

IN THE HIGH COURT OF BOMBAY AT GOA**SECOND APPEAL NO. 121 OF 2017**

1. Shri Shrikant Harishchandra Sawant
2. Shri Nilkant Harischandra Sawant
3. Shri Dhananjay Harischandra Sawant
4. Shri Subhash Harischandra Sawant

All major of age

All residents of Rambhuvan Waddo,
Ribandar, Goa.

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Appellants

(Original Defendants)

(All aforementioned are the registered addresses of the parties)

V e r s u s

Shri Anant Sazu Naik (Since Deceased)

Through L.R. S

1. (a) Smt. Mukhtabai Anant Naik, 75 years

(b) Smt. Jyoti Damodar Naik, 60 years,

- (c) Shri Sharad S. Naik, 62 years

All R/o. Ramnathi,
Bandora, Ponda, Goa.

- (d) Shri Shrikrishna Anant Naik, 53 years,

R/o.Porvorim, Goa.

- (e) Smt. Bharati Anant Naik, 55 years,

- (f) Shri Sudhir Anant Naik, 52 years,

- (g) Shri Salil Anant Naik, 45 years,

All R/o. Rambhuvan Waddo,
Ribandar, Goa.

2. Deepak Anant Naik, 50 years,

R/o Rambhuvan Waddo,

Ribandar, Goa.

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Respondents

(Original Plaintiffs)

Shri Ashok Mashelkar, Advocate for the Appellants.

CORAM: C. V. BHADANG, J.
DATE: 2nd February, 2018.

Oral Order:

Heard Shri Mashelkar, the learned counsel for the appellants.

2. A suit filed by the respondents Anant Naik and Deepak Naik for permanent and mandatory injunction directing the appellants/defendants from removing, mud which has been dumped at the entrance of the garage and for some incidental reliefs was dismissed by the trial court, which was reversed in appeal. The appellate Court while allowing the appeal, after considering threadbare the oral and documentary evidence has partly allowed the appeal in the following terms which is subject matter of challenge in this appeal:

" The appeal is partly allowed with costs.

The judgment and order dated 11/1/2011 is hereby partly varied, quashed and set aside.

Consequently, the suit is partly decreed with costs.

It is held that the plaintiffs are in possession of the suit garage.

By way of mandatory injunction, the defendants are directed to remove the mud which is dumped in front of the entrance of the suit garage and further the defendants, their agents, servants, labourers and persons acting or purporting to act on behalf of the defendants, are restrained from dumping mud or otherwise causing any nuisance or obstruction in

front of the entrance of the suit garage or interfering with the suit garage in any manner, and from obstructing the plaintiffs from carrying out the construction work of the suit garage."

3. The only contention raised by the learned counsel for the appellants is that the letter dated 11/5/1962 by the Comunidade of Morombio O Grande in favour of the respondents/plaintiffs is in breach of Articles 329 and 334 of the Code of Comundiades. Reliance is placed on the decision of this Court in the case of **Sebastian Francisco Pinto and others Vs. Shri Roque Aleixe Rebello and anr. 1991 (22) L.T. 210** in order to submit that Article 64 of the Code of Comunidade does not permit the managing body to grant lease without following the provisions of the Code (see para 5 of the judgment). Except this, there are no other contentious raised.

4. A perusal of the record shows that the ground based on the breach of Articles 329 and 334 and for the matter of that Article 64 of the Code of Comunidades was neither raised before the trial court nor during the course of the arguments before the first appellate Court. The learned counsel for the appellants in all fairness does not dispute that this ground was never raised before any of the Courts below. He, however, submits that this ground can be allowed to be raised for the first time in the second appeal. I do not find that

the contention can be accepted. The ground as raised is a mixed question of fact and law which ought to have been raised before the trial court. The issues framed by the trial court also do not disclose that any such ground based on Articles 329 and 334 and or Article 64 of the Code of Comunidades was ever raised before the trial court. There may be cases whether a pure question of law can, in a given case, be allowed to be raised for the first time in a second appeal. But this will not apply to a defence purely based on facts. That apart, even otherwise, I do not find that the contention can be accepted. This for the reason that according to the original plaintiffs, the suit garage is situated in the land adjacent to the land of the appellants. It was contended on behalf of the appellants before the trial court that the suit garage is situated in the land of the appellants which has been negated on the basis of the evidence. In such circumstances, I do not find that the second appeal raises any substantial question of law. The second appeal is accordingly dismissed.

C. V. BHADANG, J.

Ap/