining area which the appellant is entitled. In that view of the matter, no exception

can be taken to the finding as recorded by the learned trial court. The appeal is without any merit and it is accordingly dismissed with no order as to costs.

C. V. BHADANG, J.

ap/-