

IN THE HIGH COURT OF BOMBAY AT GOA**SECOND APPEAL NO. 14/2007****SECOND APPEAL NO. 14 OF 2007**

Xec Ali,
of full age, married,
Indian National,
Residing at Caranzalem, Goa (since deceased),
Through his legal representatives:

- (1) Mrs. Najmun Bi,
residing at Caranzalem, Goa,
presently residing at Sao Paul,
Taleigao, Tiswadi, Goa.
- (2) Mr. Shaik Zahid Ali, (since deceased),
through his legal heirs:

(a) Mrs. Samina Zahid Shaikh,
2nd widow of the deceased, major.

(b) Shaikh Ali Shaikh Zahid,
son of the deceased,
(being minor represented herein by
his legal guardian)

2(a) Mrs. Samina Zahid Shaikh.

Both residents of C/o A.M. Sayed,
20/814, D.N. Nagar,
Ganesh Chowk, Andheri (W),
Mumbai 53.

(c) Mr. Shaikh Mauzam Shaikh Zahid,
major, son of the deceased.

(d) Kum. Farakada Shaikh Zahid,
major, daughter of the deceased.

(e) Mr. Shaikh Azzam Shaikh Zahid,

major, son of the deceased.

All residing at
Opp. Ram Shyam Raj Nagar
Housing Co-op. Society,
Block-E, Ground Floor, Flat No. 2.
Jogeshwari (W), Mumbai.

(3) Shri Shaikh Abdul Nasser Ali,
presently residing at
Alto Porvorim, Bardez – Goa.

(4) Shri Shaikh Abdul Kadar.

(5) Mrs. Shamshad Bi.

(6) Shri Shaikh Shabir.

(7) Mrs. Mumtaj Begum.

All presently residing at Chimbel,
Ribandar, Goa.

(8) Mrs. Aixam Bi,
residing at Sao Paul, Taligao,
Tiswadi, Goa.

(9) Mrs. Noorjehan Bi.

(10) Shri Shaikh Cassam Ali,
Both were residing at Caranzalem,
Presently residing at Alto-Porvorim,
Bardez, Goa.

... Appellants.

Versus

(1) Najmundi,
wife of Xec Adam Muzawar,
widow, domestic,
residing at St. Inez, Panaji, Goa.

- (2) Julekhabi,
minor, acting through mother,
the natural guardian,
Najumbi, residing at
St. Inez, Panaji, Goa.
- (3) Shaikh Ussen Adam Muzawar,
acting through natural guardian,
mother, Najmunbi,
residing at St. Inez, Panaji, Goa.
- (4) Shaikh Issuf Shaikh Hussein,
of full age,
C/o Lucky Restaurant,
Near Municipal Garden,
Panaji, Goa.
- (4)(a) Mrs. Hafiza Bi,
wife, resident of Molocco,
Merces, Goa.
- (b) Shaikh Abdul Hamid,
son of the deceased.
- (c) Kulsun Bi, wife of (b) above named.
- Both (b) and (c), residents of
Odlem Bhat, Taleigao,
Panaji, Goa.
- (d) Shaikh Jalaluddin,
son of the deceased.
- (e) Buland Bi,
wife of (d) above named.
- Both (d) and (e) residents of
Cabesa Waddo, Santa Cruz,
Panaji, Goa.
- (f) Shaikh Abdul Khalil,

since deceased through his legal heirs.

4(f)(A) Mrs. Shainaz Bi,
wife of the deceased.

4(f)(B) Shri Shaikh Mohasin,
son of the deceased.

Both residing at Molloca, Mercês, Ilhas, Goa.

(g) Mrs. Shainaz Bi,
wife of deceased Shaikh Abdul Khalil
is on record at Serial No. 4(f)(A).
(h) Mr. Shaikh Abdul Mutalib,
son of the deceased.

(i) Karima Bi, wife of (h).

(j) Shaikh Abdul Karim,
son of the deceased.

(k) Banu Bi, daughter of the deceased.

All (g) to (k) above named,
Residents of Molloco, Mercês,
Tiswadi, Goa.

... Respondents.

Mr. S. D. Lotlikar, Senior Advocate with Ms. Aditi R. Naik, Advocate
for the appellants.

Mr. J. E. Coelho Pereira, Senior Advocate with Mr. Joaquim Godinho,
Advocate for the respondents.

CORAM : R.M. BORDE, J.

DATE :- 24th December, 2014.

ORAL JUDGMENT :-

This is an appeal by the legal heirs of the original plaintiff, taking exception to the concurrent findings recorded by both the Courts below.

2. The plaintiff instituted Regular Civil Suit No. 346/78/D in the Court of Additional Civil Judge, Senior Division, Panaji claiming declaration that he is absolute owner of the suit restaurant, including all belongings of the restaurant, as well as for a declaration that he is owner of the leasehold rights in respect of the suit premises. The plaintiff also seeks a direction against the defendants for handing over peaceful and vacant possession of the suit premises along with all belongings, such as fixtures, furniture, utensils, etc.

3. The plaintiff Xec Ali was the brother in law of the first defendant and brother of the 4th defendant. Defendants No.2 and 3 are the minor children of the first defendant. The first defendant Najmunbi is the wife of the deceased brother of the plaintiff Xec Adam Muzawar. The suit restaurant, namely “Lucky Restaurant” was previously known as “Husseini Restaurant” which was being run in the name of Xec Ussen Xec Ali Muzawar, the father of the plaintiff since last 50 years prior to filing of the suit. The premises where the restaurant is situate

belongs to Joao Calisto Sagredo Coracao Dias e Souza. According to the plaintiff, his father used to run the restaurant during his life time with the assistance of his deceased brother. The premises in which the suit restaurant is situate was leased out to the plaintiff by its owners Joao Calisto Sagredo Coracao Dias e Souza by executing a Deed of Lease dated 31st May, 1948 and the lease was renewed in the name of the plaintiff from year to year and the last of such renewal took place in August, 1969 for a period of 3 years and according to the plaintiff he became a statutory tenant of the suit premises thereafter. According to the plaintiff, since his deceased brother Xec Adam Muzawar was not having any job or profession or business, he was permitted to run the restaurant on the condition that he should give the said restaurant along with its belongings back to the plaintiff as and when required. The deceased brother of the plaintiff had agreed to pay the rent of the premises to the landlord in name of the plaintiff.

4. Xec Adam Muzawar died on 31st August, 1978, leaving behind his wife, defendant No.1 and his children second and third defendants respectively. After demise of his brother, the plaintiff requested for returning back the restaurant. However, the fourth defendant, as well as other defendants refused to do so. The plaintiff,

as such, was constrained to institute the suit, claiming the reliefs as referred to above.

5. The suit was resisted by the defendants No.1 and 4 by presenting written statement. The written statement presented by the defendants No.1 and 4 has been adopted by the other defendants. According to the defendants, the suit is bad on account of non-joinder of necessary parties, since the plaintiff has failed to join the owner of the building as party defendant, although a declaration in respect of the leasehold right is claimed by the plaintiff.

6. Defendant No.1 contends that the restaurant belongs to her father-in-law who started business and carried it out until 1967. It is denied by defendant No.1 that the plaintiff was allowed by his late father to run and manage the said restaurant during the lifetime of his father due to alleged poor financial condition of the said Xec Ussen Xec Ali Muzawar. It is contended that the plaintiff never looked after the business and on attaining majority he joined Government service of erstwhile Portuguese Regime and thereafter continued to work as Government Servant until presentation of the suit and the written statement.

7. In respect of the contention that the premises have been leased out in favour of the plaintiff on 31st May, 1948, it is contended that in fact the lease was in favour of Xec Ussen Xec Ali Muzawar. However, in 1948 due to certain reasons the lease agreement was drawn in the name of the plaintiff. The business, however, was being run by Xec Ussen Xec Ali Muzawar and by deceased husband of defendant No.1. The rent in respect of the suit premises was, in the year 1948 and even thereafter until 1967, paid by Xec Ussen Xec Ali Muzawar to the landlord. In the year 1948 and thereafter, since the lease agreement was in the name of the plaintiff, rent was paid in the name of the plaintiff by Xec Adam Muzawar, deceased husband of defendant No.1.

8. It is contended that in the year 1967, late Xec Ussen Xec Ali Muzawar transferred the business of the hotel in favour of her deceased husband Xec Adam Muzawar and the said transaction has been accepted by all. It is contended that the rights in respect of the suit premises, with the consent and knowledge of the plaintiff, his late father and landlord, were transferred in favour of late Xec Adam Muzawar who is the tenant of the premises. The contention of the

plaintiff that he is a statutory tenant of the suit premises is specifically denied. With these averments and other contentions in respect of operation of the business by the deceased husband of defendant No.1, the defendants pray for dismissal of the suit.

9. The trial Court, after recording evidence led by the parties, by Judgment and Decree dated 6th February, 1988 was pleased to dismiss the suit. An appeal preferred against the Judgment and Decree passed by the trial Court, being Regular Civil Appeal No. 16/1988, was decided by the appellate Court by order dated 27.11.1992, whereby judgment and order of the trial Court was quashed and set aside and the appeal was partly allowed. Aggrieved by the judgment and decree passed by the first Appellate Court, the defendants preferred Second Appeal No. 5/1993 which came to be allowed and the matter was remanded back to the first appellate Court for framing points for consideration and rendering decision in the matter in accordance with law. The first appellate Court, after remand of the matter, framed the points for consideration and decided the appeal. The appeal preferred by the original plaintiff came to be dismissed in view of the judgment and decree dated 19.8.2006.

10. At the stage of admission, this Court framed following substantial questions of law

i) Whether, in view of the undisputed position that there was a written Deed of Lease creating a lease in respect of the suit premises in favour of Xec Ali, which was renewed year after year and lastly in the year 1969 by the owner, and landlord of the premises for a period of 3 years, the first appellate Court could have considered oral evidence to conclude that Xec Adam Muzawar was the tenant of the suit premises on the basis that the lease deed was a sham document.

ii) Whether, the interpretation of the definition of "tenant" under Section 2(p) of the Goa, Daman and Diu Buildings (Lease, Rent and Eviction) Control Act, 1968, by the First Appellate Court, to mean tenant is a person who is paying the rent is legally correct, when there is a written Deed of Lease in favour of the person other than the person paying the rent ?

11. I have heard the arguments advanced by the respective Counsel appearing for the parties. The appellants have not seriously

challenged the findings recorded by the Courts below in respect of the operation of the hotel business by the deceased husband of defendant No.1. However, according to plaintiff, the leasehold rights in respect of the property vest in him since under the registered lease agreement executed in 1948 and thereafter, he should be considered as a lessee and the defendants do not have any entitlement in respect of the leasehold property and, as such, there was no impediment for the trial Court to grant a declaration as prayed for by the plaintiff. According to the plaintiff, apart from the execution of the lease agreement in his name until the year 1969 and in the year 1969 renewal thereof for a period of three years, coupled with the evidence in respect of the rent paid by the plaintiff, leads to a conclusion that the plaintiff is the statutory tenant of the leasehold premises.

12. I have examined the contentions raised by the plaintiff. On scrutiny of the judgments delivered by both the Courts below, as well as the evidence led by the parties, oral as well as documentary, it is noticed that as per contentions of defendant that since the plaintiff was in Government service, with a view to have some security, at the instance of the landlord, the lease agreement was executed in the name of the plaintiff. The plaintiff continued in the Government employment.

After plaintiff attained majority, until presentation of the suit, as well as the written statement, he was never concerned with the restaurant business or the suit premises. The rent of the suit premises was being paid by the father of the plaintiff and the defendant in the name of the plaintiff. DW.1 Shaikh Abdul Hamid witness for the defendants has deposed that the lease agreement has been executed in favour of the plaintiff since he was in Government employment and the rent of the premises was being paid by late father of the plaintiff and the defendant. The lease agreement was executed in favour of the plaintiff since he was in government employment. This contention raised by the defendants has been supported by DW.5 Elmerith Souza daughter-in-law of the landlord. She has specifically deposed that her father-in-law had told her that the execution of the agreement was done in the name of the plaintiff on account of security since he was a Government servant. She has also stated that the amount of rent has been paid by the defendants, however, the rent receipts are issued referring to the name of the plaintiff. It is the contention of the plaintiff that the daughter-in-law of the landlord cannot be considered to be a landlady and her evidence is not worth consideration for lending support to the finding that the rent was being paid by the defendants and that the lease agreement was executed in the name of the plaintiff only because he

was a Government servant and as a matter of security.

13. Apart from the oral evidence supporting the case of the defendants, the documentary evidence in the form of receipts are produced on record by the defendants for the years 1976, 1977, 1978, 1982 and 1983. Rent receipts from 1967 onwards were issued in the name of Xec Adam until his death in 1978. Referring to the receipts issued, it is contended by the plaintiff that those have been signed by DW.5 who is not the landlady and as such, the receipts do not have any evidentiary value and those do not lend support to the claim of the defendants. The plaintiff, however, has not produced any rent receipt to substantiate his claim that he acquired statutory tenancy since he was paying rent to the landlord. Although the defendants claim to have placed on record 8 receipts of the year 1950, 1961, and 1962, as well as rent receipts dated 19.4.1966, 8.7.1966 and 31.8.1971, however, those are not found on record. There is no doubt that till 1967 rent was paid in the name of the plaintiff, as the lease agreement was in his name. It is the case of the defendants that in the year 1967 business was transferred in favour of Xec Adam by his father and thereafter the rent of the suit premises was paid by Xec Adam in his name, since 1967. Although the plaintiff contends that the rent is paid in his name,

there is no documentary evidence placed on record to support this contention.

14. In these circumstances, in my view the Courts below were justified in accepting the evidence led by the defendants in respect of the payment of rent by late husband of defendant No.1. The plaintiff has not substantiated his claim in respect of his statutory tenancy. The findings of fact recorded by both the Courts below on appreciation of the evidence are not liable to be interfered with while dealing with the instant second appeal.

15. Although the trial Court framed an issue in respect of non-joinder of necessary parties and answered the same against the defendants on the ground that the defendants failed to lead evidence to substantiate his contention as regards the non-joinder of necessary parties, I find that it was incumbent upon the plaintiff to implead the landlord as party to the suit since he is claiming declaration in respect of the leasehold rights. In the absence of the landlord, such a declaration cannot be claimed.

16. Apart from this aspect, since it is concluded that the

concurrent findings of fact in respect of the claim of the plaintiff relating to his statutory tenancy is not liable to be interfered with, the appeal must fail. The substantial questions of law framed at the stage of admission of the instant appeal, thus, are answered in the negative.

17. The second appeal is dismissed. However, in the facts and circumstances of the case, there shall be no order as to costs.

R.M. BORDE, J.

ssm.