

IN THE HIGH COURT OF BOMBAY AT GOA

SECOND APPEAL NO. 104 OF 2005

Smt. Shevanti Putu Naik,
Widow of Putu Naik,
Aged about 72 years,
Housewife, residing at
House No. 418A,
Vishwambharwadi,
Sanvordem, Taluka Sanguem Goa
Though her duly constituted
power of attorney
Shri Vishwas Sadassiva Naik,
residing at Costi,
Sanguem, Goa.

**... Appellant/Original
Plaintiff**

Versus

Shri Sanvlo Shambu Naik
Son of Shambu Naik, aged
62 years, businessman,
residing at House no. 123,
Tony Nagar, Sanvordem,
Taluka Sanguem, Goa.

**... Respondent/Original
Defendant**

Mr. V. P. Thali, Advocate for the Appellant.
Mr. A. D. Bhobe, Advocate with Ms. Shradha Bhobe, Advocate for the
Respondents.

Coram :- F. M. REIS, J

Date : 23rd March, 2017.

ORAL JUDGMENT:

The above Appeal came to be admitted by Order dated 17.02.2006 on
the following substantial questions of law:

- (i) Whether or not, notwithstanding the provisions of Article 72(3) of **the Decree No. 3602 of 24.11.1917, a full title (and not 'domino util' only**, i.e. 'right of permanent possession' only) in the land granted under emphyteusis, is vested in the original grantee, as long as none of the conditions enumerated in Article 76 of the said Decree is not breached, as held by this Hon'ble Court (erstwhile Judicial Commissioner's Court) in the case of 'Govind Poi Raiturkar v/s Union of India and 4 others', in Special Civil Application (with Petition) No. 86/B/80 and Special Civil Application (Writ Petition) No. 87/B/80 ?
- (ii) Whether or not, the execution of a perpetual lease by a registered deed, in favour of the appellant, by the original grantee of the emphyteusis (aforamento) under Decree No. 3602 dated 24.11.1917 (now repealed under section 201 of the Goa Land Revenue Code, 1968) would be illegal for want of Government's authorization in terms of Article 255 of the said Decree No. 3602 of 24.11.1917?
- (iii) Whether or not, the judgment passed by the first appellate court suffers from the vice of perversity, in as much as the first appellate court did not consider the question of law that even in the case where Article 255 of the Decree No. 3602 dated 24.11.1917 was attracted and there was a breach of the said Article, the land granted under emphyteusis under the said Decree would revert back to the original grantee and not to the Government ?
- (iv) Whether or not, the first appellate court committed a manifest injustice by misinterpreting the provision of Decree No.3602 dated 24.11.1917 and consequently holding that the registered lease deed dated 16.12.1987, executed by the original grantee of the emphyteusis, granted under the said Decree, viz. Shri Mukund Shridhar Sinai Sawardecar, in favour of the appellant, did not confer, create or setup any title in the appellant ?

- (v) Whether or not, the judgment of the first appellate court is perverse in as much as the suit being only for injunction, it was not permissible for the court to refuse to grant the same in view of the undisputed fact that the appellant/plaintiff had a possessory title vested in her, irrespective of any other title and the respondent/defendant was neither having any title better than the appellant nor was claiming, any title or to be in possession of the suit property, as held in case of 'M. Kallappa Setty v/s M.V. Lakshminarayana Rao', reported in AIR 1972 SC 2299 ?

2. During the course of the hearing of the above Appeal, Mr. V. P. Thali, learned Counsel appearing for the Appellant presses for the second substantial question of law referred to hereinabove. The learned Counsel appearing for the Appellant has submitted that the subject property is the property in Survey No. 32/19 which stands in the name of the Lessee in the 'Other Rights Column' of the Survey records and the property belonging to the Respondent is located on the northern side of the property in Survey No. 32/19. The learned Counsel further pointed out that the Government has granted an Aforamento in favour of the family of Sanvordenkar and a portion of the property was granted to the Appellant by the said family admeasuring an area of 3425sq.mts. The learned Counsel points out that such document of grants in favour of the Appellant was by a duly registered document dated 16.12.1987. The learned Counsel further points out that on 27.01.1988 as the Respondents were encroaching into the property by dumping mud in the

portion leased to the Appellant, the suit was filed, inter alia, seeking an injunction to restrain the Respondent from dumping any mud and for a mandatory injunction to remove such mud and restore to its original condition. Learned Counsel further submits that the Respondent has no right at all to the property leased to the Appellant by the family of Sanvordenkar in Survey No. 32/19 and as such according to him, the Appellant was entitled for the relief sought in the Suit. Learned Counsel further pointed out that in the written statement filed by the Respondent, the Respondent has not claimed any right to the property occupied by the Appellant in Survey No. 32/19. Nevertheless, a contention was raised that the Appellant was not justified to file the Suit as according to the Respondent such documents of the year 1987 executed in favour of the Appellant is null and void and contrary to the terms of grant of Aforamento as provided in Decree 3602. Learned Counsel further pointed out that the learned Trial Judge, after recording of evidence and hearing the parties, by Judgment and Decree dated 06.04.2001, decreed the Suit filed by the Appellant and granted the relief of permanent injunction as well as of mandatory injunction. The Respondent thereafter preferred an Appeal before the lower Appellate Court which came to be disposed by the Impugned Judgment dated 01.04.2005, whereby the Appeal preferred by the Respondent came to be allowed and the Judgment and Decree passed by the learned Trial Judge was quashed and set aside.

Learned Counsel further submits that the lower Appellate Court has non-suited the Appellant mainly on the ground that the transfer of the lease in favour of the Appellant by the family of Sanvordenkar was contrary to the provisions as provided in Decree 3602 and as such no rights would accrue to the Appellant based on such documents. Learned Counsel further submits that the learned Judge has misconstrued the provisions of Article 255 of the said Decree to come to the conclusion that as there was no endorsement of transfer in the original grant in favour of the Sanvordenkar family, the Appellant has no locus standi to file the Suit. Learned Counsel further submits that the said provision is only one of the modes to effect the transfer of such grants, but, however, the learned Judge has failed to note the provisions of Article 75 of the said Decree which clearly permits the grantee to transfer the land subject to complying with all the terms as stipulated in the grant. Learned Counsel has thereafter taken me through the Impugned Judgment of the lower Appellate Court to point out that the learned Judge has erroneously interfered in the Judgment of the learned Trial Court when there is no cause for interference in such Judgment passed by the Trial Court. However, learned Counsel submits that the Respondent is not claiming any right to the property granted to the Appellant in Survey No.32/19 and as such, the question of considering the right of the Appellant to occupy the land based on the Deed executed in favour of the Appellant is totally

unjustified. Learned Counsel further pointed out that even assuming the Appellant is in possession of the property in Survey No. 32/19, such possession would be good against the Respondent. Learned Counsel as such pointed out that as the Respondent is not claiming any right or interest in the property in Survey no. 32/19, the question of examining the entitlement of the Appellant to occupy such land at the instance of the Respondent is totally misplaced and deserves to be quashed and set aside. Learned Counsel as such pointed out that the substantial question of law be answered in favour of the Appellant.

3. On the other hand, Shri A. D. Bhole, learned Counsel appearing for the Respondent pointed out that the lower Appellate Court was justified to examine the locus of the Appellant to file the Suit, as according to him, no rights would accrue on the basis of the lease in favour of the Appellant as according to him such documents were in contravention of the provisions of Decree 3602. Learned Counsel has taken me through Article 255 of the said Decree to point out that the only mode of transfer as provided in the said Decree is by endorsement on the said grant and, in the present case, as the Appellant failed to produce the grant of such transfer, the question of considering the entitlement to file the Suit would be justified. Learned Counsel further pointed out that the lower Appellate Court has rightly examined the right of the Appellant to file the Suit and occupy the disputed

land and as such would not call for any interference in the Judgment passed by the lower Appellate Court. Learned Counsel further points out that when the Appellant has not established any legal right to occupy the land in Survey No. 32/19, the question of granting any mandatory injunction in favour of the Appellant would not at all be justified. Learned Counsel further pointed out that the Appellant has only sought for the removal of the mud and, as such, the question of demolishing any structure in the property in Survey No. 32/19 would not at all arise. Learned Counsel further submits that the findings of the lower Court with regard to the claim of entitlement of the Appellant is justified as the Appellant has also raised two contentions that the Respondent has failed to establish that any mud was dumped in the property in Survey No. 32/19 and that the Appellant was not in possession of the subject property. Learned Counsel further points out that this aspect would be crucial for the parties in deciding the matter in controversy. With regard to the findings of the lower Appellate Court on the entitlement of the Appellant, the learned Counsel submits that it would be totally unjustified to the Respondent to examine such aspect as arguments raised before the lower Appellate Court have not been examined that in case the Court finds that the Appellant established the lease in favour of the Appellant, the matter be remanded to the lower Appellate Court to decide the other two points. Learned Counsel further pointed out that the Respondent have raised the

contention that the decree itself is a nullity as the Lessor expired.

4. I have considered the submissions of the learned Counsel and I have also gone through the records. On perusal of the Judgment of the lower Appellate Court, the lower Appellate Court has erroneously non-suited the Appellant relying upon Article 75 of the said Decree 3602. The said provision is one of the modes recognised under the said Decree to confirm the grant in favour of the lessee. But, however, Article 75 of the said Decree reads thus:

“The emphyteuts can transfer and mortgage his possessory domain or encumber it with any charges or easements, on condition, however, that the acquirer shall become by means of the execution, as regards the lands on emphyteusis, invested with the same rights and obligations as those of the assignee towards the State (Government)”

5. On plain reading of the said provisions it clearly provides that the lessee has a right to transfer the grant in favour of any other person provided he complies with all the terms and conditions as mentioned in the original grant. In the present case it is not the contention of the Respondent that there were any terms which have been contravened by the Appellant which would lead to a situation that the transfer in favour of the Appellant would stand vitiated. In fact, the document was duly registered before the Sub Registrar

of the concerned jurisdiction and there is nothing on record to show that at any point of time either the Government or any other person has raised any objection with regard to the validity or otherwise of such documents. In such circumstances, the lower Appellate Court was not justified to non-suit the Appellant merely on the ground that the Article 255 of the Decree 3602 has not been complied with. Apart from that, all records clearly disclose that the Respondent is not claiming any right or interest in the property in Survey no. 32/19 and the right of the Respondent is restricted to the property in Survey No. 37/2. As the Respondent is not claiming any right or interest to the property in Survey No. 32/19, the question of examining the entitlement of the Appellant to occupy the property in Survey No. 32/19 at the instance of the Respondent is not at all justified. Admittedly, the registered document stands in the name of the Appellant. Apart from that, neither the original grantee nor his heirs have raised any objection to such document which is duly registered before the Sub Registrar of the concerned jurisdiction. In such circumstances, even assuming that the Appellant has not been able to establish the entitlement, as the Respondent does not have a better right to occupy the property in survey No. 32/19 the Respondent cannot defeat the claim of the Appellant to occupy the land in the property in Survey No. 32/19 on the basis of the document duly registered way back in the year 1987. In such circumstances, the Appellant would have a better right to occupy such

land as the Respondent has admittedly not claimed any right or interest in the property in Survey No. 32/19.

6. With regard to the submission of Mr. Bhobe, the learned Counsel appearing for the Respondent that the Respondent has not dumped any mud in the property as claimed by the Appellant, I find that the learned Judge upon appreciating the evidence on record has come to the conclusion that the Appellant was in possession of the subject property and as such the question of examining where such mud has been dumped will have no consequences as the Respondent is not claiming any right in the property in Survey no. 32/19. Any mud dumped by the Respondent therein would naturally have to be removed as it would be an encroachment in the property in possession of the Appellants surveyed under No. 32/19.

7. With regard to the next contention of the learned Counsel that the Lease Deed in favour of the Appellant itself is null and void, admittedly, the grantee nor their legal heirs have raised any objection with that regard. Even assuming that the Appellant is occupying such land based on an invalid agreement, the possession of the Appellant in any event cannot be disturbed at the instance of the Respondent who is not claiming any right to the subject property in Survey No. 32/19.

8. In such circumstances, I find that considering the dispute is only to the property admeasuring 40 mts allegedly encroached by the Respondent in the property claimed by the Appellant, remanding the matter to the lower Appellate Court would not at all be justifiable considering that the Suit was filed in the year 1988. As such, I find that the lower Appellate Court was not justified to pass the Impugned Judgment by examining the legal right of the Appellant to occupy the subject property when the Appellant claim that he was occupying the subject property and is in their possession based on a registered documents which has admittedly not been challenged by any of the parties thereto.

9. The substantial questions of law have been answered accordingly.

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

ORDER

- i. The Impugned Judgment and Decree dated 01.04.2005 passed by the lower Appellate Court is quashed and set aside.
- ii. The Judgment passed by the learned Trial Judge dated 06.04.2001 stands upheld.
- iii Appeal stands disposed of, accordingly.

F. M. REIS, J.

msr