

IN THE HIGH COURT OF BOMBAY AT GOA**APPEAL FROM ORDER NO. 54 OF 2015**

SHRI RUBEN VASCO DA GAMA AND ANR., Appellants

Versus

CANNON FR.SANTANA JACINTO DOS
REMEDIOS FALEIRO AND 8 ORS., Respondents

Shri Parag Rao, Advocate for the Appellants.

Shri J.E. Coelho Pereira, Senior Advocate with Shri Vinod Korgaonkar and Ms. Daksha Lotlikar, Advocates for Respondent Nos.1, 2, 5, 7 and 8.

CORAM:- C. V. BHADANG, J.

RESERVED ON:- 1st DECEMBER, 2016

PRONOUNCED ON:- 4th JANUARY, 2017

JUDGMENT:

Admit. Mr. Korgaonkar, the learned Counsel for the respondent nos. 1, 2, 5, 7 and 8, waives service. Heard finally by consent of parties.

2. The challenge in this appeal is to the judgment and order dated 03.07.2015, passed by the learned District Judge at Margao, in Regular Civil Appeal No.198/2012. By the impugned judgment, the learned Appellate Court has allowed the appeal and

remanded the suit, with a direction to permit the respondents/plaintiffs to produce the power of attorney and by-laws of the Cabido and then decide the matter afresh.

3. The brief facts necessary for the disposal of the appeal may be stated thus:

For the sake of convenience, the parties are referred to in their original capacity before the Trial Court. Cabido de Se Primacial e Cathedral De Arquidiocese de Goa e Damao-Defendant No.12 (Cabido, for short), is an Association governed by the Rules of Association, comprising of 113 Articles, most of which relate to religious matters. As per Article-11, Cabido is managed by the Managing Committee, consisting of fifteen 'cannons', including a President, a Treasurer, an Attorney and a Secretary. The original plaintiffs and defendant nos. 3 to 11 are the Members of the Cabido. Cannon Fr. Benjamin Nocolau Bossuet-Defendant no. 3 (since deleted), is the President of the Cabido.

4. Land Survey No.46/1 of village Quepem, consisting of fruit bearing trees and a palatial house (Palacio-de-Deao), is the

subject matter of the present dispute, which is referred to as the suit property.

5. The respondents-plaintiffs filed Regular Civil Suit No.51/2002/A before the learned Civil Judge Senior Division at Quepem, for declaration and restoration of possession of the suit property. The plaintiffs are inter-alia seeking a declaration that the lease deed dated 15.03.2002, executed by defendant no.3 on behalf of defendant no.12 (Cabido), on the strength of a power of attorney dated 01.11.1997, is null and void. The plaintiffs are seeking perpetual injunction against the appellants (defendant nos.1 and 2) from demolishing any part of Palacio-de-Deao or causing any damage thereto and for restoration of the possession of the same to the Cabido after eviction, of the appellants.

6. The appellants contested the suit raising various contentions including the suit being under valued. It was contended that several deeds of perpetual lease, have been executed by defendant no.3 in respect of the property of Cabido and there are several leave and license agreements, which have

not been challenged. In short, it was denied that the lease deed executed by defendant no.3, is illegal or bad in law.

7. The learned Trial Court framed the following issues:

ISSUES

1. Whether the plaintiff proves that the lease deed dated 15.03.2002 is bad in law ?
2. Whether the plaintiff proves that the possession of the said Palacio de Deao to be restored to defendant no.12 by evicting defendant no.1 and 2 ?
3. What order ?

ADDITIONAL ISSUE

1. Whether the plaintiffs prove that the defendants are using the said premises for commercial gains ?

8. On behalf of the plaintiffs, Cannon Fr. Santana Faleiro was examined as PW-1 alongwith Cannon Fr. Antonio Fernandes (PW-2), Mr. Ivor Gomes (PW-3) and Shri Rajesh Kale (PW-4), while appellant no. 1-Reuben examined himself as DW-1. The learned Trial Court answered issue nos. 1 and 2 and additional issue no. 1 in the negative and dismissed the suit vide judgment and order dated 31.10.2012.

9. The original plaintiffs challenged the same, before the learned District Judge in Regular Civil Appeal No.198/2012. It appears that during the pendency of the appeal, the plaintiffs filed an application for production of the certified copy of the power of attorney alongwith bye-laws of the Cabido. The application was opposed on behalf of the appellants (respondent nos.1 and 2 before the first Appellate Court), on the ground that power of attorney could not be verified in the office of the Sub-Registrar as the record being old, the document was not traceable. It was thus claimed that respondent nos.1 and 2 are unable to say whether the copy sought to be produced is a copy of that very power of attorney tendered to the Sub-Registrar with the impugned deed of lease. It was contended that the power of attorney is a private document and the original ought to have been in possession of the attorney (defendant no.3) and the plaintiffs have not shown as to how they could obtain a copy thereof. It was contended that the document is of a doubtful character. It was also contended that it is in the nature of secondary evidence, which cannot be produced without the leave of the Court. It was in these circumstances that defendant nos.1 and 2 opposed the production of the document.

10. The learned District Judge found that there is no finding recorded by the Trial Court whether the power of attorney authorised defendant no.3 to execute the lease deed and even if, there was such a power, under what circumstances it was executed. The Appellate Court then noticed that the power of attorney was not produced on record and it was for defendant nos.1 and 2 to have shown that the power of attorney was valid and this could only be done by producing the power of attorney. It held that the learned Trial Court was not justified in holding that there was no illegality on the part of defendant no.3 in executing the lease deed on behalf of the Cabido and therefore, the matter will have to be remanded back. In such circumstances, the appeal came to be allowed in the following terms:

"The appeal is allowed. The impugned judgment is quashed and set aside.

The Id. Trial Court is directed to permit the plaintiffs to produce in evidence this power of attorney and the bye-laws. The defendants are to be given an opportunity to cross examine the witness producing these documents in respect of these documents only. The Id. Trial Court is also to

give an opportunity to produce evidence in rebuttal only in respect of these two documents. Parties to appear before the Id. Trial Court on 29.07.2015 at 2.30 p.m."

11. Feeling aggrieved the appellants are before this Court.

12. I have heard Shri Rao, the learned Counsel for the appellants and Shri Coelho Pereira, the learned Senior Counsel for respondent nos.1, 2, 5, 7 and 8. With the assistance of the learned Counsel for the parties, I have perused the relevant record and I have gone through the judgment of the Trial Court and the impugned judgment of the learned District Judge.

13. It is submitted by Shri Rao, the learned Counsel for the appellants that the learned Appellate Court ought to have decided the application under Order XLI, Rule 27 of CPC, one way or the other, in terms of the law laid down by the Hon'ble Supreme Court in the case of **Malayalam Plantations Limited Vs. State of Kerala and Another, (2010) 13 SCC 487**. It is submitted that in the absence of the same, the Appellate Court was not justified in

remanding the matter to the Trial Court. It is submitted that the the Appellate Court could not have in any case, directed the Trial Court to allow production of the documents filed before it and that part of the order is without jurisdiction. It is submitted that the impugned judgment has the effect of allowing the application under Order XLI, Rule 27 of CPC, without the same being independently considered in view of the requirements of the said Rule. It is submitted that the respondents herein never sought production of the documents before the Trial Court during pendency of the suit and as such, the same could not have been allowed. It is submitted that under the said provision, the Court cannot let in fresh evidence at the appellate stage.

On behalf of the appellants, reliance is placed on the decision of the Supreme Court in the case of **State of Gujarat Vs. Mahendrakumar Parshottambhai Desai, (2006) 9 SCC 772, K. Venkataramiah Vs. A. Seetharama Reddy, 1963 LawSuit (SC) 28, Andisamy Chettiar Vs. Subburaj Chettiar, AIR 2016 (SC) 79 and Union of India Vs. Ibrahim Uddin and Another, (2012) 8 SCC 148.**

14. On the contrary, it is submitted by Shri Coelho Pereira, the learned Senior Counsel for the respondent nos. 1, 2, 5, 7 and 8 that an appeal against an order of remand has to comply with the requirements of Section 100 of CPC, namely, it lies only on a substantial question of law and not otherwise. Reliance in this regard is placed on the decision of the Supreme Court in the case of **Narayanan Vs. Kumaran and Others, (2004) 4 SCC 26**. It is submitted that the appeal does not involve any substantial question of law. It is submitted that under Order XLI, Rule 27 of CPC, the Appellate Court can permit production of a document, where it requires any such document to enable it to pronounce judgment. It is submitted that the powers of the Appellate Court in this regard are wide and in the present case, there is nothing wrong in the Appellate Court, directing the Trial Court to permit such production and then to decide the suit. It is submitted that the material issue in the suit is about the validity of the lease deed, which is said to be executed on the strength of the power of attorney. It is submitted that no prejudice whatsoever is caused to the appellants as they would get an opportunity to establish their defence.

On behalf of respondent nos.1, 2, 5, 7 and 8, reliance is placed on the decision of the Supreme Court in the case of **Wadi Vs. Amilal, 2002 LawSuit(SC) 631**. A common reliance is placed on behalf of the parties on the decision in the case of **K. Venkataramiah** (supra).

15. I have carefully considered the rival circumstances and the submissions made and I do not find that a case for interference is made out. The material case with which the appellants approached the Trial Court is that the lease deed executed by defendant no.3 on behalf of the Cabido (defendant no.12) on the basis of the power of attorney, is null and void. Evidently, the burden to prove this was on the plaintiffs. That is also the import of issue no.1 framed by the Trial Court. The defendant nos.1 and 2 claimed that the defendant no.3 had such an authority to execute a lease deed. However, it appears that none of the parties produced the copy of the power of attorney on record before the Trial Court. It was however brought on record that apart from the lease deed in favour of the defendant nos.1 and 2, the defendant no.3 had executed some other lease deeds

on behalf of the Cabido. The learned Trial Court relied upon the admission of PW-1 to the effect that, at the time of the execution of the lease deed in favour of the defendant nos.1 and 2, the power of attorney was in force, to hold that the lease deed cannot be held "bad by any stretch of imagination".

16. Before the Appellate Court, the respondents-plaintiffs filed an application for production of the certified copy of the power of attorney and the bye-laws of the Cabido. Although, no specific provision is mentioned under which, the production was sought, the same will have to be considered in the context of the provisions of Order XLI, Rule 27 of CPC. The present case is evidently not covered by clause (a) of Rule 27. The application seeking production does not show that a case as is envisaged by clause (aa) of Rule 27 was tried to be made out. We are thus left with clause (b) of Rule 27 of Order XLI CPC, under which the Appellate Court can permit such production, where it requires any document in order to enable it to pronounce judgment or for any other substantial cause. In the case of **Wadi** (supra), the question was whether the mutation entry could be allowed to be produced

at the appellate stage. The question was examined with reference to Rule 27(b) of Order XLI CPC. The Revenue Appellate Authority, after referring to the mutation entry, had remanded the matter to the original Authority. The Supreme Court while setting aside the order of the High Court and the Board of Revenue, restored the order of the Revenue Appellate Authority. It has been inter-alia held that under the said Rule, the requirement is that of the Appellate Court, bearing in mind that the interest of justice is paramount. If it feels that pronouncing a judgment in the absence of such evidence would result in a defective decision and to pronounce an effective judgment, admission of such evidence is necessary, it can adopt that course. It is significant to note that in the case of **Wadi** (supra), once the document was found to be relevant, the order of remand, was ultimately confirmed.

17. In the Constitution Bench judgment in the case of **K. Venkataramiah** (supra), the question was about the necessity of recording reasons, while allowing production of a document at the appellate stage and the effect of omission to record such reasons. In that case also, the High Court had allowed the production under

Rule 27(b) of Order XLI CPC. The Hon'ble Supreme Court has inter-alia held that although, the omission to record reasons is to be considered as a serious defect, the provisions of Rule 27(2) requiring such recording of reasons cannot be construed to be mandatory. The following observations in para 13 of the judgment are apposite:

"It is very much to be desired that the courts of appeal should not overlook the provisions of cl. (2) of the Rule and should record their reasons for admitting additional evidence. We are not prepared, however, to accept the contention of the appellant that the omission to record the reason vitiates the admission of the evidence. Clearly, the object of the provision is to keep a clear record of what weighed with the appellate court in allowing the additional evidence to be produced-whether this was done on the ground (i) that the court appealed from had refused to admit evidence which ought to have been admitted, or (ii) it allowed it because it required it to enable it to pronounce judgment in the appeal or (iii) it allowed this for any other substantial cause. Where a further appeal lies from the decision of the appellate court such recording of the reasons is necessary and useful also to the court of further appeal for deciding whether the discretion under the rule has been judicially exercised by the

court below. The omission to record the reason must therefore be treated as a serious defect. Even so, we are unable to persuade ourselves that this provision is mandatory. For, it does not seem reasonable to think that the legislature intended that even though in the circumstances of a particular case it could be definitely ascertained from the record why the appellate court allowed additional evidence and it is clear that the power was properly exercised within the limitation imposed by the first clause of the Rule all that should be set at naught merely because the provision in the second clause was not complied with. It may be mentioned that as early as 1885 when considering a similar provision in the corresponding section of the Code of 1882, viz., s. 586, the High Court of Calcutta held that this provision for recording reasons is merely directory and not imperative vide Gopal Singh Vs. Jhakri Raj. We are aware of no case in which the correctness of this view has been doubted. It is worth noticing that when the 1908 Code was framed and Order 41, Rule 27 took the place of the old section 568, the legislature was content to leave the provision as it was and did not think it necessary to say anything to make the requirement of recording reasons imperative. It is true that the word "shall" is used in Rule 27 (2); but that by itself does not make it mandatory. We are therefore of opinion that the omission of the High Court

to record reasons for allowing additional evidence does not vitiate such admission.”

18. Coming to the present case, it would appear that the respondents had sought production of the certified copy of the power of attorney and the copy of the bye-laws of the Cabido. Out of these, the bye-laws cannot strictly be said to be a document as such. The Court can and ought to take notice of the same, being the Rules governing the management of the Cabido. In so far as the power of attorney is considered, it would appear from the reply filed to the application for production that the same was opposed on the ground of it being a secondary evidence and questioning its genuineness. It is evident that this aspect will be gone into by the Trial Court in the context of the order of remand. The learned Appellate Court in the circumstances of the case has found it appropriate to permit the production of the documents before the Trial Court on remand. In such circumstances, I do not find that the judgment suffers from any infirmity. If the overall reading of the judgment in the context of the factual background and the issues involved leads to the conclusion that the Appellate Court has applied its mind while allowing such production, no exception can

be taken to such a finding. The contention that the document was not produced or sought to be produced before the Trial Court cannot make any difference. Firstly because the resort to Rule 27 of Order XLI CPC is necessitated only where the document is sought to be produced before the Appellate Court. Secondly, under Rule 27(b), it is for the Appellate Court to find that the production of the document is necessary to enable it to pronounce the judgment or for any substantial cause.

19. In the case of **Mahendrakumar Desai** (supra), it has been inter-alia held that provisions of Order XLI, Rule 27 of CPC cannot be used to let in fresh evidence at the appellate stage where, without such evidence it can pronounce judgment in the case. It can thus be seen that the question whether the Appellate Court needs such additional evidence for pronouncing the judgment or for any substantial cause, would depend on the facts and circumstances of each case.

20. It is now well settled that the application under Order XLI, Rule 27 of CPC has to be considered at the stage of final

hearing of the appeal (see the case of **Malayalam Plantations Limited** and **Ibrahim Uddin** (supra)). Thus, the judgment in the appeal, when read as a whole, should show that the application has been considered and there is application of mind while taking a view one way or the other. In the case of **Andisamy Chettiar** (supra), the Appellate Court had allowed the production of additional evidence, which order was set aside by the High Court. In the facts of the case, it was held that the High Court in its revisional jurisdiction could not have interfered with the order of the Appellate Court also for the reason that if the order was wrong on merits, it could always be challenged in the second appeal after the appellate decree is passed. It can thus be seen that the case turned on its own facts.

21. The present appeal under Order XLIII, Rule 1(u) of CPC lies only on a substantial question of law as held by the Hon'ble Supreme Court in the case of **Narayanan** (supra). In my considered view, the appeal does not involve any substantial question of law. The appeal is without any merit and is accordingly dismissed, with no order as to costs. It is however made clear

that the Trial Court shall decide the suit on its own merits, without being influenced by the observations in the judgment of the Appellate Court or this Court.

C. V. BHADANG, J.

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