

IN THE HIGH COURT OF BOMBAY AT GOA**SECOND APPEAL NO. 103 OF 2009**

Mr. Vinayak Mahadev Raul, major of age,
Agriculturist, resident of House No. 244,
Khelbai Wado, Mayem, Bicholim – Goa. Appellant

Versus

1. Mr. Santosh Mahadev Raul, major of age, married to
2. Mrs. Netra Santosh Raul, major of age,
Both residents of Khelbai Wado,
Mayem, Bicholim – Goa. Respondents

Shri S.D. Lotlikar, Senior Advocate with Ms. Ashwini Araujo and
Ms. Aditi Naik, Advocates for the Appellant.

Shri Jayant P. Mulgaonkar, Advocate for the Respondents.

CORAM : C.V. BHADANG, J.

DATE : 2nd JULY 2018

ORAL JUDGMENT:

This Second Appeal was admitted on 25.10.2010, on
the following substantial questions of law:-

- (I) *The issue whether the plaintiff was the exclusive tenant of the suit property, or whether the defendant no. 1 was a co-tenant in respect of the suit property along with the plaintiff, was liable to be framed and referred to the Mamlatdar for its decision, in view of Section 3, Sub-Section (1) of the Goa Administration of Evacuee Property (Amendment) Act, 1989 read with Section 58(2) of the Goa, Daman and Diu Agricultural Tenancy Act 1964 ?*
- (II) *Whether, the impugned judgment and decree passed by the First Appellate Court, as well as the judgment and decree passed by the trial Court, in so far as they purport to decide the issue of tenancy in respect of the suit property, are vitiated for want of jurisdiction ?*

2. The facts necessary for the disposal of the Appeal may be stated thus:

That the appellant, filed Regular Civil Suit No. 16/1999/A, against the respondents, before the learned Civil Judge Senior Division at Bicholim for permanent injunction. The subject matter of dispute happens to be a property known as 'Hanuman Bhatle', bearing survey no. 147/1 of village Mayem, Bicholim Taluka, admeasuring 1,22,975 square metres. The disputed property is said to be a garden land (until 1989) and was not covered by the Goa, Daman & Diu Agricultural Tenancy Act, 1964 (Tenancy Act, for short).

3. According to the appellant, the suit property was auctioned in his favour by Custodian of Evacuee Property, under the Goa, Daman and Diu Evacuee Property Amendment Act, 1989, somewhere in the year 1963. According to the appellant, as there was interference with his possession of the suit property, the appellant filed the suit for permanent injunction as aforesaid.

4. The respondents resisted the suit. According to the respondents, the suit property was leased to the father of the plaintiff, by one, Ivrico D'Silva on rent. Ivrico D'Silva was the

original owner of the property and was issuing receipts towards rent. Thereafter, the property of Ivrico D'Silva was vested with the Custodian of Evacuee Property for record purpose and the rent towards the same was paid to the Custodian. It was contended that the appellant and the respondent no. 1 are brothers and had four other brothers. In short, according to the respondents, the appellant and the respondent no. 1 were the co-tenants of the suit property.

5. On the basis of the rival pleadings, the learned Trial Court framed the following issues:

1. *Whether the plaintiff proves that the suit property was exclusively leased to him for the first time in 1963 by way of an auction by the Custodian of Evacuee Property and that he is the exclusive tenant and now deemed tenant of the suit property ?*
2. *Whether the plaintiff proves that he is in peaceful continuous possession and enjoyment of the suit property without any interruption from any person ?*
3. *Whether the plaintiff proves that the defendant no. 1 alongwith some strangers/labourers trespassed in the suit property and cut the branches of cashew trees and further has been interfering in the suit property ?*

6. The parties went to trial, in which, they produced oral and documentary evidence. The learned Trial Court answered all the issues in the negative and dismissed the suit

by a judgment and order dated 22.08.2008. Feeling aggrieved, the appellant challenged the same before the learned District Judge in Regular Civil Appeal No. 83/2008. The learned District Judge framed the following points for determination:-

1. *Whether the plaintiff is in exclusive possession and enjoyment of the suit property ?*
2. *Whether the learned Trial Judge erred in dismissing the suit of the plaintiff ?*

7. The learned District Judge answered both the points in the negative and dismissed the appeal by judgment and order dated 17.09.2009. Feeling aggrieved, the appellant is before this Court.

8. I have heard Shri Lotlikar, the learned Senior Counsel for the appellant and Shri Mulgaonkar, the learned Counsel for the respondents. With the assistance of the learned Counsel for the parties, I have gone through the record and the impugned judgment passed.

9. It is submitted by Shri Lotlikar, the learned Senior Counsel for the appellant that the Civil Court was not competent to decide the issue of tenancy, in view of Section 58 of the Tenancy Act. Reliance in this regard is placed on the decision of the Supreme Court in the case of **Shri Inacio**

Martins, through LRs Vs. Narayan Hari Naik & Others, AIR 1993 SC 1756. It is submitted that the application for declaration, filed by the appellant, before the learned Mamlatdar, is still pending. It is submitted that in any case, the Civil Court could not have decided whether, the appellant was the exclusive tenant or otherwise.

10. Shri Mulgaonkar, the learned Counsel for the respondents has submitted that the Civil Court was not precluded from *prima facie* considering the claim of the appellant that he was an exclusive tenant. It was submitted that the Civil Court after considering the evidence on record, including the age of the appellant, in the year 1963 (when the suit property was allegedly auctioned in favour of the appellant), has come to the conclusion that the case made out by the appellant, was not acceptable. It is submitted that the said finding has been confirmed by the learned Appellate Court and such a finding of fact, properly recorded, is not amenable to challenge in a Second Appeal.

11. I have carefully considered the rival circumstances and the submissions made. In the case of **Shri Inacio Martins** (supra), the Hon'ble Supreme Court had an occasion to

consider the question about the jurisdiction of the Civil Court to decide the issue of tenancy. This is what is held by the Hon'ble Supreme Court in para 9 of the judgment:

“We are, therefore, of the opinion that it would be just and fair that the issue whether defendant no.1 was a tenant in respect of the lands in question should be referred to the Mamlatdar for decision and after his decision is received by the Civil Court if the issue is held against defendant no.1, the Civil Court may consider passing of a decree in eviction but if on the other hand he is held to be tenant, the Civil Court may be required to dismiss the suit.”

12. It can thus be seen that it was not open for the Civil Court to have gone into the question whether, the appellant was a co-tenant or exclusive tenant of the suit property, as essentially, the suit pertains to the claim of tenancy.

13. None of the Courts below have adverted to this aspect and have failed to consider the decision in the case of **Shri Inacio Martins** (supra). In such circumstances, this is a fit case to exercise jurisdiction under Order XLI, Rule 23-A of CPC and to remand the suit to the Trial Court, for deciding it afresh, in accordance with law. The substantial question of law at serial no.2 is answered in the affirmative. Insofar as the

substantial question of law at serial no. 1 is concerned, in view of the fact, that the application for declaration filed by the appellant is already pending, before the learned Mamlatdar, it would not be necessary for the Trial Court to make any independent reference.

14. In the result, the following order is passed:

ORDER

- (i) The Second Appeal is partly allowed.
- (ii) The impugned judgment of the Trial Court, as confirmed by the first Appellate Court, is hereby set aside.
- (iii) The Regular Civil Suit No. 16/1999/A, is restored to the file of the learned Senior Civil Judge at Bicholim, for disposal in accordance with law.
- (iv) Needless to mention that the Civil Court shall await the outcome of the application, pending before the learned Mamlatdar and then decide the suit in accordance with law.
- (v) The learned Mamlatdar is directed to decide the pending application, as expeditiously as possible and preferably within a period of one year from the receipt hereof.

(vi) In such circumstances, the parties to bear their own costs.

(vii) Decree be drawn accordingly.

C. V. BHADANG, J.

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