

IN THE HIGH COURT OF BOMBAY AT GOA**SECOND APPEAL NO. 149 OF 2004**

1. Jose Caetano Fernandes,
1(a) Santan Fernandes,
major in age,
residing at Nuvem,
Salcete Goa.

1(b) Piedade Fernandes,
major in age,
residing Nuvem, Salcete Goa.

1(c) Caetano Fernandes,
major in age,
residing Nuvem, Salcete Goa.

1(d) Femi Fernandes,
major in age,
residing at Gorvotti, Nuvem,
Salcete Goa.
2. Maria Fernandes,
major of age, housewife,
both residing at Gorvoti,
Nuvem, Salcete Goa.

..... Appellants

Versus

1. Mr. Jose Inacio Fernandes,
son of Piedade Fernandes,
major in age,
agriculturist,
2. Mr. Roque Francisco Fernandes,
son of Piedade Fernandes,
major in age,
businessman, and his wife

3. Mrs. Brigida Fernandes,
major in age, housewife,
All residing at Gorvoti,
Nuvem, Salcete Goa.
4. Mrs. Quiteria Fernandes,
widow of Marcelino Pereira,
major in age, housewife,
5. Mrs. Mary Fernandes,
major in age, housewife,
6. Mr. Joao Rosario Pereira,
son of Marcelino Pereira,
and his brother,
7. Mr. Brito Pereira,
major in age,
All residing at Sirvodem,
Navelim, Salcete Goa.
8. Mr. Bernado Fernandes,
major of age,
resident of Telaulim,
Navelim, Salcete Goa.
9. Mr. Pedro Rodrigues,
major of age,
and his son
10. Mr. Carmo Rodrigues,
major of age,
and his brother
11. Mr. Alexandre Rodrigues,
major of age,
All residing at Bibdi,
Benaullim, Salcete Goa.

12. Mrs. Antonetta Rodrigues,
d/o Pedro Fernandes,
major of age, housewife,
and her husband
13. Mr. Agnelo Fernandes,
major of age,
both residing at Paroda,
Salcete Goa
14. Mrs. Ivona Rodrigues,
d/o Pedro Fernandes,
major of age,
housewife and her husband
15. Mr. Ivon Fernandes,
major of age,
both residing near Maria Hall,
Benaullim, Salcete Goa.
16. Mrs. Dumiana Fernandes,
major of age, housewife,
resident of Gorvoti,
Nuvem, Salcete Goa
17. Mr. David Pereira,
major of age,
resident of Sirvodem, Navelim,
Salcete Goa.
18. Mrs. Angelina Pereira,
widow of Roque Fernandes,
d/o Marcelino Pereira,
Telaulim, Navelim,
Salcete Goa.

..... Respondents

Mr. V. A. Lawande, Advocate for the appellants.

Mr. S. D. Lotlikar, Senior Advocate with Ms. M. Furtado, Advocate for the respondents.

Coram:- F. M. REIS, J.

Date:- 23rd February, 2017

ORAL JUDGMENT

Heard Mr. V. A. Lawande, learned counsel appearing for the appellants and Mr. S. D. Lotlikar, learned Senior Counsel appearing for the respondents.

2. The above appeal came to be admitted by an order dated 25.08.2005 on the following substantial questions of law.

(i) Whether it was open to the Lower Appellate Court even to entertain the claim of the defendants to some kind of title to the suit cattle-shed in view of the fact that the defendants had neither challenged the validity of Deed of Sale dated 28.04.1982 as infringing on their alleged rights upon the said cattle-shed nor made any counter -claim in the suit or otherwise ?

(ii) Whether the Lower Appellate Court had the jurisdiction to find ownership title to the suit cattle-shed in favour of the defendants when the express claim of the said defendants in the memorandum of appeal (Grounds E, F, G, M, Q, R, S and V) was that they were Mundkars with regard to the said cow shed ?

3. Briefly, it is the case of the appellants-plaintiffs that the appellant no. 1, and the respondent no. 3 are the sons of late Piedade Fernandes, who also had two daughters. The remaining heirs are the successors of the said Piedade Fernandes. The said Piedade Fernandes according to the appellants, had a house in the property of Krishna Angle and the appellant no. 1 during the lifetime of his parents, started his independent business of milk and for that purpose, he purchased cattle heads and buffaloes. Thereafter, the appellants shifted from the mundkarial house of his parents and constructed another house in the property of the said Krishna Angle which is located in front of the mundkarial house of his parents which was thereafter purchased in the year 1982. The father also had a cattle shed which is located in the

property of the said Krishna where the appellant no. 1 was also tying his cattles but, however, about ten years before the filing of the suit, the appellant constructed a new cattle shed in the land purchased by the appellants. The old cattle shed of his father is located in the property purchased by the appellant no. 1 whereas the ancestral house of the appellants wherein the father was also residing as a mundkar is located in the property belonging to Krishna Angle and there is another cattle shed which is also located in the property of Vassudev Angle. The ancestral house of the parents of the appellant no. 1 is at a distance of more than 100 metres from the said cow shed which falls in the property of the appellant no. 1. As the said cattle shed was at a distance of more than five metres from the dwelling house, the appellant no. 1 requested the respondent nos. 1 and 3 to remove the said cow shed which is having palm leaf roof which is resting on one pillar without any wall. But, however, the said respondents did not accede to the demand and, as such, the suit came to be filed, inter alia, praying for a mandatory injunction to remove the said cattle shed situated in the property belonging to the appellant no.

1 and also for a permanent injunction.

4. The respondents filed their written statements disputing the claim put forward by the appellants. The respondents denied that the appellant was keeping his cattles in the subject cattle shed. It is further contended that only when the appellant constructed a house by force by demolishing the existing storeroom of the parents the appellants purchased the cattle heads. It is also contended that the property purchased by the appellant is from the income of the family business only and the house constructed was also from the family business which belongs to all the brothers and are as such equally entitled to the land and the existing house. It is further contended that the ancestral house which is a mundkarial house belongs to all the brothers. It is further contended that the property as well as the house has been constructed by the appellants from the family business income and, as such, they are all jointly entitled to the land as well as to the house.

5. The learned Trial Judge by Judgment dated 23.03.2000, decreed the suit filed by the appellants. The learned Trial Judge whilst examining issue no. 1 and on the basis of the documentary evidence produced on record as well as the oral evidence, has noted that Dw.1 in his cross examination had stated that he cannot say even by approximation how much the plaintiff had spent to construct his new house nor the amount used from the income of the family business though he claims that it was constructed from the family income of the family business. The learned Judge upon appreciating the evidence on record, has found that the respondents have failed to discharge the burden of proof in proving the issue by failure to produce any positive evidence that the property was constructed from the joint funds as claimed by the respondents. Whilst discussing issue nos. 2 and 3, the learned Judge has noted that Dw.1 in his cross examination has admitted that the old cow shed falls in the property of the appellant no. 1. Dw.1 has also deposed that the new cow shed built by him and his brothers is about 100 metres from the house which was constructed 25 years back. He has

also admitted that a new cow shed constructed by him falls in the property of the appellant no. 1. The learned Judge noted that such act on the part of the respondents was of a trespasser as they had no right to the land therein. The learned Judge also noted that by Deed at exhibit Pw.1/A dated 28.04.1982, the property came to be purchased by the appellant no. 1. The learned Judge as such found based on the admission of Dw.1 that they are the joint holders of the adjoining mundkarial plot and that the property surveyed under no. 75/1A is the exclusive property of the Pw.1. The learned Judge further noted that the respondents have encroached into the suit property and, as such, the respondents have no right at all to the cow shed located in the property belonging to the appellants herein. As such, the suit came to be decreed by the learned Trial Judge.

6. In the Appeal preferred before the learned Lower Appellate Court, the learned Appellate Judge has framed five points for determination. While deciding the point nos. (a) and (b) for determination, the learned Judge upon appreciating the

evidence on record, noted that the appellants have established their ownership and title over the suit plot bearing no. 75/1A and that the old cattle shed is at a distance of 100 metres from the ancestral mundkarial house. Whilst examining the third point for determination, the learned Lower Appellate Court noted that the Trial Court had misconstrued the pleadings and the reliefs sought by the appellants as the mandatory injunction was to demolish the cow shed built by the father and the permanent injunction was not to tie the cattle in such cow shed. The learned Judge noted that there is no pleading in the plaint that about ten years back, the respondent nos. 1 and 3 started forcibly tying the buffaloes in the said old cow shed but what was pleaded is that the appellants had stopped using the cow shed about ten years back. The learned Judge further noted that the suit cow shed originally belonged to the father of the appellant no. 1 and the respondent nos. 1, 3 and 5 and, as such, they have jointly inherited the rights to the same. The learned Trial Judge and the learned Lower Appellate Court also noted that the case of the appellants that no cow shed can exist beyond five metres of the

dwelling house of the mundkar which, according to the learned Judge, is a matter which has to be examined by the Mamlatdar under the Mundkar Act. In such circumstances, the learned Lower Appellate Court allowed the appeal filed by the respondents herein. Being aggrieved by the said Judgment of the learned Lower Appellate Court, the appellants have preferred the present Appeal which came to be admitted on the aforesaid substantial question of law.

7. Mr. V. A. Lawande, learned counsel appearing for the appellants submitted that pursuant to the sale deed dated 28.04.1982 the appellants had purchased a portion of the larger property beyond the house occupied by the respondents. The learned counsel further submitted that there is no challenge to the said sale deed and as such the learned Lower Appellate Court was not justified to examine the validity or otherwise of such sale deed. The learned counsel further pointed out that the subject matter of the dispute in the present appeal is the cow shed which is admittedly located at a distance of 100 metres from the

dwelling house which was occupied by the parents of the appellants and the respondents. The learned counsel further pointed out that it is not disputed that the area where the cow shed is located belong to the appellants pursuant to the sale deed and as such the respondents have no right to occupy such cow shed and consequently, the learned Lower Appellate Court was not justified to refuse such relief to the appellants. The learned counsel has thereafter taken me through the impugned judgment passed by the learned Lower Appellate Court to point out that the learned Judge has erroneously examined whether the cow shed was part of the mundkarial house of the respondents as according to him the Civil Court has no jurisdiction to examine such aspect. The learned counsel further submitted that in any event as admittedly the cow shed is located 100 metres away from the subject dwelling house, there is no question of such cow shed being a part of the dwelling house as defined under the Mundkars Act. In support of his submissions, the learned counsel has relied upon the judgment of the Division Bench of this Court passed in ***Letters Parent Appeal No.7 of 2012 dated 04.12.2012*** in the case

of ***Shree Nagesh V. Bodke V/s Shri Vassudev R. Poi &Anr.***

The learned counsel as such points out that the impugned judgments passed by the Courts below deserve to be quashed and set aside.

8. On the other hand, Mr. S. D. Lotlikar, learned Senior Counsel appearing for the respondents submits that the appellants and respondents are co-mundkars of the dwelling house which was originally occupied by their parents and as such according to him the cow shed is a part of the dwelling house which is in co-ownership of the appellants and the respondents. The learned Senior Counsel further submitted that as such the appellants are not entitled to seek a relief of mandatory injunction to demolish the cow shed as according to him the cow shed belongs to the appellants and the respondents. The learned Senior Counsel further submitted that as the cow shed is a part of the dwelling house, the learned Lower Appellate Court has rightly refused the relief of demolishing the subject cow shed. The learned Senior Counsel further pointed out that as such there is no infirmity committed by the learned Lower Appellate Court while passing

the impugned judgment. The learned Senior Counsel further pointed out that as the cow shed is a part of the dwelling house, the sale deed executed in favour of the appellants has no legal effect as far as the area of the cow shed is concerned.

9. I have considered the submissions of the learned counsel and I have also gone through the records. As pointed out herein above, the learned Lower Appellate Court has essentially found that whether the respondents have a right to the subject cow shed which is admittedly located at a distance of 100 metres of the mundkarial dwelling house, is a matter which would have to be examined by the learned Mamlatdar. But, however, the protection to a mundkar under the Mundkar Act is to the dwelling house as defined under the Mundkar Act. The extent of the right of a mundkar to purchase the dwelling house has been clearly examined by the Division Bench of this Court wherein it has been held inter alia that the right of the mundkar at the most extend to the area of the land and the existing dwelling house as specified in the Mundkar Act. The suit cattle shed

admittedly is beyond the dwelling house as defined under the Mundkar Act and, as such, the learned Lower Appellate Court was not justified to refuse the relief sought by the appellants in the Suit.

10. It is to be noted that the subject cattle shed is adjoining the dwelling house of the appellant no. 1 which he has constructed out of his own income and, has also built a cow shed much beyond his residential house. The parties were given opportunities to settle the matter and in fact the matter was adjourned from time to time whereby the appellants even accepted that they would provide some space close to the ancestral mundkarial house to enable the respondents to put up a cattle shed which was not accepted by the respondents herein. But the records clearly reveal that the appellants pursuant to the Sale Deed dated 28.04.1982 which is at Exhibit Pw.1/A, the land where the subject cattle shed is located has been purchased by the appellants herein. The appellants called upon the respondents to remove the cattle shed which they refused to accede to such

demand which led to the filing of the suit. The appellants being owners of the land are entitled to seek demolition of the cattle shed as the respondents have failed to establish any right to occupy such cattle shed. The cattle shed admittedly does not fall within the area as defined being the dwelling house under the Mundkar Act and, as such, the respondents who were claiming their right on the basis of the fact that they were mundkars of the ancestral house cannot retain the cattle shed which is much beyond the area of the dwelling house as defined in the Mundkar Act. The respondents have no right to occupy such cattle shed after the notice by the appellants and, as such, the learned Trial Judge was justified to grant the relief sought by the appellants. The learned Lower Appellate Court has failed to note that as the subject cattle shed was admittedly beyond the area of the dwelling house as defined under the Mundkar Act, and as such the respondents had no right to continue to use such cattle shed.

11. The claim of the respondents that the property as well as the house constructed by the appellants belonging jointly to

the respondents and the appellants, has been concurrently rejected by the fact finding Courts below. These findings have not been assailed by the respondents in the present Second Appeal. In such circumstances, as the subject cattle shed is admittedly beyond the dwelling house, the respondents are not entitled to use such cattle shed which is located in the portion of the property purchased by the appellants. The first substantial question of law is answered accordingly.

12. As far as the second substantial question of law is concerned, the Division Bench of this Court while examining whether the definition of the dwelling house can extend beyond the area as defined as a dwelling house in terms of the Mundkars Act has come to the conclusion that any structure referred to as being the part of the dwelling house would have to be located within the area of five metres from the plinth area of the existing house or 300 metres as per the option. The Division Bench of this Court in the case of ***Shree Nagesh V. Bodke*** (supra) has observed at paras 12 & 15 thus.

“12 Thus the maximum extent of land around or appurtenant to the dwelling house which a mundkar is entitled to purchase, in terms of Section 15(2), is as indicated under sub clause (I) of clause (I) of section 2.

15. Admittedly, the mundkarial residential house of the appellant is situated in the property bearing survey no.55/0 of Pernem Village and the suit premises, connected with the business of the appellant, is situated at a distance of about 500 metres away from the residential house, in the property bearing survey no.54/3. Admittedly, the suit premises is beyond the maximum area as indicated under section 2(i) of the Mundkars Act with reference to the dwelling house defined therein. It is, therefore, clear that the appellant would not be in a position to purchase the land beneath the flour mill since the same is beyond the permitted area. It cannot be accepted that the provisions of Mundkars Act do not bar any mundkar to have two separate units, one to use as residence and another to carry out business

activities and at two different places beyond the limit prescribed under Section 2(i) of the Mundkars Act. The proper interpretation, keeping in view the object and purpose of the Mundkars Act, would be that all the structures referred to in Section 2(i) of the said Act as forming part of the dwelling house have necessarily to be situated within the area of 300 sq. metres or 5 metres around the house of the mundkar in case of Panchayat area and within the area of 200 sq. metres or 2 metres around the house in case falling outside such area. In the circumstances above, the view taken by the learned Single Judge in the case of “ **Antonio Salvador Francisco Joaquim Clemente Mesquita & Anr.**” (*supra*) and the learned Single Judge in the impugned judgment, in our considered opinion, is in consonance with the provisions of the Mundkars Act and is a correct view.”

13. In the present case, it is not in dispute that the subject cattle shed is located at a distance of 100 metres from the existing plinth area of the dwelling house occupied by the respondents. In

such circumstances, the question of such cattle shed being a part of the dwelling house cannot be accepted. The subject shed located in the property exclusively belongs to the appellants pursuant to the sale deed executed in their favour. It is well settled that the possession follows title. As the respondents are not entitled to continue to occupy the subject cow shed, the question of continuing to occupy such cow shed does not arise at all.

14. The contention of Mr. Lotlikar, learned Senior Counsel appearing for the respondents that the appellants and the respondents are co-mundkars of the cow shed cannot be accepted. The cow shed does not come within the definition of a dwelling house in the Mundkar Act. The dwelling house is clearly defined under the Mundkar Act and considering the view taken by the learned Division Bench of this Court confirming the view taken by the learned Single Judge, the protection to the mundkar is only to the dwelling house within the area as defined in the Mundkar Act. As such, I find that the learned Lower Appellate Court was not justified to refuse the relief sought by

the appellants. The second substantial question of law is answered accordingly.

15. In view of the above, I pass the following :

ORDER

- (i) The appeal is partly allowed.
- (ii) The impugned judgment and decree dated 23.08.2004 passed by the learned Lower Appellate Court is quashed and set aside.
- (iii) The judgment of the learned Trial Judge dated 23.03.2000 stands confirmed.
- (iv) The respondents are accordingly directed to remove the cow shed within nine months from today and in default thereof, the appellants are at liberty to demolish the said cow shed in accordance with law.
- (v) The appeal stands disposed of accordingly with no order as to costs.

F. M. REIS, J.

at*