

IN THE HIGH COURT OF BOMBAY AT GOA

SECOND APPEAL NO. 67 OF 2017

MR. SEBASTIAO OLIVEIRO AND ANR., ... Appellants
Versus
MR. YESHWANT @ VASSANT BABU PRABHU
DESSAI (DECEASED) AND 6 ORS., ... Respondents

Mr. Ryan Da Piedade Menezes, Advocate for the appellant.
None for the respondent nos. 4, 6 & 7.

Coram:- F. M. REIS, J.

Date:- 30th June, 2017

ORAL ORDER :

Heard Mr. R. Menezes, learned counsel appearing for the appellants.

2. The above appeal challenges the judgments passed by the Courts below whereby the suit filed by the respondents was partly decreed and the appellants were directed to demolish the structure put up in the property surveyed under No.102 of Cotombi Village.

3. Mr. R. Menezes, learned counsel appearing for the appellants has assailed the impugned judgments essentially on the ground that the disputed structure was constructed with the consent of the respondent no.1 and the original co-owners who included the father of the respondent no.1 way back in the year

1991. The learned counsel further submits that the respondents have produced a letter of consent for the reconstruction of the subject house duly signed by the father of the respondent no.1 and his uncle Krishna Prabhu Dessai. The learned counsel further pointed out that the said letter is at Exhibit 71 and clearly shows that the construction was put up upon obtaining the requisite permission from the father of the respondent no.1 and his uncle. The learned counsel further pointed out that in fact the father of the respondent no.1 who is now deceased had from time to time visited to examine the progress of the structure and to ascertain whether the appellants had exceeded the plinth area. The learned counsel further pointed out that the parents-in-law of the appellant no.1 was a mundkar of the subject house and as such according to him the Courts below have erroneously discarded the said letter to come to the conclusion that the appellants are not entitled to the subject house. The learned counsel further submits that merely on the basis of some stray admissions by DW1/the appellant no.1 herein, the learned Judge had non suited the appellants of their right to occupy such house. The learned counsel further pointed out that the appellants were agricultural tenants of the subject property and as such according to him the Courts below have failed to note that the appellants were in possession of the subject house and as such the findings of the Courts below that the appellants have no right to the subject house are perverse and call for interference of this Court. The

learned counsel further submits that once it is established that the construction was put up on the basis of the consent of the father of the respondent no.1, there is no justification for the respondents to file the suit and to obtain a relief as granted in the suit. The learned counsel thereafter has taken me through the judgments passed by the Courts below to point out the evidence of DW2 and DW3 who have categorically stated that the appellants were residing in the subject house and had carried out the reconstruction therein which has been erroneously discarded by the Courts below. The learned counsel further submits that DW2 has also stated that the Bhatkar was present when the reconstruction was put up to measure the plinth area.

4. I have considered the submissions of the learned counsel and I have also gone through the records. The learned Trial Judge upon appreciating the evidence on record has come to the conclusion that the reconstruction permission referred to by the appellants at Exhibit 71 was pertaining to a house which was occupied by the father of the appellant no.1 in the property surveyed under No.98/1. The fact that the father of the appellant no.1 was Menino Oliviera who was a mundkar of the house in survey no.98/1 is not in dispute. On perusal of the letter at Exhibit 71, I find that there is no reference of any construction or any house allowed to be constructed by the father of the respondent no.1 to the appellants herein. In fact, on perusal of the

said letter, it clearly shows that such consent was given for repairs or reconstruction of a mundkarial dwelling house. Admittedly, at that point of time the father of the appellant no.1 who had apparently expired was a mundkar of the dwelling house located in the property surveyed under no.98/1. The learned Lower Appellate Court while reexamining the evidence on record has further noted that the appellant no.1 had deposed as DW1 and stated that after obtaining the consent from the father of the respondent no.1, a plan for reconstruction was submitted to the local Panchayat. Such plan has not been produced on record. The learned Judge as such rightly inferred that the non-production of such plan would itself mean that the suit house was not constructed pursuant to the licence from the pachayat. In fact, an adverse inference has to be drawn against the appellants for non-production of such plan which according to the appellants was obtained prior to the construction of the subject house. This would clearly infer that such permission, if any, was for the reconstruction of the mundkarial house which was admittedly located in the property surveyed under No.98/1 which also belongs to the respondents herein.

5. It is the case of the respondents that by obtaining a consent based on a letter at Exhibit 71, the appellant no.1 misrepresented the authorities and started illegally putting up a construction in the property of the respondents surveyed under

No.102 of Cotombi Village. The Courts below have concurrently found that the contention of the appellants that they were occupying a structure in the said property is totally false and the existence of the structure itself in the property surveyed under No.102 has not been established by any cogent or reliable material produced on record. The Courts below have also noted that the plan produced on record in respect of the property surveyed under No.102 does not show any structure therein. These concurrent findings of fact based on the material on record cannot be reappreciated by this Court in the present Second Appeal. Faced with such documentary evidence, the stray statements by DW2 and DW3 to contend that the Bhatkar was present when the construction was being put up has been rightly disbelieved by the Courts below while coming to the conclusion that the appellants have failed to establish that they have any right to the subject house.

6. The contention of Mr. Menezes, learned counsel appearing for the appellants that the parents-in-law of the appellants was the mundkar of the subject house has not been established by any evidence on record. Apart from that, there are no particulars to the so called tenancy nor does the survey records disclose that the property was given in tenancy in favour of the appellants herein. In such circumstances, the Courts below have concurrently found that the appellants had trespassed into the

property of the respondents surveyed under No.102 and put up the construction therein illegally and without the consent of the respondents which resulted in partly decreeing the suit filed by the respondents. Considering the concurrent findings of fact, I find that there are no substantial question of law which arise in the present appeal for consideration. There is no perversity in the findings arrived at by the Courts below. The existence of the structure prior to the erection of the disputed construction has not been established by any documentary or other material on record. The learned Lower Appellate Court as such rightly dismissed the appeal filed by the appellants and confirmed the decree passed by the learned Trial Judge partly decreeing the suit. In view of the above, I find that there is no substantial question of law which arises in the present appeal for consideration under Section 100 of the Civil Procedure Code.

7. The contention of Mr. Menezes, learned counsel that non consideration of evidence of DW2 and DW3 would be a perversity in the findings of fact of the Court below cannot be accepted. The Courts below upon appreciating the evidence on record and rightly drawing the inference in law have come to the conclusion that the letter at Exhibit 71 was pertaining to the property surveyed under No.98/1 wherein Menino Oliveira who is the father of the appellant no.1 was a mundkar in such property. The Courts below have also taken note of the

inconsistent stand taken by the appellant no.1 during the course of his cross examination and suggestions put to PW1 wherein the appellants contended that on account of differences with his parents, the appellants had sought permission to put up the suit construction. This itself contradicts the stand of the appellants that they were tenants of the subject property wherein a structure was existing in their occupation. In such circumstances, I find that there is no case made out for any interference in the impugned judgments by this Court in a Second Appeal under Section 100 of the Civil Procedure Code. Hence, the appeal stands rejected.

F. M. REIS, J.

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