IN THE HIGH COURT OF BOMBAY AT GOA.

WRIT PETITION NOS. 326 AND 327 OF 2002.

1. Smt. Hirabai P. Kamat Mhamai,
   r/o Panaji, represented by
   her Attorney Smt. Hema Priolkar,
   Advocate, r/o Panaji-Goa.
2. Shri Shrinivas P. Kamat Mhamai,
   r/o Panaji. ... Petitioners.

Versus

1. Shri Yeshwant B. Sakhalkar,
2. Smt. Sunita Y. Sakhalkar,
   both r/o Suyash Complex, 2nd
   Floor, Near Post Office,
   Panaji. ... Respondents.

Mr. M.S. Sonak, Advocate for the Petitioners.

Mr. M.S. Usgaonkar, Senior Advocate with Mr. S. Usgaonkar, Advocate for the Respondents.

Coram: P.V. HARDAS, J.

Date of reserving the Judgment: 27-2-2003.

Date of pronouncing the Judgment: 27-3-2003.

J U D G M E N T.

Both the petitions arise from the Judgment passed by the learned lower appellate Court in respect of the two appeals filed by the present respondents, which arose from the Order passed by the learned trial Court in Regular Civil Suit No. 63/97/B filed by the petitioners in these two petitions. The petitions are, therefore, heard together and are decided by this common Judgment.

2. Writ Petition No. 326 of 2002 is filed against the Order, dated 6th May 2002, passed by the learned Additional District Judge, Panaji, in

Miscellaneous Civil Appeal No. 76 of 1997, allowing the appeal and quashing and setting aside the Order of the Civil Judge, Senior Division, Panaji, dated 9th June 1998, in Civil Miscellaneous Application No. 138/97/B.

3. Writ Petition No. 327 of 2002 is filed against the Judgment, dated 6th May 2002, passed by the learned Additional District Judge, Panaji, in Miscellaneous Civil Appeal No. 61 of 1998, allowing the appeal and quashing and setting aside the Order of the learned trial Court confirming the injunction.

4. Both those Appeals have been decided by the common Judgment of the learned lower appellate Court. The petitioners herein had filed Civil Revision Application in this Court, which came to be withdrawn by the petitioners, as the same was found by the petitioners to be not maintainable and, accordingly, the petitioners have filed the present petitions in this Court.

5. The facts necessary for the decision of the petitions are stated thus:-

The present petitioners are plaintiffs in Regular Civil Suit No. 63/1997/B, pending on the file of the Civil Judge, Senior Division, at Panaji. The

said suit was filed by the petitioners for permanent injunction with a prayer for temporary injunction. In the City of Panaji there is a property bearing Chalta Nos. 427, 9, 13, 13-A, 19 and 20 of P.T. sheet No. 35 belonging to the erstwhile joint family of Camotim Mamai or "Casa Social Camotim Mamai". The plaintiffs are the co-owners having 1/12th share in the suit property. The said property consists of a structure with a first floor which has been leased to the respondent no. 1. The said portion on the first floor, which is leased to the respondent no. 1, is the suit property. The respondents, two days prior to the filing of the suit, demolished the front wall, partly the suit wall and partly the middle wall of the suit premises and a day prior to the institution of the suit demolished completely the middle wall. The suit of the plaintiffs basically recites that the respondents have illegally and unauthorizedly pulled down the suit premises without the permission of the plaintiffs. It was averred that grave and irreparable loss and injury would be occasioned to the plaintiffs on account of the exposure of the ground floor premises leased by the petitioners to other tenants due to the illegal and unauthorised demolition by the respondents of the first floor of the suit premises. The petitioners had also filed an application for temporary injunction with a prayer for restraining the respondents from constructing or raising

any structure in place of the demolished suit premises. The petitioners had also prayed for interim directions directing the respondents to place zinc sheets above the ground floor to protect the ground floor from the incessant rains. The suit was filed on 9th May 1997.

6. The learned trial Court, by its Order, dated 9th May 1997, granted interim relied in terms of prayer Clause (a) with a show cause notice to the respondents as to why the relief as prayed for should not be granted. Prayer Clause (a) of the temporary injunction application was for restraining the respondents, their agents, servants and labourers from constructing anything or raising any structure in place of the demolished suit structure.

7. The respondents, who are the original defendants in the pending suit, filed an application under Order XXXIX, Rule 4 of the Code of Civil Procedure on 12th May 1997 praying for vacation of the ad interim exparte relief, which had been granted by the learned trial Court in favour of the plaintiffs by its Order, dated 9th May 1997. The learned trial Court, by its Order, dated 21st May 1997, rejected the application filed by the respondents/defendants for vacation of the ad interim relief. The respondents herein, being aggrieved by the aforesaid Order of the learned trial

Court refusing to vacate the exparte ad interim Order granted on 9th May 1997, carried an appeal to the District Judge, at Panaji, which was registered as Miscellaneous Civil Appeal No. 76 of 1997.

8. Pending the decision of the appeal, the respondents filed their written statements and also filed their replies to the application for temporary injunction. After hearing the parties, the learned trial Court, by its Order, dated 9th May 1997, confirmed the exparte ad interim relief which was granted in favour of the petitioners/plaintiffs. The respondents/defendants, being aggrieved by the Order of the learned trial Court, dated 9th June 1998, carried an appeal to the District Judge, Panaji, which was registered as Miscellaneous Civil Appeal No. 61 of 1998. The learned lower appellate Court, by its common Judgment, dated 6th May 2002, allowed both the Miscellaneous Civil Appeal Nos. 76 of 1997 and 61 of 1998, which Judgment is impugned in the present petitions. As stated earlier, the petitioners, being aggrieved by the Judgment of the learned lower appellate Court, had filed Civil Revision Application Nos. 222 and 234 of 2002, under Section 115 of the Code of Civil Procedure. The petitioners sought permission of this Court to withdraw the Civil Revision Applications on the ground that after the amendment to Section 115 of the

Code of Civil Procedure, the said revisions were not maintainable. The petitioners were permitted to withdraw the Civil Revision Applications and, hence, the present petitions, under Article 227 of the Constitution of India, came to be filed. It may be stated at this juncture that from 9th May 1997 till today the respondents have maintained status quo.

9. Strong reliance is placed by the petitioners/plaintiffs on the Order, dated 7th May 1985, passed by the District Judge, Panaji, in Land Acquisition Case No. 79 of 1980, in which the learned District Judge had held thus:- "It is hereby held that there is no more the undivided family (Sociedade familia) under the name and style of 'Sociedade familia' or 'Casa Social Camotim Mamai'". The respondents, while opposing the interim relief which was granted to the plaintiffs, pleaded that the defendant no. 1 had been a tenant of the suit premises owned by the Sociedade Camotim Mamai for the last 22 years and the lease in favour of the brother of the present respondent no. 1 was originally created by the Head of the Society/Joint Family and subsequently transferred in the name of the present respondent no. 1 some time in the year 1975 by a written agreement, which was executed by the then Head of the Society/Joint Family and the Head of the Society/Joint Family has been accepting rent from

the respondents. For the last 9 years one Shri Soiru Camotim Mamai has been accepting rent in the capacity of Head of the Society/Joint Family and has been issuing receipts in token of the acceptance. The respondents also aver that they were not informed of the dissolution of the Society and were unaware till confronted with the documents in the suit. It was also stated that the respondent no. 1, being desirous of expanding his business and starting a new business venture in the suit premises, had approached the landlord/Head of the Society Shri Soiru Camotim Mamai with a request for carrying out repairs to the suit premises. It was alleged that the said Shri Soiru Camotim Mamai informed the respondent no. 1 that due to financial constraints, the Society/Joint Family were unable to carry out the repairs to the suit premises and, therefore, Shri Soiru Camotim Mamai authorised respondent no. 1 to carry out the repairs, alterations, constructions, renovations of the suit premises at the cost of the respondents and granted a No Objection Certificate. The said Soiru Camotim Mamai is said to have given his consent by his letter dated 1st April 1996 permitting the respondents to carry out various types of repairs, constructions and renovations. On the strength of the consent of the Head of the Family, the respondents applied to the Panaji Municipal Council for permission to carry out the works of plastering, re-roofing and re-flooring of the suit

premises within the existing plinth. The Panaji Municipal Council granted the licence on 11th March 1997.

10. The learned trial Court, by its Order, dated 21st May 1997, rejected the application filed by the respondents under Order XXXIX, Rule 4 of the Code of Civil Procedure. While disposing of the said application, the learned trial Court directed the respondents to place zinc sheets in order to protect the ground floor of building of which the first floor was in possession of the respondents as tenants. The learned trial Court, while dealing with Civil Miscellaneous Application No. 138/97/B filed by the petitioners for temporary injunction, adverted to the Order of the learned trial Court, dated 21st May 1997, on application under Order XXXIX, Rule 4 of the Code of Civil Procedure. The trial Court was of the opinion that as the earlier Order had dealt with similar grounds, which were urged in support of vacating the interim Order, the earlier Order dated 21st May 1997 amounted to confirming the exparte Order and the trial Court felt that it could not go into the question which had been decided by the said Order, dated 21st May 1997.

11. The respondents/defendants, being aggrieved by the Order, dated 21st May 1997 and the Order, dated 9th

June 1998, carried appeals to the learned lower appellate Court. The petitioners/plaintiffs, being aggrieved by some of the observations made by the learned trial Court, in its Order, dated 21st May 1997, filed cross-objection before the learned lower appellate Court. As stated earlier, the learned lower appellate Court, by its common Order, dated 6th May 2000, rendered in Miscellaneous Civil Application Nos. 76 of 1997 and 61 of 1998, allowed both the appeals and dismissed the cross-objection. Before the appellate Court, the respondents/defendants as also the petitioners/plaintiffs produced documents.

12. The learned lower appellate Court in paragraph 10 of its Judgment has held that the consideration to decide an application under first proviso to Order XXXIX, Rule 4 and an application for temporary injunction are different. The learned lower appellate Court did not approve of the approach of the learned trial Court in confirming the Order of temporary injunction being guided solely by the prima facie findings recorded by the trial Court in its earlier Order, dated 21st May 1997. The appellate Court then considered the question of remanding the matter to the learned trial Court for decision afresh but, since the matter had been pending for adjudication for considerable length of time, the learned lower appellate

Court undertook the exercise of deciding the applications itself.

13. The learned lower appellate Court found the following factors in favour of the respondents/defendants:- (i) the respondents/defendants were the tenants of the suit premises belonging to the 'Casa Social Camotim Mamai'; (ii) the respondents/defendants had obtained no objection certificate from the head of the joint family of 'Casa Social Camotim Mamai' for carrying out various types of constructions and renovations of the suit premises, the no objection and the consent are evidenced by the letter, dated 1st April 1996, signed by one Soiru Camotim Mamai as head of the joint family of 'Casa Social Camotim Mamai'; (iii) the respondents/defendants had obtained the requisite licence from the Municipality and, thus, prima facie, indicated that the petitioners/plaintiffs had never objected to the carrying out of the construction of the suit premises and (iv) the receipts of payment of rent have been issued by the head of the family.

14. The learned lower appellate Court found the following factors as against the petitioners/plaintiffs:- (i) the petitioners/plaintiffs contended that the joint family of 'Casa Social Camotim

Mamai' had ceased to exist and Soiru Camotim Mamai was no longer the head of the family and had no authority to issue the no objection certificate to the respondents/defendants. The non-existence or the dissolution of the joint family was substantiated by the Order of the District Judge, dated 7th May 1985, passed in Land Acquisition Case No. 79 of 1980, wherein it had been held that the undivided family (Sociedade Familiar) under the name and style of 'Casa Social Camotim Mamai' did not exist and the lease in respect of the suit premises was executed on 25th January 1964 by the head of the family of 'Casa Social Camotim Mamai' in favour of the brother of respondent no. 1/defendant no. 1.

15. While considering the prima facie case, the learned lower appellate Court came to the conclusion that the Lease Deed was executed by the head of the family and there are receipts showing the payment of rent signed by the head of the family. The learned lower appellate Court also found that the dissolution of 'Casa Social Camotim Mamai' was never brought to the notice of the respondents/defendants. The petitioners/plaintiffs did not question the authority of Soiru when he continued to act as head of the family by collecting the rents and issuing receipts for the same. The learned lower appellate Court while repelling the contention of the petitioners/plaintiffs that due to the

demolition of the suit premises the tenancy itself ceased to exist, came to the conclusion that Soiru as landlord had given no objection for carrying out the repairs and, therefore, it cannot be said that the respondents/defendants have demolished the suit premises.

16. The learned lower appellate Court, therefore, found that there was a lease agreement, receipts of payment of rent and a no objection certificate in favour of the respondents/defendants and, therefore, the petitioners/plaintiffs had not made out a prima facie case. According to the learned lower appellate Court the balance of convenience tilted in favour of the respondents/defendants as they were carrying out the repairs with the consent of the head of the family and had obtained Municipality licence to do so. The learned lower appellate Court came to the conclusion that irreparable loss would be caused to the respondents/defendants if the injunction was granted as the respondents/defendants had incurred huge expenditure to carry out those repairs and they would be deprived of carrying on their business. The learned lower appellate Court did not deal with the cross-objection filed by the petitioners/plaintiffs. However, in the operative part of the Order, the learned lower appellate Court observed that the cross-objection of the petitioners/plaintiffs

was dismissed.

17. Mr. Sonak, the learned counsel appearing for the petitioners/plaintiffs, has urged before me that as the respondents/defendants had demolished the suit premises, the tenancy does not subsist. Mr. Sonak has placed reliance on the decision of the Supreme Court in **Vannattankandy Ibrayi v. Kunhabdulla Hajee,** (2001) 1 S.C.C. 564. Reliance is placed particularly on paragraph 13 wherein there is a reference to an earlier decision of the Bombay High Court in **Hind Rubber Industries (P) Limited v. Tuyebhai Mohammedbhai Bagasarwalla,** A.I.R. 1996 Bom. 389, wherein the Bombay High Court had taken a view that by demolishing the premises the tenancy does not stand extinguished. Mr. Sonak then drew my attention to paragraph 20 of the aforesaid report, wherein the Supreme Court has held thus:-

> "On the destruction of the shop the tenancy cannot be said to be continuing since the tenancy of a shop presupposes a property in existence and there cannot be subsisting tenancy where the property is not in existence."

18. The question whether the suit premises had been demolished by the respondents/defendants and whether by virtue of the non-existence of the suit premises, the tenancy did not subsist are contentious

issues which can only be decided after the parties adduce their evidence and no prima facie findings at this stage can be recorded. Therefore, according to me, these points are not germane for deciding the issue whether the petitioners/plaintiffs had made out a prima facie case for the grant of injunction.

19. Mr. Sonak next urged before me that the joint family was no longer in existence when Soiru is alleged to have given the no objection certificate to the respondents/defendants for carrying out the repairs/renovations. Mr. Sonak also submitted that the fact of dissolution of the joint family is evidenced by an unimpeachable document, namely, the Judgment of the District Judge, dated 7th May 1985, passed in Land Acquisition Case No. 79 of 1980. Mr. Sonak has also urged before me that the petitioners/plaintiffs have produced before the learned lower appellate Court a letter written by Soiru, in response to a letter query that he had not signed the no objection certificate and, thus, according to the petitioners/plaintiffs, the no objection certificate, alleged to have been executed by Soiru, is a document wherein the signature of Soiru has been forged. Mr. Sonak also vaguely hinted that the receipts, alleged to have been executed by Soiru, also bear the forged signature of Soiru.

20. It is true that by virtue of the Judgment of the District Judge rendered in the Land Acquisition Case, the petitioners/plaintiffs had established that the joint family was no longer in existence and that Soiru was not the head of the joint family. The issues whether the no objection certificate has not been signed by Soiru and whether the signature of Soiru is a forged signature, are issues which cannot be decided at this prima facie stage. Thus, therefore according to him, the petitioners/plaintiffs have prima facie established that the joint family was no longer in existence and Soiru was not, therefore, the head of the joint family and did not have the authority to issue a no objection certificate.

21. Mr. Usgaonkar, the learned senior counsel appearing on behalf of the respondents/defendants, has referred to the documents filed before the learned lower appellate Court. He made a special reference to the plaint in Special Civil Suit No. 20 of 1990, which is said to be still pending adjudication. Perusal of paragraph 6 of the aforesaid plaint would show that a decision was given in Proc. No. 6/61 of the First Office of Comarca of Ilhas, as confirmed by the Tribunal de Ralacao on 19th February 1963, the aforesaid Sociedade 'Casa Social Camotim Mamai' became extinct and, therefore, all the properties belonging to the said

Sociedade became the properties of all the Members of the said Sociedade. This, in fact, strengthens the contention of the petitioners/plaintiffs that the joint family was extinct and was no longer in existence. Mr. Usgaonkar, the learned senior counsel on behalf of the respondents/defendants, drew my attention to the subsequent paragraphs of the plaint wherein it is stated that the 'Casa Social Camotim Mamai' despite having become extinct, the administration and management of the properties was continued by the Members on the original line and all the religious festivals are celebrated in the name of 'Casa Social Camotim Mamai'. In support of this, the respondents/defendants have placed reliance on an advertisement, which was issued in the newspaper, regarding celebration of religious festivals in the name of the joint family. Thus, according to Mr. Usgaonkar, the learned senior counsel appearing on behalf of the respondents/defendants, though the joint family was dissolved, Soiru was appointed as head by the majority of co-owners and the properties were managed and religious festivals were performed as if the joint family was in existence. Mr. Usgaonkar has also stated that the rent receipts have been issued by Soiru as the Karta of the joint family and the petitioners/plaintiffs have no answer as to how the rents were collected by Soiru styling himself as the Karta/head of the joint family. Admittedly, the petitioners/plaintiffs have not

executed a power of attorney appointing Soiru as the head of their family nor have they assigned any of their rights to Soiru. Also admittedly, Soiru expired during the pendency of the present proceedings.

22. The petitioners/plaintiffs have established, prima facie, that the joint family was dissolved and consequent to the dissolution of the joint family, Soiru was not the Karta or head of the family. As against this, the respondents/defendants have placed certain documents on record which would indicate that some of the Members of the joint family had appointed Soiru as their head and the property was being managed on the same lines as if the joint family was in existence. The question that arises for consideration is if the joint family was not in existence, did Soiru have any right to give a no objection certificate to the respondents/defendants so as to bind the petitioners. It has been established by the petitioners/plaintiffs that the joint family was no longer in existence and obviously Soiru could not act as a Karta of the joint family and bind the present petitioners/plaintiffs. Obviously, therefore, Soiru had no right to execute the no objection certificate. Whether the joint family was either reconstituted or continued to function as a joint family and whether the other co-owners had appointed Soiru as the Karta or head of the family are all

contentious issues, which have to be decided after the parties lead their evidence. On the basis of these documents a prima facie finding cannot be recorded that, despite dissolution of the joint family, Soiru was appointed as the head of the family and continued to function as such and his acts, therefore, would be binding on all the other co-owners including the petitioners.

23. At the time of consideration of a prima facie case, specially when a case rests on documents, the Courts have to accept the documents as they are. An analytical appreciation of the documents is impermissible at this stage. The documents produced by the petitioners/plaintiffs, therefore, prima facie establish that the joint family was not in existence and Soiru could not act as the Karta or head of the family. To displace this prima facie finding, the respondents/defendants ought to have produced documents to show that the joint family was not dissolved but continued to exist. Documents suggesting that Soiru was appointed as head of the family by some of the co-owners and the joint family 'may' have continued to exist are not enough to displace the prima facie case made out by the petitioners/plaintiffs. If the documents produced by the respondents/defendants are accepted at their face value, according to me, the prima facie case established

by the petitioners/plaintiffs does not stand displaced. For displacing a prima facie case made out by the plaintiff on the basis of documents, the other side should produce documents of such nature which should not be susceptible to two interpretations or two views. Only if the parties produce documents of this nature, the prima facie case established by one party, on the basis of documents, can be said to have been displaced. If after perusal of the documents, the Court finds either that two views are possible or the view propounded by the party producing the documents cannot be substantiated without leading evidence, the said documents cannot be said to have displaced the prima facie case established by the plaintiff. In my considered opinion, therefore, the respondents/defendants have not been able to displace the prima facie case made out by the petitioners/plaintiffs.

24. Coming to the question of balance of convenience, it is to be seen that prima facie the respondents/defendants have demolished the suit premises without the consent of the petitioners/plaintiffs, who, admittedly, are the co-owners. Prima facie the no objection certificate issued by Soiru is not binding on the petitioners/plaintiffs. In such circumstances, according to me, therefore, the balance of convenience

lies in the favour of the petitioners/plaintiffs. No irreparable loss is likely to be caused to the respondents/defendants if injunction is granted in favour of the petitioners/plaintiffs, as the respondents/defendants have not established that they have made any investments nor have they alleged the purchase of any construction material, which would be rendered useless due to the passage of time. Admittedly also, since the rendering of the interim Order by the trial Court, the respondents/defendants have maintained status quo.

25. I am conscious that the petitioners/plaintiffs have invoked the writ jurisdiction of this Court and a writ Court would be extremely slow to upset certain finding of facts recorded by the Courts below. The learned trial Court had proceeded to decide the application for temporary injunction by adopting a wrong approach. The learned lower appellate Court was, therefore, perfectly right in criticising the approach of the learned trial Court. However, the learned lower appellate Court fell into error in appreciating the documents while arriving at the finding regarding prima facie case. The learned lower appellate Court has embarked on a detailed scrutiny of the documents to render a finding that the petitioners/plaintiffs did not make out a prima facie case on reasons which are really

not germane for the decision of the controversies raised by the parties. The Judgment of the learned lower appellate Court, according to me, is perverse and unsustainable in law and deserves to be quashed and set aside. The parties are maintaining status quo in respect of the suit premises since 9th May 1997. Instead of remitting the matter to the Courts below, as such remand would result in protracting the litigation which is pending since long, I have undertaken the exercise to determine whether the petitioners/plaintiffs had made out a prima facie case. According to me, the appreciation of the documents by the learned lower appellate Court was wholly perverse warranting interference under the extraordinary jurisdiction of this Court.

26. In the result, therefore, the petitioners/plaintiffs succeed. Writ Petition No. 326 of 2002, which has been filed against the Judgment of the learned lower appellate Court dismissing the application for temporary injunction filed by the petitioners/plaintiffs, is allowed. The Judgment and Order, dated 6th May 2002, passed by the Additional District Judge, Panaji, in Miscellaneous Civil Appeal No. 61 of 1998 is, hereby, quashed and set aside and the application for temporary injunction filed by the petitioners/plaintiffs is allowed. Rule made absolute

in the above terms with no order as to costs. The Order of the learned lower appellate Court rendered in Miscellaneous Civil Appeal No. 76 of 1997, arising against the Order of the learned trial Court rejecting the application of the respondents/defendants under Order XXXIX, Rule 4 of the Code of Civil Procedure, is also allowed. Rule made absolute. The impugned Order is quashed and set aside. In the circumstances, there shall be no order as to costs. The learned trial Court shall decide the suit as expeditiously as possible. It is hoped that the parties to the suit shall co-operate with the learned trial Court in the expeditious disposal of the suit.

(P.V. HARDAS)
JUDGE.

ed's.