

(2015) 03 BOM CK 0406

In the Bombay High Court

Case No : Second Appeal No. 144 of 2004 and Cross Objection No. 02 of 2005

Yeshwant Sakhalkar (D) and Others

APPELLANT

Vs

Hirabai Prabhakar Kamat Mamai (D) and Others

RESPONDENT

Date of Decision : 13-03-2015

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 22

Citation : (2015) 6 ALLMR 333

Hon'ble Judges : F.M. Reis, J.

Bench : Single Bench

Advocate : A.F. Diniz, Advocate, for the Appellant; M.B. D'Costa, Senior Advocate, D. Pangam and K. Betquekar, Advocates, for the Respondent

Final Decision : Dismissed

Judgement

F.M. Reis, J.—Heard Shri A.F. Diniz, learned Counsel appearing for the Appellants and Shri M.B. D'Costa, learned Senior Counsel appearing for the Respondents. The above Appeal was admitted on 27.01.2005 on the following two substantial questions of law:

(1) Whether though the relief sought in the suit styled as permanent mandatory injunction, in substance it was suit for eviction of the tenant protected under the Goa Buildings (lease, Rent and Eviction Control) Act, 1968 as the Civil Court had no jurisdiction to entertain it?

(2) Whether the finding recorded by the learned 1st Appellate Court that the signature on NOC is not that of Soiru, is perverse being contrary to the evidence on record and primarily based on comparison which the learned Appellate Judge himself proceeded to do of one of the admitted signatures of Soiru and the signature on the NOC thereby acting as an expert in identification of hand writings, thereby overstepping his jurisdiction and also in view of the fact that the learned 1st Appellate court failed to compare the signature on the NOC with other admitted signatures of Soiru who signed in many different ways."

Thereafter, by Order dated 05.08.2005, three additional substantial questions of law were framed namely those mentioned at Para 3(1), (2) and (4) of the Appeal Memo:

(3) Whether in view of the case set up by the Respondents in the plaint that the construction works started by the Appellants were illegal on the ground that they were co-owners of the premises and their consent was not obtained and not that the Appellants had failed to obtain any consent from the landlord, there was any scope for 1st Appellate Court to decree the suit of the Respondent holding that the appellants had not obtained consent from the landlord?

(4) Whether in the absence of any challenge being thrown to the consent NOC dated 01.04.1996 issued by Soiru, either by Soiru himself (Soiru was the admitted landlord in respect of the suit premises) or for that matter any of the co-owners (including the Plaintiffs) either on the ground that it was fraudulent or forged), the First Appellate Court could have decreed the suit of the Respondents on the ground that Soiru's NOC was forged?

(5) Whether the conclusion reached by the First Appellate Court that the entire suit premises were demolished by the Appellants and their tenancy stood extinguished is perverse, being contrary to the evidence particularly that of the Court Commissioner?

2. Shri A.F. Diniz, learned Counsel appearing for the Appellants, in support of the aforesaid substantial questions of law has pointed out that taking note of the relief sought the suit, is a suit for restoration of possession and, as considering the bar of jurisdiction of the Civil Court to grant such reliefs, on this ground alone, the suit filed by the Respondents deserves to be dismissed. Learned Counsel has thereafter taken me through the relief in the suit to point out that the Civil Court had no jurisdiction to grant such relief. The learned Counsel has thereafter pointed out that the learned Trial Judge upon appreciating the evidence on record has rightly come to the conclusion that the Respondents have failed to establish that the Appellants were not entitled to carry out the repairs of the disputed premises. Learned Counsel further pointed out that it is admitted fact that the Appellants are the tenants of the disputed premises and, as such, according to him, after obtaining the requisite consent and no objection certificate from the Landlord Soiru, the Appellants started carrying out the repairs of the disputed structure. Learned Counsel further pointed out that based on such NOC, the Municipal Authorities have granted the permission to do such repairs. Learned Counsel further pointed out that the No objection granted by the said Soiru who was the Administrator and the Manager of the undivided family, was binding on the Respondents as well. Learned Counsel further pointed out that the Appellants in their written statement have clearly pleaded that the no objection was granted by said Soiru and the Appellants did not attempt to amend the pleadings and, as such, the findings of the Lower Appellate Court that the document is forged and that the signature was not of said Soiru cannot be accepted. Learned Counsel further pointed out that being an Administrator of an

Undivided Family, said Soiru was entitled to allow the Appellants to carry out the repairs of the disputed premises. Learned Counsel further submits that the disputed premises consists of the first floor of the building and three rooms on the ground floor for access only to this first floor. Learned Counsel has further submitted that the suit filed by the Respondents is on the footing that joint family had dissolved and that the Respondents are co-owners and Landlords of the suit premises which have been demolished without their consent. Learned Counsel further pointed out that in the written statement filed by the Appellants, there was a specific averment with regard to the payment of the rent to the Head of the Family said Soiru Camotim Mamai who used to receive the rents. The learned Counsel further pointed out that despite of the claim of dissolution of the joint family, there was no notice about the termination of Soiru as the Administrator to the Appellants and, as such, he continued to manage the assets of the joint family. The learned Counsel further points out that in the pleadings at para 8, there is a specific averment that Soiru gave consent for repairs/ construction and renovation and pursuant to this, the municipality had also granted a licence which is at exhibit 50 and, consequent thereto, some walls were removed for the purpose of carrying out the repairs. The learned Counsel further points out that there is no amendment carried out by the Respondents to the plaint to claim any forgery or fraud in respect of the said document. Learned Counsel has thereafter taken me through the Judgment of the learned Trial Court to point out that the learned Judge has come to the conclusion that the signature of Soiru was proved. Learned Counsel further submits that as the Respondents did not amend the plaint and, as such, the findings of the Lower Appellate Court that the signatures had not matched and that the contents thereof have not been proved are not sustainable in view of the Judgment reported in *Narbada Devi Gupta Vs. Birendra Kumar Jaiswal and Another*, Learned Counsel has thereafter taken me through the provisions of Section 33 of the Goa Rent Control Act and pointed out that as per the provisions therein, the tenant is entitled to carry out major repairs to the premises with the permission of the Landlord and to deduct the cost thereof from the rents. Learned Counsel further points out that as such permission was obtained it was not open to the Lower Appellate Court to grant the relief in favour of the Respondents herein. The learned Counsel further pointed out that the finding of the learned Judge that the premises were totally demolished are also perverse as it is contrary to the evidence on record. Learned Counsel has thereafter taken me through the Judgment of the Lower Appellate Court to advance his contention that the learned Judge was not justified to come to the conclusion that the no objection certificate has not been established and that the Respondents were entitled for the reliefs granted in the proceedings. The learned Counsel also submitted that the findings of the tenancy has extinguished, is also perverse.

3. On the other hand, Shri M.B. D'Costa, learned Senior Advocate appearing for the Respondents, has supported the impugned Judgment of the Lower Appellate Court. The learned Senior Advocate has pointed out that on bare perusal of the

alleged no objection certificate, it is evident that such document is a fraudulent document. Learned Senior Advocate further pointed out that Soiru was alive at the time of the filing of the suit and that the Appellants did not take any steps to prove his signature by examining the said Soiru. Learned Senior Advocate further pointed out that the receipt of the alleged no objection has not been examined to prove the contents of the document. Learned Senior Advocate further submits that the Lower Appellate Court has rightly compared the signatures to come to the conclusion that the signatures of Soiru did not tally. Learned Senior Advocate further submits that the Judgment of the Apex Court relied upon by Shri A.F. Diniz, learned Counsel appearing for the Appellants, would not be applicable to the facts of the present case as the Respondents have not admitted the signature of the said Soiru on the said document. Learned Senior Advocate has further pointed out that the contents of the alleged no objection has not been proved and, as such, the question of reading the said document in evidence could not arise. Learned Senior Advocate has thereafter pointed out that the complete document has not been produced as the alleged no objection dated 01.04.1996 refers to a letter addressed by the Respondent Yeshwant B. Shakhalkar, who has not stepped into the witness box nor produced such letter. The learned Senior Advocate further points out that D.W. 2 who was examined has clearly admitted that he was not present when the alleged document dated 01.04.1996 was signed. Learned Senior Advocate further pointed out that the evidence of D.W. 2 as such would not assist the Appellants to prove the contents of the said document. Learned Counsel further pointed out that Soiru has written a letter denying the existence of such no objection which letter has been duly proved and admitted in evidence. Learned Senior Advocate further submits that in any event, the said no objection would not deprive the Appellants of their legal rights to oppose the proposed structural changes to the premises which belong in co-ownership to the Respondents. Learned Senior Advocate has thereafter taken me through the provisions of Article 1270 No. 4 read with Article 2179 of the Portuguese Civil Code to point out that the alleged no objection would not help the Appellants to carry out structural changes in the disputed premises. Learned Senior Advocate has thereafter taken me through the provisions of Article 19 of the Usages and Customs of Hindus in Goa to point out that the Head of the Family does all acts of management as laid down in the general law subject to any express agreement or special authorization given by the joint family in a Public Deed. Learned Senior Advocate further pointed out that D.W. 2, who was examined on behalf of the Respondents has categorically admitted that the Hindu Undivided Family had dissolved in the year 1951 and that it did not exist in the year 1975. Learned Senior Advocate as such submits that the contention of Shri A.F. Diniz, learned Counsel appearing for the Appellants, that said Soiru was the Head of the Family cannot be accepted. Learned Counsel further pointed out that Article 1270 No. 4 provides that none of the co-owners may without the consent of the others make alternation to the immoveable properties belonging to the Society of common ownership, even if such authorizations appeared to him to be useful. Learned Senior Advocate has also relied upon the Judgment of the Apex

Court reported in Malay Kumar Ganguly Vs. Dr. Sukumar Mukherjee and Others, , to point out that in Para 37 thereof, it is clearly observed that the documents which are otherwise inadmissible cannot be taken in evidence only because no objection to its, admissibility thereof was taken. The learned Counsel has minutely taken me through the said document to point out that the contents and the authenticity of the said document are doubtful. Learned Counsel further submits that even assuming that the said no objection has to be accepted, it only permitted the repairs and not re-construction of the disputed premises which is manifested by the report of the Commissioner. Learned Senior Advocate thereafter has taken me through the Commissioner's report to point out that the licence issued by the Municipality was only to change the flooring and to repair the roof but, on the contrary, the acts which have been committed by the Appellants were the demolitions of the wall and reconstruction of the premises which was not in accordance with the permission which was granted by the Municipality. Learned Senior Advocate further pointed out that the Appellants who are the tenants of the premises are not entitled to arbitrarily and without the consent of the Respondents to change and alter the premises. Learned Senior Advocate further pointed out that the findings of the Lower Appellate Court is that the premises itself have been demolished and, as such, the question of allowing the Appellants to reconstruct such premises would be totally unjustified and grave prejudice would occasion to the Respondents herein. Learned Senior Advocate as such submits that the Appeal be rejected.

4. I have considered the submissions of the learned Counsel appearing for the respective parties. I have also gone through the records. On going through the records with the assistance of the learned Counsel, what emerges is that the head of the Casa Social Camotim Mamai (the Joint family), let out the suit premises situated opposite Abade Faria Statute, Panaji. The Appellants are the tenants of such premises. Such lease was created in the year 1975. It is the case of the Respondents that the said Joint Family stands dissolved and that a share in the property was allotted to the Respondents as co-owners thereof. In the year 1997, the Respondents filed a suit, inter alia, contending that the Appellants had demolished the front walls partly demolishing the middle wall of the suit premises and about two days prior to the filing of the suit and a day prior, the Appellants had demolished the said middle wall. It is further the case of the Respondents that such activities were carried out without the consent of the Respondents herein and, as such, the suit was filed, inter alia, for a permanent injunction restraining the Appellants from constructing in the place of the demolished premises and from constructing anything on the ground floor and further for mandatory injunction to place the zinc sheets above the ground floor.

5. The Appellants resisted the suit disputing the contentions raised by the Respondents. It is further their case that the work which was being carried out by the Appellants was pursuant to a no objection certificate dated 01.04.1996 issued by the Head of the Family Soiru and, as such, according to the Respondents, they were entitled to carry out such activity. The learned Trial

Judge by Judgment and Decree dated 24.08.2004, dismissed the suit filed by the Respondents. Being aggrieved by the said Judgment, the Respondents preferred an Appeal before the learned Judge which was allowed by Judgment and Decree dated 03.11.2004 and the suit was decreed in terms of prayer clause (a).

6. Being aggrieved by the said Judgment, the Appellants have preferred the above Second Appeal which came to be admitted on the aforesaid substantial question of law.

7. It is not in dispute that the disputed premises belonged to the joint family and that the lease was created by the said Head of the Joint Family Soiru who was also receiving the rents. The fact that the Respondents are part of the said Joint Family and have co-ownership rights in respect of the disputed premises are also established on the basis of the material on record as found in the Judgments of the Lower Appellate Court. The case of the Respondents is that the Appellants who are tenants had illegally and unauthorisedly pulled down the entire suit premises without the permission of the Respondents and thereby tenants of the premises never subsists. The main contention of Shri A.F. Diniz, learned Counsel appearing for the Appellants is that on the basis of the no objection dated 01.04.1996, the Appellants were entitled to carry out such alleged repairs. The learned Trial Judge whilst examining the provisions of Section 33 of the Rent Control Act, has noted that the Respondents could carry out such repairs provided the consent of the landlord Soiru was obtained. Section 33(3) of the Rent Control Act, reads thus:

Section 33(3) - Landlord's duty to keep building in good repair.

(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 the, 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 as 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 costs 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."

8. On plain reading of the said provisions, it clearly provides that when the premises are required to be repaired without which the building is not habitual or

usable, the tenant can be permitted to carry out such works after obtaining an Order from the Rent Tribunal. Admittedly, in the present case, the Appellants did not seek any Order from the Rent Tribunal and, as such, the question of the Appellants relying upon the provisions of Section 33(3) of the Rent Control Act would not at all be justified. In case the Appellants desired to carry out such alleged repairs or re-construction taking note that the premises are inhabitable or not usable, without such repairs, it was necessary for the Appellants to proceed in terms of the provisions of the said Rent Control Act to obtain such permission. As admittedly no such exercise has been resorted to the alleged repairs carried out by the Appellants are not at all justifiable. The learned Trial Judge as such was not justified to hold that the alleged permission of Soiru would be sufficient to meet the requirements of Section 33(3) to enable the Appellants to carry out the alleged repairs, considering that the Rent Tribunal has to examine every aspect of the matter including the cost and hear the landlord before passing such Order. The learned Trial Judge has further held that the Appellants have removed the entire middle wall of the suit premises on the basis of the evidence of the Commissioner appointed by the Court. The learned Judge also noted that the front walls as well as the wooden beams of the wall have also been removed and further found that as the premises were on the first floor, the question of putting up any foundation on the ground floor would not arise. The Lower Appellate Court after correctly examining the provisions of Section 33 of the Rent Control Act held that even assuming the alleged no objection of Soiru is to be accepted, it only provided that the permission was granted to repair the ceiling wall, the roof and the flooring and not to demolish all the walls of the suit premises and carry out any re-construction and, as such, the learned Judge rightly came to the conclusion that the Appellants are not entitled to protection under Section 33 of the Rent Control Act. The learned Appellate Court has further found that on the basis of the material on record, the Respondents were estopped from disputing the authority of the said Soiru to give the consent for repairs. The learned Appellate Court has minutely gone through the disputed no objection dated 01.04.1996 and has come to the conclusion that the signature of Soiru does not tally with the admitted signatures. The reasons for such finding have been clearly redressed at para 27 of the Judgment. The learned Judge has also relied upon the Judgment of the Apex Court reported in the case of Murarilal vs. State of M.P. to justify such action.

9. The Judgment relied upon by Shri A.F. Diniz, learned Counsel appearing for the Appellants in the case of Narbada Devi Gupta Vs. Birendra Kumar Jaiswal and Another, , would not be applicable to the facts of the present case. The Respondents have not admitted the signature of said Soiru. In the said Judgment, the signature was admitted and the contents were disputed and in that premise, the Apex, Court found that the pleadings were lacking to dispute the authenticity of the said document. In the present case, the signature of Soiru has been disputed by the Respondents. Apart from that, merely producing the documents does not establish the contents thereof. The Appellants have not

examined said Soiru nor the original Respondent who was the beneficiary of the alleged document to prove the contents thereof. As the contents have not been proved, the question of relying upon such document would not be justifiable. Nevertheless, as pointed out herein above, the no objection does not entitle the Appellants to demolish and reconstruct the disputed premises,. The licence which has been produced from the Municipality also does not support the claim of the Appellants that they have were permitted to demolish the wall and reconstruct the suit premises. The Lower Appellate Court was justified to grant the relief against the Appellants herein. The rights to co-ownership in the property cannot be defeated on the basis of the alleged no objection by one co-owner. The acts of the Appellants would amount to totally changing the nature of the suit building without the consent of all the co-owners of the property.

10. Shri M.B. D"Costa, learned Senior Advocate, has rightly relied upon the provisions of Article 1279 and Article 1270 of the Portuguese Civil Code which, inter alia, establishes that an act of management does not entitle such manager to change the nature of the property even assuming he finds that it is for the benefit of all the co-owners. Admittedly, no such consent has been obtained by the Appellants and, as such, the acts of the Appellants to demolish and carry out the reconstruction of the premises cannot be justified or protected. Consequently, the Respondents were entitled for the relief of injunction. This is a peculiar case where a tenant has sought to demolish the suit premises and carry out reconstruction. The alleged no objection of Soiru does not entitle the Appellants to carry out such activity. The learned Appellate Court as such has rightly on the basis of the evidence on record decided the point for determination (b) against the Appellants herein. These findings of fact by the Lower Appellate Court do not call for any interference by this Court as there is no perversity in such findings nor can they be said to be erroneous.

11. The contention of Shri A.F. Diniz, learned Counsel appearing for the Appellants, that the findings of the Lower Appellate Court that consent was not required from the Appellants, cannot be challenged or assailed by the Respondents in the present Appeal cannot be accepted. In the Judgment of the Apex Court reported in Hardevinder Singh Vs. Paramjit Singh and Others, , the Apex Court, inter alia, held that after the 1976 amendment of Order 41 Rule 22 of the Civil Procedure Code, the insertion made in sub-rule (1) therein makes it permissible to file Cross Objections against the findings. The difference is basically that a Respondent may defend himself without taking recourse to file Cross Objection to the extent the Decree stands in his favour but, if he intends to assail any part of the Decree, it is obligatory on his part to file Cross Objections. In the present case, the Respondents are not seeking any modification of any part of the Decree passed by the Lower Appellate Court but are only challenging an adverse findings though supporting the Decree in their favour. As such, in view of the above Respondent, are entitled to dispute the correctness of such findings in the present appeal. Order 41 Rule 22 of the Civil Procedure Code clearly provides that in cases in which the ultimate Decree is in favour of the

Respondents, it is always open to the Respondents to show that the findings of the Lower Appellate Court were not in accordance with law specially when as such the ultimate relief granted by the Appellate Court would not be modified.

12. In such circumstances, I find that the Appellants were not justified to carry out the construction activities without the consent of the Respondents. Apart from that, alleged no objection of Soiru has not been proved and the Appellate Court has rightly appreciated the evidence as stated above with that regard. The substantial questions of law are answered accordingly. In view of the above, I find no merit in the above Appeal which stands accordingly rejected. The Cross Objections are disposed of accordingly.