

(2010) 09 BOM CK 0087

In the Bombay High Court

Case No : Second Appeal No. 69 of 2003

Shri Devdatta N. Dhond

APPELLANT

Vs

Shri Bernard Pereira through Attorney Fernande Afonso

RESPONDENT

Date of Decision : 08-09-2010

Acts Referred:

Goa, Daman and Diu Buildings (Lease, Rent and Eviction) Control Act, 1968 — Section 2, 23

Citation : (2010) 6 BomCR 658

Hon'ble Judges : A.P. Lavande, J

Bench : Single Bench

Advocate : J.P. Mulgaonkar, for the Appellant; N.N. Sardesai, for the Respondent

Final Decision : Dismissed

Judgement

A.P. Lavande, J.—By this Second Appeal, the Appellant takes exception to Judgment and Decree dated 9.5.2003 passed by the Additional District Judge, Mapusa, in Regular Civil Appeal No. 47/2001, partly allowing the appeal preferred by the Respondent against Judgment and Decree dated 14.6.2000 passed by the Civil Judge, Senior Division, Bicholim, in a suit for mandatory injunction, recovery of possession and mesne profits. The trial Court by Judgment and Decree dated 14.6.2000 dismissed the suit filed by the Respondent against the Appellant. The parties hereinafter shall be referred to as per their status before the trial Court.

2. Briefly, the facts leading to filing of the present appeal are as under:

The father of the defendant was inducted as a tenant in the suit house by lease deed dated 15.7.1972 on payment of rent of Rs. 10/- per month. The lease deed was renewed on 1.5.1978 and the rent was enhanced to Rs. 20/- per month. The plaintiff became the absolute owner of the suit house by virtue of the Gift Deed dated 18.4.1972 executed in his favour. In April 1991, the plaintiff filed proceedings for eviction against the defendant before the Rent Controller at

Mapusa u/s 2(a)(b)(ii)(d)(e) and 23 of the Goa, Daman and Diu Buildings (Lease, Rent and Eviction) Control Act, 1968 (for short "The Rent Act"). Thereafter, in November 1991, the plaintiff filed suit against the defendant seeking relief of mandatory injunction, recovery of possession and mesne profits on the ground that in violation of the agreement the defendant had carried out extensive illegal constructions without the plaintiffs' consent and had illegally raised the height of the suit house. The suit was resisted on several grounds. One of the grounds raised was that since the plaintiff had already filed eviction proceedings before the Rent Controller, the suit filed by the plaintiff was not maintainable. In the course of trial the plaintiff examined two witnesses, namely the plaintiff himself, PW.1 and an Architect Laximan Dessai, PW.2 who had visited the site and prepared a report regarding the illegal construction carried out by the defendant. The defendant examined four witnesses. The trial Court framed the following issues:

- i) Whether the plaintiff proves that defendant has carried out illegal construction of steps, verandha, concrete ramp connecting the suit house so also illegal extension towards the south-eastern side of the suit house in the dimension of 5.10 x 3.50 metres x 3.10 meters ?
- ii) Whether the plaintiff proves that he is entitled for the mesne profit at the rate of Rs. 300/- per month from the defendant from 6.3.1991 till 6.11.1991 amounting to Rs. 2400/- and mesne profit at the same rate till the actual payment due to wrongful possession of the land occupied by the illegal construction?
- iii) Whether the defendant proves that this suit cannot proceed as the matter in issue is directly and substantially in issue in a previous proceedings between same parties before Rent Controller, North Division, Mapusa?
- iv) Whether the defendant proves that suit is bad for non- joinder of proper and necessary parties?
- v) Whether the defendant proves that suit is barred by law of Limitation?

3. The trial Court answered issue No. 1 partly in favour of the plaintiff. The trial judge dismissed the suit.

4. Aggrieved by the Judgment and decree passed by the trial Court, the plaintiff filed the appeal to the District Court at Panaji, which was made over to the Additional District Judge at Mapusa.

5. The Appellate Court by impugned judgment and decree allowed the appeal. The Appellate Court framed the following points for determination:

- i) Whether the plaintiff had established that illegal construction was carried out by the defendant and that it was without his consent?
- ii) Whether the decree passed by the trial Court is not in conformity with the material on record so as to justify interference in appeal?

6. The Appellate Court answered both the points in favour of the respondent herein.

7. Mr. J.P. Mulgaonkar, learned Counsel appearing for the Appellant submitted that since the plaintiff had already filed eviction proceedings before the Rent Controller at Mapusa seeking his eviction, the suit filed by the plaintiff seeking the reliefs claimed therein, on identical facts was not maintainable. According to Mr. Mulgaonkar, the repairs to the suit house were carried out within the leased premises and therefore, the suit filed by the plaintiff was not maintainable. According to Mr. Mulgaonkar the trial Court had rightly dismissed the suit and the reasons given by the trial Court for dismissal of the suit could not have been reversed by the Appellate Court. Mr. Mulgaonkar further submitted that the documents produced by the defendant, more particularly, the telegram (Exhibit PW.1/N/D), communication dated 2.9.1988 (Exhibit PW.1/O/D), sent by the plaintiff to the defendant and communication dated 21.1.1989 (Exhibit PW.1/P/D) clearly established consent on the part of the plaintiff to carry out repairs in the suit premises by the defendants. According to Mr. Mulgaonkar, the defendant had carried out only repairs and not any construction and that too, with the consent of the plaintiff and, as such, the Appellate Court erred in decreeing the suit filed by the plaintiff. Mr. Mulgaonkar lastly submitted that the Appellate Court wrongly placed reliance upon the evidence of the plaintiff and his witness to hold that the plaintiff had proved his case.

8. Per contra, Mr. Sardesai learned Counsel appearing for the respondent submitted that there are concurrent findings given by the trial Court as well as by the Appellate Court that a number of illegal constructions were carried out by the defendant without the consent of the plaintiff. Mr. Sardesai further submitted that the Appellate Court rightly held that the defendant had carried out illegal extension towards south-eastern side of the suit house to the extent of 5.10 metres x 3.5 metres x 3.10 metres. According to Mr. Sardesai the evidence of the plaintiff and his witness Laximan Dessai, PW.2, the Architect who had prepared the report after visiting the suit house was rightly accepted by the Appellate Court and, therefore, no fault can be found with the impugned judgment and decree. According to Mr. Sardesai, the Appellate Court has rightly decided that the suit filed by the plaintiff was maintainable since the constructions were not carried out within the leased premises. Mr. Sardesai further submitted that the reliefs sought in the suit were not available in the proceedings filed by the plaintiff before the Rent Controller and therefore, the suit filed by the plaintiff was maintainable.

9. Perusal of the impugned judgment discloses that the Appellate Court upon appreciation of the evidence, both oral and documentary, led by the parties came to the finding that the evidence led by the plaintiff clearly established that the defendant had carried out illegal constructions which were mentioned by the plaintiff in the plaint. To arrive at this finding, the Appellate Court placed reliance upon the evidence of the plaintiff and his witness and held that the plaintiff had

proved that the defendant had carried out the said illegal constructions. In so far as consent alleged to have been given by the defendant is concerned, the Appellate Court placed reliance upon the telegram and the two communications relied upon by Mr. Mulgaonkar in the course of his arguments and held that the same only permitted the defendant to carry out repairs in the suit house. The Appellate Court also placed reliance upon the fact that the estimate of expenditure incurred by the plaintiff for the repairs according to the defendant himself was Rs. 79,970/- and having regard to the amount spent by the defendant on the alleged repairs, it was difficult to accept the case set up by the defendant that he had only carried out repairs and had not carried out any constructions. The Appellate Court also placed reliance upon the photographs taken prior to carrying out of the construction and after the construction produced by the plaintiff who clearly depicted the illegal constructions carried out by the defendant. The Appellate Court also recorded a finding that although the plaintiff had filed eviction proceedings under the Rent Act for eviction of the defendant on several grounds having regard to the reliefs sought in the plaint, the suit filed by the plaintiff was maintainable.

10. Having considered the submissions made by Mr. Mulgaonkar learned Counsel appearing for the appellant and Mr. Sardessai learned Counsel appearing for the respondent, I am of the considered opinion that the appellant has not made any case for interference with the impugned judgment and decree. The finding of the Appellate Court that the suit was maintainable although proceedings for eviction were initiated by the plaintiff under the Rent Act cannot be said to be legally unsustainable since the reliefs sought in the suit cannot be granted by the Rent controller in proceedings initiated for eviction of the tenant. The Rent Controller has jurisdiction only to grant eviction of the tenant. He has no jurisdiction to grant any mandatory order to demolish illegal constructions carried out by the tenant. This being the position, I am unable to accept the submission of Mr. Mulgaonkar that the plaintiff although had recourse to the proceedings under the Rent Act for eviction of the defendant could not have filed the suit against the defendant seeking the reliefs claimed in the suit.

11. In so far as the consent alleged to have been given by the plaintiff to the defendant to carry out repairs to the suit house is concerned, the finding of the Appellate Court that the defendant had carried out illegal constructions and not repairs to the suit house cannot be faulted. Even the documents upon which reliance has been placed by the defendant and referred to by Mr. Mulgaonkar in support of his submissions disclose that what the plaintiff had granted to the defendant was permission to carry out repairs to the suit house and by no stretch of imagination the said documents would amount to granting consent to carry out any constructions in or outside the suit premises. In this view of the matter, I am unable to accept the submission of Mr. Mulgaonkar that the defendant had only carried out repairs and that too after obtaining consent of the plaintiff and had not carried out any illegal constructions.

12. In view of the above discussion, I am of the considered opinion that the impugned judgment and decree cannot be faulted. Both the substantial questions of law are answered against the defendant. Consequently, the appeal stands dismissed. Having regard to the facts and circumstances of the case, the parties are directed to bear their own costs.