

(2012) 07 BOM CK 0093

In the Bombay High Court

Case No : Second Appeal No. 38 of 2003

Mr. Ricardo Jaime Fernandes

APPELLANT

Vs

Mr. Vishnudas alias Gurudas Khandolkar

RESPONDENT

Date of Decision : 20-07-2012

Acts Referred:

Evidence Act, 1872 — Section 116

Citation : (2012) 07 BOM CK 0093

Hon'ble Judges : U.V. Bakre, J

Bench : Single Bench

Advocate : S.D. Lotlikar, with Mr. K.B. Surjuse, for the Appellant; R.V. Kamat, for the Respondent

Final Decision : Dismissed

Judgement

U.V. Bakre, J.—This Second Appeal arises out of Judgment and Decree dated 2/5/2003 passed by the learned District Judge, Panaji (first Appellate Court, for short), in Regular Civil Appeal No. 54/1996. The said Regular Civil Appeal was filed by the defendant of Regular Civil Suit No. 31/91/D against the Judgment and Decree dated 11/9/1996 passed by the learned Civil Judge, Junior Division, Panaji (trial Court, for short), in the said suit.

2. The parties shall hereinafter be referred to in the same manner as they appear in the cause title of the said Regular Civil Suit.

3. The plaintiff had filed the said suit for eviction and for recovery of mesne profits. The case of the plaintiff, in short, was as follows:

The erstwhile Government during Portuguese regime had granted lease to late Lourencinho Fernandes, father of the plaintiff, in respect of a piece of land belonging to the Government of Goa, near old Ferry Wharf, St. Lawrence, Agacaim-Goa, by Alvara No. 466 dated 22/11/1957, on payment of yearly rent of Rs. 8.75 and he was allowed to erect a structure of temporary nature in the said land for the purpose of running his business of bar and restaurant (Tea shop).

Thereafter, father of the plaintiff erected temporary structure made of tin sheets and wooden planks and divided the same into two parts by means of wooden and tin sheets partition and in one part he started running the bar, whereas in the other part a restaurant (tea shop). Subsequently, father of the plaintiff, with the consent of the Government authorities, replaced the roof by asbestos cement sheets. When the Shops and Establishments Act came into force in Goa, father of the plaintiff got the business registered under the said Act in the office of the Commissioner, Labour and Employment at Junta House, Panaji. Father of the plaintiff expired on 1/9/1983 after which the plaintiff made an application dated 28/8/1984 to the Excise Department for transfer of licence of the bar in his name. Accordingly, licence of the bar stood transferred in the name of the plaintiff as per the letter dated 24/2/1984 of the office of the Commissioner of Excise, Panaji.

4. Further case of the plaintiff is as follows:

In the year 1973, the Government wanted the land which was leased to father of the plaintiff for the purpose of constructing an approach road to Zuari bridge and for that purpose notices were issued by the Deputy Collector, North Division, Panaji and by the Mamlatdar of Tiswadi, Panaji. As father of the plaintiff was required to vacate the Government land and as his father would have suffered in the business, a request was made to Gammon India Ltd, the company which was supposed to construct the Zuari bridge, for allowing father of the plaintiff to run his business of bar and restaurant in the company's premises in the existing structure, free of rent. This request of father of the plaintiff was granted and an agreement dated 30/11/1973 was entered into between them. The agreement for running canteen/restaurant was extended from time to time till Zuari bridge was commissioned. Subsequently, it transpired that the approach road would not affect the land on which the structure wherein the business of bar and restaurant was previously run by father of the plaintiff, was existing. Hence, the Government informed father of the plaintiff that after the work of the bridge and approach road was completed, he would be allowed to run his business in the said Government land. Accordingly, somewhere in the month of March or April 1982, father of the plaintiff was again put in possession of the said structure wherein the business of bar and restaurant was being run previously and since then, father of the plaintiff again started running his said business in the said structure. As stated earlier, the plaintiff took over the running of business on 1/9/1983 and employed the defendant in the restaurant (tea shop) to work on payment of daily wages. The defendant accordingly worked for about four years. Subsequently, since the plaintiff was finding it difficult to look after the business of bar and restaurant at the same time, he inquired with the defendant whether he was willing to run his business of restaurant on leave and licence basis, on payment of licence fee/royalty of Rs. 300/-per month, to which the defendant agreed. Accordingly, since January 1984, the plaintiff allowed the defendant to run the restaurant/tea shop on leave and licence basis on payment of licence fee/royalty of Rs. 300/-per month. It was also agreed that the licence was liable to

be terminated by the plaintiff as and when desired. The tea shop premises and the bar had only one electricity meter since the beginning which was situated in the portion occupied by the bar. However, the defendant in February 1990, obtained a separate electricity meter for tea shop without obtaining prior consent of the plaintiff and when the plaintiff objected to the same, the defendant approached the plaintiff and tendered apology and pleaded that henceforth he would not do anything in the tea shop without obtaining permission from the plaintiff and requested the plaintiff not to terminate the licence. Believing the defendant, the plaintiff did not terminate the licence. Subsequently, in March 1990, the plaintiff learnt that without his knowledge, the defendant had got the tea shop registered in his name in the office of Labour Commissioner under the Shops and Establishment Act and when the plaintiff objected to the same, the defendant apologized and undertook to get the said registration cancelled. However, since the defendant failed to do so, the plaintiff by Registered A/D notice dated 18/12/1990 terminated the licence of the defendant in respect of the tea shop w.e.f 1/1/1991 and called upon the defendant to remove the articles/things from the tea shop premises. The defendant received the said notice, but by reply dated 4/1/1991, falsely claimed ownership rights to the said tea shop and refused to comply with the notice. The defendant is earning a net profit of about Rs.150/- per day by running the said tea shop. Hence, the suit.

5. By way of written statement, the defendant alleged as follows:

That the mother of defendant was allowed by Gammon India Ltd. to start the tea shop in the structure constructed by the company from 1972 to 1983 and father of the plaintiff continued his business in a separate structure. In the year 1972 (sic 1983), the company requested the mother of the defendant to continue business in the old structure which was supposed to be demolished, but which had not been demolished. Since that time, the defendant is in possession and enjoyment of the said structure of the tea shop, as an independent owner on the land of the Government. It is false that the defendant was employed by the plaintiff on daily wages for four years and later on was given the tea shop on leave and licence basis. The defendant registered the tea shop in 1989 under the Shops and Establishment Act, at which time the plaintiff had raised objection before the Labour Commissioner, but the said objection was overruled. He took electricity connection for the tea shop in the year 1990 and nobody objected to the same. The land on which the suit structure is situated belongs to the Government and the plaintiff has no locus standi to file the suit.

6. Upon consideration of the entire evidence on record, the trial Court held that the plaintiff has proved that the land belonging to the Government was given on lease to the father of the plaintiff, on yearly rent of Rs. 8.75, under Alvara No. 466 dated 22.11.1957 and was allowed to erect a structure for running his business of bar and restaurant. Trial Court further held that the plaintiff has proved that his father divided the said structure into two parts by means of wooden tin sheets partition and started bar in one part and tea shop in the other

part. It has been further held by the trial Court that the plaintiff has proved that he had employed the defendant in his tea shop to work on daily wages for four years and thereafter allowed the defendant to run the said tea shop on leave and licence basis on royalty of Rs. 300/-per month, since January 1989. The trial Court held that the defendant could not prove his legal possession of the said structure from 1972 till date. The suit, therefore, came to be decreed. The defendant was directed to vacate the tea shop/restaurant within 30 days from the date of the judgment and to hand over vacant possession of the same to the plaintiff.

7. In Regular Civil Appeal No. 54/1996, the learned first Appellate Court agreed with the finding of the Trial Court that the land belonging to the Government of Goa was given on lease to father of the plaintiff under Alvara no. 466 dated 22.11.1957 on yearly rent of Rs. 8.75 and that father of the plaintiff was allowed to erect the structure for running his business of bar and restaurant. The first Appellate Court also agreed with the finding of the trial Court that sometime in the month of March or April 1982, father of the plaintiff was again put in possession of the said structure wherein the business of bar and restaurant was being run. However, the first Appellate Court found that the possession of leased premises was taken back by the Government sometime in the year 1973 for the purpose of approach road to Zuari bridge and there is no satisfactory evidence on record to show that somewhere in the month of March or April 1982, father of plaintiff was again put in possession of the structure owned by the Government. The first Appellate Court found that the letter dated 3/3/1982 at Exhibit PW.1/M, relied upon by the Trial Court was not reliable. The first Appellate Court held that the plaintiff failed to establish that his father was put back in possession of the said structure in the month of March or April 1982. The first Appellate Court held that since the plaintiff has not proved that his father was put back in possession of the suit structure, the fact remains that the suit structure belongs to the Government and the plaintiff has no right or title to the same. The first Appellate Court, therefore, held that the defendant has proved that the plaintiff has no locus standi to file the suit since the suit structure belongs to the Government. The Regular Civil Appeal No. 54/1996 was allowed and the judgment of the trial Court was set aside.

8. The plaintiff, therefore, has filed this Second Appeal which has been admitted on the following substantial questions of law:

1) Whether the first Appellate Court could have reversed the Judgment of the trial Court, without reversing the findings recorded by the trial Court, on the issues framed in the suit, particularly the finding of the trial Court that it was the Appellant who had allowed the Respondent to run the restaurant/tea shop on leave and licence basis on royalty of Rs. 300/-per month since January 1989 and that the respondent had failed to prove that he was in legal possession of the said structure from 1972, as alleged by him?

2) Whether in the absence of any proof to the effect that the lease granted by

the Government in favour of the Appellant's father and continued in favour of the appellant was terminated, it could be said that the appellant's father had lost his title in respect of the suit structure?

3) Whether the findings recorded by the learned first Appellate Court that the Appellant has failed to prove that in 1982, his father was put back in possession of the suit structure, is vitiated by non consideration of vital documentary evidence viz. the record of rights in respect of survey no. 115/2 in which the structure is located, the receipts in respect of payment of professional tax to the Mamlatdar including the receipt dated 13/5/1990, the certificate of registration under the Shops and Establishment Act, notices of assessment from Sales Tax Department, electricity bills, the correspondence with M/s. Gammon India Ltd. which if had not been omitted from consideration, would have resulted in different conclusion, contrary to which reached by the First Appellate Court?

4) Whether the judgment of the first Appellate Court is vitiated due to perversity of reasoning, surmises, misreading of material on record, having been rendered by misreading the letter dated 3/3/1982 from Mamlatdar to the Appellant's father, by failing to refer to the oral evidence which was considered by the trial Court for the purpose of reaching its findings; and

5) Whether the conclusion of first Appellate Court that the Appellant had no locus standi to file a suit against the Respondent, is based on wrong assumption viz. that the suit structure belongs to the Government, and whether even assuming that the suit structure belongs to the Government, the locus standi of the Appellant to institute the suit against the respondent would remain unaffected, if it was established that it was he himself who had inducted the respondent in the suit structure?

9. Mr. Lotlikar, learned Senior Counsel, on behalf of the plaintiff, invited my attention to the "Alvara", which is at Exhibit PW.1/A, which specifically states that father of the plaintiff is given land in concession for commercial activity of bar and selling tea. He, therefore, argued that from the beginning, the plaintiff's father was running bar and tea stall in the said structure. He further invited my attention to the finding of the trial Court to the effect that the plaintiff had proved that he employed the defendant in his tea shop to work on daily wages and subsequently allowed him to run the tea shop on leave and licence basis on royalty of Rs. 300/-per month since January, 1989. He contended that since the learned first Appellate Court has not reversed the said finding of the trial Court, the first Appellate Court could not have reversed the judgment of the trial Court. He further contended that looking at the nature of the entire structure of which the roof is common, it is not possible to hold that the tea stall was subsequently erected by the defendant. According to learned Senior counsel, since the defendant admits his presence in the tea stall, it was for the defendant to establish his capacity since the structure belongs to the plaintiff. The learned Senior Counsel took me through the Memo of Appeal filed before the first Appellate Court and pointed out that there was absolutely no challenge to the

letter dated 3/3/1982 which is at Exhibit PW.1/M. He pointed out that even in the evidence of the parties this letter has not been challenged. The learned counsel for the plaintiff therefore argued that the first Appellate Court could not have held that the said letter is not genuine. Learned Senior Counsel further argued that the lease granted to the plaintiff was never cancelled and by the said letter dated 3/3/1982 at Exhibit PW. 1/M, the Government demanded rent from him, which means that the lease still continued. Relying upon Section 116 of the Evidence Act, the learned Senior Counsel argued that the defendant cannot deny the title of the plaintiff. He argued that the trial Court on the basis of oral evidence of both the parties accepted the plaintiff's case and there was nothing in the trial Court judgment to compel reversal of these findings. He, therefore, argued that the judgment of the first Appellate Court is not in accordance with the settled principles of law and, therefore, the same is bound to be set aside, thereby restoring the trial Court's judgment. He has relied upon:

(i) "Santosh Hazari Vs. Purushottam Tiwari (dec.) By Lrs." [(2001) 3 Supreme Court Cases 179]; and

(ii) Madhusudan Das Vs. Smt. Narayanibai (Deceased) by Lrs. and Others, .

10. Per contra, Shri R.V. Kamat, learned counsel on behalf of the defendant, argued that in cross-examination of the plaintiff's witnesses, the case of the plaintiff was fully demolished. He argued that in the year 1973, the Government wanted the land back and, therefore, the plaintiff was evicted from the said structure, due to which the plaintiff removed everything belonging to him and went away. He questioned as to how after 10 years the said temporary structure would still exist at the same place? He argued that initially the plaintiff was put in possession of 450 square metres of land leased to him by means of Alvara and that the tea stall of the defendant is not included in the said area. Learned counsel pointed out that the name of the bar of the plaintiff, as mentioned in the Alvara was "Bar Portuguese" whereas, in the letter at Exhibit PW.1/M, the name of the bar belonging to father of the plaintiff is mentioned as "Bar Jumbo". According to Mr. Kamat, therefore, the said letter does not pertain to the suit premises. He further pointed out that from the year 1972, the plaintiff has not paid any rent and he had his canteen in the land belonging to the company Gammon India Ltd. He argued that the agreement dated 30/11/1973 between the plaintiff and M/s Gammon India Ltd. has deliberately not been produced. Learned Counsel further argued that there is absolutely no documentary evidence to prove that the defendant was at any time an employee of the plaintiff or that the defendant had entered into any leave and licence agreement with the plaintiff in relation to the tea stall. According to Mr. Kamat, merely because the roof is one, it cannot become the structure of the plaintiff. He pointed out that both the structures are independent insofar as there is no access from the bar premises to enter the tea stall and vice-versa and that both the structures have independent access. He pointed out that the electricity bills of the tea stall run by the defendant are in the name of the defendant and the

defendant has meter in his own name from the time the defendant obtained electricity connection in the year 1990. According to Mr. Kamat, the learned first Appellate Court has rightly held that there is no evidence to the effect that the father of the plaintiff was again put in possession of the same structure, wherein the business of bar and restaurant was being run under the "Alvara". He argued that the first Appellate Court has rightly held that the said structure in which the defendant is running the tea stall belongs to the Government and the plaintiff has no locus standi. He therefore submitted that the Appeal deserves to be dismissed.

11. I have gone through the entire material on record in the light of the arguments advanced by the learned counsel for both the parties.

12. There is no dispute that by "Alvara" No. 466 dated 22/11/1957, plaintiff's father was given in concession, land for commercial activity of bar and selling tea at St. Lawrence of Agacaim Taluka. The demand notice for payment of annual rent of Rs. 8.75 in respect of the said Government land, which is at Exhibit PW.1/B, reveals that the Government land has been granted on temporary occupation basis. By notice dated 19/6/1973, which is at Exhibit PW.1/T-cross, the Mamlatdar of Tiswadi directed the plaintiff's father that the possession of the said Government land occupied by him will be taken on 28/6/1973 at 11.00 a.m., through the Circle Inspector. Admittedly, thereafter, the possession of the land along with the structure was taken back by the Government. In other words, the lease or licence granted by Alvara No. 466 automatically came to an end, since the father of the plaintiff was evicted from the said land and the structure. In his cross-examination, PW.1 (plaintiff) has admitted that there was eviction proceeding filed against them by the Collector in the year 1970 and that the Mamlatdar had issued Show Cause Notice to them to vacate the premises on 28/6/1973. PW.1 has admitted that they have not paid rent in respect of the land from 1972 onwards.

13. There is absolutely no documentary evidence on record to prove that fresh lease or fresh licence was granted to the plaintiff in respect of the same land wherein the said old structure was existing. There is no dispute that the said structure has one common roof. Admittedly, the plaintiff's father upon grant of concession vide the Alvara had erected the structure and had divided the same into two parts. Thus, the structure in possession of the plaintiff's father had two compartments. In his cross-examination at page 9, PW.1, the plaintiff has admitted that the premises in which he runs the business now has two compartments. PW.1 has admitted that an area of about 45 square metres was given to him on lease for erection of bar and tea shop. However, to the suggestion that the said two compartments form an area of about 45 square metres, PW.1 answered that he does not know. It is therefore evident that the plaintiff has in his possession the structure containing two compartments. Merely because the structure of the plaintiff and that of the defendant has common roof, that in itself is not sufficient to prove that the entire structure with a common

roof was again occupied by the plaintiff. Admittedly, the defendant is in possession of the tea stall and since 1989, the tea stall is registered in the name of the defendant under the Shops and Establishments Act and since 1990 the electricity meter in the tea stall is also in the name of the defendant. There is no documentary evidence to prove that previously, the electricity in the structure occupied by the defendant was from the meter fixed in the bar premises. Admittedly, there is no internal entry from the bar portion to the tea stall and vice versa. Both have independent accesses. Hence, both the structures are independent entities with a common roof. Once the said land along with the structure was taken back by the Government, by evicting the plaintiff's father therefrom, it goes without saying that the same belongs to the Government. Therefore, unless the plaintiff proves that a fresh lease or a fresh licence was granted to him, the plaintiff cannot have locus standi to file the suit, as has been rightly held by the first Appellate Court.

14. It is true that the first Appellate Court has not specifically reversed the finding of the trial Court that it was the plaintiff who had allowed the defendant to run the restaurant/tea shop on Leave and Licence basis, on payment of royalty of Rs.300/-per month, since January 1989 and further that the defendant failed to prove that he was in legal possession of the said structure from 1972, as alleged by him. Issue No. 8 as framed by the trial Court was whether the defendant proves that plaintiff has no locus standi to file suit as land on which suit structure stands belongs to Government. The said issue was treated by the trial court as preliminary and by order dated 30/7/1993, it was answered by the trial Court against the defendant. In the appeal filed before the first Appellate Court, the defendant had also challenged the said order dated 30.7.1993.

15. The first Appellate Court framed the following points for determination:

(i) Whether the Plaintiff has proved that the land belonging to Government of Goa, under "Alvara" No. 466 dated 22.11.1957 was given on lease to the father of the Plaintiff more than 40 years back on yearly rent of Rs. 8.75 and that he was allowed to erect a structure for running his business of bar and restaurant?

(ii) Whether the Plaintiff has proved that somewhere in March or April, 1982, his father was again put in possession of the said suit structure owned by the Government?

(iii) Whether the Defendant has proved that the Plaintiff has no locus standi to file the suit and that the suit structure belongs to the Government.

16. When it is held by the first Appellate Court that the land and the structure, after eviction of the plaintiff's father, belongs to the Government and that the plaintiff could not prove that some where in March or April, 1982, his father was again put in possession of the suit structure, it automatically means that the finding of the trial Court that it was the plaintiff who had allowed the defendant to run the restaurant/tea shop on leave and licence basis has been reversed. Further, the question of failure of defendant to prove that he was in legal

possession of the said structure from 1972, does not arise and is not relevant. Substantial question No. 1, therefore, gets answered against the plaintiff.

17. Once, the plaintiff is evicted from the said land and the structure, it only means that the lease or licence granted by the Government in favour of the plaintiff's father was terminated. Unless the plaintiff proves that a fresh lease or licence was created, it cannot be said that the plaintiff's father continued to have title in respect of the suit structure. Therefore, the first Appellate Court has rightly held that the plaintiff's father had lost his title in respect of the suit structure. Substantial question no. 2, therefore, gets answered against the plaintiff.

18. Since the plaintiff continues to be in possession of the structure, however with the exclusion of the structure occupied by the defendant, the documents namely the Record of Rights in respect of Survey no. 115/2, the receipts in respect of payment of professional tax to the Mamlatdar, Certificate of Registration under the Shops and Establishment Act, Notices of Assessment from Sales Tax Department, electricity bills and the correspondence with M/s. Gammon India Ltd., produced by the plaintiff, do not help to prove that the structure occupied by the defendant has any nexus with these documents. These documents cannot go to prove that the plaintiff's father was put back in possession of the suit structure, occupied by the defendant. Hence, the finding of the first Appellate Court that the plaintiff has failed to prove that in 1982, his father was put back in possession of suit structure is correct. Substantial question no. 3 is, therefore, answered against the plaintiff.

19. Upon consideration of the impugned judgment, I am of the view that the same is not vitiated due to perversity of reasoning, surmises or misreading of the material on record. The letter dated 3/3/1982 which is at Exhibit PW.1/M directs the plaintiff's father to attend the office of Mamlatdar on 10/8/1982 at 11.00 a.m. along with copies of challans paid towards the rent for the years 1981 and 1982 as well as copy of the order (lease agreement) in connection with the temporary occupation of Government land at Agacaim. This letter in itself cannot at all prove that the plaintiff's father was put back in possession of the said land with structure. It also cannot prove that the plaintiff was paying rent for the land after he was evicted from the said land. PW.1(plaintiff) has admitted that they have not paid rent in respect of the land from 1972 onwards. Hence, the substantial question no. 4 gets answered against the plaintiff.

20. Once the plaintiff fails to prove that he was put back in possession of the entire suit structure, it automatically means that it is not established that it was the plaintiff who had inducted the respondent in part of the suit structure. Admittedly, the land and the suit structure after eviction of the plaintiff belonged to the Government and since there was no fresh lease or licence granted to the plaintiff, it continued to belong to the Government. Therefore, the conclusion of the first Appellate Court that the plaintiff had no locus standi to file the suit against the defendant is not based on any wrong assumption, but is based on

correction appreciation of the evidence on record. In view of the above, the substantial question no. 5 gets answered against the plaintiff.

21. By virtue of section 116 of the Evidence Act, inter alia, where it is proved that the occupation by a person of immovable property is by permission of another, the occupier is estopped from denying that other's title. In the facts and circumstances of the present case, where it is not proved that the plaintiff had any title to the tea shop in occupation of the defendant, after his father was evicted therefrom in the year 1973 or that the plaintiff came back in possession of the tea shop occupied by the defendant, in March or April 1982 and that the defendant came upon the said tea shop in or about January 1989, by licence of the plaintiff, section 116 of the Evidence Act is not applicable. In the case of "Madhusudan Das"(supra), the Apex Court has held that findings of fact of trial Court mainly based on oral evidence should not ordinarily be disturbed by first Appellate Court unless trial Court's approach in appraisal of evidence appears materially erroneous. In the present case the trial Court's approach in appraisal of evidence appears to be materially erroneous since the same is based on conjectures and surmises. Hence the above citation is not applicable to the present case. The case of "Santosh Hazari" (supra), also cannot help the plaintiff to succeed in this second appeal. There is no merit in this Second Appeal which deserves to be dismissed. In the result, the Second Appeal is dismissed, with no order as to costs.