

Suchitra

IN THE HIGH COURT OF BOMBAY AT GOA

SECOND APPEAL NO.20/2008

1. Shri Shripad Govind Sinai alias
Ava Padmanaba Kamat (deceased),
Rep. by his legal heirs

(a) Suresh Ava Kamat and his wife

(b) Radha Suresh Kamat

Both resident of Sacordem,
Sanguem

(c) Govind Ava Kamat and his wife

(d) Pallavi Govind Kamat

(e) Kishor Ava Kamat and his wife

(f) Alaka Kishor Kamat

(g) Ashok Ava Kamat,

All resident of Agossa, Cola

(h) Smt. Vimal Bala Prabhu Dessai
Resident of Loliem, Canacona.

2. Ramabai Kamat (expired)
Resident of Agossa of the said Cola

... APPELLANTS

Versus

1. Shri Bhivam Dulo Velip
(Since deceased) represented by his
legal heirs

(a) Shaba Shiva Velipo and his wife

(b) Premavati Shaba Velipo

(c) Bicam Bhivam Velipo and his wife
(since deceased) through LR's:

1(c)(i) Shri Bhiva alias Kushali Bhikan
Velip son of deceased respondent
no.1(c)

1(c)(ii) Shri Dharma Bhikan Velip, Son
of deceased respondent no. 1(c) and
his wife

1(c)(iii) Smt. Saguna Dharma Velip

1(c)(iv) Shri Rama Bhikan Velip, Son
of deceased respondent no. 1(c) and
his wife

1(c)(v) Smt. Riya Rama Velip,
All residents of Rovamol, Navar
Khola, Canacona Goa

i(c)(vi) Smt. Puni Shiva Velip
Daughter of deceased respondent
no.1(c) and her husband

1(c)(vii) Shri Shiva Velip, Both
residents of Mudcheli, Agonda,
Canacona Goa

1(c)(viii) Shri Kanta Velip, both
residents of Ghanekhola, Canacona Goa

1(c)(ix) Smt. Ugme Purso Velip and
her husband

1(c)(x) Shri Purso Velip, Both
residents of Morpilla, Quepem, Goa

1(c)(xi) Smt. Tulsi Nagu Velip and her
husband

1(c)(xii) Shri Nagu Velip, Both residents of Barshe, Quepem, Goa

1(c)(xiii) Smt. Abole Velip, Resident of Tudal, Canacona Goa

(d) Draupadi Bican Velipo (deceased)
Rep. by her legal heirs 1(g) to (l)

(e) Bombo Panglo Velipo and his wife (since deceased) rep. by his legal heirs, Shri Satu Bombo Velipo, R/o Novat Khola

(f) Rukmini Velipo

(g) Shri Bhivia B. Velip,

(h) Smt. Bhimavati B. Velip

(I) Shri Dharmu B. Velip
All majors and r/o Novar Cola and legal representatives of deceased respondents no. 1 (d)

... RESPONDENTS

Mr. Vilas P. Thali with Mr. Rajdeep Prabhugaonkar, Advocate for the Appellants.

CORAM: M. S. SONAK, J.

DATED: 20th October 2022

ORAL JUDGMENT:

1. This Second Appeal was admitted on 25.03.2009 on the following substantial question of law:

"Whether the Courts below fell in error, in dismissing the suit and the appeal on the ground that the plaintiffs are not in possession of the property, particularly when the plaintiffs had filed an amendment application seeking possession of the property?"

2. However, for the reasons discussed hereafter, I am satisfied that the above substantial question of law does not arise in this Second Appeal. Further, the plaint in Regular Civil Suit No.61/2000, from which these proceedings arise, deserved to be rejected by resorting to the provisions of Order VII Rule 11 of the Civil Procedure Code (CPC).

3. In relation to the suit property, earlier, a joint Civil Suit No.104/1969 came to be instituted. This suit was decreed on 18.01.1977. However, the First Appellate Court in Regular Civil Appeal No.62/1977 set aside the decree dated 18.01.1977 and dismissed the suit. This was by a decree dated 30.03.1979. Second Appeal No.7/B/1979 was partly allowed by this Court, and the matter was remanded to the First Appellate Court for fresh disposal. Upon remand, the same was registered as Regular Civil Appeal No.8/1986.

4. The Regular Civil Appeal No.8/1986 was partly allowed by the First Appellate Court. However, a permanent injunction was not granted to the present appellants because the First Appellate

Court held that the respondents, i.e. the original defendants, were in possession of the hilly portion (western side of the suit properties).

5. The appellants filed a Second Appeal No.21/1990 before this Court, impugning the portion of the decree dated 03.02.1990 that was against the present appellants. However, on 25.11.1997, this appeal was dismissed. In para 15 of the decree dated 25.11.1997, this Court held that the finding of the First Appellate Court concerning the possession of the hilly portion of the suit property of the defendants as tenants is only incidental and would not confer any status upon them.

6. The present appellants relying upon the decisions of this Court in *Sitabai Vaze (since deceased) through LRs. v/s. Administrative Tribunal, Goa, Daman & Diu & Ors. - 1996 (2) Goa Law Times 246, Vaman Naik & Anr. v/s. The Administrative Tribunal, Goa, Panaji-Goa & Ors. - 1999 (1) Goa Law Times 203* and *Dattaram Arolkar v/s. Mamlatdar of Mormugao – AIR 2001 Bom 74* to the effect that a Mamlatdar had no jurisdiction to grant negative declaration under Section 7 of the Goa Agricultural Tenancy Act, 1964 (Agricultural Tenancy Act), instituted Regular Civil Suit No.61/2000.

7. In the plaint in Regular Civil Suit No.61/2000, from which ultimately this Second Appeal arises, the appellants sought for following reliefs:

"a) This Hon'ble Court be pleased to grant a declaration that the defendants are not the tenants in respect of the hilly portion of the property known as Cudva first addition situated at Soliem enrolled in matríz under No.1309 and as described in Para 1 of the plaint.

b) The defendants, by themselves and/or their servants, agents or any person on their behalf be restrained from interfering with the hilly portion of the property known as Cudvan first Edition situated at Soliem and enrolled in matríz under No. 1309."

8. On 29.10.2005, the appellants applied for leave to amend the plaint and seek prayer for recovery of possession of the suit property should the Trial Court conclude that the defendants were indeed in possession of the suit property. However, by order dated 30.11.2005, the Trial Court rejected this application seeking leave to amend the plaint, citing several reasons.

9. Further, the Judgment and Decree dated 05.05.2006 dismissed this Regular Civil Suit No.61/2000 by the Trial Court. The First Appellate Court dismissed the appeal by decree dated 14.06.2006. Hence the present appeal on the above substantial question of law.

10. Suppose the prayers in Regular Civil Suit No.61/2000 are perused. In that case, the appellants had sought a negative declaration to declare that the defendants are not the agricultural tenants of the suit property. Based thereon, the defendants should be restrained from interfering with the suit property. Even if the amendment were to be allowed, the plaint would include an additional prayer for the restoration of the possession of the suit property based on the fundamental premise that the defendants were not the agricultural tenants of the suit property. Therefore, it is evident that the main relief in the plaint or rather the foundational relief in the plaint, was the declaration that the defendants are not the agricultural tenants of the suit property. The relief of either permanent injunction or recovery of possession (if the amendment were to be allowed) were only incidental or consequential reliefs, not foundational reliefs.

11. Unfortunately for the appellants, the Agricultural Tenancy Act was amended sometime in 1991. In particular, Section 7 was amended to incorporate the expression "*or was*" between the expressions "*is a*" and "*tenant*". In addition, the amendment clarified that the Mamlatdar would have jurisdiction to decide whether a party is a tenant and whether a party was a tenant in the past.

12. Further, the Hon'ble Supreme Court, in *Madhumati Atchut Parab v/s. Rajaram V. Parab & Ors. - (2009) 4 SCC 183* impliedly overruled the decisions in *Sitabai Vaze (supra)* and *Vaman Naik (supra)* and expressly overruled *Dattaram Arolkar (supra)*. The Hon'ble Supreme Court, in the precise context of Section 7 of the Agricultural Tenancy Act held that the Mamlatdar has the power to grant a negative declaration to the effect that a person is not a tenant under the provisions of the Agricultural Tenancy Act.

13. Section 58-B of the Agricultural Tenancy Act provides that save as otherwise provided in this Act, no Court shall have jurisdiction to settle, decide or deal with any question which is by or under this Act required to be settled, decided or dealt with by the Mamlatdar, Tribunal, Collector, Administrative Tribunal or Government and no orders passed by these authorities under this Act shall be questioned in any Civil or Criminal Court.

14. This provision is similar to the provisions contained in Section 85 of the Bombay Tenancy and Agricultural Lands Act 1948. Based on these provisions, it is clear that the Civil Court would not have any jurisdiction to consider the prayers in the plaint in Regular Civil Suit No.61/2000. Based on the averments in the plaint itself, such a suit was barred under the provisions of

the Agricultural Tenancy Act as interpreted by the Hon'ble Supreme Court in *Madhumati Parab (supra)*.

15. In *Madhumati Parab (supra)*, the Hon'ble Supreme Court held as follows:

"The expression "If any question arises where any person is or was a tenant" embraces within its sweep both the facets i.e. positive declaration as well as negative declaration, and the conclusion can be reached only at the end of the enquiry. It is clear that when there is a dispute or doubt over the tenancy of a person, the Mamlatdar shall decide such question after conducting a due enquiry to establish the same. Therefore, if the conclusion of the Mamlatdar, on enquiry, is that a particular person is not a tenant, he is bound to declare such a person that he is not a tenant. It would be unacceptable, untenable and a sheer waste of time if the Mamlatdar after a detailed enquiry under Section 7 of the Goa Tenancy Act refuses to exercise his jurisdiction on the ground that he cannot pass a negative order because the person concerned is not a tenant. This cannot be the intention of the legislature, to create such an ambiguous position, which would result in a lengthy procedure that might ultimately yield no result."

16. The Hon'ble Supreme Court further held that:

"Only because Section 4(1) of the Goa Tenancy Act, confers a limited jurisdiction on the Mamlatdar by mentioning therein the categories of persons in respect of whom he can give a negative declaration, does not mean that while deciding the question under Section 7 of the

Goa Tenancy Act, the jurisdiction of the Mamlatdar to declare that the person concerned is or was not a tenant is ousted. When the legislature has provided that the landlord can seek a negative declaration in respect of the categories of person mentioned in Section 4(1) of the Goa Tenancy Act, it cannot conclusively lead to the conclusion that in other cases, namely, where the question arises as to whether a person is or is not a tenant, the Mamlatdar is not conferred with any power to grant a negative declaration that the person concerned is not a tenant in respect of the disputed property. Therefore, the Mamlatdar has jurisdiction to declare a negative declaration, that is to say, a particular person is not a tenant under Section 7 of the Goa Tenancy Act. Therefore, the judgment of the High Court cannot be sustained."

17. Applying the principles above, it is apparent that the plaint in Regular Civil Suit No.61/2000 is required to be rejected. Further, even if any leave were to be granted for amendment, that would make no difference to this conclusion. As noted earlier, the foundational relief was the negative declaration about the defendants not being the agricultural tenants of the suit property. If this foundational relief could not be granted, then there was no question of grant of incidental reliefs by the Civil Court.

18. Mr Thali did try to urge that the defendants had raised a plea of adverse possession or prescription. However, to exercise powers under Order VII Rule 11 (d) of CPC, the averments in the plaint are relevant, not the defence. Since the plaint, in this

case, was almost exclusively to seek a negative declaration about the defendants not being the tenants of the suit property, such a plaint, deserved to be rejected considering the law in *Madhumati Parab (supra)*.

19. Mr Thali also submitted that the decision of the Hon'ble Supreme Court in *Madhumati Parab (supra)* was delivered on 29.01.2009. He pointed out that *Dattaram Arolkar (supra)* was holding the field when the suit was instituted. However, it is well settled that when the Hon'ble Supreme Court declares the legal position, the same relates to nativity. Nothing in *Madhumati Parab (supra)* remotely indicates that it was overruling *Dattaram Arolkar (supra)* with the prospective effect. Therefore, based on this contention as well, the suit, as instituted, cannot be saved.

20. For all these reasons, the substantial question of law as framed does not arise. Or even if the same arose and were to be answered in favour of the appellants, the ultimate conclusion about the suit not being maintainable before the Trial Court would not be altered.

21. For all the reasons above, this appeal is dismissed. Accordingly, there shall be no order for costs.

22. However, the dismissal of this appeal will not come in the way of the appellants exploring the possibility of instituting an application for negative declaration in terms of the decision of the Hon'ble Supreme Court in *Madhumati Parab (supra)*. Similarly, rejection of the plaint will also not come in the appellant's way of instituting a suit for injunction or recovery of possession without involving the issue of either a positive or negative declaration concerning the agricultural tenancy.

M. S. SONAK, J.

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