IN THE HIGH COURT OF BOMBAY AT GOA, PANAJI

SECOND APPEAL NO. 3 OF 2002

Shri Antonio Fernandes,
son of Pascoal Fernandes,
r/o H.No.388, 4th Bairro,
Colva, Taluka Salcete, Goa. ... Appellant.

versus

Smt. Baldy Palmira Domentina
Gracias e Miranda(deceased)
through legal heirs/representa-
tives:

(a) Shri Epifanio Verissimo
Vicente Caetano Gracias,
of major age, landlord
and his son,

(b) Shri Vinay Savio Godfrey
Gracias, of major age,
landlord and his brother,

(c) Shri Victor Gracias,
of major age, landlord.

All residents of H.No.35,
Third Ward Colva, Salcete,
Goa. ... Respondents.

Mr. M. S. Usgaonkar, Senior Advocate with Mr.S.Usgaonkar, Advocate for the Appellant.

Mr. M. S. Sonak with Mr. E. P. Lobo, Advocates for the Respondents.

CORAM: P. V. HARDAS, J.

DATED: 21ST MARCH, 2002.

ORAL ORDER

This Second Appeal has been filed at the instance of the Original Defendant who was unsuccessful in the two Courts below. The Appellant/Original Defendant had set up a plea that he was a mundkar of the suit house. The issue which was referred to the Mamlatdar and

confirmed by the Division Bench was that the Appellant/Original Defendant was not a mundkar. On this issue being answered, the learned Trial Court after recording the evidence of the parties decreed the suit. The Appellant being aggrieved by the Order of the learned Trial Court preferred Regular Civil Appeal No.16/2000 before the appellate Court which came to be dismissed by the Judgment and Decree of the Additional District Judge, South Goa, Margao, by his Judgment dated 28th September, 2001. The Appellant being aggrieved by the aforesaid Judgment and Decree has filed the present Second Appeal challenging the aforesaid Judgment.

2. Mr. M. S. Usgaonkar, the learned Senior Advocate appearing for the Appellant has referred to paras 2, 4 and 7 of the plaint in order to establish that what was pleaded by the Respondents/Original Plaintiff was not that the suit hut had been constructed by the Respondents/Original Plaintiff. According to the learned Senior Advocate appearing for the Appellant/Original Defendant what is pleaded in para 4 of the plaint is "that the Defendant has his residential hut, and the Defendant resides therein with the family members for the last 4 to 5 years, as tresspassers". Mr. M. S. Usgaonkar, the learned Senior Advocate appearing for the Appellant then referred to Exh.P.W.1/G, a letter said to have been written by the Respondents to the Sarpanch of Village

Panchayat, Colva. The learned Senior Advocate appearing for the Appellant invited my attention to the first paragraph of Exh.P.W.1/G which states "this is to inform you that I the undersigned had given permission to Antonio Fernandes, toddy tapper, resident of Chandor, Goa to put up a hut in my plot situated in the fourth ward of Colva for the rainy season only in the year 1972". Mr. Usgaonkar, the learned Senior Advocate appearing for the Appellant then invited my attention to the prayer clause of the plaint and according to him, prayer (f), which was a prayer for eviction of the Appellant/Original Defendant had not been valued at all and no Court Fee was paid. His grievance is that the two Courts below have granted this prayer of eviction without proper Court Fee being paid and secondly, relying on the fact that no Court Fee was paid. It was urged before me that it was never the intention of the Plaintiff to rely on the prayer for eviction. The learned Senior Advocate appearing for the Appellant then invited my attention to the evidence of P.W.1 in which P.W.1 had stated that the suit hut was already in existence and the Appellant/Original Defendant was allowed to carry out certain extension to the suit hut on the material which was supplied to the Plaintiff. Thus, according to the learned Senior Advocate appearing for the Appellant, the two Courts below had countenanced evidence which was beyond the pleadings and the Courts ought not to have passed the Judgment and Decree on the evidence which

was beyond the pleadings of the parties. It was also urged before me in support of the arguments that prayer clause (f) in the plaint was not really intended to be relied upon. No cause of action in the plaint for seeking relief is pleaded.

3. According to the learned Senior Advocate appearing for the Appellant, the following substantial questions of law arise in para 16 of the plaint:-

(a) Whether the Courts below misconstrued the pleadings and decreed the suit beyond the pleadings?

(b) Whether the Courts below erred in granting relief of eviction from residential structure when there was no cause of action pleaded as to eviction from residential structure.

(c) Whether the Courts below ought to have seen that construing pleading as they stand and also considering that the prayer (f) is not valued at all,

substantially the suit was filed on account of damage caused and it was relating to the property excluding the residential structure.

(d) Whether the Trial Court could grant relief of eviction of Appellant from the hut constructed by Appellant when there was no prayer for restoration of possession of land by demolishing the existing house.

(e) Whether the decree can be executed without prayer of restoration.

(f) Whether the Courts below were right in interpreting the pleading in para 2 of the plaint to come to conclusion that it does not show that the Appellant constructed the house.

(g) Whether above conclusion could

> be reached for express admission in the plaint and in the face of documentary evidence emanating from Respondent, namely, complaint to Village Panchayat stating that the house was constructed in 1972 by the Appellant.

4. In substance, therefore, what is urged before me is that the two Courts below had taken into consideration the evidence of the Plaintiff which was beyond the pleadings. A perusal of the Judgment of the learned appellate Court would show that this point was never urged substantially before the learned appellate Court. A perusal of the Memo of Appeal would also show that it was never urged in the Memo of Appeal. However, the appellate Court on the construction of the pleadings has come to the conclusion that the recitals in para 2 of the plaint do not indicate an admission of the Plaintiff that the suit hut had been constructed by the Defendant. The appellate Court when it was considering the Appeal of the Appellant, according to me, very rightly addressed itself to the question whether the Appellant could be evicted from the suit hut if it was constructed by him. The appellate Court with reference to the pleadings and the evidence of

the parties has recorded its finding that the suit hut had not been constructed by the Appellant/Original Defendant but had in fact been constructed by the Plaintiff and the extension had been constructed by the Appellant/Original Defendant on the material supplied by the Plaintiff. Thus, on the basis of the evidence of the parties, the learned appellate Court came to the aforesaid conclusion. The attention of the learned appellate Court was also invited to the letter Exh.P.W.1/G. The learned appellate Court on perusal of the letter also came to the conclusion that the recitals in the aforesaid letter at Exh.P.W.1/G did not convey the meaning that the Appellant/Original Defendant had constructed the suit hut.

5. I have heard the learned Advocates for the parties at length and I have also perused the pleadings and the evidence on record. The grounds urged in support of the admission of the Second Appeal according to me, are pure questions of fact which have been dealt with on appreciation of the evidence by the two Courts below. Whether the Appellant/Original Defendant had constructed a hut and, therefore, the Courts below were not entitled to pass a decree of eviction is a pure question of fact which has been answered by the Courts below. On appreciation of the evidence, the learned Courts have come to a conclusion that the Appellant had not constructed the suit hut and, therefore, the learned Trial Court was perfectly justified

in decreeing the suit of the Plaintiff. I see no perversity in the reasoning of the two Courts below and particularly as the Second Appeal raises questions of fact I am not inclined to interfere with the concurrent findings of the two Courts below.

6. In the result, therefore, Second Appeal No.3/2002 is dismissed with no order as to costs.

(P. V. HARDAS)
JUDGE

RD.