

IN THE HIGH COURT OF BOMBAY AT GOA**FIRST APPEAL NO. 125 OF 2016**

Dr. Fernando Jose Mascarenhas,
son of late Constancio Mascarenhas,
77 years old, Indian National,
r/o 1st Floor, No.3 Beach Nest
Co-operative Housing Society,
Miramar, Panaji Goa.

... Appellant

Versus

1. Ms. Drakshayani Appasaheb Palekar,
major of age, Indian National,
2. Sainath Appasaheb Palekar,
major of age, Indian National,
3. Sumit Appasaheb Palekar,
major of age, Indian National,
All residents of H. No.547-1-A,
C/o Tukaram Shiriodkar
“Rukmini Niwas”
Near Pragati School,
Betim, Bardez Goa.

... Respondents

Mr. J. E. Coelho Pereira, Senior Advocate with Mr. Vinod Vishnu Korgaonkar, Advocate for the appellant.

Mr. Deepak Gaonkar, Advocate for the respondents.

Coram:- F. M. REIS, J.

Date:- 3rd March, 2017

ORAL JUDGMENT :

Heard Mr. J. E. Coelho Pereira, learned Senior Counsel appearing for the appellant and Mr. D. Gaonkar, learned counsel appearing for the respondents.

2. Admit. Heard forthwith with the consent of the learned counsel.

3. The learned counsel appearing for the respondents waives service.

4. The parties were put to notice that the above appeal may be disposed of finally at the stage of admission. Hence, the matter was heard finally at the stage of admission.

5. The above appeal challenges an order passed by the learned Civil Judge Senior Division, Panaji dated 15.10.2016 whereby an application filed under Order VII Rule 11 of the Civil Procedure Code by the respondents came to be allowed and the

plaint filed by the appellant came to be rejected.

6. Mr. Coelho Pereira, learned Senior Counsel appearing for the appellant has pointed out that the learned Judge has rejected the plaint essentially on the ground that the suit is barred in terms of Section 56 of the Goa, Daman and Diu Buildings (Lease, Rent & Eviction) Control Act, 1968 (herein after referred to as "the Rent Control Act" without examining that the plaint filed by the appellant was on the basis that the respondents were trespassers in the subject premises. The learned Senior Counsel further pointed out that the learned Judge has erroneously taken a view that commercial tenancies devolved upon the respondents when according to the appellant no such tenancy rights devolved upon the respondents herein. The learned Senior Counsel further submits that the judgment of the Apex Court relied upon by the learned Judge to hold that commercial tenancies are heritable would not be applicable to the present case as according to him the plaint itself contend that the appellant has not admitted the respondents to be the tenants of the subject

premises. The learned Senior Counsel further pointed out that the essential requirements to hold that the suit is barred under Section 56 of the Rent Control Act is that the person has to be a tenant of the subject premises. The learned Senior Counsel further pointed out that it is the case of the appellant that no tenancy rights of the subject premises devolved upon the respondents herein as according to the appellant the respondents were trespassers of the subject premises and as such the learned Judge has erroneously rejected the plaint filed by the appellant. The learned Senior Counsel has thereafter taken me through the definition of "tenant" in terms of Section 2(p) of the Rent Control Act to point out that such declaration of inheritance extend only to the first degree of inheritance and not in perpetuity. The learned Senior Counsel further pointed out that a statutory tenant can be inherited only in terms of the Statute and as such on plain reading of the Statute, there is nothing to suggest that any rights of the deceased tenant have devolved upon the respondents herein. The learned Senior Counsel further pointed out that even on reading the provisions of Order VII Rule 11 of the Civil Procedure Code, the averments in

the plaint only have to be read and not the defence raised by the respondents to examine whether the plaint deserves to be rejected. The learned Senior Counsel further pointed out that the contention raised by the respondents that they are tenants of the premises are matters to be examined only after filing of the written statement and issues are framed and the evidence is recorded in accordance with law. The learned Senior Counsel as such submits that the impugned order passed by the learned Judge be quashed and set aside.

7. On the other hand, Mr. D. Gaonkar, learned counsel appearing for the respondents has supported the impugned order. The learned counsel pointed out that it is well settled by the Apex Court in the judgment reported in **AIR 1985 SC 796** in the case of **Smt. Gian Devi Anand V/s Jeevan Kumar & Others**, that commercial tenancies are heritable and as such according to him the respondents being the heirs of the statutory tenant are entitled to inherit such tenancy rights. The learned counsel further pointed out that on perusal of the averments at para 7 of the plaint, it

clearly disclose that the appellant has accepted the father of the respondents to be a statutory tenant and as such on going through the definition of "tenant", such rights have devolved upon the respondents herein. The learned counsel further pointed out that the learned Single Judge of this Court in the judgment dated 21.02.2014 passed in ***Second Appeal No. 60 of 2009*** in the case of ***Shri Tulsidas Atmaram Shirodkar alias Narvekar & Anr. V/s Shri Chandrakant Bhikaro Naik*** has taken a view that commercial tenancies are heritable and as such the contention of the appellant that no such rights have devolved upon the respondents is totally misplaced. The learned counsel further pointed out that the respondents come within the meaning of tenancy in terms of the Rent Control Act and as such the learned Judge was justified to pass the impugned order. The learned counsel further pointed out that the essential relief sought by the appellant is for eviction of the respondents and as such in terms of Section 56 of the Rent Control Act, the suit filed by the appellant is barred. The learned counsel further pointed out that as such there is no case made out for interference in the

impugned order and the appeal be accordingly rejected.

8. I have duly considered the submissions of the learned counsel and I have also gone through the records and on the basis thereof, the following point for determination arises in the present appeal.

POINT FOR DETERMINATION

Whether the learned Judge was justified to reject the plaint on reading the averments in the plaint filed by the appellant ?

9. On going through the averments in the plaint, the essential pleadings of the appellant in the plaint are that the respondents are trespassers in the subject premises. It is contended by the appellant that the tenancy rights have devolved upon the respondents herein after the death of the father/husband. On going through the reliefs sought by the appellant, prayers (a) and (b) read thus :

(a) For a judgment and decree, declaring that the defendants are trespassers in respect of the suit shop.

(b) For judgment and decree, directing the defendants to hand over to the plaintiff vacant possession of the suit shop.

10. On going through the said reliefs, the second prayer of the appellant for eviction of the respondents is based on the declaration sought at para 8 to the effect that the respondents are trespassers of the subject premises. The truthfulness or otherwise of the allegations in the plaint cannot be considered or examined by the learned Judge while examining the application under Order VII Rule 11 of the Civil Procedure Code. In such circumstances, on going through the averments in the plaint and taking note of the fact that it is the case of the appellant that no tenancy rights have devolved upon the respondents and as the appellant do not accept the respondents as tenants of the subject premises in the plaint, I find that the learned Judge was not

justified to reject the plaint under Order VII Rule 11 of the Civil Procedure Code. The defence of the respondents that they are tenants of the premises is a matter which has to be considered after the issues are framed and evidence, if any, is recorded in accordance with law. As already pointed out herein above, the correctness or otherwise of the contention of the appellant based on the pleadings of the plaint cannot be examined by the Court on the basis of the defence raised in the written statement by the respondents.

11. Looking into the averments in the plaint and taking note thereof, I find that as it is the case of the appellant that the respondents are trespassers in the subject premises and as a declaration to that effect has been sought by the appellant, which relief can be examined by the Civil Court, the learned Judge was not justified to pass the impugned order. Needless to say that the rival contentions on merits of the claim put forward by the appellant and the respondents are left open to be examined by the learned Judge after necessary issues are framed based on the

pleadings of the parties in accordance with law. In such circumstances, the learned Judge has proceeded on an assumption that the respondents are admitted tenants of the subject premises when on the contrary upon reading the averments in the plaint, there is no admission on the part of the respondents that the respondents herein are tenants of the subject premises. In such circumstances, in my considered opinion the impugned order passed by the learned Judge rejecting the plaint under Order VII Rule 11 of the Civil Procedure Code cannot be sustained and deserves to be quashed and set aside. The findings herein are tentative only for the purpose of examining an application filed under Order VII Rule 11 of the Civil Procedure Code and all contentions of the parties on merits including the point on jurisdiction raised by the respondents are left open. The point for determination is answered accordingly.

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

ORDER

- (i) The impugned order dated 15.10.2016 is quashed and set aside.
- (ii) Special Civil Suit No. 32/2015 is restored to the file of the learned Judge.
- (iii) The learned Judge shall proceed to decide the suit on its own merits after hearing the parties in accordance with law.
- (iv) Needless to say that all contentions on merits are left open.
- (v) The appeal stands disposed of accordingly.

F. M. REIS, J.

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