

IN THE HIGH COURT OF BOMBAY AT GOA

SECOND APPEAL NO. 125 OF 2013

Mr Joseph Michael Pereira

..... Appellant

V e r s u s

1. Smt. Eliza A. M. Coutinho & Others

..... Respondents

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

Mr. Sudin Usgaonkar, Senior Advocate with Ms. Tanvi Ghanekar, Advocate for the Respondent nos. 2(a), 2(b)(i), 2(b)(ii), 2B(iii), 2(c) and 2(d).

Coram :- F. M. REIS, J

Reserved for Order on Date: 24th March, 2017

Order Pronounced on Date : 20th April, 2017

ORDER

Heard Mr. S. D. Lotlikar, learned Senior Advocate appearing for the Appellant and Mr. Sudin Usgaonkar, learned Senior Advocate appearing for the Respondent nos. 2(a), 2(b)(i), 2(b)(ii), 2(b)(iii), 2(c) and 2(d).

2. The above Appeal challenges the Judgment passed by the Lower Appellate Court, whereby the Suit filed by the Respondents was partly decreed and the Appellant, his servants and agents were evicted from the suit garage and the vacant possession thereof was ordered to be handed over to the Respondents by the Court Receiver and the Gift Deed dated

09.03.2005 was declared null and void.

3. Briefly, it is the case of the Appellant that the Respondent-Original Plaintiff filed the suit for recovery of possession in the trial Court on the stand that they are in possession of a property of an immoveable property along with a building situated therein which is surveyed under chalta no. 107 to 209 of P. T. sheet no. 135 of Mapusa City which is registered in the Land Revenue Officer under no. 914 of Bardez Taluka and bears Municipal no. 171/5. The said building consists of two floors while on the southern side of the said building, beneath the ground floor, there is a basement whereas the entire first floor and the second floor is occupied by the Respondent for their residential purpose. The back side portion of the ground floor which is not in the level of the road consisting of four compartments, is in possession of the Respondents whereas all the other premises on the ground floor are let out to various people for commercial and residential purposes. It is further the case of the Respondents that the basement is divided into three compartments and that though such compartments are separated by masonry walls, they are connected by openings for doors. The middle compartment is a garage in possession of the Respondents herein. The compartment towards west of the said garage is let out to M/s. Autolite Batteries and the door between the suit garage and the said premises is located on both the sides. The compartments towards east of the suit garage is let out to the Appellant no. 1-Defendant no. 1 in the

suit for business of ladies tailoring in the name and style of 'La Madame' and it does not have a door. The open space for the door has been closed by the Respondents by means of a wooden sheet and that the Appellant no. 1 had kept cupboards with pigeon holes on his side in the compartment. It is also contended that the garage has a metallic rolling shutter and the Respondents used to park their two scooters in the said garage and store some other belongings. It is further contended by the Respondents that the Appellant has his cloth business in the name and style of 'Mac Style' on the ground floor whereas in the room at the basement he was conducting business of ladies tailoring in the name of 'La Madame'. The Appellant used to ask the Respondents to allow him to use the said suit garage but, however, the request was turned down. It is further their case that on 02.04.1987, the Appellant came to the suit garage with a group of persons armed with implements like electric drills and pick-axe and cut off and broke open the two locks put to the rolling shutter of the suit garage by the Respondent and took forceful possession of the suit garage and threw out the belongings of the Respondents lying there. A police complaint was also lodged to that effect. The original Defendant no. 8 has executed a Gift Deed dated 09.03.2005 in favour of the Appellant which is ab initio void and not binding on the Respondents. It is as such contended that the Respondents are entitled for the recovery of possession and for other reliefs and, as such, the suit came to be filed seeking the eviction of the Appellant from the suit garage.

4. The Defendant no. 1(a)/Appellant herein, filed their written statement disputing the claim put forward by the Respondents. It is the case of the Appellant that he is the tenant of the Respondent no. 1 in respect of one room in the basement consisting of two outer doors and a window. It is also contended that there is an internal office which has an opening of about four square feet to its ceiling giving access to the room on the ground floor of the said building which is also leased to the Appellant. It is further contended that the said Appellant is carrying out business of ladies tailoring on the basement room in the name of 'La Madame' and the Gents Tailoring on the ground floor in the name of 'Mac Style' and that the said opening on the ceiling is an internal connection between the said two premises. It is further contended that as the suit garage is part of the tenanted premises, the Civil Court has no jurisdiction. It is further contended that the Respondent no. 1 has no right to use and occupy the premises as garage without obtaining permission from the Municipality. It is also pointed out that from December 1986, the renovation work of 'La Madame' was in progress and all of sudden in the end of March 1987, the Respondent no. 1 came with a proposal that the Respondent no. 1 should be permitted to keep in such compartment his scooter. It is also pointed out that thereafter the Respondent no. 1 brought useless materials and kept it on the road with a request to the Appellant to keep it in one of the corners of the compartments of 'La Madame'. The Appellant also disputed the claim of trespass put

forward by the Respondents and, as such, prayed that the suit be dismissed.

5. It is the claim of the original Defendant no. 8, that the said Defendant is the co-owner of the suit building and is married to Freda Coutinho i.e. the original Plaintiff no. 2(c). It is further alleged that there is no garage and that the parents of the original Plaintiff no. 2(c) were not happy with the marriage of such Defendant with their daughter and, as such, they filed a false criminal case against the Appellant no. 1 who is related to him.

6. The learned Trial Judge by Judgment dated 02.4.2007, has framed three issues and one additional issue. Whilst appreciating the evidence on record, the learned Judge whilst discussing issue no. 1, has come to the conclusion that the Respondents have failed to establish that the Appellants had forcefully entered the suit garage. The learned Judge has further found that the Appellants have established that the suit garage was in possession of the Appellants as tenants. The learned Judge also found that Respondents have failed to establish that the disputed Gift Deed is null and void. In the Appeal preferred by the Respondents before the Lower Appellate Court, being Regular Civil Appeal no. 46/2007 which came to be disposed of by Judgment dated 08.02.2013. The Lower Appellate Court has framed three points for determination. Whilst examining the first point for determination, the learned Judge noted that there is no dispute that the Respondents were the owners in respect of the entire building under no.

171/5 situated in the property surveyed under chalta no. 107 to 109 of P. T. Sheet no. 135 of Mapusa City. The learned Judge also noted that it is not disputed that the Appellant no. 1 is occupying two rooms/premises on the ground floor as a tenant and one room/premises of such building. The learned Judge further found that all the three compartments are separated by masonry wall but are interconnected with an opening for the door. But, however, it is the contention of the Respondents that the basement is divided into three compartments whereas the case of the Appellants that the basement is divided into only two compartments. It is also an admitted position that the western side of the compartment has been leased to one M/s. Autolite Batteries. The learned Judge also noted that there is also an opening of four square feet on the ceiling of the middle compartment and the basement of the building. The learned Judge noted that mere such opening would not lead to the conclusion that the Appellant was in possession of the disputed middle compartment. The learned Judge on the basis of the material on record found that the claim of the Respondent-Plaintiff that the Appellant had approached him to give the middle compartment , was more plausible. The lease Agreement on record at exhibit Dw.1/P1 is in respect of the ground floor where 'Mac Tailors'; is functioning. The learned Judge further noted that Dw.1, who is the Attorney of the original Defendant no. 1, had admitted the contents of the Advocate's notice at exhibit Dw.1/P1 wherein there is a clear mention of only one room on the basement being leased out to the Appellant no. 1. The admitted position is that the

Defendant no. 1 did not enter the witness box. The learned Judge also noted that it was necessary that the Defendant no. 1 should have entered the witness box to establish the extent of the leased premises. The learned Judge also noted that exhibit Pw.3/D clearly shows provisions made for the proposed underground garage or the garage underground in the basement of such building. The Lower Appellate Court also examined the oral evidence produced by the parties and found that the photographs on record disclose the existence of a motorcycle in the disputed compartment as well as the wooden door. The learned Judge has minutely examined the photographs on record and found that the material gives credence to the case of the Respondents that the Appellant no. 1 trespassed into the compartment of the suit garage only in April 1987 and thereafter the premises are seen renovated as depicted in the photograph at exhibit Pw.3/I. The learned Judge took note of the acquittal of the Appellant no. 1 and noted that the standard of proof required in a criminal case differs from the standard of proof in a Civil case and on the basis of the testimony on record of Pw.1, Pw.2 and Pw.3, the learned Judge noted that they have stated that on 02.04.1987 at about 2.30 p.m., the Appellant along with some other persons, forcefully opened the shutter leading to the suit compartment. The learned Judge on the basis of the material on record, has come to the conclusion that there is sufficient material to prove the forceful entry of the Appellant no. 1 in the suit compartment on 02.04.1987 based on even the independent witness examined by the Respondent. The learned Judge had

also examined the evidence produced by the Appellant and noted that the evidence of Dw. 2 who had done the work was not material to examine the extent of the premises leased. The learned Judge as such found that the suit compartment was kept by the Respondents for their own use for keeping the two scooters and other unused belongings and that such compartment is in possession of the Court Receiver in view of the Order passed by this Court whilst disposing of the Appeal From Order on 28.04.1988. Whilst discussing the point for determination no. 2, the learned Judge noted that the Gift Deed dated 09.03.2005, was executed solely by late Defendant no. 8 in favour of the Appellant no. 1 in respect of one-fifth undivided share in the said building. The learned Judge noted that it is the case of the Defendant no. 8 that he got married to Plaintiff no. 2(c) on 24.04.1989 and, consequently, in view of the provisions of Article 1119 of the Portuguese Civil Code, the said Defendant no. 8 could not convey any property in favour of the said Plaintiff no. 2(c). In the present case, there is no consent of the Plaintiff no. 2(c) to execute the Gift Deed and consequently such Deed is null and void. The learned Judge as such noted that the learned Trial Judge has failed to note or draw any inference as against the Appellant no. 1 for having not stepped in the witness box. The learned Judge also failed to note Article 1119 of the Portuguese Civil Code and, as such, set aside the Judgment of the learned Trial Judge and partly decreed the suit filed by the Respondents.

7. Shri S. D. Lotlikar, learned Senior Advocate appearing for the

Appellant, has vehemently argued that the subject compartment was part of the leased premises wherein the Appellant was conducting business of 'La Madame'. Learned Senior Advocate further pointed out that the business of the Appellant no. 1 had two sections one is the Men's Section which is 'Mac Tailors' which was being run on the ground floor whereas the Ladies compartment 'La Madame' was being run on the basement. It is further pointed out that the learned Lower Appellate Court has failed to note that there was an opening connecting the ground floor with the basement which led to the disputed suit garage which would itself show that the disputed premises was also part of the leased premises. Learned Senior Advocate further submits that merely relying on the Advocate's notice would not by itself defeat the claim of the Appellant no. 1 that the disputed premises were part of the leased premises. Learned Senior Advocate further submits that as far as the basement premises are concerned, there is no written lease and, as such, the Appellant no. 1 has duly established that the disputed premises are part of the leased premises of the Appellant. Learned Senior Advocate has also pointed out that the Respondents have filed three eviction proceedings out of which two have been dismissed and one is still pending and, as such, the Lower Appellate Court was not justified to interfere with the Judgment passed by the learned Trial Judge. Learned Senior Advocate has also pointed out that the learned Trial Judge has minutely examined the material on record and has rightly come to the conclusion that the Respondents have failed to establish their claim of forceful dispossession or

that the subject suit garage was not given on lease to the Appellant herein. Learned Senior Advocate further pointed out that in such circumstances, as the findings of fact arrived at by the Lower Appellate Court are perverse and there are substantial questions of law which arise in the present Appeal for consideration.

8. On the other hand, Shri Sudin Usgaonkar, learned Senior Advocate, has pointed out that the act of the Appellant to trespass into the suit garage has no justification as the Appellants have forcefully opened the shutters leading to the suit garage in the presence of the witnesses examined by the Respondents. Learned Senior Advocate further pointed out that the Lower Appellate Court has rightly appreciated the evidence on record and the oral testimony of the witnesses to come to the conclusion that the forceful dispossession of the Respondents have been duly established. Learned Senior Advocate further pointed out that the 'La Madame' was being run only in one compartment and the middle compartment was kept for the user of the Respondents who were the owners of the premises. Learned Senior Advocate further pointed out that the existence of the scooters in the suit garage as well as the old material and other miscellaneous items belonging to the Respondents, would clearly show that the possession of the suit garage and that one compartment was occupied by 'La Madame' and that the door was sealed by wooden planks has been duly established by the Respondents and, as such, the contention that there existed a door leading

to both the compartments as claimed by the Appellant is totally false. Learned Senior Advocate further pointed out that as such there are no substantial questions of law that arise in the present Appeal for consideration.

9. I have duly considered the submissions of the learned Senior Advocates and I have also gone through the records. The Lease Agreement produced on record is only with regard to the ground floor where the Appellant no. 1 is conducting his Men's Tailoring business in the name and style of 'Mac Tailors'. As far as the basement is concerned, the admitted position is that the Respondents had given on lease only one compartment out of the three compartments therein to the Appellant. Though it is the contention of the Appellants that the basement consisted of two compartments, nevertheless, the existence of the wall in between the suit garage which is the middle compartment and the eastern compartment where the Appellants were running the Ladies Tailoring business 'La Madame' would clearly establish that such claim put forward by the Appellant falsifies such stand put forward by the Appellant. The contention of the Appellants that the Respondents have brought old materials and appliances and asked the Appellants to keep the scooter in the subject compartment has been rightly disbelieved by the fact finding Court. The Lower Appellate Court has rightly found that such material was existing in the disputed middle compartment which belonged to the Respondents herein. The notice of the

Advocate Shri R. R. Colvalkar, has rightly been relied upon by the Lower Appellate Court to note that it clearly specifies that only one room on the basement was given on lease to run the business of 'La Madame'. The findings of fact arrived at by the Lower Appellate Court with regard to the lease created by the Respondent in favour of the Appellant, is based on oral and documentary evidence on record which this Court cannot re-appreciate in a Second Appeal under Section 100 of the Civil Procedure Code. Even whilst disposing of the Appeal From Order, the subject premises were kept with the Receiver and admittedly the Appellant has not been occupying such premises since the year 1988. On the contrary, the Respondents have been deprived of the enjoyment of such possession on account of the illegal acts committed by the Appellant in forceful dispossessing the Respondents of the subject suit garage. The finding of fact arrived at by the Lower Appellate Court upon appreciating the evidence on record, cannot be said to be perverse as such findings have been rendered based on the material produced on record. There is no perversity in such finding as the Appellant was not in a position to show that any documentary evidence has been overlooked by the Lower Appellate Court nor that such findings have been rendered by misreading the evidence on record. Apart from that, the Appellant -Original Defendant no. 1 has not even entered the witness box. Dw. 1 has been examined as a duly constituted Attorney who claimed was in charge of the business of the Appellant and was conversant with the fact. Nevertheless as far as the extent of the leases premises are concerned, the

personal evidence of the Defendant no. 1 would be material. This would be more essential considering that there were allegations directly made as against the Appellant who had forcefully entered the subject premises. In such circumstances, the Lower Appellate Court was justified to take adverse inference for the failure of the Defendant no. 1 entering the witness box. The Lower Appellate Court has rightly appreciated the evidence on record whereas the learned Trial Judge though has extensively noted the evidence, has failed to draw the legal inferences based on such material on record.

10. On perusal of the substantial questions of law as proposed by the Appellant, I find that the first substantial question of law proposed, is essentially based on the finding of fact which the Lower Appellate Court has found to be in favour of the Respondent herein. As already pointed out herein above, there is no perversity in such finding that the Respondent was in possession of the subject suit garage based on the material on record. As far as the proposed second substantial question of law, the First Appellate Court is justified to re-examine the evidence and consider the validity of the findings of fact arrived at by the learned Trial Judge. There is no infirmity by the Lower Appellate Court whilst carrying out such exercise for the reasons stated herein above. As far as the other substantial questions of law proposed, the Lower Appellate Court has rightly dealt with the existence of the opening on the ceiling of the basement as well as the fact that there were three compartments on the basement which included the suit garage.

11. In such circumstances, I find that there are no substantial questions of law which arise in the present Appeal for consideration. The Lower Appellate Court has rightly examined the material on record. The Appellants have failed to establish the right to occupy the subject suit premises as the alleged claim of the Appellant has not been established by the Appellant by any material on record. The Gift Deed is a nullity as rightly held by the Lower Appellate Court.

12. In such circumstances, I find no merit in the above Appeal, which stands accordingly rejected.

F .M. REIS, J.

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