

IN THE HIGH COURT OF BOMBAY AT GOA**FIRST APPEAL NO. 116 OF 2009**

Bandekar Brothers Pvt. Ltd.,
Suvarn Bandekar Building,
Vasco da Gama, Goa
[A private limited company
incorporated under the Companies Act, 1956
and having its registered office as above]
through its duly Constituted Attorney
Shri Ramesh K. Shenoy

... Appellant/
Original defendant

Versus

Damodar Mangalji & Co. Ltd.,
having its office at “Damodar Niwas”,
Mahatma Gandhi Road,
Panaji Goa.
[A private limited company incorporated
under the Companies Act, 1956
and having its registered
office as above]

... Respondent/
Original plaintiff

Mr. J. E. Coelho Pereira, Senior Advocate with Mr. E. Dias, Mr. V. Braganza, Ms. Sujai Joshi and Mr. J. Dias, Advocates for the appellant.

Mr. S. R. Rivonkar and Mr. Sagar Rivonkar, Advocates for the respondent.

Coram:- F. M. REIS, J.

Date:- 21st March, 2017

ORAL JUDGMENT

Heard Mr. J. E. Coelho Pereira, learned Senior Counsel appearing for the appellant and Mr. S. R. Rivonkar, learned counsel appearing for the respondent.

2. The above appeal challenges the judgment and decree dated 16.04.2009 passed in Special Civil Suit No.62/1996 whereby the suit filed by the respondent for delivery of possession and mesne profits came to be partly decreed and the appellant were directed to hand over the vacant possession of an area of 24218 square metres of the property surveyed under Nos. 15 and 16 of Village Kotombi to the respondent herein. The appellant were also directed to pay to the respondent mesne profits calculated at the rate of Rs.10,000/- per year from 01.01.1995 until delivery of vacant possession of the said area of 24218 square metres to the respondent with interest at the rate of 18% per annum. The

appellant were also restrained by a permanent injunction from using the said area of 24218 square metres.

3. Briefly, the facts of the case as stated by the appellant is that by an indenture of lease executed between the parties on 16.12.1974, the respondent demised unto the appellant in perpetuity an area of 22,250 square metres of the property described in Land Registration Office of Bicholim under No.11155 of Book B-109. It is further their case that by letter addressed by the respondent to the partnership firm on 23.12.1974, the respondent offered to sub lease an area of approximately 25000 square metres of the suit property inter alia for five years with effect from 05.01.1975 till 31.12.1979 with further renewals for three periods of five years each. Thereafter, according to the appellant by an agreement dated 18.01.1975 executed between the respondent and the said partnership firm, the respondent sub leased the said area of the land subject to the conditions stipulated therein. It is further the case of the appellant that on 07.06.1975 an indenture of lease was executed between Pandu Gopal Porbo, Ezzo Pando Porbo and Gopal Rama

Porbo as lessors with the respondent thereby they demised in favour of the respondent in perpetuity an area of 1668 square metres of the property described in the Land Registration Office of Bicholim under No.11155 of Book B-109. It is further their case that the said partnership firm was dissolved somewhere on 22.12.1980 and the appellant being one of the partners of the partnership firm took over its assets and liabilities including the right to such sub lease over the said property. It is further the contention of the appellant that the lease expired by efflux of time in 1994. The respondent as such filed the suit on 17.12.1996 for seeking the above reliefs. The appellant filed their written statement disputing the claim put forward by the respondent. It is further contended that the appellant are protected in terms of Decree 43525 whereby the land given on lease was an open land for commercial purpose and the appellant cannot be evicted dehors the said Decree. The appellant also offered to deposit all the arrears of rent and in fact have deposited such rent in terms of the lease agreement.

4. The learned Judge after framing issues and recording of

evidence by the judgment dated 16.04.2009 partly decreed the suit by granting the reliefs referred to herein above. While disposing of the said suit, the learned Judge came to the conclusion that the occupation of the appellant was merely as a licensee and there was no right which accrued in favour of the appellant as lessors thereof. The learned Judge has failed to examine the contention of the appellant that they were protected tenant in terms of Decree 43525 as the learned Judge came to the conclusion that the occupation of the appellant was merely of a licensee. While coming to such conclusion the learned Judge interpreted one of the clauses in the agreement wherein the right of access was reserved to the respondent to mean that the appellant were not given exclusive possession of the subject property based on the relationship between the parties.

5. Mr. J. E. Coelho Pereira, learned Senior Counsel appearing for the appellant has pointed out that the appellant are lessee of the area approximately 25000 square metres whereby open land was given on lease for commercial and industrial purpose

to install a benefication plant as well as a weighbridge which relationship is governed under Decree 43525. The learned Senior Counsel further pointed out that it is now well settled based on the judgment of this Court reported in **1989(2) GLT 118** in the case of ***Gangadhar Narsingdas Agrawal vs. Alina D'Costa e Pinto and ors.***, that though the Transfer of Property Act has come into force, the Decree 43525 governing lessees of open land for industrial purpose stands protected. The learned Senior Counsel further pointed out that in terms of the said Decree, once the term of lease gets determined, the landlord has a right to seek eviction of the lessees only in terms of the provisions as provided therein. The learned Senior Counsel further pointed out that the contention of the respondent that the lease has been determined has no substance as according to him the lease does not get determined by efflux of time in terms of the said Decree 43525. The learned Senior Counsel thereafter has taken me through the terms and conditions imposed by the respondent while granting the subject land on lease to the appellant to point out that the words therein to the effect that the respondent have given the land on sub lease to the appellant would

itself suggest that the intention of the parties was to create a lease in favour of the appellant herein. The learned Senior Counsel thereafter has taken me through the terms of the said lease agreement to point out that reading the terms, the rent fixed therein would clearly show that in fact a lease was created in favour of the appellant herein. The learned Senior Counsel further submitted that as the documentary evidence itself conclusively establishes that a lease was created in favour of the appellant, the learned Judge was not justified to come to the conclusion that the appellant were ~~not~~ lessees of the subject property. The learned Senior Counsel further pointed out that the conclusion arrived at by the learned Judge to hold that the agreement was merely a licensee is totally erroneous as according to him on plain reading of the said terms, it implies that a right is only reserved to the respondent as means of access to go to the remaining part of the property and/or to use the weighbridge in terms of the said agreement. The learned Senior Counsel as such points out that the findings of the learned Judge to that effect are misplaced and as such the impugned judgment passed by the learned Trial Court deserves to be quashed and set

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aside. Besides relying upon the said judgment of this Court reported in 1989(2) GLT 118, the learned Senior Counsel has also relied upon the judgments of the Apex Court reported in **(1986)3 SCC 83** in the case of ***Nanakram Vs Kundalrai*** and **(2002)8 SCC 31** in the case of ***Nutan Kumar and others Vs IInd Additional District Judge and others.***

6. Mr. Rivankar, learned counsel appearing for the respondents, has supported the impugned Judgment. Learned counsel has pointed out that on plain reading of the Memorandum between the parties, it clearly shows that a licence was given to the appellants to carry out their commercial activities in the open land. Learned counsel further pointed out that on going through the terms of such Agreement, it clearly show that the respondents had reserved a right of access through the subject land which would clearly demonstrate that the exclusive possession was not handed over to the appellants herein. Learned counsel further submits that in any event the licence was only for a maximum period of 15 years and, as such, according to him, once such period had elapsed, the

respondent were entitled to file the suit for eviction against the appellants. The learned counsel has thereafter taken me through the Judgment of the learned Judge to point out that the learned Judge has rightly appreciated the material on record to come to the conclusion that the appellant are mere licensees of the subject property. Learned counsel further pointed out that for an area of more than 24000 square metres, the appellants are seeking to pay a sum of Rs.10,000/- minimum which itself shows that the stand of the appellant is illusory and without a foundation in law. Learned counsel further submits that the material on record would clearly suggest that the appellants were mere licensees and that the respondent have rightly terminated the license and sought the eviction of the appellants herein. Learned counsel further pointed out that no interest can be created in favour of the appellants based on the memo entered between the appellants and the respondent herein. Learned counsel as such submits that, as admittedly, such document has not been registered, the question of claiming that a lease has been created of the subject land is totally misplaced. It is further pointed out that as the appellants are licensees of the subject

land, the question of claiming any protection under Decree No. 43525 is totally misplaced. Learned counsel as such pointed out that the Appeal be accordingly rejected.

7. I have considered the submissions of the learned Counsel and I have also gone through the records. On the basis thereof, the following points for determination arise in the present case :

POINTS FOR DETERMINATION

(1) Whether the appellants have established that they are occupying the subject property as tenants and are as such protected by Decree No. 43525 as in force ?

(2) Whether the learned Judge was justified to ~~refuse~~ grant the relief of eviction of the subject land on the basis of the impugned Judgment ?

8. With regard to the first point for determination, on

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perusal of the letters dated 15.07.1974 and 23.12.1974, which is the basis of the claim of the appellants, whereby the parties are deriving their jural relationship, I find that the contents thereof clearly specify that the respondents had agreed to sub-lease an area of approximately 25000 square metres at the riverside plot at Kotombi. It further provides that the sub-lease would be operative for an initial period of five years w.e.f. 05.01.1975 and further three periods each. On perusal of letter dated 18.01.1975, it clearly specifies that the respondents have agreed to sub-lease an area of 25,726 square metres to the appellants herein. It would be pertinent to note herein that the respondents were perpetual lessees of the subject land pursuant to lease executed by the family of Porob in favour of the respondent herein. The said letter further provides that the sub-lease Agreement shall be operative for an initial period of five years and would have three renewals. It also provides that yearly rent of Rs.10,000/- minimum would be payable besides the amounts as specified in para 4 of the said letter. The condition also stipulates that the appellants would be entitled to instal and construct loading bridge and other machineries at the cost and risk

of the appellants connected therewith. On bare perusal of the said condition, what has been clearly agreed was a sub-lease of the plot in favour of the appellants. No doubt, the nomenclature in such document does not by itself determine the intention of the parties, nevertheless, the evidence on record as well as the clear and unequivocal conditions in the Agreement would clearly show that the appellants were also permitted to instal different types of machinery as well as a loading bridge and a beneficiary plant. All these aspects would clearly suggest that the respondents intended a long relationship between the appellants and the respondents in respect of the subject property. Even on perusal of the cross examination of Pw.1, at page 182, it clearly shows that the said respondent had stated that a sub-lease was created in favour of the appellants. The respondent has also accepted that the possession of the subject plot was delivered to the appellants in terms of said ~~partition~~ ^{lease}. The evidence of Pw. 1 at page 175, he has clearly admitted that different type of heavy machinery were installed by the appellants in the subject plot. The fact that a permission to construct was also given to the appellants was accepted by Pw.1. In

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such circumstances, the overwhelming evidence on record suggests that the respondent had created a lease of the subject property in favour of the appellants herein. The learned Trial Judge whilst coming to the conclusion that the appellant was merely a licensee of the subject property, has relied upon one of the conditions specified in the said letter which provides that in the event the respondent require the loading bridge for the purpose of their own use, the appellants will allow an access thereon without any consideration. As already pointed out herein above, the said memorandum clearly permitted the appellants to put a loading bridge in the subject property allowing the respondents to use the loading bridge for their activities without costing any charge, would not by itself defeat the claim of the appellants, as the possession of the entire land was delivered to them. The access reserved was to go to the loading bridge which belonged to the respondent herein. This material cannot over-weigh the specific conditions in the letter which clearly provide that the appellants wanted to create a sub-lease of the subject property in favour of the appellants herein. In such circumstances, I find that the findings of the learned Judge that

the appellants were merely licensees of the subject property, cannot be accepted. The very fact that the appellants have installed heavy machinery for carrying out other business activities would clearly show that the respondent intended a long relationship with the appellants in connection with the subject property. In such circumstances, the findings of the learned Trial Judge on the ground that the appellants were mere licensees of the said property cannot be accepted. As already pointed out herein above, the appellants were the lessees of the subject property and, as such, protected in terms of Decree 43525. The admitted position is that based on such documents, the possession of the subject property was delivered to the appellants. This is clearly read into the conditions of the said letter dated 18.01.1975.

9. Apart from that, the fact that the land was given to the appellants for commercial purpose to instal machinery to carry out the mining business has not been disputed by the respondents herein. The lessees of open land stand protected by the said Decree no. 43525 which has been clearly held by this Court in the case of

Gangadhar Narsingdas Agrawal V/s Alina D'Costa E Pinto &

Others reported in ***1989 (2) G. L. T. 118***. This Court has observed

at paras 5 and 6 thus :

“5. Mr. Kakodkar then urged that Portuguese Decree 43525 stands repealed with effect from September, 30, 1969 in view of the enactment of the Goa, Daman and Diu Building (Lease, Rent and Eviction) Control Act, 1968. The learned counsel referred to the provisions of Section 59 of the Act which deals with repeals and savings. Sub-section (1) of Section 59 prescribes that the provisions of Decree No. 43525 dated March 7, 1961 and the corresponding provisions of any other law for the time being in force shall stand repealed from the date on which the Act is brought into force. The Act was brought into force on October 1, 1969 and says Mr. Kakodkar, that proceedings instituted by the respondents for eviction after that date under the Portuguese Decree was not maintainable. The submission is not correct because the provisions of the Goa, Daman

and Diu Buildings (Lease, Rent and Eviction) Control Act, 1968 do not apply to premises which are not buildings. The expression “building” has been defined under Section 2(e) and means by building, or part of a building, which is, or is intended to be, let separately for use as a residence or for commercial use or for any other purpose. Mr. Kakodkar with his usual fairness, conceded that as the lease in the present case was of an open plot of land the lease would not attract the expression “building” under Section 2(e) of the Act. It is therefore obvious that repealing provision of Section 59(1) would not cover the premises which are not buildings and in respect of these premises the provisions of the Portuguese Decree No. 43525 shall continue to apply even after October 1, 1969. The second contention urged by Mr. Kakodkar therefore must stand rejected.

6. Finally Mr. Kakodkar urged that the provisions of the Portuguese Decree have no application after the advent of the

Transfer of Property Act to the area covered under the Goa, Daman and Diu territory. The learned counsel referred to the Notification dated November 1, 1965 issued by the Lieutenant Governor in exercise of the powers conferred by sub-section (2) of Section 3 of the Goa, Daman, Diu (Laws) No.2 Regulation, 1963 and submitted that the provisions of Transfer of Property Act, 1882 were made applicable to the area where the leased property is situated with effect from November 1, 1965. It was urged that after November 1, 1965 the rights of the lessor and lessee would be governed not by the provisions of the Portuguese Decree but by the provisions of Chapter V of the Transfer of Property Act. Mr. Kakodkar submits that the lease could be terminated only in accordance with the provisions of the Section 111 of the Transfer of Property Act and the suit for recovery of possession is required to be filed in accordance with the provisions of the Transfer of Property Act. The submission is not correct and cannot be

accepted. Section 4(1) of Regulation No.11 of 1963 prescribes that any law in force in Goa, Daman and Diu corresponding to any Act referred to in Section 3 shall stand repealed as from the date of coming into force of such Act. The submission of Mr. Kakodkar that the Portuguese Decree stands repealed after the advent of Transfer of Property Act cannot be accepted because the Rules prescribed under the Portuguese Decree cannot be said to be a law corresponding to the Transfer of Property Act. The Portuguese Decree prescribed for regulating the relationship between a landlord and a tenant and the right was not restricted as in the case of provisions under Chapter V of the Transfer of Property Act. The Portuguese Decree provided for additional protection and indeed the protection which is available is identical as to a tenant under various Rent Acts in this country and which protection is not available to contract of lease under the Transfer of Property Act. The Property Act prescribes that lease can be terminated for

various reasons including efflux of time, while Portuguese Decree confers protection on the tenants for eviction unless specific breach as set out in the Decree is committed. In our judgment it is a far cry to suggest that the law enacted under the Decree is one corresponding to the provisions of the Transfer of Property Act, dealing with lease and termination of lease. In our judgment the submission that the Portuguese Decree stands repealed after application of the provisions of the Transfer of Property Act is not correct and therefore deserves to be repelled.”

10. In another Judgment of the learned Single Judge of this Court while dealing with both the issues with regard to the protection under Decree 43525 for a lease of the open land for industrial purpose as well as for lack of registration, it has been held in ***Second Appeal no. 3 of 1995 dated 11.09.1998*** in the case of ***Shri Chandapa Balapa Gunjekar vs. M/s. Silen Industries***, at paras 6 and 7 thus :

“6. Considering the provisions of Sections 17 and 49 of the Registration Act, 1908, the deed was required to be registered. Therefore, no fault can be found with the finding of the trial Court with regard to the fact that the document cannot be relied upon for want of registration. Nevertheless, the document can certainly be relied upon for collateral purpose such as the proof of the possession of the suit plot in capacity of that of a tenant. This has been well explained by the learned Single Judge of Mysore High Court in the matter of Abdul Razack Sab v. H.K. Gopal Setty reported in A.I.R. 1974 Mysore 7. Similar is the decision of the Apex Court in the matter of Shri Janki Devi Bhagat Trust Agra v. Ram Swarup Jain (Dead) by Lrs., reported in (1995) 5 SCC 314 wherein it has been clearly held that though the unregistered lease could not be looked at but the factum of lease can be and for that purpose the lease deed can be safely referred to. Therefore, it is clear that both the Courts below have arrived at the concurrent finding regarding the relationship of landlord and tenant between

the parties.

7. It is not in dispute that the appellant has not terminated the lease hold rights of the respondent. Undoubtedly the lease was in respect of the landed property in Goa. This court in the matter of Gangadhar Narsingdas Agrawal v. Alina D'Costa e Pinto and others reported in 1989(2) Goa Law Times 118 has held that the Rent Act is not applicable to the premises which are not buildings and in respect of those premises the provisions of the Portuguese Decree No. 43525 shall continue to apply. It has been further held in the said decision that the said Decree No. 43525 prescribes for regulating the relationship between landlord and tenant and the rights are not governed by the provisions of Transfer of Property Act. It has been further held therein that the said Decree No.43525 confers protection to the tenant against eviction except on the grounds as set out in the said Decree. Admittedly, no such suit on the allegation of any breach entitling eviction of the tenant under the said Decree has been instituted by the

appellant against the respondent. Once it is clear that neither the lease had been terminated in terms of law in force nor there being any decree for eviction against the respondent, it was not permissible to the appellant to dispossess the respondent by taking law in his hand. In this view of the matter no fault can be found with the impugned decree as well as the order of the Trial Court for the restoration of the suit property to the respondent.”

11. Taking note of the said observations as the respondents had created a lease of open land in favour of the appellants the appellants would be entitled to the protection in terms of the said Decree No. 43525 after the expiry of the period of such lease as the appellants can be evicted only in terms of such Decree. Article 45 of the said Decree as translated and placed on record reads thus :

Article 45th.

The rescission of contract in the absence of consent by lessee has to be decreed by court in terms of this diploma in the form of law of procedure.

12. The ground on which such rescission can take place is enumerated in Article 46 of the said Decree. The manner in which the lease stands extended is also provided in Article 52 of the said Decree. Looking into the said provisions, it clearly stipulate that the said Decree 43525 confers protection to the tenant against the eviction except on the ground as set out in the said Decree. Admittedly, in the present case, the respondents have not invoked any of the clauses in the said decree to seek eviction of the appellants in terms thereof. The suit filed by the respondents is not invoking the ground as provided in the said Decree. In such circumstances, the respondents without following the due process as provided in the said Decree cannot seek eviction of the appellants from the subject plot unless such procedure and process is duly followed.

13. On perusal of the impugned judgment, I find that the learned Judge has erroneously come to the conclusion that the use of the disputed area by the appellants till 31.12.1994 was merely permissive use and consequently, there was no landlord -tenant

relationship to avail of the protection of the said Decree 43525. As already pointed out herein above, on perusal of the letters dated 15.07.1974 and 23.12.1974, it clearly disclose that a long term arrangement was intended to create a tenancy of the open land for commercial and industrial purpose. In the background of the above, the only aspect which remains to be considered is whether the rent as provided in the said agreement would continue to be the same. Article 80 of the said Decree as translated reads thus :

Article 80th

1st. The landlord can on expiry of each period of 5 years, in duration of the lease, increase the rent. The quantity of increase to be fixed by accord of parties or in its absence, by valuation, in terms of the article 107th.

2nd. The lessee has liberty not to accept the increase dismissing in terms of this period, but without the right of any compensation or extension granted by this decree.

3rd. The increase may be notified till 3 months in advance of term of the said period and the non-acceptance of it till 30 days after that first notification.

4th. If the lessee, timely notified, nor dismissing in

the form of earlier paragraphs, nor paying the new rent, the landlord has right of rescission of contract, in terms of the clause a) of article 46th.

5th. The increase when fixed by accord of parties having been mutually agreed in titles in his power, which are being, in following, presented, in marked period for the initial title, in Office of Revenue of respective Taluka, after of annotation of increase in triplicate of title or in its notorial copy in his power which devolved to the presenter, with the respective note.”

14. The said provision clearly provides that the rents are to be increased in the manner specified therein every five years of such lease. In the present case, Mr. J. E. Coelho Pereira, learned Senior Counsel appearing for the appellants has pointed out that the appellants have been depositing the rent in terms of the Lease Agreement as mentioned in the statement produced and marked 'X' for identification. On perusal of such amount paid, it prima facie, suggests that the rent has not been increased or fixed in terms of Article 80 of the said Decree. There were discussions between the Counsels to examine whether the parties could agree to a specific

amount of rent looking into the said provisions specified in the said statement. The parties could not arrive at an amicable settlement and, as such, the respondents are at liberty to file appropriate proceedings in terms of the said Decree for fixation of the rents in terms thereof after the contractual relationship between the parties had lapsed in the year 1995.

15. Mr. J. E. Coelho Pereira, learned Senior Advocate appearing for the appellants, upon instructions, further pointed out that the appellants shall pay a sum of Rs.50,000/- per annum from the year 1995 after deducting the amounts which have been deposited in this Court during the pendency of the suit. Accepting the said statement, until the final adjudication of the rents payable by the appellants to the respondents in terms of the said Decree are duly fixed, the appellants shall pay to the respondents a sum of Rs.50,000/- per annum from the year 1995 until such amounts are duly fixed. Needless to say, the amounts deposited in the proceedings shall be deducted whilst fixing the said amount. The parties are at liberty to fix the rent amount by Agreement or the

respondents are at liberty to move the concerned authorities in terms of the said provisions of the said Decree 43525. Shri J. E. Coelho Pereira, learned Senior Advocate appearing for the appellants, states that the amount of rent in the light of the above shall be paid to the respondents within six months from today.

16. At this stage, Mr. Rivonkar, learned Counsel appearing for the respondents, seeks directions that the respondents be permitted to withdraw the amount deposited before the learned Trial Court as well as before this Court from the year 2008 along with interest accrued thereon, if any. Accordingly, the respondents are at liberty to withdraw such amounts deposited before the learned Trial Court as well as before this Court with interest accrued thereon. The points for determination are answered accordingly.

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

ORDER

- (i) The Appeal is partly allowed.
- (ii) The impugned Judgment and Decree dated 16.04.2009 passed in Special Civil Suit no. 62/1996, is quashed and set aside.
- (iii) The appellants are directed to pay the rent referred to herein above with liberty to the respondents to move the concerned authorities to fix the rent since 1995 in accordance with law.
- (iv) The Appeal stands disposed of accordingly with no orders as to costs.

F .M. REIS, J.

arp/at*