

Santosh

IN THE HIGH COURT OF BOMBAY AT GOA
SECOND APPEAL NO.33/2023
WITH
CIVIL APPLICATION NO. 851/21(F)

JOSE REMEDIOUS RODRIGUES

son of Paixao Rodrigues,
56 years of age, business B-4,
Riviera Residency , PDA Colony ,
Alto Porovim, Bardez Taluka, Goa

... Appellant.

Versus

CACULO PROPERTIES PVT. LTD.,
A company incorporated under The Indian
Companies Act, 1956 Having their address
at new Shanta, 6th floor, above Caculo Mall,
"St. Inez, Panaji Goa Represented by their
authorized Signatory Shri. Shripad R. Devari,
S/o Late Ramchandra Devaii, Major,
aged 75years, Consultant, R/O Porvorim Goa

... Respondent.

Mr Arjun F. Naik, Advocate *for the Appellant.*

Mr Raunak A. Kantak, Advocate *for Respondent.*

CORAM : M. S. SONAK, J.

DATE : 20th July 2023

ORAL JUDGMENT :

1. Heard Mr Arjun Naik for the Appellant and Mr Raunak Kantak for the Respondent.

2. This appeal was heard on the first two substantial questions of law on 13th July 2023. The matter was posted today under the caption of "part hard" because, in the meanwhile, the Appellant wished to inspect the goods confiscated by the Respondent. Today,

further arguments were heard in the matter, and with the consent of the learned Counsel for the parties, this Second Appeal is being disposed of.

3. The second Appeal was heard on the following substantial questions of law :

(A) When the Learned First Appellate Court arrives at a finding that the vacant possession of the suit kiosk was taken over by the plaintiff effectively on 9/3/2013 and in the absence of evidence that the plaintiff suffered a loss due to closure of the suit kiosk, whether the Learned Appellate court was justified in awarding damages at the rate of Rs. 50,000/- along with interest at the rate of 6% per annum effective from 1/8/2013 till the date of actual payment?

(B) When the Learned Appellate Court itself has come to a finding that the plaintiff has not examined any expert or produced any expert report to show the exact damages caused or based on which the damages could be quantified whether the Learned First Appellate Court is justified in awarding damages of Rs. 50,000/- with interest of 6% without there being any evidence on record in respect of the injuries suffered by the plaintiff?

4. The Appellant is the original Defendant, and the Respondent is the original Plaintiff in Regular Civil Suit No. 101/2013/C, instituted in the Court of Civil Judge, Junior Division, 'C' Court, at Panaji (Trial Court). The suit was for eviction and damages from the kiosk licensed to the Appellant in a mall.

5. The Trial Court dismissed the suit by Judgment and Decree dated 8th August 2017. The First Appellate Court has partly allowed

the Respondent's Regular Civil Appeal No. 107/2017. By Judgment and Decree dated 29th February 2020, the Appeal Court noted that the Appellant was evicted from the kiosk on 9th March 2013. Still, it directed the Appellant to pay damages of ₹50,000/- with interest at the rate of 6% per annum, effective from 1st August 2013 till the actual payment date. This Second Appeal is against the portion of the impugned Judgment and Decree made by the First Appellate Court.

6. The record shows that by an agreement dated 10th October 2012, the Respondent licensed the suit premises (kiosk) in a mall to the Appellant for the period between 1/11/2012 and 31/10/2013 against payment of licence fees of ₹10,000/- and maintenance charges of ₹2,000/- per month. It was the Respondent's case that the Appellant kept the kiosk space closed for unjustifiable reasons, and, therefore, the Respondent confiscated the Appellant's goods on 9th March 2013. After that, the Respondent instituted the suit seeking a decree of eviction and damages.

7. Both the Courts have recorded concurrent findings of fact that the Respondent confiscated the Appellant's goods from the kiosk. It is unclear under what authority of law the Respondent exercised this power of confiscation and, after that, instituted the suit for eviction. The two Courts have held that there was no question of eviction because the Appellant was out of the suit premises effective from 9th March 2013. The goods were removed by the Respondent and placed at some other place. These concurrent findings have not even been challenged by the Respondent.

8. In paragraph 28, the Appeal Court records explicitly that the Respondent (Plaintiff) took possession of the suit kiosk on 9th March 2013. Further, in paragraph 29, the Appeal Court has held that the Plaintiff was at fault for not issuing any termination of leave and licence notice in the first place. The Appeal Court has, therefore, affirmed the Trial court's findings that the Respondent was not entitled to any licence fee from January 2013 to July 2013, along with taxes amounting to ₹94,381/-. Again these categorical and concurrent findings were never challenged by the Respondent. In any case, such findings are backed by the evidence on the record.

9. The Appeal Court has, however, awarded damages of ₹50,000/- with interest thereon at the rate of 6% per annum solely on the ground that there was a clause in the leave and licence agreement about the Appellant not keeping the kiosk closed. Mr Kantak submitted that keeping the kiosk closed in the mall would harm the mall's operations. He submitted that in such matters, there was no necessity of leading specific evidence to prove damages, and the Appeal Court was justified in making the reasonable award. He contended that it may be impossible for the Court to assess compensation arising from such a breach in such matters. He relied on paragraph 66 of *Oil & Natural Gas Corporation Ltd. vs. Saw Pipes Ltd.* (2003) 5 SCC 705 to support his contention.

10. The entire discussion on the issue of damages is in paragraphs 30, 31 and 32 of the Appellate Court's impugned Judgment and Decree. The Appellate Court has admitted that the Respondent has not examined any expert or produced any expert report to show the exact damages caused or the basis on which the damages could be

quantified. The Appellate Court did not even go into the issue of whether the Appellant had closed the kiosk or whether the goods in the kiosk were confiscated by the Respondent as was admitted by the Respondent. The Appellate Court reasoned that since the Appellant failed to file any written statement, it was not required to investigate this issue. Based on this observation, the Appeal Court proceeded to award ₹50,000/- with interest at the rate of 6% per annum as damages.

11. Recently, in Second Appeal No. 106/2021(F) preferred by one Pedro C. Lobo, the Appeal Court, after recording a finding that there was no evidence whatsoever in support of the damages, still proceeded to award damages of ₹50,000/- to the Plaintiff in the said matter. This Court set aside such a Decree by Judgment and Order dated 6th April 2023 in Second Appeal No. 106/2021(F) (*Pedro C. Lobo vs. Feliciano Edgardo Couto*).

12. Even in the present case, after recording a finding that there was no evidence whatsoever led by the Respondent, the Court, based upon surmises, has awarded ₹50,000/- towards damages. The Appellate Court failed to appreciate that a Plaintiff must stand or fall on its own feet. Here there was evidence about the so-called confiscation, which was nothing but an eviction brought about by the Respondent without the intervention of the Court. The Court also failed to consider that the Respondent had a security deposit of ₹40,000/- with it. Considering the Appellate Court's finding that the Respondent was not entitled to recover the licence fees from January 2013 to July 2013, there was no question of any additional damages for the alleged closure of the kiosk by the Appellant. The

finding and computations regarding damages are perverse and warrant interference.

13. The decision in *Oil & Natural Gas Corporation Ltd.* (supra) turns on its facts. Here, the breach was not proved. There are concurrent findings of confiscation and ouster. Other circumstances on record should have entered the decision-making process to determine whether any damages were payable. Therefore, from this perspective, the decision in *Oil & Natural Gas Corporation Ltd.* (supra) will not assist the Respondent.

14. For all the above reasons, the substantial questions of law are answered favouring the Appellant. This Appeal is allowed, and the impugned Judgment and Decree directing the Appellant to pay damages with interest is set aside. There shall, however, be no order for costs.

15. Misc. Civil Application does not survive, and the same is also disposed of.

M. S. SONAK, J.