

IN THE HIGH COURT OF BOMBAY AT GOA

SECOND APPEAL NO. 24 OF 2015

1. Smt. Amirabai Chowdhary
Aged 65, housewife, married
Indian National,
and her husband

2. Shri Dastagir Chowdhary
Aged 62 years, Indian National,
Both residents of Cusmane,
Quepem, Goa.

..... Appellants

V e r s u s

1. Smt. Khatila Bi
Widow of Karismsab Bepari,
Major, Indian National,
residing at House No.9,
Cusmane, Quepem, Goa.

2. Smt. Safirambi alias Safura Bi
Widow of Imam Sab Chowdhary,
major, Indian National,
Resident of Cusmane,
Quepem Goa.

..... Respondents

Mr. S. S. Kakodkar, Advocate for the Appellants.

Mr. C. A. Coutinho and Mr. R. Almeida, Advocates for the Respondent no.1.

CORAM: C. V. BHADANG, J.
DATE: 16TH OCTOBER, 2015.

ORAL ORDER:

By this appeal, the original applicants/obstructionists are

challenging the judgment and order dated 16/3/2015, passed in Regular Civil Appeal No.111/2014. By the impugned judgment, the appeal filed by the first respondent/original decree holder challenging the order dated 3/5/2014, passed by the learned Civil Judge, Junior Division, Quepem in C.M.A No.117/2000/B was allowed. The net result of the impugned judgment and decree is that the objection raised by the appellants to the executability of the decree has been negatived and the appellants have been directed to vacate the suit premises and to hand over possession of the same to the first respondent/Decree holder.

2. The brief facts necessary for the disposal of the appeal may stated thus:

That the first respondent filed Regular Civil Suit No.39/85/A against the second respondent and the State of Goa. That suit was filed before the learned Civil Judge, Senior Division, Quepem for eviction, possession and permanent injunction. It appears that the property being one half of the eastern part of Lote 3 of the property known as “Nocod bhat Borod” admeasuring 629 sq.mtrs. situated at Cusmane is the subject matter of the suit. It appears that the second respondent contested the suit. In the Trial Court there were as many as eleven issues raised. The suit came to be partly decreed in favour of the first respondent by a judgment and decree dated 30/11/1995.

3. It appears that the second respondent challenged the same in Regular Civil Appeal No.9/96/II in which eventually the parties reached a compromise and the compromise decree was drawn on 3/11/1998, with the following material terms:

The appellant undertakes to vacate part of the house in plot B i.e. the Eastern half of Lote No.3 admeasuring 314 sq. mtrs. sold to the respondent no.1 by deed of sale dated 19/6/1979 (Ex. PW1/A) except small portion which falls in plot "A" shown in the plan annexed to Exbt. PW1/A along with all their materials affixed to the house belongings and fixtures, within a period of one and half years from today i.e. on or before 30.4.2000. The appellant while vacating the said portion and removing her goods, fittings, etc. shall not cause any damage to the said portion. The appellant undertakes not to introduce any third party in the said portion of the house during the period of one and half year.

2. In case of delay in vacating the said portion the appellant undertakes to pay Rs.2000/- (Rupees Two thousand only) per month to the respondent no.1 for delayed period with effect from 30.4.2000..."

4. It is thereafter that the first respondent filed an execution application for execution of the consent decree being Execution Application no.13/2000/B before the learned Civil Judge, Senior Division at Quepem. In that execution the appellants herein filed an application under Order 21 Rule 97 of C.P.C. r/w Order 21 Rule 35 and Section 151 of C.P.C. The appellants

inter alia claimed that the suit house originally belonged to Advocate Clovis Da Costa. It was claimed that some time in the year 1963, Smt. Jainabi who happens to be the mother of the appellant no.1 and one Mumtaz Ali Chowdhary (the brother of appellant no.1) began to occupy two rooms, one big and one small in the western part of the said house. It was contended that the big room was converted by them into a kitchen and drawing room while the small room was used as a bed room. Said Jainbai and her children came to occupy the said premises as tenants of late Imam Sab Chowdary, initially on a monthly rent of Rs.35, which was later on increased to Rs.50/- per month. The second respondent/Judgment Debtor is the widow of Imam Sab Chowdary and the sister of appellant no.1. Jainabi expired some time in the year 1989 and the appellants continued to occupy the said premises on payment of the rent to late Imam Sab Chowdary. Apart from them, another sister namely Asafia and Safira were also residing with the appellant in the rented premises.

5. It was contended that as per the instructions of Imamsab Chowdary during his life time, the monthly rent of the premises from August 1979 were being paid to Karim Sab Bepari, who is the husband of the first respondent/decreed holder. The rent was paid till about 1983 and further rent was stopped as Karim Sab Bepari refused to issue receipts. It was contended that after the death of Karim Sab the rent was tendered to the decree holder

but she avoided to accept the same. It was contended that some time in the year 1996 the roof of the rented premises collapsed due to the breaking of the main beam and the same was repaired by construction of six laterite masonry stone pillars. It was also contended that the appellants had incurred expenditure of Rs.22,000/- for carrying out the repairs. It was also contended that some amount was adjusted towards this for the period from 1984 till March, 1999. It was contended that the entire house including the eastern part of the same is in occupation of the first respondent.

6. It was the material case that in the month of April 1999, the appellants learnt of the suit between the first and the second respondent and also learnt that out of a collusion and fraud, a consent decree was obtained. It was also contended that the relations between the appellant no.1 and the second respondent, her sister, were strained. The appellants addressed a notice to the first respondent on 19/4/1999, to which a reply dated 14/5/1999 was received. It was contended that the part in which the appellants are residing is bearing house no.513. The appellants also contend that they are in possession of the electoral card for the year 1988 and that their names also figure in the electoral role of 1983 of the Quepem Assembly Constituency. They had also applied for obtaining a ration card and are holding a ration card bearing no.364. However, it was lost on 17/11/1999. In short, according to the appellants right from the year 1963 they are having legal possession of

the rented premises bearing house no.513 (and not house no.68) of Cusmane, Quepem. It was contended that under the garb of the consent decree, which was collusive in nature the first respondent cannot evict the appellants and the decree cannot be executed under Order 21 Rule 35 of C.P.C.

7. The first respondent filed a reply to the application opposing the same.

8. The parties led oral and documentary evidence.

9. The Executing Court by the order dated 3/5/2014 while upholding the objection dismissed the Execution application holding that the decree cannot be executed against the appellants. Feeling aggrieved, the first respondent filed Regular Civil Appeal No.111/2014 before the learned District Judge at Margao. The learned District Judge came to the conclusion that although the appellants were factually in possession of the portion of the suit house, the Executing Court has not adverted to the aspect as to the capacity in which the appellants were in possession of the premises. The learned District Judge found that under Order 21 Rule 97 to 101, of C.P.C the Executing Court can inquire into all the aspects relating to executability of the decree and the executing Court ought to have decided as to whether the appellants were in possession of the suit premises as tenants, as claimed by

them. It appears that on appreciation of the evidence the learned District Judge came to the conclusion that there was no sufficient material on record to establish that the appellants were tenants. In that view of the matter, the appeal came to be allowed.

10. I have heard Mr. Kakodkar, the learned counsel appearing for the appellants and Mr. Coutinho, the learned counsel appearing for the first respondent. None appears for the second respondent, though served. With the assistance of the learned counsel for the parties, I have perused the impugned judgments.

11. It is submitted by Mr. Kakdokar, the learned counsel appearing for the appellants that both the Courts below have concurrently recorded the finding that the appellants were in possession of the suit house. It is submitted that there is no clear finding recorded by the first Appellate Court that the appellants have failed to prove their case being in possession as tenants. It is submitted that even otherwise the appellants would be entitled to the protection of the Rent Act. The learned counsel has referred to Section 56 of the Goa, Daman and Diu Buildings (Lease Rent & Eviction) Control Act, 1968, in order to submit that the Civil Court's jurisdiction to deal with the said issue was barred. The learned counsel has placed reliance on the decision of this Court in the case of **Sh. Felicio D'Souza Vs. Sh. Damiao D'Costa**, in

Second Appeal No.10 of 1989 dated 15/10/1993, in particular para 14 thereof, in order to submit that mere absence of a lease deed does not necessarily lead to invalidity of such lease, as the relationship between the concerned parties can be proved by any other evidence available, even if there is no written document executed between them for the purpose of creation of the lease. It is thus submitted that the finding recorded by the first appellate court would partake of the nature of a substantial question of law the finding being clearly against the weight of the evidence, and thus perverse.

12. On the contrary, it is submitted by Mr. Coutinho, the learned counsel for the first respondent that admittedly there is neither a lease deed nor any rent receipts or oral evidence about the appellants being in possession of the suit house, as tenants. The learned counsel sought to distinguish the judgment in the case of **Felicio D'Souza** on the ground that in that case there was other evidence available. It is submitted that thus the said judgment cannot come to the aid of the appellants.

13. It is submitted that going by the case of the appellants they are claiming initially through the husband of the Judgment Debtor and thereafter the husband of the decree holder. It is submitted that in that view of the matter, the appellants would be bound by the decree, as they cannot claim to

be have any independent right. The learned counsel would submit that in this case, the appellant no.1 Amirabi, is the sister of the judgment debtor and as per the case originally set up, Jainabi was claiming to be the tenant of her son-in-law, namely, Imam Sab Chowdhary, who is the husband of Safirabi. It is submitted that the first Appellate Court on appreciation of the evidence while confirming the factum of possession, has rightly come to the conclusion that the appellants have failed to establish that they were in possession as tenants. He, therefore, submitted that the said finding of fact having been arrived on proper appreciation of evidence, does not need interference.

14. The learned counsel has then placed reliance on the provisions of section 2 (p) of the Rent Act in order to submit that it is only the unmarried daughters who are living with the tenant as a member of his/her family up to the date of death of the tenant can come within the ambit of the definition of a tenant. It is submitted that in this case, Amirabi being admittedly the married daughter of Jainabi cannot claim to be a tenant. The learned counsel would submit that although this contention was not raised before the Courts below, it being a pure question of law can be allowed to be raised for the first time in the Second Appeal. He therefore submitted that the appeal does not involve any substantial question of law.

15. I have given my anxious consideration to the rival circumstances and the submissions made. The material issue is as to whether the appellants can justifiably claim to be not bound by the decree in the context of the case, as set up in the objection lodged before the Executing Court. The relation between the parties is not in dispute. Indisputably Jainabi had two daughters and a son namely, Amirabai (appellant no.1), Safirabi (Judgment Debtor) and Mumtaz Chowdhary. Karimsab Bepari is the husband of the first respondent, decree holder, while Imam Sab Chowdhary is the husband of second respondent Safirabi. It is undisputed that on the basis of the consent terms, the suit filed by the first respondent against the second respondent came to be decreed and that decree was sought to be executed in which the appellants raised the objection as obstructionists.

16. A perusal of the impugned judgments would clearly show that the Courts have concurrently come to the conclusion about the factum of the possession of the appellants of the suit house and this finding is not challenged by any of the parties. A perusal of the judgment of the Executing Court would show that although the Executing Court recorded a finding about the factum of possession, the executing Court had not adverted to the status on the basis of which this possession was claimed by the appellants. The Appellate Court after noticing this aspect as a final fact finding Court has considered the oral and documentary evidence on record and has come to the

conclusion in para 34 and to my mind rightly so, that the appellants have failed to prove that they were in possession as tenants.

17. In the case of **Felicio D'Souza**, this Court after noticing the provisions of Section 34 of the Rent Act has inter alia held that notwithstanding the operation of the Rent Act and the non-compliance with the mandate of Section 34, an absence of a lease deed does not necessarily lead to the conclusion about absence of relationship between the parties, as landlord and tenant. This general proposition would always be subject to the individual facts and circumstances of the case and the evidence obtaining therein. What it means is that the mere absence of the lease deed would not be sufficient to conclude absence of relationship as landlord and tenant. In the present case, after considering the oral and documentary evidence, the first Appellate Court has come to the conclusion that the appellants have failed to establish their claim of they being in possession as tenants. Secondly, it also appears from the objection that Jainabi, the mother of the appellant no.1 was claiming to be tenant of Imam Sab Chowdhary, the husband of the judgment debtor.

18. The provisions of Section 2 (p) of the Rent Act would be relevant for the present purpose and they read thus:

“tenant” means any person by whom or on whose account or behalf the rent of any building is, or but for special contract would be, payable and includes [in the event of his death the surviving spouse, or any son, or unmarried daughter or father or mother who had been living with him as a member of his family up to the date of his death and] a sub-tenant and also any person continuing in possession after the termination of his tenancy, but shall not include any person against whom any order, or decree for eviction has been made.”

19. It can thus be seen that in so far as the appellant is concerned, she being the married daughter of Jainabi at the time of her death cannot come within the ambit of a tenant as defined under the said Act. It is trite that a pure question of law the determination of which is not depended on any question of fact or one requiring evidence to be led, can always be allowed to be raised in the Second Appeal and in that view of the matter notwithstanding the fact that this ground was not raised before the Courts below can be allowed to be raised in the Second Appeal for the first time.

20. For all the reasons as stated above, I do not find any exception can be taken to the impugned judgment passed by the learned first Appellate Court.

21. In the result, the appeal does not involve any substantial question of law and is hereby dismissed with no order as to costs.

C. V. BHADANG, J.

Ap/-