

Amrut

IN THE HIGH COURT OF BOMBAY AT GOA
WRIT PETITION NO.297 OF 2018

1. Mr. Benedito Costa,
Since deceased through
his legal representatives
1(a) Mr. Alex D'Costa
Age 63 years,
Resident of H.No.599, Antoi,
Guirdolim, Chandor,
Goa.
1(b) Mr. Jack D'Costa,
Age 60 years,
Resident of H.No.40, Bri Chawl,
2nd Floor, Dilip Gupta Road,
Mahim, Mumbai 16,
1(c) Mrs. Leena Britto,
Aged 54 years,
1(d) Mr. Venancio Britto,
aged 55 years,
Both r/o Room No.40,
Bri Chawl, 2nd Floor,
Dilip Gupta rd, Mahim,
Mumbai 16.
2. Mrs. Conceicao Maria Fernandes,
Aged 83, widow of late Benedicto
Costa
Resident of H.No.599, Antoi,
Guirdolim, Chandor,
Goa.
The Petitioners 1(b), 1(c), 1(d) and 2
are represented by their constituted

Power of Attorney
Mr. Alex D'Costa,
Petitioner No.1(a).

... Petitioners

Versus

1. Mr. Sebastiao Fernandes,
(Since deceased through his legal
representatives R-1(a) to 1(j)(iii)
Age 54 years,
Son of late Agostinho Fernandes,
bachelor, Major r/o Antoi,
Guirdolim
1(a) Anna Gracias (widow)
major of age,
Resident of Dexibhatt,
Near Agacaim Police Station and
Bridge Old toll booth
Goa.
1(b) Ligorina D'Costa
Major of age,
Resident of Kanti Vaddo, Cotta,
Chandor, Salcette Goa.
1(c) Celestine D'silva,
Major of age,
Resident of H.No.79, Mena Cavorim,
Chandor, Salcette, Goa.
1(d) Perpetua Fernandes
major of age,
and her children,
1(e) Sydney Fernandes,
Bachelor, major,
1(f) Steven Fernandes,
Bachelor, major,
All residents of H.No.379,
Jitlem moll,
Guirdolim, Chandor,
Salcette Goa,

1(g) Milagres Rodrigues,
major of age, married,
and his wife,
1(h) Angelina Rodrigues,
major of age,
Both residing at Bolapur, Sanguem
Goa.

1(i) Francisco J. Luis,
Since deceased through his legal
representatives,

1(j) Margarida Luis,
Widow of Francisco J. Luis,
major of age,

1(j)(i) Mr. Eusebio Luis
Major of age, married,
and his wife,

1(j)(ii) Mrs. Mitsy Luis,
major of age, married,

1(j)(iii) Mr. Joslaun Luis
major of age, bachelor,
All residents of H.No.257, Chinchall,
Navelim, Salcete Goa.

2. Mrs. Peregrina Costa,
C/o Mrs. Christalina D'costa,
Resident of Opp. Bharat Saw Mill,
Savordem Goa.

3. Mrs. Mary Costa,
Resident of Manisha Apt. Flat No.8/2,
Ground Floor, Marochi Rd.
Marol Village, Andheri (E),
Bombay 59.

...Respondents

Mr. Sudesh Usgaonkar and Ms. R. Pereira,, *Advocates for
the Petitioners.*

Ms. Amina Shaikh, *Advocate for Respondent No.1(a).*
Mr. G. Teles, *Advocate for Respondent Nos. 1(b), (c), (g) and (h).*

CORAM: M. S. SONAK, J

DATED: 20th July 2021

ORAL JUDGMENT

1. Heard Mr. Usgaonkar, learned counsel for the Petitioners, Mr. G. Teles, learned counsel for Respondent Nos. 1(b), (c), (g), and (h) and Ms. A. Shaikh, learned counsel for Respondent No.1(a).

2. Mr. Usgaonkar, learned counsel for the Petitioners states that all the Respondents are served. Having regard to the issues raised, it is only appropriate that this petition is finally disposed of. Accordingly, the rule is issued and the same is made returnable forthwith at the request and with the consent of the learned counsel for the Respondents who are the contesting Respondents.

3. The challenge in this petition is to the orders dated 15.01.2018 and 14.02.2018 by which the learned Trial Judge has rejected the Petitioners' application for striking off the issue Nos. 1 to 5 as cast by order dated 10.06.1997.

4. The Petitioners are the original Plaintiffs. They filed

Regular Civil Suit No.317/1990/F seeking eviction of the Respondents claiming that the Respondents are the trespassers in so far as the suit hut/house is concerned.

5. The Respondents filed their written statement, in which they contended that they are not trespassers but they are mundkars and therefore, are entitled to the protection under the provisions of the Goa, Daman, and Diu Mundkars (Protection from Eviction) Act, 1975 (the said Act).

6. Accordingly, the issue of mundkarship was framed and the same was referred to the Mamlatdar since the Civil Court lacks jurisdiction to decide such issue.

7. The Mamlatdar in this case has held that the Respondents or their predecessor in title was the Mundkar. This decision was appealed but the Collector dismissed the appeal. The Petitioners instituted a revision before the Administration Tribunal which was allowed and the declaration of mundkarship made by the Mamlatdar and confirmed by the Additional Collector was set aside.

8. As against the order of the Administrative Tribunal, the Respondents instituted Writ Petition No.67 of 2016. The Writ Petition No.67 of 2016 was however dismissed as abated.

Today, i.e. on 20th July 2021, the abatement has been set aside and the widow of the original Petitioner has been permitted to prosecute the Writ Petition No.67 of 2016, no doubt, by keeping open the objections of the Petitioners herein.

9. On 10.06.1997, the Trial Court framed the following issues:-

“1. Whether the plaintiffs prove that they are the owners in possession of the suit property?

2. Whether the plaintiffs prove that Agostinho Fernandes, from Ponda, late father of the suit house, by Ana Joaquine Barreto, in order to look after the house, in her absence at Bombay ?

3. Whether the plaintiffs prove that they used to come and stay in the suit house, and prior to end of 1989 they came for good ?

4. Whether the plaintiffs prove that defendant about middle of May 1990, illegally and without consent of plaintiffs, constructed a hut wherein he keeps rickshaw?

5. Whether the plaintiffs prove that in June, 1990, illegally and without consent of the plaintiffs, constructed a fence of sticks and palm leaves near said hut, as shown in the private plan ?

6. Whether the plaintiffs prove that the illegal occupation of defendant caused loss and prejudice to them, to the tune of Rs.300/- per month, since June 1990, and of Rs.100/- per month since then ?

7. Whether the defendant proves that the original plaintiff no.1 permitted the father of defendant to reside as mundkar, in the portion of the suit house, and the defendant continues to reside therein as such ?

8. What relief ? What order ?”

10. The Petitioners applied for striking off the issue Nos. 1 to 5 and it is this application that was dismissed by the Trial Court. Even the review against such an order was dismissed by the Trial Court. It is these orders which are challenged in the present petition.

11. According to me, issue Nos. 1 to 5 do not arise in the suit. The defendants in the suit never seriously contested the ownership of the Petitioners. The only defense of the defendants in the suit was that they were mundkars of the petitioners in respect of the suit hut/house. Mr. Usgaonkar has referred to the ruling of this Court in *Kamlakant Roghuvir Sinai Bonsule Vs Anthony Mascarenhas*¹ and *Savita Morajkar and others Vs Ganba Fati Fal Dessai*² to submit that in a suit of this nature only issue relevant is that of mundkarship.

12. Even according to me, the fate of the suit depends upon the defendants proving the issue of mundkarship. If they are

¹2010 (2) Goa LR 572

²2010(2) Goa LR 577

successful in establishing that they are the mundkars in respect of the suit hut/house then, the suit will have to be dismissed. However, if they fail in obtaining such a declaration then, possibly the suit will have to be decreed. The issue of mundkarship is now pending adjudication in Writ Petition No. 67 of 2016.

13. Mr. Usgaonkar agrees that even if the issue nos. 1 to 5 are struck off still, the suit cannot immediately proceed until Writ Petition No.67 of 2016 is disposed of one way or the other.

14. Accordingly, the Petitioners' application for striking off the issue nos. 1 to 5 as aforesaid is liable to be allowed and is hereby allowed. The issue Nos. 1 to 5 are struck off and only the issue Nos. 6, 7, and 8 are retained. The adjudication of issue No.7 is pending before this Court in Writ Petition No.67 of 2016. Therefore, until this issue is decided the further proceedings in Regular Civil Suit No.317/1990/F cannot go on.

15. The rule is accordingly made absolute to the aforesaid extent. The Petitioners' application for striking off the issue Nos. 1 to 5 is allowed and issue Nos. 1 to 5 as reflected in the order dated 10.06.1997 are struck off. However, it is clarified that until the issue of mundkarship is decided one way or the other in Writ Petition No.67 of 2016, further trial in Regular

Civil Suit No.317/1990/F will not proceed.

16. All concerned to act on the authenticated copy of this order.

M. S. SONAK, J.

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