

IN THE HIGH COURT OF BOMBAY AT GOA**APPEAL FROM ORDER NO. 41 OF 2010**

1. Mr. Jerry Alex Braganza @
Jeronimo Oriculo Alex Braganza,
major of age, businessman and
Landlord, his wife
2. Ms. Lavina C. Braganza,
d/o Leo Pinto,
major of age, housewife,
both resident of Angod,
Mapusa, Goa.

.... Appellants

V e r s u s

1. Smt. Rajeshree alias Rayeshri
Ramdas Borkar @ Shobhavati
Ramdas Borkar,
major of age, married, housewife,
2. Shri Ramdas Satu Borkar,
(since deceased represented by
his legal representatives)
- 2 (a) Miss Sandhya R. Borkar,
major of age,
- 2 (b) Mr. Samir R. Borkar,
major of age,
- 2 (c) Mr. Sachin R. Borkar,
major of age,
both resident of H. No.75,
Orulem, Vasco, Goa.
- 3 Laxmi Narayan Nemlekar,

major of age,

4. Narayan Bhikaji Nemlekar,
major of age,

both resident of B-15,
Telecom Quarters Ansahat,
Mapusa, Bardez, Goa.

5. Ms. Rijim Builders,
Through its Proprietor having
Office at Rijim Plaza Morod,
Mapsua, Bardez, Goa.

6. Shri Hanuman Bhiku Mayekar,
major of age, businessman and

7. Miss Jyoti Hanuman Mayekar,
major of age,

8. Miss Pragati Hanuman Mayekar,
major of age,

- 8.a. Mr. Harish Pednekar,
Major of age,
Resident of G-1,
Shanta Durga Apartments,
Moro, Mapusa,
Bardez, Goa.

(amendment carried out as per order dtd 22.10.2018)

(amendment carried out as per order dtd. 22.10.18 passed in MCA no.605.18)

9. Mr. Prakash Hanuman Mayekar,
major of age,

All residing at G-1,
Shanta Durga Apts, Morod,
Mapusa, Bardez, Goa.

10. Shri Mohan Bhiku Mayekar (expired)

11. Smt. Mohini Bhiku Mayekar (expired)

13. Shri Ravindra Devu Gadekar,
major of age,
both resident of S-1,
Shanta Durga Apt.,
Morod, Mapusa, Bardez, Goa.
14. Shri Ramesh Laximan Mayekar,
major of age,
15. Miss Rekha Ramesh Mayekar,
major of age,
Both resident of H. No. 280,
St. Inez, Panaji, Tiswadi, Goa.
- Respondents

Shri Valmiki Menezes, Advocate with Advocate Aksay Shirodkar for the Appellants.

Shri V. R. Parsekar for the Respondent nos. 3 and 4.

CORAM: C. V. BHADANG, J.
Reserved on: 11/1/2019.
Pronounced on: 02/02/2019.

J U D G M E N T:

By this appeal, the appellants (original defendant nos. 2 and 3) are challenging the judgment and order dated 11/6/2010 passed by the learned Adhoc District Judge -1, at Panaji in Regular Civil Appeal no.15/2008. By the impugned judgment, the additional issue no.1 raising objection to the jurisdiction of the Civil Court has been remanded back to the trial court.

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

The first and the second respondent filed regular Civil Suit no.188/1999 against the fifth respondent (defendant no.1), the present appellant (defendant nos 2 and 3) and the respondent nos. 3 to 15 for recovery of possession and for permanent and mandatory injunction, in respect of the suit property, more specifically described in para 2 of the plaint. It is not disputed that the appellants are the landlords. The case made out in the plaint is that now deceased Bhiku Nagesh Mayekar, was an agricultural tenant in respect of the suit property, who died on 20/10/1985. His wife Vatsal @ Indumati Bhiku Mayekar died on 9/11/1993. The first respondent happens to be one of the daughters of Bhiku Mayekar and Smt. Vatsal. It was contended that the appellants have illegally transferred the suit property in favour of the fifth respondent, where certain construction activities were found to be carried out. It was contended that the same is illegal as the suit field is a paddy field and the fifth respondent without obtaining permission from the Mamlatdar and the first and the second respondent, who are the deemed purchasers under the Goa, Daman and Diu Agricultural Tenancy Act, 1964 (Tenancy Act, for short) had trespassed into the suit property and carried out illegal construction. It was in these circumstances that a mandatory injunction was sought for removal of the encroachment and the construction along with

prohibitory injunction and possession.

3. The suit was resisted by the fifth respondent as well as by the present appellants.

4. According to the fifth respondent, it was denied that the respondent nos.1 and 2 were the tenants. It was contended that the respondent no.1 took over the suit property by virtue of Development Agreement dated 11/11/1984 and after the soil testing was done the construction was undertaken where the piling work was done from December 1994 to February 1996. It was contended that the Civil Court would lack jurisdiction to try the suit as the material issue involved in the suit was about the alleged tenancy rights of the respondent nos.1 and 2 (plaintiffs).

5. The appellants have taken similar plea in the suit.

6. It is a matter of record that the appellants filed an application under Order 7 Rule 11 C.P.C for rejection of plaint on the ground that it is barred by law, namely, section 58 of the Tenancy Act. The learned trial court dismissed the said application by order dated 27/1/2002, which was challenged by the appellants before this Court in Writ petition no.138/2003. This Court

disposed off the petition on 6/6/2003 inter alia holding that considering the pleadings in the plaint it was not possible to hold that the Civil Court would lack jurisdiction, considering the reliefs claimed against the fifth respondent (defendant no.1) as a person who allegedly is having no right in the property. This Court observed that on the basis of the pleadings an issue can be framed which could be decided as a preliminary issue.

7. It appears that the trial court framed the following issue as an additional issue no.1:

Whether the defendant nos. 2 and 3 prove that this Court lacks jurisdiction to entertain the suit?

8. On hearing the parties, by an order dated 12/11/2007, the learned trial court upheld the preliminary objection and dismissed the suit for lack of jurisdiction on the ground of section 58 (2) of the Tenancy Act. The trial court came to the conclusion that inasmuch as the appellants have transferred the rights in respect of the suit property in favour of the fifth respondent, the fifth respondent would enter into the shoes of the landlord and as such the Civil Court would lack jurisdiction to entertain and grant the reliefs in the suit as framed and filed.

9. Feeling aggrieved, the original defendant nos 14 and 15 (who are

supporting the plaintiffs) filed Regular Civil Appeal no.15/2008 before the learned District Judge at Panaji. The learned District Judge allowed the appeal on 11/6/2010 and has remanded the matter back to the trial court. This is how the appellants are before this Court.

10. I have heard Shri Menezes, the learned counsel for the appellants and Shri Parsekar the counsel for the respondent nos.3 and 4. With the assistance of the learned counsel for the parties I have gone through the record.

11. It is submitted by Shri Menezes, the learned counsel for the appellants that the appellate Court was in error in interfering with the order passed by the learned trial court dismissing the suit on upholding the preliminary objection, as raised by the appellants herein. It is submitted that the trial court has rightly come to the conclusion that by virtue of the transfer, the fifth respondent would enter into the shoes of the landlord and thus the suit as framed and filed was not maintainable in view of section 58 (2) of the Tenancy Act. The learned counsel has pointed out that the appellants have filed a separate application for declaration and injunction before the Mamlatdar bearing TNC/SR/1/04 and TNC/MAP/18/01 and in the later case, the fifth respondent is also made a party. It is thus submitted that the appellants already having approached the Mamlatdar under the Tenancy Act

where the fifth respondent (defendant no.1) is also made a party claiming similar reliefs, as are claimed in the suit, the suit was not maintainable.

12. On behalf of the appellants reliance is placed on the decision of the Hon'ble Supreme Court in the case of **Smt. Madhumati Archut Parab Vs Shri Rajaram V. Parab and others 2009 (3) ALL MR 486.**

13. On the contrary, Shri Parsekar, the learned counsel for the respondent nos.3 and 4 (original defendant nos.14 and 15) has supported the impugned order. It is submitted that the Development Agreement executed in favour of the defendant no.1 cannot clothe him with the ownership rights and as such, he cannot be said to be the landlord. It is submitted that it is only in respect of a dispute between a tenant and a landlord that the jurisdiction of the civil court would be barred. It is pointed out that the Mamlatdar is not competent to grant any relief against a third party or a stranger. It is submitted that the respondent no.5 is a rank trespasser against whom no relief can be claimed before or granted by the Mamlatdar. The learned counsel has placed reliance on the decision of the Supreme Court in the case of **Inacio Martins, deceased through Lrs. Vs. Narayan Hari Naik and others AIR 1993 SC 1756.**

14. I have carefully considered the rival circumstances and the submissions made.

15. As noticed earlier, initially the appellants had sought rejection of the plaint which was also granted by the trial court. That order was set aside by this Court. This Court had prima facie found that going by the recitals in the plaint, (which alone are relevant for deciding an application for rejection of the plaintiff under Order 7 Rule 11 of C.P.C.), it was not possible to hold that the Civil Court had no jurisdiction. Considering the reliefs claimed against the respondent no.5 (defendant no.1) as a person having no right in the property, this Court was of the opinion that in an appropriate case the issue can be framed which can be tried as a preliminary issue. The trial court indeed conducted that exercise and the preliminary objection was upheld on the premise that the fifth respondent being the transferee from the landlord. Became the landlord. Thus the relief of permanent injunction, restoration of possession and also mandatory injunction can be claimed under the Tenancy Act.

16. The Appellate Court found that the transfer does not necessarily mean transfer by sale, as the property can be transferred by various means and transfer does not always mean sale. The appellate Court found that the

Tenancy Act does not provide that a transferee of the property steps into the shoes of the landlord. It was in these circumstances that the appellate court remanded the matter back to the trial court.

17. The record discloses that there is a Development Agreement executed in favour of the fifth respondent for carrying out development work in the suit property, after obtaining the necessary construction licence and conversion. The entire suit property is occupied by the building erected thereon and it is contended that in respect of 78 units Agreements for Sale have been entered into and out of that twenty parties have already taken possession of the units. The question in such circumstances for consideration would be whether the nature of the agreement executed in favour of the fifth respondent would clothe him with the status of a landlord and even otherwise whether the Mamlatdar would be having jurisdiction to grant the reliefs as claimed in the suit. In my considered view, once the preliminary issue is framed, unlike in a matter of rejection of plaint, the rival pleadings of both the parties can be taken into consideration along with documentary and other evidence and then the trial court would be in a better position to decide whether the civil court lacks jurisdiction. Prima facie, no exception can be taken to the finding that mere transfer may not always necessarily lead to a conclusion that it is by way of sale i.e. absolutely transferring the property in

favour of the fifth respondent. Considering the overall circumstances, I am not inclined to interfere with the impugned order.

18. In the case of **Madhumati Atchut Parab (supra)**, the issue was whether the landlord can seek a negative declaration against the person claiming to be a tenant.

19. In the result the appeal is hereby dismissed with no order as to costs.

C. V. BHADANG, J.

Ap/