

IN THE HIGH COURT OF BOMBAY AT GOA**SECOND APPEAL NO. 49 OF 2007**

1. Mr. Laximan Gauns,
Major in age,
Married,
Businessman,
Residing at House No. 134,
Mapusa, Bardez, Goa.
2. Mrs. Laximan Gauns,
Major in age,
Housewife,
Residing At House No.134,
Mapusa, Bardez, Goa.
3. Dr. Albert Pedro Lucio Afonso,
Major in age,
Widower,
Residing at Caranzalem, Ilhas Goa.
(since deceased represented by his
Legal Heirs the Appellants 4 to 17).
4. Mrs. Maria Filomena Afonso Mascarenhas,
Major in age, Married,
Residing at House No.12-C,
Xel, Bastora, Bardez Goa.
5. Mr. E. J. Mascarenhas,
Major in age,
Husband of Maria Filomena Afonso Mascarenhas,
Residing At House No.12-C,
Xel, Bastora, Bardez Goa.
6. Mrs, Maria Alina Afonso Rodrigues,
Major in age, married,
Residing at House No.C-1-22(5)
Near the Court, Margao Goa,

7. Mr. Oswald Rodrigues,
Major in age, Married,
Residing At House No.C-1-22(5),
Near the Court, Margao Goa.
8. Mrs. Maria Elsa Afonso Martins,
Major in age, Married,
Residents of House No.355,
Caranzalem, Ilhas Goa.
9. Mr. Olavo Martins,
Major in age, Married,
Resident of House No.355,
Caranzalem Ilhas Goa.
10. Mrs. Maria Julieta Dourado,
Major in age, Married,
Resident Of Ridgeway, Essex, London
(through Power of Attorney,
Adv. Antonio Braganza).
11. Mr. Adolf Dourado,
Major in age, Married,
Resident Of Ridgeway, Essex, London
(through Power of Attorney,
Adv. Antonio Braganza).
12. Ms. Maria Zinha Afonso Godinho,
Major in age,
Resident of Caranzalem, Ilhas, Goa.
13. Mrs. Garcia Godinho
major in age, married,
Residing at House No.358,
Caranzalem, Ilhas Goa.
14. Mrs. Maria Ida Afonso Machado,
Major in age, Married,
Residing at House No.156,

Rua Natal, Fontainhas,
Panaji, Goa.

15. Mr. Jose Machado,
Major in age, Married,
Residing at House No.156,
Rua Natal, Fontainhas, Panaji Goa.
16. Mrs. Maria Fatima Afonso Braganza,
Major in age, Married,
Residing at House No.220-6-2,
Near Church, Mapusa Goa.
17. Mr. Antonio P. Braganza,
Major in age, Married, Advocate,
Residing At House No. 220-6-2,
Near Church, Mapusa Goa.

... Appellants

Versus

1. Mr. Deepu P. Kuncolienkar
(since deceased represented by his
legal representatives 1(a) to 1(c).
- 1(a) Mr. Usno Deepu Kuncolienkar,
Major in age, Married,
Residing At Amaral, Taleigao,
Ilhas Goa.
- 1(b) Smt. Vaishali Usno Kuncolienkar,
Major in age, Married,
Residing at Amaral, Taleigao,
Ilhas Goa.
- 1(c) Shri Nepal Deepu Kuncolienkar,
Major in age, Married,
Residing at Amaral, Taleigao,
Ilhas Goa.
2. Smt. Radhika Deepu Kuncolienkar,

Major in age, Married,
Residing at Amaral, Taleigao,
Ilhas Goa.

... Respondents

Shri S. D. Lotlikar, Senior Advocate with Ms. A. Naik, Advocate for the appellants.

Shri M. B. da Costa, Senior Advocate with Ms. K. Betquekar, Advocate for the respondents.

CORAM :- F.M. REIS, J.

Date : - 6th May, 2015.

ORAL JUDGMENT :-

Heard Shri S. D. Lotlikar, learned Senior Counsel appearing for the appellants and Shri M.B. Da Costa, learned Senior Counsel appearing for the respondents.

2. The above appeal came to be admitted on 20th July, 2007, on the following substantial questions of law :

(A) Whether in view of the case set up by the plaintiff that he was residing in the property under Survey No.160/3 over which he was claiming a right of access as a Mundkar, Civil Court had no jurisdiction to entertain his suit in view of the

provision of Section 6 r/w Section 32(1) of the Goa Mundkars (Protection from Eviction) Act, 1975 ?

(B) Whether in view of the claim of the respondents themselves that they were residing in the property under Survey No. 160/3 as Mundkars, they could claim an easement by way of prescription over the property surveyed under No.160/3 in which they resided and the property under Survey No. 160/2 which until the year 1972 formed a part of one and the same property ?

3. Shri S. D. Lotlikar, learned Senior Counsel appearing for the appellants has pointed out that the whole property is surveyed under No.160/3 of Village Taleigao, wherein the appellants are owning a plot of land which was purchased from the original *bhatkars* of the respondents herein. The learned Senior Counsel further points out that the respondents are occupying a dwelling house in a portion of the property surveyed under No.160/3 beyond the plot purchased by the appellants. The learned Senior Counsel further submits that the respondents are claiming an easementary right by prescription over the disputed plot purchased by the appellants as, according to the

respondents, they have been using an access through it for the last over 30 years. The learned Senior Counsel further points out that the respondents are occupying the dwelling house in terms of the provisions of the Goa Mundkars (Protection from Eviction) Act, 1975 ('the said Act' for short) and are not entitled to any access beyond the one reserved under the said Act. The learned Senior Counsel has, thereafter, taken me through the definition of "dwelling house" to point out that it includes an easementary right of access. The learned Senior Counsel as such, submits that the question of claiming any prescriptive right over the same property wherein the respondents are occupying as mundkars does not arise at all. The learned Senior Counsel further submits that in case of threatened dispossession of the dwelling house, the respondents have a remedy under the said Act and, as such, the Civil Court has no jurisdiction to entertain any dispute which comes within the purview of the said Act. The learned Senior Counsel as such, submits that the first substantial question of law has to be answered in favour of the appellants.

With regard to the second substantial question of law,

the learned Senior Counsel has pointed out that the question of granting any relief to the respondents with regard to an easementary right of prescription would not arise at all considering that the appellants have purchased the plot in the year 1986 and the suit was also filed in the year 1986 and consequently, the period of 20 years had not elapsed to create such a right. The learned Senior Counsel further points out that both the Courts below have erroneously considered the claim of the respondents of easementary right of prescription without considering that the ingredients as required to claim such a right were found wanting in the pleadings, as well as the evidence on record. The learned Senior Counsel has, thereafter, taken me through the Judgments of the Courts below to point out that both the Courts below have erroneously decreed the suit filed by the respondents, without examining the fact that the right of access reserved to the respondents was a customary right of access. The learned Senior as such, submits that both the substantial questions of law are to be answered in favour of the appellants.

4. On the other hand, Shri M. B. Da Costa, learned Senior Counsel appearing for the respondents, has pointed out that the respondents have not yet been declared as mundkars and, as such, according to him, the question of contending that the respondents are only entitled to a customary right of access, is totally erroneous. The learned Senior Counsel further points out that the respondents have been using the suit access as a matter of right for the statutory period and, as such, the Courts below have rightly found that the respondents are entitled to the access by prescription. The learned Senior Counsel further submits that the appellants are third parties and, as such, according to him, the question of the appellants defeating the claim of the respondents of an access to come to the main road on the basis that the respondents are mundkars is not available to the appellants. The learned Senior Counsel further submits that both the Courts below, upon appreciating the evidence on record, have come to the conclusion that the respondents have been using the disputed access as a matter of right for the statutory period and, as such, the question of any interference in the findings of fact by this

Court would not arise. The learned Senior Counsel further submits that without prejudice to his aforesaid submissions, in case this Court comes to the conclusion that the Civil Court has no jurisdiction to entertain the suit, a protection may be granted to the respondents with regard to the disputed access to enable the respondents to file appropriate proceedings before the Mamlatdar. The learned Senior Counsel, as such, points out that the appeal be dismissed.

5. I have considered the submissions of the learned Counsel and I have gone through the record. The “dwelling house” as defined under the said Act, under Section 2(i)(iii) of the said Act includes the customary easement, if any, which the residents of the dwelling house have been enjoying for an access to a public road or a well or any other place. On plain reading of the said provision and the objects of the Mundkar Act, it is clear that protection has been given to the mundkars from eviction from his dwelling house, which naturally includes the customary right of access, as provided therein. Section 5 of the said Act further provides that a mundkar in possession of his dwelling house who apprehends that he may be dispossessed of the

dwelling house by or on behalf of the bhatkar contrary to the provisions of the Act may, in the prescribed manner, apply to the Mamlatdar for an order safeguarding his right of possession. Section 9 of the said Act further provides that if the bhatkar sells, exchanges, mortgages, or leases or in any manner transfers, his property where the dwelling house is situated, the right of the mundkar in the dwelling house shall not, in any way, be affected by such transfer. Reading of the said provisions conjointly of the said Act reveals that merely because a part of the property has been sold by the bhatkar in favour of the appellants, that, by itself, cannot affect the rights as protected under the said Act.

6. Section 31(2) of the said Act further provides that no Civil Court shall have jurisdiction to settle, decide or deal with any question or to determine any matter which is by or under the Act required to be settled, decided or dealt with or to be determined, by the Mamlatdar. Reading of the said provision makes it clear that the jurisdiction of the Civil Court is barred with regard to the matters which are to be dealt with by the Mamlatdar. As pointed out herein above, the respondents who are the plaintiffs in the suit, have put up their claim on the basis

that they are mundkars occupying a dwelling house in the disputed property. The respondents have a remedy to get their rights, if any, adjudicated before the Mamlatdar. In such circumstances, the Civil Court has no jurisdiction to deal with the issues which come within the ambit of the Mamlatdar. Considering that the claim of the respondents is of an access to a dwelling house, which is a matter which has to be examined in the context of the provisions of the Mundkar Act, the jurisdiction of the Civil Court is barred and consequently, the Judgments of the Courts below holding that the respondents have an easementary right of access to the dwelling house cannot be sustained.

7. Section 15 of the Easements Act provides that where the access and use of light or air to and for any building has been peacefully enjoyed therewith, as an easement, without interruption and for twenty years, such a person can get the right of easementary access by prescription. In order to avail of such a right, apart from using such an access for a period of 20 years, such person has to use such an access *as a matter of right*. In the present case, considering that the respondents are claiming to be mundkars of the property where the subject access is located, the respondents can claim only customary

easementary right of access as a matter of right. In such circumstances, considering the claim of the respondents, the Courts below were not justified to grant the reliefs sought by the respondents on the basis that they have acquired an easementary right of access by prescription. On perusal of the findings of the Courts below, I find that these aspects have not been gone into by the Courts below while passing the impugned Judgments. These issues go to the root of the matter in dispute which affect the jurisdiction of the Civil Court in deciding the matter. As such, I find that the Judgments of the Courts below cannot be sustained and deserve to be quashed and set aside. The substantial questions of law are answered accordingly.

8. In view of the above, I pass the following order :

(I) The appeal is allowed.

(II) The impugned Judgment and Decree passed by the learned Civil Judge, Junior Division, Panaji dated 29/11/1999 in Regular Civil Suit No.244/86/C and the impugned Judgment and Decree passed by the learned Additional District Judge, at Panaji dated 08/03/2007 in Regular Civil Appeal No. 1/2000, are quashed and set aside.

(III) The suit filed by the respondents stands dismissed.

Shri S. D. Lotlikar, learned Senior Counsel appearing for the appellants, upon instructions, states that for a period of six weeks from today, the appellants shall maintain status quo with regard to the disputed access to enable the respondents, if so advised, to take appropriate measures in accordance with law. The said statement is accepted.

The appeal stands disposed of accordingly.

F.M. REIS, J.

ssm.