

Suchitra

IN THE HIGH COURT OF BOMBAY AT GOA

SECOND APPEAL NO.101/2010

1. Smt. Filomena Mudgal (since deceased), widow of Joseph Mudgal, 76 years of age, through heirs, appellants no.5 to 8.

2. Shri George Mudgal, son of said Joseph Mudgal, 55 years of age, married, and his wife

3. Mrs Marianinha Mudgal, 50 years of age

4. Mr John Mudgal, (since deceased), son of Joseph Mudgal, 42 years of age, all major of age, and residents of H.No.601, Orel, Assolna, Salcete, Goa.

5. Mario Fernandes, son of Martin Fernandes, aged 62 years, widower, service and his daughter

6. Olivia Fernandes, major of age, service, aged 25 years, spinster

7. Victoria Colaco, daughter of late Joseph Mudgal, aged 51 years, married, service and her husband

8. Armano Colaco, son of Juze Luis Colaco, aged 61 years, married, service,

All residents of 26, Oakington Manor Drive, Webley, London, England, Ha9 6lz.

... APPELLANTS

Versus

1. Smt Maria Alina Augustas Rodrigues e Lopes, widow, resident of 31st January Road, Panaji Goa.

(Deleted as per order dated 04.03.2011)

[2] 1. Shri Joe Mahindra Monteiro, son of late Antonio Xavier Monteiro, resident of H.No.730, ward Culmorod, Assolna, Salcete, Goa.

2. Meera Rodrigues, wife of Alfred Gracias, major of age, resident of House No.1225, Wogaped, Thall, Siroda, Post Office Shiroda, Taluka Ponda, Goa, 403103.

... RESPONDENTS

Mr Shukr Usgaonkar, Advocate *for the Appellants.*

None *for the Respondents.*

CORAM: M. S. SONAK, J.

Reserved on: 8th June 2023

Pronounced on: 12th June 2023

JUDGMENT:

1. Heard Mr Shukr Usgaonkar for the appellants. The respondents, though served, were neither present nor represented.

2. The appellants are the original plaintiffs, and the respondents are the original defendants in Regular Civil Suit No.131/1998 instituted in the Court of the Civil Judge, Junior Division at Margao (Trial Court).

3. The appellants instituted the suit for injunction to restrain the respondents from interfering with the suit premises and/or dispossessing the appellants from the suit premises or blocking their access to the suit premises, or causing loss or damage to the suit premises either by demolishing the same or any portion thereof. The appellants had claimed in the suit that they were the tenants of the suit premises, of which the respondents were the landlords.

4. The appellants amended the suit because it was their case that during the pendency of the suit the suit premises were destroyed due to acts attributable to the respondents. Mr Usgaonkar explained that the suit premises were on the ground floor, and the respondents/landlords occupied the first floor premises. However, the respondents/landlords demolished/damaged the first floor premises, as a result of which the suit premises on the ground floor were exposed to the elements of nature. The suit premises ultimately collapsed, so the appellants had to source alternate premises.

5. By way of amendment, the appellants sought a permanent injunction restraining the respondents from developing the property surveyed under No.1/5 at Assolna, Salcete, Goa, for any purpose other than to reconstruct the suit premises or to do any additional construction permissible therein. The appellants also sought a mandatory injunction to direct the respondents to reconstruct the suit premises and restore the possession of the reconstructed premises to the appellants.

6. The Trial Court, by Judgment and Decree dated 31.07.2009, dismissed the suit with costs. The Trial Court disbelieved the appellants' case about the suit premises being destructed due to any acts attributable to the respondents. The Trial Court, relying on the decision of the Hon'ble Supreme Court in *Vannattankady Ibrayi v/s. Kunhabdulla Hajee*¹ held that once the tenanted premises are destroyed, the right to tenancy stands extinguished. The Trial Court ultimately held that the suit was not maintainable as the suit premises did not exist.

7. The appellants appealed by instituting Regular Civil Appeal No.145/2009 in the District Court-IV, South Goa at Margao. By Judgment and Decree dated 19.05.2010, the First Appellate Court dismissed the appeal with costs by upholding the findings recorded by the Trial Court.

8. This Second Appeal was admitted on 05.10.2011 on the following substantial question of law:-

“Whether the reliance placed by the Courts below on the judgment of the Apex Court in Vannattankandy Ibrayi ((2000) 1 SCC 564) to hold that as the suit premises had been destroyed due to natural causes, the Appellant's tenancy right had extinguished, was misplaced in light of the Appellant's clear pleadings and evidence to the effect that the respondents had actively caused the demised premises to collapse during the heavy rains ?”

1 (2001) 1 SCC 564

9. By further order dated 17.03.2023, an additional substantial question of law was formulated, and the same reads as follows:-

*“Whether in view of the later decision of the Hon'ble Supreme Court in the case of **Shaha Ratansi Khimji and Sons Vs Kumbhar Sons Hotel Private Limited and others [(2014) 14 SCC 1]**, the impugned decrees, which are based upon **Vannattankandy Ibrayi Vs Kunhabdulla Hajee [(2001) 1 SCC 564]** warrant interference ?”*

10. Mr Shukr Usgaonkar, learned counsel for the appellants, submitted that the impugned judgments and decrees made by the Trial Court and the First Appellate Court were almost entirely based upon the decision of the Hon'ble Supreme Court in *Vannattankandy Ibrayi* (supra). He pointed out that a larger Bench of the Hon'ble Supreme Court in the case of *Shaha Ratansi Khimji* (supra) has overruled *Vannattankandy Ibrayi* (supra) and held that the right of tenancy does not extinguish with the destruction of the tenanted premises. He submitted that on this short ground, the impugned judgments and decrees must be reversed and the suit instituted by the appellants, decreed.

11. Mr Usgaokar also handed in an application urging the framing of yet another substantial question of law which reads as follows:-

*“Whether there exists an obligation on the Respondent to reconstruct the suit premises as it existed or as nearly as it existed prior to its collapse and put the Appellants in possession thereof on account of the continuing landlord-tenant relationship between the Respondent and the Appellants as held by the Hon’ble Supreme Court in **Shaha Ratansi Khimji v. Kumbhar and Sons Hotel Private Limited** [(2014) 14 SCC 1] and in view of the common. law governing the jural relationship between the landlord and the tenant?”*

12. In the context of the above additional substantial question of law Mr Usgaonkar submitted that the appellants were protected tenants under the Goa Buildings (Lease, Rent and Eviction) Control Act, 1968. He submitted that under Section 33 of the Rent Control Act, an obligation was cast upon the respondents/landlords to keep the tenanted premises in good repair. He submitted that this obligation would include reconstructing the destructed tenanted premises so that the appellants could be placed in possession of the same. He relied upon *Simper v/s. Coombs*² and *Dermott v/s. Jones*³ in support of his contentions.

13. In addition to the above, Mr Usgaonkar relied upon *Raichurmatham Prabhakar & Anr. V/s. Rawatmal Dugar*⁴, *Shri Shripad Govind Sinai alias Ava Padmanaba Kamat (deceased)*

2 1948 All ER (1) 306

3 69 US 1 (1864)

4 (2004) 4 SCC 766

through LRs v/s Shri Bhivam Dulo Velip (since deceased) through LRs⁵, Damayanti Ramesh Bhudhadev (Thakkar) & Ors. V/s Devaram Bhomaji Sharma & Anr.⁶, Shri Vivek Ramchandra Pradhan & Ors. V/s Dr. Narendra Anant Mule⁷, Kamakshi Builders v/s Ambedkar Educational Society & Ors.⁸, Ramesh Chand Ardawatiya v/s Anil Panjwani⁹, Saraswati And Others v/s Lachanna (Dead) through LRS.¹⁰ and Bihar State Co-operative Marketing Union Ltd. V/s Uma Shankar Sharan And Anr.¹¹ in support of his contentions.

14. Insofar as the substantial questions of law formulated in the orders dated 05.10.2011 and 17.03.2023 are concerned, the same will have to be answered in favour of the appellants given the decision of the Hon'ble Supreme Court in *Shaha Ratansi Khimji* (supra). In this decision delivered by a larger Bench of the Hon'ble Supreme Court, the decision in *Vannattankandy Ibrayi* (supra), which was the mainstay of the impugned judgments and decrees made by the Trial Court and the First Appellate Court, came to be overruled.

15. In *Shaha Ratansi Khimji* (supra), a Bench comprising of three judges of the Hon'ble Supreme Court was considering the conflicting opinions in *Vannattankandy Ibrayi* (supra) and *T.*

5 *Second Appeal No.20/2008 decided on 20.10.2022*

6 *2016 SCC OnLine Bom 11981*

7 *2016 SCC OnLine Bom 9715*

8 *(2007) 12 SCC 27*

9 *(2003) 7 SCC 350*

10 *(1994) 1 SCC 611*

11 *(1992) 4 SCC 196*

*Lakshmipathi v/s. R. Nithyananda Reddy*¹² on the legal impact of the destruction of the leased building or the structure or the leasehold rights. *Vannattankandy Ibrayi* (supra) relied upon by the Trial Court and the First Appellate Court had held that once the tenanted premises are destroyed, the tenancy rights are extinguished. *T. Lakshmipathi* (supra) held that the tenancy right survives the destruction of the tenanted premises, particularly where the lease created an estate/interest in both the structure and the land underlying the structure. The larger bench of the Hon'ble Supreme Court resolved the controversy by overruling *Vannattankandy Ibrayi* (supra) and approved *T. Lakshmipathi* (supra).

16. Accordingly, *Shaha Ratansi Khimji* (supra) holds that where there was nothing to indicate that the lease was only in respect of the structure or premises or where the land underlying the structure was expressly excluded, the tenancy rights would survive the destruction of the tenanted premises. Thus, it is apparent that the mainstay of the impugned judgments and decrees made by the Trial Court and the First Appellate Court no longer hold good. The impugned judgments and decrees will therefore have to be reversed to the extent they hold that the appellant's suit was not maintainable consequent upon the destruction of the tenanted premises or that the appellants had no cause of action since their tenancy rights stood extinguished with the destruction of the tenanted premises.

12 (2003) 5 SCC 150

17. The larger bench of the Supreme Court has held that the word "*building*" must take in the site also, as a part of the building. If that is so, without the site, there cannot be a structure and the site becomes an integral part of the building. Without a site, the superstructure of the building on the land cannot normally exist. Thus, when there is a lease of a building, such lease would normally take in the site unless the lease specifically excluded the underlying land. Hence, the building or structure and land are both normally the subject matter of the lease, and even if the building or superstructure is destroyed, that would not determine the lease when the land, which is the site of the building, continues to exist.

18. In the present case, nothing is on record to even remotely indicate that the land beneath the tenanted premises was excluded from the lease. This was not even the case pleaded by the respondents. It is also not the case of the respondents that the land beneath the tenanted premises has ceased to exist by any act of nature or otherwise. Accordingly, following the law in *Shaha Ratansi Khimji* (supra) it will have to be held that the tenancy rights of the appellants survived the destruction of the tenanted premises. The findings of the trial court and the first appellate court to the contrary cannot sustain and are set aside.

19. The additional substantial question of law that Mr Usgaonkar now proposes does not arise for consideration, particularly because the same does not appear to have been seriously pressed before the Trial Court or the First Appellate

Court. Be that as it may, no case is made out to answer such a substantial question of law in favour of the appellants.

20. There are concurrent findings that the respondents were not responsible for the destruction of the tenanted premises. No perversity is demonstrated in the record of such concurrent findings of fact. This is why no substantial question of law is framed about perversity or otherwise regarding such findings. The findings are supported by the evidence on record.

21. Since reliance was placed upon Section 33 of the Rent Control Act the same is transcribed below for convenience of reference:-

33. Landlord's duty to keep building in good repair.- (1)
Every landlord shall be bound to keep the building in good and tenantable repair.

(2) If the landlord neglects or fails to make, within a reasonable time after notice in writing, any repairs which he is bound to make under sub-section (1), the tenant may make the same himself and deduct the expenses of such repairs from the rent or otherwise recover them from the landlord:

Provided that the amount so deducted or recoverable in any year shall not exceed one-twelfth of the rent payable by the tenant for that year.

(3) Where any repairs without which the building is not habitable or usable except with undue inconvenience are to be made and the landlord neglects or fails to make them after notice in writing, the tenant may apply to the Rent Tribunal for permission to make such repairs himself and may submit to the Rent Tribunal an estimate of the cost of

such repairs, and, thereupon, the Rent Tribunal may, after giving the landlord an opportunity of being heard and after considering such estimate of the cost and making such inquiries as it may consider necessary, by order in writing, permit the tenant to make such repairs at such cost as may be specified in the order, and it shall, thereafter, be lawful for the tenant to make such repairs himself and to deduct the cost thereof, which shall in no case exceed the amount so specified, from the rent or otherwise recover it from the landlord:

Provided that the amount so deducted or recoverable in any year shall not exceed one-half of the rent payable by the tenant for that year:

Provided further that if any repairs not covered by the said amount are necessary in the opinion of the Rent Tribunal and the tenant agrees to bear the excess cost himself the Rent Tribunal may permit the tenant to make such repairs.”

22. From the analysis of the above provisions, every landlord shall indeed be bound to keep the tenanted premises in good and tenantable repair. However, suppose the landlord neglects or fails to make any repairs which he is bound to make under sub-section 1 of Section 33 within a reasonable time after notice in writing. In that case, the tenant may make it himself and deduct the expenses of such repairs from the rent or otherwise recover them from the landlord consistent with the proviso to sub-section 2 of Section 33.

23. Sub-section 3 of Section 33 of the Rent Control Act provides that where any repairs without which the building is not habitable or usable except with undue inconvenience are to be made and the landlord neglects or fails to make them after notice

in writing, the tenant may apply to the Rent Tribunal for permission to make such repairs himself and may submit to the Rent Tribunal an estimate of the cost of such repairs, and, thereupon, the Rent Tribunal may, after giving the landlord an opportunity of being heard and after considering such estimate of the cost and making such inquiries as it may consider necessary, by order in writing, permit the tenant to make such repairs at such cost as may be specified in the order, and it shall, thereafter, be lawful for the tenant to make such repairs himself and to deduct the cost thereof, which shall in no case exceed the amount so specified, from the rent or otherwise recover it from the landlord.

24. Thus, if the appellants' case falls under sub-section 2 of Section 33 of the Rent Control Act then the appellants would perhaps be free to effect the repairs and deduct expenses of such repairs from the rent or otherwise recover the same from the landlord. Similarly, if the appellants' case falls under sub-section 3 of Section 33 of the Rent Control Act then it would be for the appellants to apply to the Rent Tribunal and seek appropriate orders. However, it would not be appropriate for this Court to direct the landlords to reconstruct or repair, particularly when there is no evidence of the landlord destroying the tenanted premises. A special remedy is provided by the Rent Control Act on which the appellant relies.

25. Section 56 of the Rent Control Act provides that save as provided in the Rent Control 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. Thus, exclusive jurisdiction to address the grievances referred to in sub-section 3 of Section 33 is vested in the Rent Tribunal and not the Civil Court. Accordingly, it would not be appropriate to answer the additional substantial question of law proposed by Mr Usgaonkar in favour of the appellants.

26. Mr Usgaonkar, however, submitted that objection to the jurisdiction of the Civil Court was never raised by any of the respondents before the Trial Court or the First Appellate Court. Further, he submitted that in the case of composite reliefs, the Civil Court would have jurisdiction to grant the relief of repairs or reconstruction of the tenanted premises. He relied upon certain decisions in support of these contentions.

27. On perusal of the decisions relied on, it is apparent that the same were in the context of objections involving mixed questions of law and fact. Besides, it is well settled that neither waiver nor consent can confer jurisdiction upon a Court if such jurisdiction is inherently wanting. Since the appellants rely upon Section 33 of the Rent Control Act, the procedure prescribed or the remedy provided by the Rent Control Act cannot be bypassed.

28. Accordingly, this Second Appeal is partly allowed. The impugned judgments and decrees are set aside, and the appellants' suit is decreed in terms of prayer clause (a) to the amended plaint, which reads as follows:

“a) For permanent injunction restraining the Defendants nos. 1 and 2, their agents, servants, labourers etc. from developing the said property surveyed under No.1/5 of Assolna Village of Salcete Taluka for any purpose other than to reconstruct the suit premises and to do any additional construction permissible therein;”

29. Although no relief is being granted in terms of prayer clause (b) to the amended plaint, the same will not preclude the appellants from exploring the possibility of obtaining such relief by resorting to the provisions of Section 33 of the Rent Control Act. However, all contentions of all parties in this regard are kept open.

30. The Second Appeal is partly allowed in the above terms. A decree be drawn out in the above terms. There shall be no order for costs.

M. S. SONAK, J.

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