

IN THE HIGH COURT OF BOMBAY AT GOA

CIVIL REVISION APPLICATION NO.221 OF 2001

1. Smt. Anusuya Naik,  
of full age, housewife;
2. Shri Laxmikant Naik,  
son of Waman Naik,  
of full age, service;
3. Shri Gopi L. Naik,  
major (deceased) through  
his legal heirs:
  - (a) Shri Mahadev Gopi Naik;
  - (b) Shri Sadanand Gopi Naik;
  - (c) Shri Krishna Gopi Naik

All are major by age,  
resident of Parampai,  
Marcaim, Ponda, Goa;

4. Smt. Jayu G. Naik,  
wife of Gopi L. Naik,  
housewife;
5. Dattaram L. Naik,  
son of Ladu Naik,  
of full age;
6. Smt. Vatsala D. Naik,  
wife of Dattaram Naik,  
of full age;
7. Shri Bhiknu L. Naik,  
son of Ladu Naik;
8. Smt. Sugandha B. Naik,  
wife of Bhiknu Naik,  
housewife,

All residing at House  
No.451, Parampai,  
Marcaim, Ponda, Goa

...PETITIONERS.

versus

Shri Trivikram R. kamat,  
son of Raghuvir Kamat,  
of full age, service,  
resident of Malwada,  
Marcaim, Ponda, Goa

...RESPONDENT.

-----

Shri N.K. Sawaikar, Advocate for the Petitioners.

Shri Sudin Usgaonkar, Advocate for the Respondent.

-----

**CORAM : A.S. AGUIAR, J.**

DATED : JANUARY 18, 2002.

ORAL JUDGMENT

Admit. By consent, heard forthwith.

2. This Civil Revision Application arises from the Order dated 19-9-2001 passed in Regular Civil Suit No.120 of 1989 dismissing the Application dated 10-9-2001 filed by the Defendants i.e. Petitioners herein, under Order 14, Rule 5 of the Code of Civil Procedure for framing additional issue as follows:

"Whether the Defendants prove that they are the Mundkars of the Plaintiff of their house situation in the suit property ?"

3. Prayer was for framing additional

issue in Regular Civil Suit No.120 of 1989 filed by the Respondent herein for mandatory injunction and recovery of possession of the structures shown in the Sketch as "A", "B", "C", "D", "E" and "F" and also for permanent injunction restraining the Defendants/Petitioners herein from doing further construction or extension in the suit property excluding the suit house. According to the Petitioners, the issue of mundkarship is pending in the Court of Mamlatdar. The Petitioners herein have prayed for stay of the suit till the issue of mundkarship is decided. It is the case of the Plaintiff/Respondent herein that the Defendants/Petitioners are in occupation of the house bearing NO.451 which is part of the suit property. The area of the said house is 150 square metres. However, since 1985 the Petitioners have from time to time been encroaching and put up structures on the remaining portion of the land, as a result of which the Plaintiff/Respondent had to take out an amendment application for adding further structures "G", "H", "I", "J", "K" and "L" shown in the fresh sketch submitted by the Plaintiff.

4. The case of the Petitioners/Defendants is one of denial. They

contend that the said mundkarial house was inherited by them from their ancestors who have been living therein for more than 100 years. They specifically deny the allegation that they have put up any additions or unauthorised constructions except for construction of one room (kitchen) which was constructed with the permission of the Respondent in the year 1974 thereby admitting that the said room constructed as kitchen does not form part of the mundkarial house. However, the Respondent denies that any permission was granted even for construction of this shed referred to as kitchen.

5. The issue before this Court is whether the proceedings in suit for mandatory injunction filed by the Respondent ought to be stayed till the mundkarial issue is framed by the Civil Court and the issue is decided finally by the Mamlatdar.

6. By the impugned Order, the application for framing the issue "Whether the Defendants prove that they are Mundkars of the Plaintiff of their house situated in the suit property ?" has been dismissed. The issue whether the Petitioners have constructed additions to the

existing mundkarial house which originally admeasured 150 square metres will have to be decided in the suit. From the pleadings and the Sketch annexed to the plaint by way of amendment, it, prima facie, appears that the Petitioners have constructed additions to the existing structure beyond 150 square metres. The Plaintiff's suit is for mandatory injunction in respect of those additions. In view thereof, the Court will have to independently decide whether there are any additional structures put up by the Petitioners to the mundkarial house which according to Respondent admeasures 150 square metres notwithstanding the fact that the Petitioners claim that their mundkarial house admeasures 200 square metres.

7. Learned Advocate for the Petitioners has relied upon the decision of this Court in **Shri Subha Venkatesh Kamat v. Shri Vasu Naik and others**, reported in 2001(1) Goa L.T.3 wherein the Court observed that in an application for execution what is in issue is not the house as it existed, but the illegal construction. The Respondents at the relevant time though had opportunity, had not pleaded that they were mundkars of the said additional structures as the plea of mundkarship in respect of the main

structure was not required to be pleaded as that was not in issue. That being the case, in the application opposing execution, the Petitioners could have objected under Section 47, namely, that if they succeed they will be entitled not only to the area of the original house, but also to the area which they are entitled to under the Mundkars Act. In conclusion, the Court held that as the Respondents will be entitled to exercise their rights if they succeed as mundkars of the dwelling house in respect of the additional structures, the ends of justice will be met if the execution proceedings are stayed till the decision of the authority under the Mundkar Act is given. In the present case, what is sought is the stay of the proceedings in the suit filed by the Respondents in respect of the additional structures while in the case referred to above what was sought to be stayed was the execution of the decree. In the present case, no prejudice will be caused to the Petitioners if the suit is proceeded with since, if the Petitioners succeed in their Application before the Mamlatdar, they will obtain appropriate reliefs and execution of decree if and when passed in the suit filed by the Respondent could be stayed in view of the decision referred to above.

8. Learned Advocate on behalf of the Respondent has relied upon the decision of this Court in Civil Revision Application No.160 of 1997 in **Miss Telma de Souza Gonsalves v. Mr. Dashrat Shantaram Gadekar & others**, reported in 1998(1) Goa L.T. 429, Para 9 which reads as follows:-

" The plaintiff has come with a specific case that the encroachments/structures were made in the year 1990 as stated in the plaint and the Civil Court is required to give decision on the said contentions of the petitioner. In case the defendants are occupying the said structures for 30 years as contended by them, they can certainly lead evidence to prove that the said encroachments/structures are being occupied by them for the said period and evidence in rebuttal can be led. It is not necessary

at all, in the controversy raised by the petitioner, to decide the capacity in which the defendants are occupying the suit structure and in case the defendants so desire, they can independently resort to the remedy available to them in order to assert their capacity in which they are occupying the suit structures/encroachments.

For the purpose of this suit it is not necessary to decide the said capacity. The petitioner's case would succeed or fail on the averments made in the plaint and the defendants can certainly lead rebuttal evidence to disprove the same."

The Court further held:

" In view of the



discussion above, the impugned order of the Civil Judge, ordering framing of issue relating to mundkarship cannot be sustained. The impugned order to that effect is set aside."

9. In the light of the above observations, the trial Court has rightly rejected the said Application and refused to frame the additional issue as desired by the Petitioners.

10. Hence this Revision Application is dismissed and disposed of. No order as to costs.

( A.S. AGUIAR )  
JUDGE.

ac.