

IN THE HIGH COURT OF BOMBAY AT GOA**SECOND APPEAL NO. 128 OF 2004**

- 1) Shri Vishwanath Ganu Dabolkar (Amendment carried out as per order
S/o late Ganu Dabolkar, dtd. 22/11/13 passed in MCA
Major of age, No.96/13)
C/o H. No. 399,
Titawadda, Nerul,
Bardez- Goa.
(since deceased through LRs)
- 1(1) Smt. Bhanumati Vishwanath Dabholkar
w/o Vishwanath Ganu Dabholkar,
aged 75 years, resident of H. No.399,
Titawada, Nerul, Bardez, Goa.
- 1(2) Shri Rajendra Vishwanath Dabholkar,
Son of Vishwanath Dabholkar,
Age 56 years, resident of H. No.399,
Titawada, Nerul, Bardez, Goa.
- 1(3) Smt. Radhika Rajendra Dabolkar,
Wife of Rajendra V. Dabholkar,
Aged 45 years, resident of H. No.399,
Titawada, Nerul, Bardez, Goa.
- 1 (4) Shri Avinash V. Dabholkar,
Son of Vishwanath Ganu Dabholkar,
aged 48 years, resident of H. No.399,
Titawada, Nerul, Bardez, Goa.
- 1(5) Smt. Ashwini Avinash Dabolkar,
Wife of Avinash V. Dabholkar,
aged 33 years, resident of H. No.399,
Titawada, Nerul, Bardez, Goa.
- 1(6) Miss Lata V. Dabholkar,
Daughter of Vishwanath Ganu Dabholkar,
aged 57 years, (Spinster) resident of H. No.399,
Titawada, Nerul, Bardez, Goa.

- 1(7) Smt. Seema Sandeep Naik,
Daughter of Vishwanath Ganu Dabholkar,
aged 40 years, resident of Kapileshwari,
Ponda, Goa.
- 1(8) Shri Sandeep Sada Naik,
Husband of Seema Sandeep Naik,
Age 43 years, resident of Kapileshwari,
Ponda, Goa.
- 1(9) Smt. Dikshita Dyaneshwar Naik,
Daughter of Vishwanath Ganu Dabholkar,
Age 56 years, resident of Parampai,
Madkai, Ponda, Goa.
- 1(10) Shri Dyaneshwar Naik,
Husband of Smt. Dikshita D. Naik,
Age 39 years, resident of Parampai,
Madkai, Ponda, Goa.
- 1(11) Smt. Sarika Pandurang Naik,
Daughter of Vishwanath G. Dabholkar,
Age 30 years, resident of Khadpaband,
Ponda, Goa.
- 1(12) Shri Pandurang Naik,
Husband of Smt. Sarika Naik,
Age 33 years, resident of Khadpaband,
Ponda, Goa.
- 1(13) Smt. Megha Mahendra Naik,
Daughter of Vishwanath Ganu Dabholkar,
Age 28 years, resident of Mardol,
Ponda, Goa.
- 1(14) Shri Mahendra Naik,
Husband of Smt. Megha M. Naik,
Age 32 years, resident of Mardol,
Ponda, Goa.
- 1(15) Smt. Sangita S. Kandolkar,

Daughter of Vishwnath Ganu Dabholkar
Age 26 years, resident of Tivim,
Casa ward, Bardez, Goa.

1(16) Shri Sudesh Harischandra Kandolkar,
Husband of Smt. Sangita Kandolkar,
Age 32 years, resident of Tivim,
Casa ward, Bardez, Goa.

1(17) Shri Chandan V. Dabolkar,
Son of Vishwanath Ganu Dabolkar,
Age 29 years, resident of Tivim, Casa Ward,
Bardez, Goa.

V e r s u s

Shri Anant B. Naik (since deceased)
By his Legal Representatives:

1. Shri Bhikurao Anant Naik,
son of late Anant B. Naik,
major of age,
teacher by profession and his wife,
2. Smt. Anuradha Bhikurao Naik,
housewife, major of age,
3. Shri Prasad Anant Naik,
son of late Anant B. Naik,
major of age,
occupation service, and his wife,
4. Smt. Prasad Naik,
major of age,

All above are resident of
Fattawada, Nerul,
Bardez, Goa.

5. Smt. Shanta Gokuldas Amonkar,
daughter of late Shri Anant B. Naik,
major of age, and her husband,

6. Shri Gokuldas Chandu Amonkar,
son of Shri Chandu Amonkar,
major of age,

Both resident of Tonca, Miramar,
Post Office: Caranzalem, Goa.

7. Smt. Krupa Shivkumar Naik,
Daughter of late Shri Anant B. Naik
major of age, and her husband

(Appeal stand dismissed a
agst. respondt. Nos.7 & 8
as per order dtd. 15.9.2011

8. Shri Shivkumar Naik,
major of age,
Both residents of Pantemala,
Curchorem, Behind Kamat Hospital,
Curchorem, Sanguem, Goa.

(Appeal is restored agst.
respond. nos. 7 & 8 as per
order dtd. 22.11.13)

9. Miss Sadhana Anant Naik,
daughter of late Shri Anant Naik,
major of age,

10. Miss Seema Anant Naik,
daughter of late Shri Anant Naik,
major of age,

both residents of Fattawada,
Nerul, Bardez, Goa.

..... Respondents.

(the addresses of the parties herein, are their respective registered addresses)

Shri S. D. Lotlikar, Senior Advocate with Advocate Ms. A. Naik for the
Appellant.
None for the Respondents.

CORAM: C. V. BHADANG, J.
DATE: 12th June, 2018.

JUDGMENT:

On 26/9/2006, this Appeal was admitted on the following substantial questions of law:

- 1) Whether, in view of the plea of the defendant in the written statement, that he constructed the suit shop at his own expense, on obtaining necessary permission from the previous owner and paid Rs.3/- monthly as ground rent, to its previous owner, it could be said that what was created in favour of the defendant was a lease or that it was a lease for building purposes?
- 2) Whether, in the absence of any plea in the Written statement to the effect that the defendant was a permanent lessee in respect of the suit portion of the land covered by the suit shop, the defendant could be held to be a permanent lessee of the same.?
- 3) Whether, upon the collapse of the suit shop, the defendant was entitled to reconstruct the same on the basis of the plea set up by him in the written statement to the effect that he constructed the suit structure with the permission of the landlady and was paying Rs.3/- by way of ground rent in respect of the land covered by the

suit shop?

2. The brief facts necessary for the disposal of the appeal may be stated thus: That the appellant (original plaintiff) filed Regular Civil Suit No.146/98/E (Old Regular Civil Suit No.111/90/D) against the respondents for permanent injunction. The subject matter of dispute happens to be a land admeasuring 584 sq.mtrs bearing survey no.3/1 situated at Nerul Bardez-Goa (hereinafter referred to as the suit property). According to the appellant, he has purchased the suit property from one Surendra Pandhari Naik on 25/5/1981 and the sale deed is registered with the Sub Registrar at Panaji on 15/7/1982. The appellant had a tea shop in the suit property which was constructed by the appellant at his own expense and he was running the same for many years prior to the filing of the suit. Adjacent to the tea shop, there is also a store room./shop constructed by the predecessor, Mr. Surendra Naik. This room/shop forms the subject matter of dispute and is hereinafter referred to as the “suit shop”. According to the appellant, the suit shop was occupied by the defendant as a tenant on a monthly rent of Rs.10/-. It was contended that after the appellant purchased the suit shop, the defendants stopped paying rent and has deliberately demolished the suit shop so as to reconstruct the same without the consent of the appellant. It was also contended that the defendant had closed the shop since two years prior to the filing of the suit.

3. On 10/4/1990, the appellant noticed that the respondent had brought some construction material on the site which led the appellant to file the suit seeking injunction against the respondents from reconstructing the suit shop and from interfering with the suit property in any manner. The appellant had also filed an objection before the Village Panchayat of Verem and before the Panaji Planning and Development Authority, requesting them not to issue licence/No Objection Certificate (NOC) to the respondent for construction.

4. It appears that the plaint was subsequently amended and the appellant claimed that the respondent was occupying the suit shop on a leave and licence basis.

5. The respondent filed a written statement and resisted the claim. It was denied that the suit shop was constructed by the predecessor of the appellant. It was contended that the suit shop was constructed by the respondent at his own expense after obtaining necessary permission from the predecessor of the appellant and he was paying ground rent at Rs.3/- per month to the previous owner. It was also contended that the respondent is a mundkar of the suit shop and had filed an application for registration before the Mamlatdar at Nerul. It was further contended that the previous owner i.e. the predecessor-

in- title of the appellant, had filed Regular Civil Suit No.45/1966 against the respondent claiming that the respondent was a tenant and had failed to pay the rent. The respondent had raised a plea of mundkarship in the said suit whereupon the suit was withdrawn by the previous owner on 2/9/1968. In short, it was contended that the respondent is the owner and is in possession and enjoyment of the suit shop. In para 8 of the written statement it was contended that the shop was demolished by the appellant which in fact needed immediate repairs. The respondent filed an additional written statement and raised a counter claim, in which it was not disputed that a part of the suit shop has collapsed and the remaining portion may also collapse at any time. It was contended that the appellant was solely responsible for the damage caused to the suit shop. The respondent, therefore sought a declaration that he is entitled to reconstruct the suit shop and/or to carry out repairs thereto and sought injunction against the appellant restraining him or anybody on his behalf from obstructing the respondent from carrying out repairs/reconstruction of the suit shop and in any manner interfering with the suit shop or the land underneath.

6. On the basis of rival pleadings, the learned trial court framed the following issues in the suit:

1. Whether the plaintiff proves that the defendant deliberately demolished the suit shop as to construct the

same without the consent of the plaintiff?

2. Whether the plaintiff proves that the defendant dumped laterite stones and other building material on 10/4/90 to reconstruct a new shop?

3. Whether the defendant proves that he constructed the suit shop in the year 1952 at his own expenses by obtaining permission of the previous owner and paying Rs.3/- monthly as ground rent to the previous owner?

4. Whether the plaintiff proves that he is entitled to the relief of injunction?

5. Whether the defendant proves that the suit shop and the land below is always in possession and enjoyment of the defendant exclusively?

Additional Issues:

5-A Whether the plaintiff proves that the suit shop totally collapsed in April, 1990?

5-B Whether the defendant proves that he is the lessee in possession of the suit land?

5-C Whether the defendant proves that he is entitled to repair the suit shop?

5-D Whether the defendant proves that the counter claim is barred by limitation?

7. The parties led evidence in which Mr. V. Dabolkar was examined as (PW.1), along with Mr. Gajanan Naik (PW.2), Gurudas Chopdekar (PW.3) and Laximan Dessai (PW.4). The respondent examined Shri Bikurao Naik as (DW.1), along with Mr. Namdev Naik (DW.2) and Mr. Pundalik Naik (DW.3).

8. The learned trial court by judgment and decree dated 6/7/2002 dismissed the suit while decreeing the counter claim. The learned trial court, however clarified that before proceeding with the construction/reconstruction /repairs the respondent shall obtain necessary permission from the concerned authorities. Feeling aggrieved, the appellant challenged the same before the learned District Judge at Mapusa in Regular Civil Appeal No.96/2002. The learned District Judge framed a solitary point for determination, as to whether the trial court erred in holding that the defendant is a permanent lessee of the land beneath the suit room/shop? The learned District Judge answered the point in the negative and dismissed the appeal by judgment and order dated 20/7/2004. Feeling aggrieved the appellant is before this Court.

9. The appellant as well as the respondent are dead and are survived by their legal representatives who have been brought on record.

10. I have heard Shri Lotlikar, the learned Senior Counsel for the appellant. None appears for the respondent. With the assistance of the learned Senior Counsel for the appellant I have gone through the record and the impugned judgment of the trial court as well as the first appellate court.

11. It is submitted by Shri Lotlikar, the learned Senior Counsel for the appellant that the Courts below were in error in holding that the respondent was a permanent lessee, in the absence of any such plea being raised by the respondent. It is submitted that the respondent cannot be said to be a permanent lessee of the suit shop or of the land underneath. It is submitted that the respondent raised a plea of mundkarship which was untenable on the face of it, inasmuch as there cannot be a mundkar, in respect of a commercial structure/shop. It is submitted the concept of a mundkar essentially applies to a dwelling house and thus the plea was not available to the respondent. It is submitted that the reliance placed by the learned trial court and the District Judge on the decision of the Supreme Court in the case of **Sivayogeswara Cotton Press Devangere and others Vs. M. Panchaksharappa and anr., AIR 1962 S,C 413** is misplaced, as the said case clearly turned on its own facts. The learned Senior Counsel has pointed out that the suit shop is not in existence since long and therefore, considering the fact that the counter claim is decreed on the basis of a finding of the respondent being a permanent lessee, the same may be set aside.

12. I have carefully considered the circumstances and the submissions made. The challenge and the submissions on behalf of the appellant have to be examined in the context of the substantial questions of law framed as set

out above. The learned Senior Counsel for the appellant had basically taken exception to the finding of the Courts below holding the respondent as a permanent lessee. Thus I first propose to deal with the substantial question of law at serial no.2.

It is true that the respondent had not raised any plea about he being a permanent lessee of the suit shop. All that was claimed by the respondent was that he had constructed the suit shop with the permission of the previous owner and was paying Rs.3/- per month as ground rent to the previous owner. In the suit as originally filed, it was also the appellants' own case that the respondent was a tenant on a monthly rent of Rs.10/-. Now the tenancy of the superstructure, (in the nature of a suit shop) would essentially involve and cover the tenancy of the land underneath, inasmuch as the tenancy or the existence of the suit shop cannot be conceived without the tenancy of the existence or the land underneath. Both the Courts after considering the oral evidence on record have concurrently found the respondent to be a tenant of the land underneath and that finding being a finding of fact properly recorded on appreciation of the evidence, is not amenable to be interfered with. Both the Courts below have concurrently found that the respondent had constructed the suit shop with the permission of the previous owner and the respondent was a lessee of the land on which the suit shop was constructed. The courts below have further found and rightly so that the appellant had

purchased the suit property subject to the rights of the respondent.

However, in so far as the finding of permanent tenancy is concerned, it was not the case of the respondent either that he was a permanent lessee. On a careful consideration of the submissions made and a perusal of the impugned judgments, I am clearly of the opinion that the Courts below were not justified in holding the respondent to be a permanent lessee.

I find that the first appellate Court was not justified in placing reliance on the decision of the Supreme Court in the case of **Sivayogeshwara Cotton Press (supra)**, as has been rightly submitted by the learned Senior Counsel for the appellant. The case is clearly distinguishable on facts. In that case, on consideration of the terms of the lease deed, it was found that the lease was heritable and assignable and that it could not have been in the contemplation of the parties that the lease should only be for the life time of the grantee. Lastly on facts it was found that the lease deed evidenced an intention to create a permanent lease (see paras 9, 16 and 19 of the judgment).

13. The learned District Judge has observed in para 30 of the judgment that in **Sivayogeshwara Cotton Press (Supra)**, it has been observed that if the tenancy is for a building purpose, prima facie it is intended for the life time of the lessee or it may in certain cases be a permanent lease. As has been noticed

earlier, it was not even the case set up by the respondent that it was a permanent lease. Thus on the basis of the evidence, the Courts below could not have come to the conclusion that it is a case of permanent lease in favour of the respondent placing reliance on the case of **Sivayogeshwara Cotton Press supra**). Point no.2 has thus to be answered in the negative.

14. Point nos.1 and 3:

I have already noticed that there is a concurrent finding by the Courts below that there was a tenancy in respect of the land underneath of the suit shop from the time of the previous owner and the respondent was paying ground rent of Rs.3/- per month. It is now well settled that destruction/demolition of the tenanted premises, would not lead to termination/determination of tenancy. Section 108 (e) of the Transfer of Property Act, 1882 is relevant for the purpose and may reproduced as under :

108. Rights and liabilities of lessor and lessee.

(A) -

(B) -

(e) if by fire, tempest or flood, or violence of an army or of a mob, or other irresistible force, any material part of the property be wholly destroyed or rendered substantially and permanently unfit for the purposes for which it was let, the lease shall, at the option of the lessee, be void:

Provided that, if the injury be occasioned by the wrongful act or default of the lessee, he shall not be entitled to avail himself of the benefit of this provision.”

It can thus be seen that destruction of any material part of the suit

property, wholly or in part, by any irresistible force, cannot bring about the termination of the tenancy rights. All that which happens in such as case is that, the lease at the option of the lessee, becomes void. The proviso appended to section 108 (e) of the Transfer of Property Act would show that a tenant may not be entitled to take benefit of the substantive provision, if the injury to the tenant premises is occasioned either by the wrongful act or default of the lessee. In the present case the tenancy was not even in respect of the suit shop which the Courts below have found to be constructed by the respondent. Thus the tenancy can be at the highest in respect of the land underneath which cannot come to an end by demolition/destruction of the suit shop. Thus the respondent was entitled to reconstruct the same unless and until the tenancy is properly terminated. Thus notwithstanding the finding against issue no.2 in my considered view no exception can be taken to the judgment of the Courts below decreeing the counter claim. In that view of the matter, the Second Appeal is dismissed with no order as to costs. Decree be drawn accordingly.

C. V. BHADANG, J.

Ap/