

IN THE HIGH COURT OF BOMBAY AT GOA**SECOND APPEAL NO. 59 OF 2015**

Mr. Joaquim L. Almeida,
55 years of age, married,
son of Anthony Almeida,
resident of Rauta Vaddo,
Nagoa, Bardez Goa.

... Appellant

Versus

Mr. Luis Gonzaga D'Souza,
major of age,
resident of Bodiem,
Tivim, Bardez Goa.

... Respondent

Mr. Ashwin D. Bhobe, Advocate for the appellant.

Mr. S. D. Lotlikar, Senior Advocate with Ms. G. Xettigar, Advocate
for the respondent.

Coram:- F. M. REIS, J.

Date:- 1st April, 2016

ORAL JUDGMENT

Heard Mr. A. D. Bhobe, learned counsel appearing for the
appellant and Mr. S. D. Lotlikar, learned Senior Counsel appearing
for the respondent.

2. The above appeal challenges the judgment dated
20.02.2015 passed by the learned Lower Appellate Court whereby the

suit filed by the respondent was partly decreed and the appellant was directed to hand over the possession of the rear portion of the subject house to the respondent.

3. Mr. Bhobe, learned counsel appearing for the appellant has submitted that the respondent filed the suit on the ground that the respondent had given on lease an out house on 27.04.1984 and thereafter the front portion of the residential house located in the same property of Moira village. The learned counsel further points out that it is the case of the respondent that the rear portion of the said house bearing house No.737 was occupied by one of the aunties of the respondent and that after she left such portion, the appellant had trespassed into the rear portion of the house. The learned counsel further points out that the said house bearing No.737 was given on lease on 27.04.1984 and, thereafter, an out house was given on lease to the appellant when the rent was increased from Rs.100/- to Rs.200/-. The learned counsel further submits that from April, 1984 the appellant has been occupying the entire house as a tenant and as such the learned Lower Appellate Court was not justified to come to the conclusion that the appellant is liable to be evicted from the rear

portion of the house when such relief, if any, could be granted only by the Rent Controller. The learned counsel further pointed out that as the appellant is a tenant of the entire subject house, the learned Lower Appellate Court had no jurisdiction to direct the eviction of the appellant. The learned counsel further submits that the contention of the respondent that the house bearing No.737 has two portions being the front portion and the rear portion is totally misconception as according to him the entire house was given on lease to the appellant. The learned counsel has taken me through the judgment of the learned Lower Appellate Court to point out that the learned Judge has erroneously appreciated the evidence on record and come to the conclusion that the appellant was liable to be evicted from the rear portion of the house. The learned counsel further submits that the learned Lower Appellate Court has erroneously put the burden on the appellant to show that the entire house was given on lease when on the contrary the burden was on the respondent to establish that the rear portion of the house was not given on lease to the appellant as alleged. The learned counsel thereafter has pointed out that as there is a jurisdictional error in passing the impugned judgment, there are substantial questions of law which arise in the present appeal for

consideration. The learned counsel has also pointed out that there is an erroneous burden cast on the appellant which has caused grave prejudice to the case of the appellant. The learned counsel as such points out that there are substantial questions of law for consideration by this Court in the present Second Appeal.

4. On the other hand, Mr. S. D. Lotlikar, learned Senior Counsel appearing for the respondent has supported the impugned judgment. The learned Senior Counsel pointed out that the learned Lower Appellate Court has minutely examined the evidence on record and based on the documents as well as the oral evidence coupled with the admission of DW1 has come to the conclusion that the appellant was not given the rear portion of the house on lease as claimed by the appellant. The learned Senior Counsel has thereafter pointed out that even in the written statement filed by the appellant, it is clearly averred at para 2 that an out house was given on lease in April, 1984. The learned Senior Counsel further submits that on this admission itself the contention of the learned counsel appearing for the appellant that the entire house was given on lease in April, 1984 is totally erroneous. The learned Senior Counsel further pointed out that based on the replies of DW1 in the cross examination who had no

knowledge about the nature of the rear portion of the house, the learned Lower Appellate Court has come to the conclusion that the rear portion was not given on lease to the appellant. The learned Senior Counsel has also taken me through the subsequent agreement which is otherwise styled as an affidavit to point out that it is merely stated that the front portion of the house was given on lease to the appellant. The learned Senior Counsel as such points out that the appeal be rejected.

5. I have considered the submissions of the learned counsel and I have also gone through the records. The bone of the contention of Mr. Bhobe, learned counsel appearing for the appellant is that in April, 1984 the entire house was given on lease to the appellant and that subsequently, the rent was increased to Rs.200/- when an out house was also given to the appellant by the respondent. But however, on going through the written statement at para 2, it is the case of the appellant that the out house was given on lease in April, 1984. As such, the contention of the appellant that the entire house was given on lease in April, 1984 cannot be accepted based on the pleadings of the appellant himself.

6. With regard to the next contention of Mr. Bhobe, I find that the learned Lower Appellate Court upon appreciating the evidence on record and considering the deposition of DW1 as well as the subsequent document executed between the parties has come to the conclusion that the appellant was given on lease only the front portion of the residential house bearing no. 737. The learned Judge as such found that the appellant was not entitled to occupy the rear portion of the house which was not given on lease. The said findings of fact arrived at by the learned Lower Appellate Court cannot be reexamined by this Court in the present Second Appeal under Section 100 of the Civil Procedure Code unless there is perversity in such findings of fact. The findings with that regard arrived at by the learned Lower Appellate Court are based on the oral testimony of PW1 as well as DW1 besides the documentary evidence. Even on perusal of the document which is otherwise styled as an affidavit dated 01.05.1989, it clearly indicates that the parties had segregated the front portion from the rear portion of the subject house bearing No.737. This can also be considered in the context of the observations of the learned Lower Appellate Court that DW1 was not at all aware about the topography of the rear portion of such house. Apart from

that, DW1 has also admitted that the rear portion of the house has got no electricity supply whereas the front portion of the house has electricity supply. These findings of fact arrived at by the learned Lower Appellate Court cannot be re-appreciated by this Court in the present Second Appeal. The fact that the subject house had two portions, one being the front portion and other the rear portion is clearly culled out from the documentary evidence as well as the admissions of DW1 himself. In such circumstances, I find that there is no perversity in such findings and as such the question of entertaining the present appeal would not arise at all as there is no substantial question of law which arises in the present appeal.

7. With regard to the contention of Mr. Bhobe, learned counsel appearing for the appellant that the learned Lower Appellate Court had no jurisdiction to direct the eviction of the appellant, I find that to examine the aspect of jurisdiction would depend upon the findings of fact as to the portion of the premises which were leased to the appellant. The fact finding Court has come to the conclusion that what was leased to the appellant was an out house and the front portion of the house. As pointed out herein above, there is no

perversity in such findings. On going through the judgment of the learned Trial Judge dated 27.09.2012, I find that the learned Judge had framed three issues. Upon appreciating the evidence on record, the learned Judge came to the conclusion that the respondents have proved that they were the owners of the suit property. Whilst dealing with issue no. 2, the learned Judge came to the conclusion that the respondents had failed to prove that the front portion of the suit house was leased to the appellants. While rendering the finding on such issue, the learned Judge noted that Pw.1 in the cross examination had admitted that he does not have any documentary evidence to show that the front portion of the suit house including the verandah and the room was given on lease in 1983. The learned Judge as such noted that as such the eviction of the respondents could be granted under the Goa, Daman and Diu Rent Control Act as Section 56 of the Rent Control Act bars the jurisdiction of the Civil Court to settle, determine and deal with any question which is barred under the said Act. The learned Judge, as such, partly decreed the suit filed by the appellants in terms of prayer 'a' part and 'b' part. Consequently, the respondents were directed by mandatory injunction to remove all the wooden logs and the waste material belonging to the respondents if

stored and kept in the property surveyed under no. 6/15. On perusal of the said findings of the learned Trial Judge, I find that the learned Judge has failed to consider that the evidence of Dw.1 and the fact that the defendants themselves admit that the front portion was given on lease to the appellants by the respondents and the other material which has been rightly noted by the learned Appellate Court whilst unsettling the said findings of the learned Trial Judge.

8. On perusal of the Judgment of the learned Lower Appellate Court, the learned Appellate Court has framed five points for determination. The learned Appellate Court found that the cross objections filed by the respondents were maintainable. The learned Judge also noted that the appellants have failed to establish that the Civil Court had no jurisdiction to grant the relief as prayed for. The learned Judge also noted that the learned Trial judge erred in not granting the relief of possession of the back portion of the suit house. The learned Appellate Court further noted that the learned Trial Judge had granted relief in property surveyed under no. 6/15. The learned Judge also modified the relief granted in connection with the property surveyed under no. 6/15. On perusal of the findings of the learned

Judge, I find whilst discussing the point nos. 2 and 3, the learned Judge noted that there was no documentary evidence to suggest that the whole house was given on lease to the appellants. The learned Appellate Court has noted the evidence of Dw.1 and found that there is no iota of evidence on record to show that the entire front house and/or the back portion of the suit house was leased to the appellants by the respondents and, consequently, the learned Trial Judge erred in coming to the conclusion that he had no jurisdiction to grant the relief as prayed for in the plaint. The learned Judge thereafter noted the evidence of Dw.1 in the cross examination and found that the picture which emerges is that the appellant has no documentary evidence even to suggest that the back portion of the suit house was leased to the appellants by the respondents and the appellant has no knowledge as to what is there in the back portion of the suit house which the appellant claimed to be in possession as a lessee. The appellant has shown his ignorance about the material aspects/physical description of the back portion of the suit house which clearly implies thereby that the appellant is completely unaware of even the nature of the back portion of the suit house. As far as the identity of the front portion and the back portion is concerned, the learned Lower

Appellate Court has considered the evidence of Pw.1, who has also produced a sketch at Exhibit 63 Colly which remained unchallenged by the appellants. The learned Appellate Court upon minutely appreciating the evidence on record, has found that the rear portion of the house was not given on lease to the appellants and, consequently, granted relief to that effect in favour of the respondents herein. The learned Lower Appellate Court accordingly partly allowed the appeal as well as the cross objections and, consequently, directed the appellant by a mandatory injunction to remove all the logs, waste material and any other material belonging to him kept in the back portion of the suit house consisting of the dinning hall, one bed room, one store room, one kitchen and bathroom and the back verandah as shown in the plan at Exhibit 63 Colly of Pw.2 and to handover the vacant possession thereof to the respondent and also remove the locks of the gates leading to the suit properties. The learned Judge also protected the ingress to the portion of the house occupied by the appellant. As already pointed out herein above, the only contention raised by Mr. Bhobe, learned counsel for the appellant, was to assail the finding of the Lower Appellate Court to grant the mandatory injunction to vacate the rear portion of the suit house. As pointed out

herein above, there is no perversity in the finding of the learned Lower Appellate Court whilst coming to the conclusion that the respondents are entitled to get such relief based on the oral and documentary evidence on record.

9. Consequently, the learned Lower Appellate Court was justified to modify the relief granted by the learned Trial Judge and direct the eviction of the appellant of the rear portion of the suit house. Hence, I find that there are no substantial questions of law which arise in the present Appeal for consideration.

10. Consequently, there is no merit in the above Appeal which stands accordingly rejected.

F. M. REIS, J.

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