

Andreza

IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO. 215 OF 2020

- 1) Mrs. Maria Sucorinha Pimenta, daughter of late Mr. Santano Damaciano Joao Flaiero, aged 50 years, resident of Loutolim, Salcete, Goa.
- 2) Mr. Agnelo Faleiro, son of Shri Santan Faleiro, 53 years of age, r/o. Kamurlim, Salcete, South Goa.
- 3) Mr. Higino Aleixo Braganza, son of late Shri Pedro Aleixo Braganza, 66 years of age, resident of Colva, Salcete, Goa.
- 4) Smt. Maria Filomina Divina Faleiro E Braganza, daughter of late Shri Santano Damaciano Joaao Faleiro, aged 52 years, resident of Colva, Salcete Goa.
- 5) Smt. Maria Fatima Artimizia Feleiro alias Maria Denis D'Souza, daughter of late Shri Santanao Damaciano Joao Faleiro, aged 46 years, resident of

Socorro, Porvorim, Bardez,
Goa.

- 6) Shri Denis Selwyn D'Souza,
son of late Shri John Manuel
D'Souza, aged 51 years,
resident of Socorro,
Porvorim, Bardez, Goa.
- 7) Smt. Adelia Jeorgina Cruz
Antonieta Mafalda Faleiro
daughter of late Shri
Santano Damaciano Joao
Faleiro, aged 44 years,
resident of Loutolim,
Salcete Goa.
- 8) Shri Carmo Francisco
Faleiro, Son of late Shri
Santano Damaciano Joao
Faleiro, aged 41 years,
resident of Loutolim,
Salcete, Goa.

(All the plaintiffs duly
represented by their
constituted power of
attorney Petitioner No.1
Mrs. Maria Sucorinha
Pimenta)

...Petitioners

Versus

- 1) Precioso Soares, major in
age, Resident of house
No.617, Orgao, Loutolim,
Salcete, Goa.

- 2) Mr. Alex Faleiro, Son of late Mr. Santano Damaciano Joao Flaiero, landlord,
- 3) Mr. Joseph Faliero, Major of age, married, landlord,
- 4) Martino Faleiro, major of age, landlord
- 5) Smt. Virgina Faleiro, major of age, Housewife;
- 6) Smt. Bulaferio Faleirro, major of age, Housewife;
- 7) Smt. Blancio Faeiro, w/o late Shri Afonso Faleiro, major in age, Housewife;
- 8) Smt. Socorina Faliero, major of age , wife of late Alex Faleiro, housewife, ('Respondents no. 2 to 8 are residing at 75 , High Street, Camp, Belgaum)
- 9) Mr. Gil Soares and his wife
- 10) Mrs. Maia Conceicao Soares, Both major of age, residtn of House no. 617, Loutolim
- 11) Mr. Antonio Soares Widower, major of age,

Resident of house no. 612,
Loutolim

- 12) Mr. Vitino Soares and his wife,
- 13) Mrs. Vitino Soars, both major of age, Resident of House No.617, Loutomim
- 14) Mrs. Sauzinho Soares Major of age, resident of House No. 617, Loutolim
- 15) Mrs. Cynthia Soares and her husband
- 16) Mr. Vicky Babtista, Both major of age residents of House No. 617, Loutolim ...Respondents

Mr Omkar Vyankatesh Kulkarni, Advocate for the Petitioners.

Mr. Jose Manuel Reis, Advocate for the Respondent no. 1.

CORAM: M. S. SONAK, J

DATED: 27th July 2021

ORAL JUDGMENT

1. Heard Mr. Omkar Kulkarni, learned Counsel for the Petitioners, and Mr. Jose Manuel Reis learned Counsel for Respondent no.1, the contesting Respondent. The remaining Respondents are served. Some of the remaining Respondents are not even the contesting Respondents.

2. Accordingly, Rule is issued in this Petition and with the consent of the learned Counsel for the parties, the Rule is made returnable forthwith.

3. The challenge in this Petition is to the orders dated 13.08.2019, 16.12.2019, and 29.01.2020 made by the learned Trial Judge.

4. By the order dated 13.08.2019, the learned Trial Judge only partly allowed the Petitioners-Plaintiffs' application at exhibit 70. The learned Trial Judge held that the Plaintiffs will have to lead evidence, to begin with on the issues where the burden was cast on the Plaintiffs. However, issues where the burden was cast on the Defendants who had raised the plea of adverse possession, it is the said Defendants that will have to lead evidence first and, thereafter, the Plaintiffs would be allowed to rebut.

5. The Petitioners-Plaintiffs instead of complying with the directions with the order dated 13.08.2019, gave a praecipe that they do not wish to lead any evidence. The Defendants who had raised the plea of adverse possession also, thereupon, gave a praecipe that they too do not wish to lead any evidence.

6. At this stage, the Petitioners-Plaintiffs applied for leave to lead evidence in rebuttal. This application was quite correctly rejected by the learned Trial Judge vide order dated 16.12.2019 and the matter was posted for final arguments.

7. The Petitioners-Plaintiffs' application to postpone the final arguments because the Petitioners were in the process of

instituting the present Petition, was dismissed by order dated 29.01.2020.

8. Therefore, all the aforesaid three orders have been challenged by the Petitioners by instituting the present Petition.

9. Now, Mr. Reis, the learned Counsel for Respondent no.1, is quite right in his submission that it is the Petitioners-Plaintiffs who should have led the evidence first on the issues where the burden was expressly cast upon the Petitioners-Plaintiffs. Having failed to do so, the Petitioners-Plaintiffs have missed the bus and there was no question of seeking any leave to lead any evidence in rebuttal because none of the Defendants had led any evidence in the matter.

10. The Petitioners, in this case, should have followed the course set out in the order dated 13.08.2019. However, it was pointed out by Mr. Kulkarni, the learned Counsel, that Petitioners were improperly advised and genuinely expected the Defendants to lead evidence so that the Petitioners could get an opportunity of rebuttal.

11. According to me, Mr. Kulkarni's submission, in the peculiar facts of the present case, deserves acceptance. The Petitioners, in all probabilities, expected that they would get an opportunity of rebuttal because some of the Defendants had raised the plea of adverse possession. Normally, Implicit in such a plea, is the acknowledgment of the Plaintiffs' ownership.

12. Mr. Reis, however, clarifies that the plea of adverse possession had been taken as a matter of abundant caution. He submits that, to begin with, the Defendants have denied the title of the Plaintiffs. He also submits that in previous litigation, this issue has been already settled.

13. According to me, this is a case where the Petitioners appear to have been ill-advised and now are at an extremely disadvantageous position in the matter. No doubt, the Petitioners should thank themselves or maybe their advisors for placing them in such a situation. In all this appears to be an error of judgment on part of the plaintiffs and for this error, the Plaintiffs cannot be made to suffer disproportionately.

14. Mr. Kulkarni submits that, in the interest of justice, at least, the Petitioners should now be allowed to lead evidence on the issues on which the burden was cast upon them. He submits that prejudice, if any, to the opposite parties, can always be compensated in terms of costs. On instructions, he submits that the Petitioners will pay costs of ₹ 50,000/-, even though, they can really not afford to pay such costs, within four weeks from today. He submits that the first impugned order was made on 13.08.2019 and after March of 2020, the Courts have not been functioning on the full scale due to pandemic. He submits that all these factors may be taken into consideration in the interests of justice and an additional opportunity be granted to the Petitioners to lead evidence as permitted by the Order dated 13.08.2019.

15. According to me, the request made by Mr. Kulkarni, in the peculiar circumstances of the case, is quite reasonable. The interests of justice require that the Petitioners are not visited with disproportionate consequences. No doubt, some prejudice is bound to occasion the contesting Respondents but such prejudice can be compensated to some extent by awarding costs in their favor. Besides, the contesting Respondents will also have an opportunity to lead their evidence, notwithstanding the praecipes earlier filed by them.

16. Mr. Kulkarni has quite rightly relied on *Nipendrachandra Bid vs. Rajaramka Pulp and Paper Mills Ltd.*¹ where, in the precise context of the provisions of Order 18 Rule 3 of the Civil Procedure Code (CPC), the learned Single Judge of this Court has held that rules of procedure are the handmaid of the administration of justice and, therefore, a somewhat liberal approach is to be adopted, particularly where a stringent approach would disable the parties from leading any evidence whatsoever in the matter.

17. Similarly, the learned Single Judge of the Delhi High Court in *Prem Sagar Gupta vs Kamlesh Kumari*² has held that interests of justice should be kept in mind when issues concerning Order 18 Rule 3 of the CPC arise so that, too much time is not spent on the revisions and petitions, which, invariably arise in such matters.

1 1979 0 Mh.L.J. 220

2 2004 0 AIR(Del) 136

18. Having regard to the peculiar circumstances of the present case as well as the liberal approach advocated by the decisions relied upon by Mr. Kulkarni, the Petitioners can be granted an opportunity to lead evidence, subject to payment of costs as offered by them. A similar opportunity can also be granted to the defendants in the suit.

19. Accordingly, this Petition is disposed of by making the following order :

ORDER

(a) The impugned orders dated 16.12.2019 and 29.01.2020, are hereby set aside.

(b) However, the impugned order dated 13.08.2019 is not interfered with.

(c) Consistent with the directions with the impugned order dated 13.08.2019, the Petitioners-Plaintiffs are granted an opportunity of leading evidence on the issues in which the burden was cast upon them. This shall however be subject to the Petitioners depositing before the Trial Court within four weeks from today, the amount of ₹ 50,000/-.

(d) If the amount of ₹ 50,000/- is not deposited within four weeks from today, then, this Petition,

shall be deemed to have been dismissed in its entirety.

(e) If the costs are indeed deposited within four weeks, then, Respondent no.1 will be permitted to withdraw an amount of ₹ 40,000/- since this Respondent appeared through an Advocate before this Court.

(f) Respondent nos. 9, 10, 11, and 12, will be permitted to withdraw an amount of ₹ 2,500/- each since, even they have raised the plea of adverse possession, though they did not choose to appear in these proceedings before the High Court.

(g) Notwithstanding the praecipies that may have been filed by any of the Defendants in the Suit, once the Petitioners-Plaintiffs lead their evidence, the Defendants will also be entitled to lead their evidence, having regard to the order dated 13.08.2019.

(h) Thereafter, if the Petitioners-Plaintiffs desire to lead evidence in rebuttal, then, the Petitioners-Plaintiffs will have the right to do so, again having regard to the order dated 13.08.2019.

(i) The Rule is made absolute in the aforesaid terms. The stay on further proceedings is hereby vacated.

20. The parties are to now appear before the learned Trial Court on 30.08.2021 at 10.00 a.m. and file authenticated copy of this Order.

21. All concerned to act based on an authenticated copy of this Order.

M. S. SONAK, J.

ANDREZA PEREIRA Digitally signed by ANDREZA PEREIRA
Date: 2021.07.28 11:03:51 +05'30'