

IN THE HIGH COURT OF BOMBAY AT GOA**SECOND APPEAL NO. 61 OF 2017**

SHRI VASSUDEV P. NAIK REP. THR.
POA MR. ROOPESH V. NAIK AND ANR. ... Appellants

Versus

SHRI KRISHNA VITHOBA X. TILVE
(DEC) THR. LRS. AND ANR., ... Respondents

Shri C.A. Ferreira with Shri G. Teles, Advocates for the Appellants.

Shri S. Desai, Senior Advocate with Shri Premanand A. Kholkar, Advocate for the Respondents.

CORAM:- C.V. BHADANG, J.

DATE:- 16th JUNE, 2017.

ORAL ORDER:

The appellants, have proposed the following draft substantial questions of law, in the appeal memo:-

"1. Whether the impugned judgment and decree is illegal, perverse and untenable in law and hence liable to be quashed and set aside ?

2. Whether the Trial Court could have decreed the suit for eviction in view of specific plea raised by the appellants that they had carried works of permanent character with the knowledge of the respondents and the original owners of the suit house and were occupying the same as permanent licensees ?

3. *Whether the ld. Trial Court failed to frame issue vis-a-vis pleadings that the appellants were occupying the suit house as permanent licensees of the original owner as such the impugned judgment and decree is liable to be quashed and set aside ?*

4. *Whether the suit for recovery of possession was not maintainable without seeking declaration that the respondents were the owner of the suit house when admittedly the appellants were in possession of the suit house on the date of execution of sale deed dated 22.01.1996 ?*

5. *Whether respondents have no locus to file the suit for recovery of possession in the absence of conveyance of the suit house to the respondents vide sale deed 22.01.1996 ?*

6. *Whether the suit is not maintainable for want of proper and necessary parties as the respondents are not the exclusive owners of the suit property and suit house and cannot maintain the present suit exclusively by themselves ?*

7. *Whether the original owner i.e. vendor of the respondents were not capable of transferring the suit house or the possession of the suit house as on the date of execution of sale deed dated 22.01.1996 to the respondents and as such the respondents has no rights and interests in the suit*

house ?

8. *Whether the appellants have no rights to the suit house merely because the mundkarial claim of the appellants was rejected under the Goa, Daman and Diu Mundkars (Protection from Eviction) Act, 1975 ?*

9. *Whether the Id. Appellate Court failed to consider the evidence on record and the grounds raised in the memo of appeal while dismissing the appeal filed by the appellants ?*

10. *Any other substantial question of law that may be formulated at the time of hearing the second appeal.*

11. *On the substantial question of law above mentioned and that may be permitted to be formulated during the course of hearing with the leave of Court, the appellant submits that impugned order judgment and decree dated 14.02.2017 passed by Adhoc District Judge-2 at Panaji in Regular Civil Appeal No.55/2016 be quashed and set aside."*

2. The first contention raised by Shri Ferreira, the learned Counsel for the appellants is that, the appellants had sought amendment of the written statement, which was allowed by the learned Trial Court on 31.12.2002. By the said

amendment, the appellants sought to introduce a plea that, with the knowledge of the defendants/plaintiffs, they carried out work of a permanent nature and the appellants being permanent licensees, cannot be evicted. The second contention is that the issue of the appellants being permanent licensees, has not been addressed by the Courts below. Thirdly, it is contended that the respondents have no locus to file the suit for recovery of possession in the absence of conveyance of the suit house in favour of the respondents. Except these, no other grounds are raised.

3. Mr. Desai, the learned Senior Counsel for the respondents pointed out that the respondents had filed a suit being Regular Civil Suit No. 113/97/B, to declare the sale deed dated 22.01.1996, to be null and void. However, that suit was withdrawn on 05.10.2011 and as such, now, the appellants cannot contend that the sale deed does not cover the portion, which is in possession of the appellants. Secondly, it is submitted that the appellants had raised a claim of being in possession as mundkars, which was negated. The matter travelled upto the Hon'ble Supreme Court and SLP No. 1463/2015, was dismissed by the Supreme Court on 01.12.2015. It is submitted that at no point of time, the appellants sought

framing of the issue as to the appellants being permanent licensees.

4. I have carefully considered the rival circumstances and the submissions made. It is undisputed that the appellants had filed Regular Civil Suit No. 113/97/B, challenging the sale deed dated 22.01.1996 as null and void. However, that suit was withdrawn on 05.10.2011. Thus, the appellants cannot re-agitate the same issue in the present proceedings.

5. The Trial Court framed the following issues on 31.08.1998:-

“1. Do the plaintiff prove that they permitted the late mother of defendant no. 1 to occupy the suit portion of their house ?

2. Do the plaintiff prove that the defendants are not the mundkars of the suit portion ?

3. Do the plaintiffs prove that since 1/7/97, the defendants are trespassers in the suit portion ?

4. Do the plaintiff prove that they are entitled for mesne profits of Rs.500/- per month from 1/7/97 ?

5. *Do the defendants prove that this Court has no jurisdiction to try and entertain this suit ?*

6. *What relief ? What order ?”*

6. The appellants never sought framing of the issue as to whether, the respondents were entitled to seek eviction of the appellants from the portion of the suit house, on the basis of the sale deed dated 22.01.1996. Presumably, this may be on account of the fact that the suit filed by the appellants, challenging the sale deed, was already withdrawn by them.

7. The First Appellate Court framed the following points:

“1. Whether the plaintiffs proved that possession of defendants to the suit portion is that of permissive in nature giving no rights to defendants after notice to evict the suit portion is issued by the plaintiffs ?

2. Whether the defendants prove that their suit portion was not purchased by the plaintiffs and plaintiffs have no right to the suit portion and are not entitled to evict the defendants ?”

8. The First Appellate Court, answered point no. 1 in the affirmative and point no. 2 in the negative. I have carefully gone through the reasoning articulated by the First Appellate Court,

while dealing with point no. 2 and I do not find that it suffers from any infirmity. In any event, the appellants having withdrawn the said suit, challenging the sale deed dated 22.01.1996, cannot now be permitted to challenge the impugned judgment and decree on a similar ground.

9. Coming to the case of the appellants being permanent licensees, the appellants were permitted to introduce the said plea by way of amendment in the year 2002. The appellants did not insist for framing of the said issue. That apart, even in the grounds of appeal before the First Appellate Court, the appellants have not raised a contention about the Trial Court having failed to frame an issue, as to the appellants being permanent licensees. Thus, the appellants at this distance of time, cannot be permitted to agitate that the Courts below have refused to consider the case of permanent tenancy. It would be significant to note that, when the matter was decided before the Supreme Court on 01.12.2015, the appellants were claiming to be the mundkars of the house and thus, now, they cannot be permitted to claim that no proper issues were framed, insofar as permanent tenancy is concerned. I have carefully gone through the concurrent findings of the Courts below and I do not find that the Second Appeal raises any substantial question of law.

The Second Appeal is accordingly dismissed, with no order as to costs.

10. At this stage, the learned Counsel for the appellants states that interim relief, already operating, be continued for a period of six weeks.

11. The learned Counsel for the respondents opposes the same.

12. In view of the fact that interim relief was operating before the First Appellate Court, the same is extended by a period of six weeks.

C.V. BHADANG, J.

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