

IN THE HIGH COURT OF BOMBAY AT GOA**SECOND APPEAL NO. 15 OF 2018**

1. Mrs. Maria Remingia Gomes D'Souza,
64 years of age, married, wife of
Mr. Justin Francis D'Souza,
Indian National, residing at J-22,
Sector 6, Vashi, New Bombay
400 703, Maharashtra.
 2. Mr. Justine Francis D'Souza,
76 years of age, married, Indian National,
Residing at J-22, Sector 6, Vashi,
New Bombay 400 703, Maharashtra.
 3. Mr. Agnelo Feliciano D'Souza,
71 years of age, married, Indian National,
Residing at Room No.445, Building
No.28, Oshiwara Transit Camp,
Jogeshwari (W), Bombay 400 102.
 4. Mrs. Luisa D'Souza,
71 years of age, wife of Mr. Agnelo
Feliciano D'Souza, Indian National,
Residing at Room No.445,
Building no.28, Oshiwara Transit Camp,
Jogeshwari (W) Bombay 400 102.
 5. Mrs. Antoninette Menezes,
78 years of age, wife of Mr. Victor
Menezes, Indian National,
Having her address as c/o Denis
D'Souza, House No.518/28 Goan
Colony, Bhajan Gunj Ajmer,
Rajasthan.
- ... Appellants.

V e r s u s

1. Mr. Francisco do Rosario Agnelo
Joveniano De Souza, major,
married, Indian National, Advocate
by profession, residing at
Sauntavaddo, Calangute,
Baga Road, Bardez-Goa.
 2. Mrs. Ulrike Espediller E. Souza,
Major, married, wife of Mr. Francisco
Do Rosario Agnelo Joveniano De Souza,
German National, having her last known
address as c/o M. Francisco do Rosario
Agnelo Joveniano de Souza, Sauntavaddo,
Calangute, Baga Road, Baga,
Bardez-Goa.
- Respondents.

Adv. Susan Linhares for the Appellants.

Adv. Valmiki Menezes for Respondent no.1.

Coram:- C. V. BHADANG, J.

Date:- 22nd June 2018.

Oral Order:

This second appeal is by the original plaintiffs against the concurrent findings of dismissal of their suit for eviction, by the Courts below.

2. The learned counsel for the appellants has handed over the following

draft substantial questions of law during the course of the arguments at bar :

- A. Whether the interpretation of the Agreement at Exh. 65 C by the Courts below to hold that it is a Lease Deed is correct in view of the contra decisions reported in 1991 SCC (2) 180, 1997 (4) Bom. CR 250, 1983 (2) Bom CR 136 & 2012 Supreme (MP) 202?
- B. Whether the Courts below erred in applying the decisions reported in 1999 SC 3571, 1990 (2) RCJ 367 to hold that the Agreement at Exhibit 65C is a Lease Deed?
- C. Whether the Courts below erred in relying on the nomenclature of the Agreement at Exh. 65C and not upon the intention of the parties gathered from the words used in the Agreement as a whole?
- D. Whether the Courts below failed to consider that from the use of the specific words or phrases, it can be gathered that the Agreement at Exh.65C is a Leave and Licence Agreement and not a Lease Deed?.

3. I have heard Ms. Linhares, the learned counsel for the appellants and Mr. Menezes, the learned counsel for the respondent no.1. None appears for the other respondents though served.

4. It is submitted by Ms. Linhares, the learned counsel for the appellants that the agreement at Exhibit 65 -C although styled as a Lease Deed is in fact a Leave and Licence Agreement. It is contended that the Courts below failed to properly appreciate the contents and the recitals in the agreement in order to hold that it is a lease deed. It is submitted that the recitals of the agreement do not show that exclusive possession was parted with by the appellant in favour of the respondents. The learned counsel for the appellants pointed out that as per Clause 11 of the Agreement, the appellants were entitled to occupy one room out of the suit house. It is further submitted that the suit house was let out along with furniture and fixtures belonging to the appellants which would be indicative of the fact that the exclusive possession was never parted with. It is submitted that the nomenclature under which the agreement is styled is not decisive and the Court has to gather the intention of the parties on the basis of the recitals in the agreement in order to find out whether it is a lease deed or whether it is a Leave and Licence agreement. Ms. Linhares, the learned counsel for the appellant submits that the agreement is also not registered and the Courts below failed to consider this aspect.

5. On behalf of the appellants reliance is placed on the following decisions:

- (i) Puran Singh Sahni Vs. Sundari Bhagwandas Kripalani (Smt) and othes (1991) 2 SCC 180.**
- (ii) Dr. Suresh Madhukar Nagarkar Vs. Ujubala Madhav Desai and others 1997 4 ALLMR 98.**
- (iv) Bengal Water Proof Works (1040) Ltd. Vs. Ardeshir Jehangir Works 1983 2 BomCR 136.**
- (v) Dipak Rasbiharilal Goyel Vs. Naliniben H. Raval 2012 (2) GCD 1552 (Guj.)**
- (vi) Sandeep Sharma & others Vs. Sai Chhaya Autolink (P) Ltd., 2012 0 AIR (MP) 98.**

6. On the contrary it is submitted by Mr. Menezes, the learned counsel for the respondent no.1 that the trial court as well as the first appellate court after threadbare consideration of the evidence and terms of the lease deed have rightly come to the conclusion that it is a lease deed and not a Leave and Licence agreement. The learned counsel has extensively taken me through the observations and findings of the first appellate Court in which the first appellate court has found that as per Clause 11 of the Agreement, the appellants were entitled to occupy only one room, out of the entire house and that too it was the lessee who was to allow the appellants to occupy the said room. It is submitted that it was the appellants who had relied upon the Lease

deed and therefore in view of the provisions of Sections 91 and 92 of the Evidence Act the appellants could not have led evidence contrary to the contents of the agreement which aspect is also considered by the first appellate court. He, therefore submits that the second appeal does not raise any substantial question of law.

7. I have carefully considered the rival circumstances and the submissions made and I do not find that the any substantial question of law arises in this appeal. There cannot be any manner of dispute with the proposition that the nomenclature of the document would not be decisive. The Court has to consider the contents and the recitals of the agreements as a whole and any other evidence produced and then to determine whether the parties intended to create a lease or an agreement of Leave and Licence. The question would entirely depend upon facts and circumstances of each case.

8. Clause 11 of the agreement reads :

“11. The lessee shall provide accommodation in the room of the said house attached to the Bar-room to the lessor, her husband, her brother-in-law and his wife and the respective children as and when they come to Goa.”

9. It can thus clearly be seen that Clause 11 provides that the lessee/respondent shall provide accommodation in one room of the suit house

adjacent to the bar room to the appellant and her family members as and when they come to Goa. The fact that the accommodation is to be provided only in one room and not the entire house and that too the accommodation is to be provided by the lessee is clearly indicative of the fact that it was the lessee who was in possession of the entire suit house. Had it been a case that the appellants had not parted with the possession of the suit house as claimed, there was no occasion for the lessee to provide such an occupation to the appellant. On a careful consideration of the terms of the agreement and the reasoning articulated by the first appellate court I do not find that the finding recorded by the Courts below that it is a lease deed can be said to be perverse. A finding of fact properly recorded on appreciation of the evidence on record is not amenable to interference in a second appeal unless the finding is shown to be perverse or is against the weight of the evidence.

10. Coming to the contention about the document not being registered. A bare perusal of the agreement shows that it was for eleven months. It has not been shown that the agreement was a compulsorily registrable document under the provisions of the Registration Act. The issues framed by the trial court and the points for determination framed by the first appellate court do not show that any such contention was raised either before the trial court or before the first appellate court. That apart when the appellants themselves

had placed reliance on the said document it is not possible to envisage how the appellants can raise a contention that the document is not a registered document. All these aspects have been properly considered by the Courts below. The judgments relied on behalf of the appellants turned on their own facts. The appeal does not raise any substantial question of law and is dismissed with no order as to costs.

C. V. BHADANG, J.

Ap/-