

Maria S.

IN THE HIGH COURT OF BOMBAY AT GOA
WRIT PETITION NO.375 OF 2023

1. Mr Rajendra Govind Mahale,
son of late Mr. Govind Mahale,
aged 53 years, married,
business, Indian National,
residing at Kamat Plaza,
Building No.4, F-2, First Floor,
St. Inez, Panaji, Goa -403001.
2. Mr Govind Rajendra Mahale,
son of late Mr. Rajendra
Govind Mahale, aged 29 years,
unmarried, service, Indian
National, residing at Kamat
Plaza, Building No.4, F-2, First
Floor, St. Inez, Panaji, Goa -
403001.
3. Miss Tanisha Rajendra Mahale
daughter of Rajendra Govind
Mahale, aged 22 years,
unmarried, student, Indian
National, residing at Kamat
Plaza, Building No.4, F-2,
First Floor, St. Inez, Panaji,
Goa -403001.
4. Mr Gangaram Govind Mahale,
son of late Govind Mahale,
aged 45 years, married,
service, Indian National,
residing at Block-A G-1, St.
Mary's Colony, Near Bell Air,
Miramar, Panaji, Goa -
403001.
5. Mrs Sulbha Gangaram Mahale,
wife of Mr Gangaram Govind
Mahale, aged 45 years,

married, service, Indian National, residing at Block-A G-1, St. Mary's Colony, Near Bell Air, Miramar, Panaji, Goa -403001.

6. Mrs Saraswati Ganapat Chorlekar, wife of Ganapat Vishnu Chorlekar, aged 67 years, married, housewife, Indian National, residing at Nandanban Apartments, S-2, Second Floor, St. Inez, Goa - 403001.

7. Mr Ganapat Vishnu Chorlekar, son of Vishnu Chorlekar, aged 54 years, married, business, Indian National, Nandanban Apartments, S-2, Second Floor, St. Inez, Goa -403001.

... Petitioners

Versus

Mr Haroon Ebrahim, son of late Ebrahim Mohammed, aged 58 years, businessman, Indian National, residing at Panaji-Goa, carrying on business in Sole Proprietorship in the name and style of M/s. Magnum Constructions, having his office at Magnum Chambers, V.V. Dempo Marg, St. Inez, Panaji-Goa.

...Respondent

Mr Y. V. Nadkarni, Advocate *with Mr Nilay Naik, Advocate for the Petitioners.*

Mr Ashwin D. Bhoje, Advocate *with Ms Shaizeen B. Shaikh, Advocate for the Respondent.*

**CORAM:
DATED:**

**PRAKASH D. NAIK, J
25th SEPTEMBER, 2023**

JUDGMENT:

1. The petitioners have invoked the jurisdiction of this Court under Article 227 of the Constitution of India challenging order dated 28.03.2023 passed by the Civil Judge Senior Division, Panaji in Special Civil Suit No.41/2020/B dismissing the application filed by the petitioners at Exhibit D-15.
2. The petitioners filed a Regular Civil Suit No.162/2011/D in the Court of Civil Judge Junior Division at Panaji, seeking declaration that the plaintiffs/petitioners are owners in possession of a suit plot and the suit house and for decree of permanent injunction restraining the defendant from interfering with the suit plot and suit house. The respondent herein was defendant.
3. The subject matter of the aforesaid suit was a plot of land admeasuring an area of 259sq.mts along with house existing thereon which forms part of the land surveyed under No. Chalta No.32, P.T. Sheet No.94 of Panaji City. The plot was delineated in the plan annexed to the plaint which was referred to as 'suit plot' and the House No.277 which was existing on the suit plot was described as 'suit house'. The plaintiffs pleaded that the defendant claims to have purchased the entire land bearing Chalta No.32 P.T. Sheet No.94 of Panaji City from its original owners under a Deed of Sale dated 16.02.2006. The plaintiffs are having their house No.277 in the suit plot. The house was

constructed by plaintiff's predecessor in title Shri Govind Rama Mahale. The plaintiffs are in exclusive, uninterrupted possession of the suit plot and they have been enjoying the same adverse to the owners for more than 50 years by way of adverse possession. The defendant approached the plaintiff and informed that he wanted to undertake development of the entire land and include suit plot in the development. The plaintiffs told the defendant that they would consider the proposal and the defendant should give details of terms and proposal. On 01.10.2011, the defendant and others came to the suit plot and tried to dig and take measurements. The plaintiffs obstructed the defendant.

4. The suit was disposed off vide Consent Decree dated 23rd November 2011.

5. The Consent Decree stipulates that the parties agree and admit that the plaintiffs have acquired right to ownership of suit plot admeasuring 259sq.mts by way of adverse possession as plaintiffs and/or their predecessors possession has always been adverse to the defendant and the defendant predecessors in title for more than 50 years and has ripened into prescriptive title in favour of the plaintiffs. Area of 259 sq.mts forming part of land bearing Chalta No.32C of P.T. Sheet No.94 of Panaji City shown as plot A was described in the Consent Terms. The parties further agree and admit that the plaintiffs are owners in possession of suit house admeasuring 110sq.mts constructed at his cost by plaintiffs predecessors in title Shri Govind Rama Mahale. The parties have agreed that in consideration of

defendant undertaking described in the consent terms, the plaintiffs shall vacate the said suit plot along with possession of the land admeasuring 84.50m² shown as plot 'B' which forms part of land bearing Chalta No.72 of P.T. Sheet No.94 of Panaji City which is also in exclusive and absolute possession and enjoyment of the plaintiffs to enable the defendant to develop the same land and carry out constructions thereon. It was also agreed that the plaintiffs shall vacate the suit plot and the plot 'B' described therein and hand over the possession thereof to the defendant to enable the defendant to develop the same lands and carry out the construction thereon. The defendant shall immediately on obtaining permissions for development from the Corporation inform about the same to the plaintiffs and thereafter the plaintiffs shall vacate the suit plot and the structure and hand over the possession to the defendant. The defendant shall be entitled to demolish the structure existing on the suit plots and carry out construction thereon as per the approved plans. The defendant shall be bound to construct and hand over to the plaintiffs the constructed premises to be constructed on the land viz., a flat premises to be having an area of 40m² to be constructed on the second floor of Building C as shown on the plan. Shop premises named as Shop No.6 admeasuring 15m² in area to be constructed on ground floor of the building 'C' shown on the plan. A flat premises to be having an area of 80m² to be constructed on the third floor of the building C shown in the plan. Flat premises having area of 40m² to be constructed on second floor of the building 'C' as shown on the plan. Flat premises having area of 60m² to be constructed on the first floor of building C as shown in plan.

Shop premises named as Shop No.7 admeasuring 15m² area to be constructed on ground floor of building 'C' shown on plan. Flat premises having area of 60m² to be constructed on third floor of building 'C' as shown on plan. It was also agreed that the construction of the premises to be allotted to the plaintiffs was on ownership basis. The defendant to pay to the plaintiffs the amounts in the manner mentioned therein to enable the plaintiffs to procure alternate accommodation during the period of construction. The defendant also agreed to 30 post-dated cheques backed by bank guarantee from a reputed bank. The defendant agreed to deliver possession of the new premises along with sale deed/title documents. It was also agreed that in case the defendant is unable to give possession of the new premises to the plaintiffs within 30 months, the defendant will pay to the plaintiffs from 31st month to 48th month as stated in the Consent Decree and in the event the defendant is unable to hand over the possession of new premises within 48 months, the defendant will pay from 49th month the amounts stated therein.

6. Agreement dated 17.01.2015 was executed between the defendant and plaintiffs to record modifications of the terms of the Decree as mutually agreed by the parties. It was agreed that second party shall vacate the suit plot described in Schedule stated therein and the suit house existing thereon on 1st February 2015 and shall hand over the vacant possession of the same to the first party. The first party shall instead of compensation recorded in paragraph (5) of the Consent Decree dated 23.11.2011 pay compensation to the second party as stated in the said agreement.

7. Addendum to agreement dated 03.07.2018 was entered into between the plaintiffs and defendant in view of death of one of the plaintiffs. The Addendum to agreement was executed between Haroon Ebrahim as party of one part and Mr. Rajendra Govind Mahale, Mr. Govind Rajendra Mahale, Miss Tanisha Rajendra Mahale, Mr Gangaram Govind Mahale, Mrs. Sulbha Gangaram Mahale, Mrs. Saraswati Ganapat Chorlekar and Mr. Ganpat Chorlekar as second party. It was stated that the Civil Judge Junior Division, Panaji passed a Consent Decree dated 23.11.2011 in Regular Suit No.162/2011 filed by second party against first party. For various reasons the terms of decree could not be performed and both the parties agreed on certain modifications of the terms of Decree and had entered into an agreement dated 17.01.2015 executed at Panaji. The plaintiff No.1 in the said suit and the member no.1 of the second party of the said agreement named Sitabai Govind Mahale expired on 01.02.2018 leaving behind her share in the consent decree dated 23.11.2011 and in the agreement dated 17.01.2015. Therefore, the parties are desirous of recording in writing the terms of Addendum to the agreement dated 17.01.2015. In the Addendum it was recorded that, at the time of Agreement dated 17.01.2015, the second party agreed to vacate the suit plot and the suit house existing thereon described in Schedule of the said Agreement and accordingly has handed over the same to the party of the first part on 1st February 2015. As per Consent Decree dated 23.11.2011, in clause (3) sub-clause (a) the flat premises to be having an area of 40m² to be constructed on the second floor building 'C' to be exclusively allotted to plaintiff

No.1, i.e. Sitabai Govind Mahale (now deceased). As per the said Agreement dated 17.01.2015 in clause (2) sub-clause (1), the plaintiff No.1/member no.1 Sitabai Govind Mahale (now deceased) to be paid a sum of Rs.16,000/- per month, this amount shall be increased by Rs.1000/- only per month after expiry of every year. All the parties of the second part hereby agree and give no objection to transfer the monthly compensation payable to plaintiff No.1/member no.1 of late Sitabai Govind Mahale in favour of Rajendra Govind Mahale, one of the son of late Govind Rama Mahale and Sitabai Govind Mahale the party no.1 of the second part of Addendum Agreement. Without any further consent of or reference to other members of the second party and the same shall fully discharge the obligation of the first party to said Sitabai Govind Mahale, under the said Decree and Agreement dated 17.01.2015. The Agreement dated 17.01.2015 shall henceforth be read along with present Addendum. The Agreement dated 17.01.2015 shall remain in force and effect with the present Agreement.

8. As per the agreement dated 17.01.2015, the plaintiffs vacated the suit plot 'A' along with suit house existing thereon on 01.02.2015 and handed over possession thereof to the defendant on 01.02.2015. The plaintiffs vacated the plot 'B' and handed over possession to the defendant along with structures on 01.02.2015.

9. The defendant demolished the structure including the suit house in the suit plot 'A' and structures in plot 'B'.

10. In terms of Agreement dated 17.01.2015 the defendants had been paying the compensation to the plaintiffs as per clause 2 of the agreement. The said compensation was initially Rs.16,000/- per month to the respective plaintiffs with an increment of Rs.1,000/- per year. The defendant paid Rs.20,000/- per month to respective plaintiffs from 01.02.2019 to 01.02.2020. As per agreement dated 17.01.2015 if the defendant does not complete the construction of premises to be constructed for and handed over to the plaintiffs by 01.07.2020, the defendant shall be bound to hand over the suit plot back to the plaintiffs and that the defendant shall have no right or claim of whatsoever nature over the same. The agreement also provides that defendant was at his own expenses and for the benefit of the plaintiffs construct in the suit plot a house admeasuring an area of 110sq.mts.

11. Notice dated 19.08.2020 was issued by the defendant to the plaintiffs which was replied by the plaintiffs on 12.09.2020. Another notice dated 16.10.2020 was addressed by the defendant to the plaintiffs.

12. The plaintiffs/petitioners filed Special Civil Suit No.40/2020/B on 10.12.2020 in the Court of Civil Judge Senior Division at Panaji for declaration that the defendant is in unlawful and illegal possession and occupation of the suit plot 'A' and plot 'B' since 01.07.2020. The plaintiffs also prayed for a decree against the defendant to restore the possession of the suit plot 'A' and suit plot 'B' to the plaintiffs by handing over vacant and peaceful possession of the suit plot 'A' and suit plot 'B' to the

plaintiffs by removing all the structures existing thereon. Several other reliefs were sought in the said suit. The defendant/respondent filed written statement dated 05.04.2021.

13. The plaintiffs filed an application dated 28.09.2021 in Special Civil Suit No.40/2020 for a relief that pending hearing and final disposal of the suit, the defendant be directed to pay to the plaintiff an amount of Rs.88,000/- per month with effect from 01.09.2020.

14. The defendant filed reply dated 14.12.2021 to the said application.

15. Vide order dated 28.03.2023 the learned Civil Judge Senior Division dismissed the application filed by the plaintiff.

16. Learned advocate for the petitioner submitted that the trial Court had powers under Section 151 of CPC to grant relief. The defendant had made monthly payment to the plaintiffs even after 1st July 2020, i.e. the date since the defendant has been in occupation of the suit plot. Since September 2020 the defendant has not made any payments to the plaintiffs despite continuing to be in unlawful occupation of the suit plot. The monthly payments were made by the defendant to the plaintiffs to sustain themselves as regards their temporary alternate accommodation since the day they left the suit house and handed over possession of the house and the suit plots to the defendant on 01.02.2015. The defendant is neither handing over

the vacant and peaceful possession of the suit plots to the plaintiffs nor constructing house to the plaintiffs in the suit plot. The defendant is bound to make interim payments to the plaintiffs. It is not necessary that the agreement dated 17.01.2015 nor the addendum dated 03.07.2018 were required to be compulsorily registered as per the Registration Act, 1908. The defendant had paid the amount from 01.02.2015 to 30.08.2020. Thereafter, the payments stopped. The petitioners had vacated the suit plots. Thereafter, the defendant did not make any grievance of whatsoever nature and suddenly stopped the payment and demanded the documents. It is not disputed that the petitioners have vacated the plot admeasuring 84.50sq.mts. However, the respondent demanded documents after 5 and half years. The respondent has demolished all the structures including suit house in the suit plot 'A' and suit plot 'B' and the defendant has erected temporary structures in the said plot which is being used as a residence for labour employed by him and to store material. As per agreement dated 17.01.2015 the respondent had been paying the agreed compensation to the petitioners as stipulated in clause 2 of the Agreement. The said compensation was initially Rs.16,000/- per month with an increment of Rs.1000/- every year. The amount payable for the period from 1st February 2019 to 1st February 2020 was Rs.20,000/- per month to respective plaintiffs which was paid. The defendant continued to pay same amount of Rs.20,000/- per month without increment to respective plaintiff even after 1st February 2020 and the last payment was in August 2020. The defendant/respondent failed to commence and complete construction of premises to be constructed and hand over to

plaintiff by 1st July 2020. Notice was sent by respondent by raising irrelevant contentions. It was replied by plaintiffs. The respondent was called upon to vacate subject plots and to hand over peaceful possession of plots to plaintiffs.

17. Learned advocate for the respondent submitted that the respondent had so far paid an amount of Rs.53,93,000/- to the petitioners. The area admeasuring 84.50sq.mts as per clause 2 of the Consent Decree has not been given to respondent by the petitioners. The application preferred by the petitioners was not in consonance with the prayers sought in the suit. The petitioners have not pointed under what provision such application has been made. The suit is for land restitution. The petitioner has to establish that he is entitled to the reliefs sought in the suit. The petitioner has not pointed out any documents regarding compliance of the terms in the Consent Decree. The learned Judge has rightly rejected the application vide order dated 28.03.2023. The suit filed by plaintiff was wholly misconceived. The application dated 20.09.2021 does not make reference to provision under which it is filed. The respondent had spent amount of Rs.6,12,21,348/-. There is failure by plaintiffs to comply obligations. The plaintiffs are not entitled to amount claimed by them as they have failed to comply their representations under the terms filed in Regular Civil Suit No.162/2011. The plaintiffs have failed to legally transfer the right in respect of area of 84.50sq.mts, i.e. plot B. The plaintiffs cannot expect the defendant to comply its part, on their failure to abide terms. The agreement dated 17.01.2015 was not registered. The respondents had sent notice dated 19.08.2020

to plaintiffs and brought to their notice that, the respondents are unable to utilise the land admeasuring 84.50 sq.mts in plot B, as claims of plaintiffs being in possession and enjoyment of the same is not correct. The settlement was arrived on the ground that the defendant would be entitled to use both the plots i.e. plot A and plot B. The land admeasuring 84.50 sq. mts shown as plot B is claimed by owners as access. The respondent is unable to carry out development as proposed, resulting in huge monetary loss. The plaintiff is bound to comply their obligation. The respondent had called upon petitioners to comply their obligation by notice dated 19.08.2020. No relief can be granted to petitioners.

18. Learned advocate for the respondent has relief upon the following decisions:

(i). My Palace Mutually Aided Co-operative Society versus B. Mahesh and Others¹.

(ii). Cotton Corporation Of India Limited versus United Industrial Bank Limited And Others.²

19. Agreement dated 17.01.2015 was executed between the defendant and the plaintiffs in the Regular Civil Suit No.162/2011/D to record the modification of the terms of the said decree as mutually agreed between the parties. The agreement indicate that the second party/petitioners shall vacate the suit plot described therein and the suit house thereon on 01.02.2015 and shall hand over the vacant possession of the

¹ 2022 SCC OnLine SC 1063

² (1983) 4 SCC 625

same to the first party/respondent/defendant. The first party shall instead of compensation recorded in the Consent Decree in paragraph (5) of the Consent Decree dated 23.11.2011 pay compensation to the second party. The addendum to the agreement dated 03.07.2018 was also entered into between the plaintiffs and the defendant in view of death of one of the original plaintiffs.

20. The plaintiffs/petitioners vacated the suit plot 'A' along with the suit house existing thereon on 01.02.2015 and handed over possession thereof to the defendant on 01.02.2015. The plaintiffs vacated the subject plot 'B' and handed over the possession thereof to the defendant along with all the structures. The defendant demolished all the structures including the suit house in suit plot 'A' as also structures in plot 'B'. The defendant had been paying the compensation to the plaintiffs as per clause 2 of the agreement. The compensation was initially Rs.16,000/- per month to the respective plaintiffs with an increment of Rs.1,000/- per year. The amount paid by the defendant for the period from 01.02.2019 to 01.02.2020 was Rs.20,000/- per month to the respective plaintiffs. The last payment was made in August 2020. As per the agreement dated 17.01.2015 if the defendant does not complete the construction of the premises to be constructed for and handed over to the plaintiffs by 01.07.2020, the defendant shall be bound to hand over the suit plot back to the plaintiffs and shall have no right or claim over the same. The agreement also provides that the defendant at his own expenses construct in the suit plot a house admeasuring 110sq.mts. However, notice dated 19.08.2020 was issued by the

defendant to the plaintiffs which was replied by the plaintiffs. Legal notice dated 16.10.2020 was also addressed by the defendant to the plaintiffs. The plaintiffs filed a suit as stated hereinabove. The plaintiffs claimed an amount of Rs.88,000/- per month w.e.f. 01.09.2020. The learned Judge, however, dismissed the application preferred by the petitioners.

21. While dismissing the application the learned Civil Judge has observed that the reliefs claimed in the application are not claimed as interim relief or otherwise as an interim relief in the main suit. The plaintiffs had not claimed the amount in specific way.

22. It is pertinent to note that the defendant had initially paid the amount as agreed in the Consent Terms and suddenly demanded certain documents. The Consent Decree clearly stipulates that plaintiffs have acquired right to ownership of the suit plot admeasuring 259 sq.mts by way of adverse possession and then are owners in possession of the suit admeasuring 110sq.mts constructed by the plaintiffs. Pursuant to the Consent Decree the plot and the house was handed over to the defendants by the plaintiffs and the same was demolished. The defendant was supposed to carry out construction and hand over the premises as agreed in the Consent Decree and the agreement executed between the parties. The Consent Decree, the agreement or addendum to agreement does not indicate that any other documents are to be provided by the petitioners or any other obligations are required to be complied by the petitioners. It is pertinent to note that the respondent/defendant paid the

compensation as agreed between the parties and suddenly stopped the payment of the amounts as agreed. The trial Court had jurisdiction and power under Section 151 of CPC to grant the relief. The defendant/respondent had made a monthly payment to the plaintiffs even after 01.07.2020, i.e. after the possession was handed over to the defendant. It is relevant to note that the defendant has neither agreed to hand over the vacant and peaceful possession of the suit plots to the plaintiffs nor agreed to construct the house to the plaintiffs. The defendant is bound to make interim payment to the plaintiffs. As agreed in the agreement dated 17.01.2015, the defendant had paid to the plaintiffs an amount of Rs.64,000/- per month for the first year, i.e. 01.02.2015 to 31.01.2016. Thereafter, as agreed in the agreement dated 17.01.2015, the defendant has paid to the plaintiffs total monthly compensation of Rs.68,000/- for the year 01.02.2016 to 31.01.2017, Rs.72,000/- for the year 01.02.2017 to 31.01.2018, Rs.76,000/- for the year 01.02.2018 to 31.01.2019 and Rs.80,000/- for the year 01.02.2019 to 31.01.2020. The respondent is in possession of plots since 1st July 2020. The learned Judge while rejecting the application preferred by petitioners had observed that there are no such specific compensation to be paid to plaintiff is mentioned in consent terms which are valid in eyes of law and the agreement is under dispute. At prima facie stage, there cannot be any reliefs granted to plaintiff under Section 151 of CPC as the agreements are not admitted and objections in regard to registration is in issue. The finding is erroneous. The parties had executed consent terms. Agreement and Addendum to Agreement was executed and even payment as agreed was made

till particular period. The plots were handed over to defendant and suit house has been demolished. The respondent now contends that agreement is not registered and calls upon plaintiffs to comply obligations which does not appear in consent terms or Agreement. The decisions relied upon by learned Advocate for respondent are not applicable in the present case. Considering the circumstances, the petitioners are entitled for a monthly payment of Rs.88,000/- per month. Hence, there is no substance in the contention of respondent/defendant. The petitioners/plaintiffs are entitled for the relief claimed in the application preferred by them.

ORDER

- (i) Writ Petition No.375 of 2023 is allowed.
- (ii) The impugned order dated 28.03.2023 passed by Senior Civil Judge 'B' Court, Panaji in the application Exhibit D-15 is quashed and set aside.
- (iii) The respondent shall pay to the petitioners an amount of Rs.88,000/- as described in the prayer clause (b) of this petition in accordance with Consent Decree, Agreement/Addendum to agreement from September 2020.
- (iv) Petition stands disposed of.

23. At this stage, learned counsel for the respondent seeks four weeks' time to make the payment to the petitioners without prejudice to the rights to challenge this order before the Apex Court. In view of the submissions, the respondent is permitted

to make the payment as stated above to the petitioners within a period of four weeks from the date of uploading this order without prejudice to the rights to challenge this order before the superior Court.

PRAKASH D. NAIK, J.

MARIA SUZANA REBELLO

Digitally signed by MARIA SUZANA REBELLO
DN: cn=MARIA SUZANA REBELLO, o=, ou=, email=