

IN THE HIGH COURT OF BOMBAY AT GOA**SECOND APPEAL NO.109 OF 2006**

SMT. DOLOROSA VIEGAS E CARVALHO (deceased)

1. SHRI LUIS VICTOR JACINTO CARVALHO
(since deceased through legal representatives)

1(a) Sandra Rumde
daughter of late Jacinto Carvalho,
major of age, divorced,

1(b) Darryl Carvalho
son of late Jacinto Carvalho,
major of age, married,
and his wife;

1(c) Joyce Carvalho
major of age, married,

All residing at 663, Pamela Mansion,
Alto Porvorim, Goa 403521

...Appellants

V/s.

1. MANUEL S. GRACIAS
Son of Salvador Gracias
Major of age,
Resident of Chavdi, Canacona, Goa

2. Maria Heather Carvalho
daughter of late Jacinto Carvalho,
major of age, un-married,
resident of

3. Brian Keith Francis Carvalho,
son of late Jacinto Carvalho,
major of age, married,
and his wife;

4. Keenya Anita Carvalho,
major of age, married,

Both are residing at
68, Lucas Circuit,
Kellyville, N.S.W
Australia – 2155

5. Lloyd Nicolao Carvalho
son of late Jacinto Carvalho,
major of age, married,
and his wife;
6. Natasha Pereira
major of age, married,
Both are residing at
28 Broadleaf Crescent,
Beaumont Hills,
NSW 2155
Sydney, Australia
7. Kenneth Benjamin Carvalho
daughter of late Jacinto Carvalho,
major of age, unmarried
8. Shirley Carvalho
daughter of late Jacinto Carvalho,
major of age, married,
and her husband;
9. Terence Noronha,
major of age, married.

All residing at 663, Pamela Mansion,
Alto Porvorim, Goa
403521

...Respondents

Shri Sudesh Usgaonkar and Ms. R. Pereira, Advocates for the Appellants.
The Respondent No.1 in person.

Coram:- DAMA SESHADRI NAIDU, J.

Date:- 7th January 2020

ORAL JUDGMENT:

The appellants are the plaintiffs and the respondents the defendants. The plaintiffs' predecessor was the owner; she claimed that the defendants' predecessor was a licensee in occupation of the property. On the other hand, the defendants' predecessor claimed that he was a prospective purchaser put in possession of the property under a part-performance of an oral agreement for sale. We will narrate the events in the names of the landlady and the occupant, without reference to the legal heirs.

2. Seeking the occupant's eviction, the landlady filed RCS No.31/1997 before the Civil Judge, Junior Division, Canacona. It was in July 1997. Besides eviction, she claimed arrears of rent and *mesne* profits.

3. The occupant entered appearance and set up his defence. He has pleaded that the landlady offered to sell the property to him for ₹35,000.00. Accepting that proposal, the occupant paid the amount, that is the entire sale consideration, on 30.06.1985 and secured a receipt. He has denied that he has ever been a licensee.

4. Later, the occupant amended the written statement and introduced the plea that pending the execution of the sale deed, he wanted to legitimize his possession. So on the landlady's request and to avoid eviction, the occupant agreed to pay ₹2400.00 as "rent deposit". He has

further pleaded that the landlady continued to take interest on that ₹2400.00 as the monthly rent. That apart, the occupant raised a preliminary objection about the maintainability of the suit.

5. While the trial Court framed the issues, first it framed the issue of maintainability as the preliminary issue and deferred all other issues to be framed later. For the other issues depended on the outcome of the preliminary issue. Thus the issues the trial Court framed read:

“1. Whether the defendant proves that rent is being received by the plaintiff for the suit shop for more than 12 years and the jurisdiction of the Hon'ble Court is barred in the present suit under section 56 of the Goa, Daman and Diu Building (Lease, Rent and Eviction) Control Act, 1968?

2. Whether the defendant proves that value of the suit for purposes of Court fee has been undervalued for the sum of nearly ₹3,00,000/-?”

6. The landlady did not lead any evidence. On the contrary, the occupant led; he examined himself as DW1. That examination concerned the preliminary issue. The occupant placed on record certain documentary proof about his status as the putative purchaser. Through its judgment, dated 18.11.2005, the trial Court ruled in the occupant's favour on the preliminary issue: that the Civil Court has no jurisdiction to try the suit as the occupant has proved himself to be a tenant. In other words, the landlady could not establish that the occupant is a licensee for the Civil Court to try the matter. Aggrieved, the landlady filed Regular Appeal

No.134/05/III, before the District Judge, South Goa, Margao. Concurring with the trial Court, the appellate Court too upheld the occupant's preliminary objection; it dismissed the First Appeal. Then, aggrieved, the plaintiff has filed this Second Appeal. This Court has earlier admitted the Second Appeal and framed the following substantial questions of law:

- (a) Is there any infirmity in the judgments of the Courts below—that is, have the Courts below complied with the requirements of Order XIV Rule (1) Sub-Rule (5) of CPC, for they did not frame issues and record evidence based on the material proposition of facts or of law on which the parties are at variance?
- (b) Have the Courts below erred in deciding the issue no.1 as a preliminary issue when that was not an issue of law as mandated under Order XIV Rule 2 Sub-Rule (2), read with Rule 1 Sub-Rule (4)(b) of CPC.
- (c) Was the appellate Court right in holding that the amendment to Section 3(1)(c) of Rent Control Act does not apply to a building constructed in 1985?

Submissions:

7. In the light of the above factual background, Shri Sudesh Usgaonkar, the learned counsel for the landlady, has submitted that the landlady, initially, took the plea that the occupant is a licensee. If that plea ought to be accepted, only the Civil Court would have jurisdiction. On the contrary, even if the courts were to accept, as they did, that the occupant is a tenant, still only the Civil Court has jurisdiction. To elaborate, Shri Usgaonkar has drawn my attention to Section 3(1)(c) of the Goa, Daman

& Diu Buildings, (Lease, Rent and Eviction) Control Act, 1968 (“the Rent Control Act”). According to him, the landlady constructed the building in 1987. So, under Section 3(1)(c) of the Rent Control Act, a newly constructed building stands exempted from the rigours of that Act for the first 15 years. According to him, by the time the landlady filed the suit, 15 years had not been completed. Therefore, looked from either prospective, only the Civil Court has the jurisdiction. To support his contention, he has relied on *Guido Loyola Furtado v. National Insurance Co. Ltd.*¹.

Respondents:

8. On the other hand, Shri Manuel Gracias, the learned counsel for the occupant, has submitted that the landlady has never pleaded the bar provided under Section 3(1)(c) of the Act either before the trial Court or before the First Appellate Court. He has also submitted that since the occupant could discharge his burden that he is a tenant, the Courts below have rightly held that the Civil Court has no jurisdiction.

9. To elaborate, Shri Gracias has submitted that the building in fact was constructed in 1985, that is much before 1997, when the landlady filed the suit. By then, the building could not be said to be a new construction. In the alternative, he has also argued that 15 years must be reckoned from 1997. The beneficial exemption under Section 3(1)(c) of the Act does not

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apply to the suit building. Therefore, he has urged this Court not to interfere with the concurrent findings of the Courts below.

10. Shri Gracias has also pointed out that earlier when the trial Court rejected the occupant's plea on his status, he approached this Court and had the matter remanded. In that remand, this Court has observed that if the occupant could establish himself to be a tenant, then the Civil Court could have no jurisdiction to try the suit. According to Shri Gracias, the judgments rendered by the Courts below are in tune with this Court's observation in its judgment, dated 17.07.2018. Thus, he has urged this Court not to interfere with the concurrent findings of the Courts below.

Discussion:

11. I may address the occupant's first objection: the landlady has not invoked Section 3(1)(c) of the Act before the Courts below. Indeed, it is true. To begin with, the issue of jurisdiction may be a mixed question of fact and law. That said, when it concerns the maintainability of the suit, it goes to the root of the matter. Besides, when a person is nonsuited based on a statutory bar, it is a pure question of law, the facts remaining collateral. Better put, even a pure question of law needs to be decided in the factual backdrop of a case, and that does not mean it is a question of fact or a mixed question of law and fact. And a pure question of law can be raised at any stage – more so, when it affects the maintainability of the

proceedings.

12. Indeed, the landlady's counsel has argued that in the light of the 1976 amendment to Order 14 of the CPC, the trial Court ought to have framed all issues, including those on maintainability, and ruled on them comprehensively. But I am afraid Order 14 Rule 2 provides for exceptions: "and for that purpose [the Court] may, if it thinks fit, postpone the settlement of the other issues until after that issue has been determined, and may deal with the suit in accordance with the decision on that issue." Indeed, the trial Court did follow that exception.

13. Even if the plaintiff has not raised the issue of the statutory impact of Section 3(1)(c) of the Act on the maintainability of the Civil Suit, I reckon that plea, being a pure question of law, can be raised even at this stage as well, as I have already noted.

14. True, while remanding the matter, through its judgment, dated 27.07.2003, this Court has observed:

"The issue as to whether the plaintiff is a tenant can be gone into by the Civil Court. However, if the trial Court comes to the conclusion that the defendant is a tenant, then considering Section 56 of the Goa Rent Act, the Court will cease to have jurisdiction."

15. In the light of the above observations, we need to examine Section 56 of the Rent Act as well. Section 56 reads:

56. Jurisdiction of courts barred – Save as provided in this Act, no court shall have jurisdiction to settle, determine or deal with any question which is by or under this Act required to be settled,

determined or dealt with by the Controller, the Rent Tribunal, Appellate Board, or the Government and no order passed by any such authorities under this Act shall be called in question in any court.

16. I reckon, as a canon of well-established statutory construction, Section 56 is a generic provision dealing with the jurisdictional bounds of courts under the Rent Control Act. But that must be read with Section 3(1)(c) of the same Act, for the latter provision is a specific one exempting certain buildings from the purview of the Rent Control Act. Indisputably, when this Court rendered the judgment, dated 17.07.2018, neither party has brought to its notice the statutory impact of Section 3(1)(c). In that backdrop, this Court observed that if the occupant was a tenant, the Civil Court might have no jurisdiction to entertain the suit. That observation is *sub silentio* of the impact Section 3(1)(c) has on the dispute. Even otherwise, this Court's observation—now, with hindsight, could be labelled as gratuitous—should only be understood as holding that “the tenant of a building amenable to the jurisdiction of the Rent Control Act.” Thus, that obiter—even when the ‘law of the case’ doctrine is applied—does not deter us from deciding further.

17. Had it been an application under Order VII, Rule 11 of CPC, the trial Court would have been called upon to decide the maintainability of the suit entirely based on the plaint averments. Instead, here the Court framed a preliminary issue under Order 14, Rule (2) CPC, based on the

rival pleadings. Thus, it has rightly gone into not only the rival pleadings but also the evidence, if any, placed or led by either party.

18. The occupant has taken a plea of purchase under an oral contract. According to him, he paid the entire consideration of ₹35,000/- but could not have the Sale Deed because of certain technical problems. To elaborate, the occupant has submitted that the landlady herself wanted time for executing the Sale Deed because she had to fulfil her promise to the occupant of providing certain amenities. At any rate, he claims to have been put into possession of the property under an oral sale. First, there could be no oral sale. Second, the occupant's induction, in the alternative, is said to be under an oral agreement of sale. But part performance of that oral agreement of sale, resulting in the occupant's getting possession, is a matter of trial. The Court may in due course consider that aspect—and consider it in the face of Section 53 of the Transfer of Property Act.

19. True, the occupant has taken an alternative plea, too: that “pending execution of the Sale Deed in favour of the defendant, in order to fully legalise the defendant's possession of the suit shop and to guarantee his tenancy and noneviction till such time as a Sale Deed could be executed in his favour. The plaintiff asked for [and] received an advance deposit of rent of ₹2400.00 and with interest accrued thereon

would be treated by her as monthly rent”.

20. The courts below have accepted the occupant’s plea that he is a tenant. In the first place, whether the occupant is a licensee or a tenant is a question of fact that should be gone into only during the trial. If we were to assume that he was a tenant, then we should also examine Section 3(1)(c) of the Act. It reads:

3(1)(c) – to any newly constructed building for a period of “fifteen” years from the date of its completion.

21. Indisputably, the building was constructed in 1985. The suit was filed in 1997. Fifteen-year bar, as provided under the amended Section 3(1) (c) of the Rent Control Act, ended in 2000. So until that year, the landlady could not have approached the Rent Controller. If she had to file a suit for eviction before 2000, it must have been before a regular Civil Court. And the landlady filed the suit in 1997.

22. In this context, the occupant has argued that the building was not newly constructed. He has also, in the alternative, asserted that fifteen-year period must be reckoned from the date of the amendment. To be explicit, Section 3 suffered an amendment in 1994, when the period of protection enlarged to 15-years. So he argued that the building must have been constructed only after 1994. I am afraid this plea cannot be sustained. 'Newly constructed', as the occupant has fairly agreed, is a relative term; it cannot be viewed in isolation. Therefore, the legislature

originally felt that a building should be treated as 'new' for the first four years after its construction. That was how the unamended Section 3(1)(c) read. Later in 1994, the Legislature substituted "4 years" with "15 years." And a building remains "new" for the statutory—to be specific, jurisdictional—purpose for fifteen years "from the date of its completion."

23. That means, whenever a building was constructed, for the next 15 years it stands exempted from the rent control regime. A learned Division Bench of this court in *Guido Loyola Furtado* (supra) has held:

"23. Section 3(1) (c) of the Rent Control Act, as is presently existing, provides that nothing in this Act shall apply to any newly constructed building for a period of 'fifteen' years from the date of its completion. The word 'fifteen' came to be substituted in place of the word 'four' by virtue of amendment, which came into force as from 5.5.1994, in terms of Goa Buildings (Lease, Rent and Eviction) Control (Amendment) Act 1993 published in the Official Gazette Series I, No. 5 dated 5/5/1994. Except for the change of the period from four years to fifteen years, there is no other change in the said provision. There is no dispute that the expression 'newly constructed building' was there in that provision even prior to the amendment of the said clause (c). *The amendment does not add the words 'as from the date of coming into force of this amendment' after the expression 'newly constructed building'.* The expression 'newly constructed building' cannot be read literally to mean a recently constructed building. The entire clause (c) should be read. Newly constructed building means a building in respect of which a period of fifteen years has not expired from the date of completion of its construction. Prior to coming into force of the amendment, newly constructed building meant a building which had not completed four years from the date of completion of its construction. The meaning of newly constructed building, for the purposes of the Rent Control Act, has changed after the said amendment. *Therefore, the submission of learned Counsel for the defendant that the word 'newly' means from the date of amendment i.e. from 5/5/1994 is without merit.*

(emphasis added)

24. In fact, in *Guido Loyola Furtado*, the argument was identical. There it was contended that since the construction was completed in December 1984, four-year period, as contained in the unamended clause (c) of Section 3(1) of the Rent Control Act, ended in December 1989. So the defendant, as the argument goes, became a protected tenant. Then, this Court repelled that contention. It has held that Section 3 of the Rent Control Act does not speak about accrual of any substantive right to a statutory tenant, under the Act; it deals with the non-applicability of the Act to certain buildings. According to *Guido Loyola Furtado*, the defendant had a right to take advantage and enjoy that statutory protection as long as the provision remained in force and applied to the tenanted building. But once the provision has changed, the defendant cannot claim to continue to have the old statutory protection. Pertinent is *Guido Loyola Furtado's* observation that "it was another thing if the plaintiff had filed the suit when the provision of Section 3(1)(c) of the Rent Control Act had the word 'four' instead of 'fifteen'. In that case, the defendant could have taken advantage of the said provision to resist the eviction by the plaintiff." Thus, the contention that the protection for a building to be "new" for 15 years applies from the date of the amendment of Section 3(1)(c) stood rejected.

25. In fact, at this juncture, Shri Gracias, the occupant's counsel, has drawn my attention to paras 31 to 33 of the First Appellate Court's judgment. In fact, the appellate court has observed as follows:

31. As rightly pointed out by the respondent, the said amendment was introduced by the Amendment Act 1994 dated 20/04/1994. The word four years in Section 3(1)(c) existing, was substituted by 15 years.

32. This amendment came into force from 20/04/1994. As such in respect of buildings constructed as on 20/04/1994, for a period of 15 years from 1994, the provisions of the Rent Control Act would not apply to such buildings.

33. In the present case, the plaintiff had pleaded that her building was completed in 1985. As in 1985, the Rent Control Act was not applicable to newly constructed buildings for a period of 4 years. Thus, the Rent Control Act was not applicable to the suit building up to 1989.

26. Thus, on facts, the First Appellate Court has concluded that as the building was completed in 1985, on the date of the suit, that is on 25/07/1997, it could not be a newly constructed building, in terms of the unamended Act.

27. I am afraid the First Appellate Court's reasoning is self-contradictory. Plainly put, para 32 contradicts para 33. According to the Appellate Court, a building "constructed as on 20/04/1994," remains beyond the jurisdiction of the Rent Control Act "for a period of 15 years from 1994." It has not said that the building must have been constructed after 1994, the year of amendment. Instead, it has said that the building must have been constructed "as on 20/04/1994," the date of amendment.

If we apply the Appellate Court's reasoning in para 32 of the impugned judgment, it only prolongs the protection a landlord enjoys: protection for 15 years not from the date of completion but from date of amendment.

28. That said, the Appellate Court has also observed that when the landlady constructed the house in 1985, Section 3 (1) (c) of the Rent Control Act treated the building as new only for four years. So, according to it, the landlady enjoyed the protection from 1985 to 1989. Regrettably, this reasoning is wrong.

29. I reckon, whenever the building was constructed in terms of Section 3(1)(c) it must be treated as newly constructed for the next 15 years and here the suit building must be treated so until 2000. At any rate, *Guido Loyola Furtado's* case holding leaves no room for any doubt or further discussion on this question.

Under these circumstances, I find merit in the Second Appeal. I accordingly allow it. As a result, the trial Court will frame further issues and decide the suit on the merits, expeditiously. Parties to appear before the Trial Court on 17/03/2020 at 2.30 p.m.

DAMA SESHADRI NAIDU, J.

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