

IN THE HIGH COURT OF BOMBAY AT GOA**SECOND APPEAL NO. 9 of 2015**

1. Shri Narayan Waingankar,
40 Years of age,
Residing at Behind Village
Panchayat, Mollem-Goa.
2. Mr. Gurunath Waingankar,
72 Years of age,
Resident at H. No.33/17,
Behind Village Panchayat,
Mollem-Goa.
Through his duly constituted
Attorney Appellant No.1.
3. Mr. Santosh Waingankar,
43 Years of age,
Resident at H. No.144,
Bazarwado, Collem-Goa.
Through his duly constituted
Attorney Appellant No.1.
4. Mrs. Santosh Waingankar,
38 Years of age,
Resident at H. No.144,
Bazarwado, Collem-Goa.
5. Mrs. Laxmi N. Waingankar,
28 Years of age,
Resident at behind Village
Panchayat, Mollem, Apem,
Mollem, Goa.
6. Mrs. Gayatri Waigankar,
(deceased) represented by legal,
heirs i.e. Appellants no.1,2,3,4,&5. .. Appellants

V/s

Archdiocese of Goa & Daman
Pacopatriaral religious institution
Represented by its power of Attorney
Holder Mr. Piedade Fernandes,

Major in Age, R/o Mettawadao,
Collem, Goa. .. Respondent

Shri A. D. Bhobe and Ms. S. Bhobe, Advocates for the appellants.

Shri J. E. Coelho Pereira, Senior Advocate with Mr. V. Korgaonkar,
Advocate for the respondent.

CORAM :- C. V. BHADANG, J.

Date : 21st July, 2015

ORAL JUDGMENT :

By this appeal, the original defendants are challenging the concurrent finding, by which the suit filed by the respondent/ original plaintiff, for mandatory and permanent injunction, has been decreed.

2. On hearing the learned Counsel for the parties, the appeal raises the following substantial questions of law :

1. Whether the suit simpliciter for injunction was maintainable ?

2. Whether the Courts below were justified in decreeing the suit in the absence of relief of declaration of title ?

3. The parties were put to notice and have been heard on the aforesaid substantial questions of law and the appeal is being

disposed of accordingly.

4. Brief facts, necessary for disposal of the appeal, may be stated thus :

That the respondent filed a suit against the appellant no.1. According to the plaint allegations, the respondent is a religious institution and the suit was filed under the General Power of Attorney dated 30/06/1994 of father Victor Rodrigues. It was the material case that by deed of Succession, Gift and Relinquishment dated 07/06/1934, the respondent was in exclusive possession and enjoyment of the property known as 'APEM', situated at Mollem, Tal. Sanguem, bearing Land Registration No.13977 and surveyed under Survey No.22/1 and 23/1 with the name as 'MATA' and 'DEVACHEM' respectively. It was contended that the property 'APEM' comprises of the property better known as 'MATA' and 'DEVACHEM'. Properties are more specifically described, including boundaries thereof, in paragraph 2 of the plaint. According to the respondent, the property consists of partly paddy field, partly a forest and a barren land. The property surveyed under Survey No.22/1 better known as 'MATA' is the suit property.

5. The respondent claimed that the Attorney of the

respondent used to reside at Collem and used to visit the property periodically. On or about 12/07/2001, when the Attorney visited the suit property, he noticed that the appellant no.1 (original defendant) along with masons and labourers, is raising an illegal structure and has raised a room covered with tiled roof and was further attempting to extend it on front and back side. It was further claimed that earlier to that, a foundation was noticed on 01/06/2001. However, at that time, nobody was present at the site. A complaint was lodged before the Village Panchayat, Mollem. The said construction comprises of an area of 9 metres x 5 metres i.e. 45 square metres, which is at a distance of about 144 metres from PWD road. According to the respondent, the appellants have no right, title and interest over the suit property. It was, in these circumstances, that the suit (R.C.S. No.27/2001) came to be filed with the following material reliefs :

“(a) That by a Judgment, Order and Decree in the nature of permanent injunction the defendants, his family members, servants, agents be restrained from interfering in whatsoever nature in the suit property surveyed under No.22/1 and described in para 3 of the plaint and from continuing with the work of suit construction and from occupying and/ or using the suit construction.

(b) That by a Judgment, Order and Decree of mandatory injunction, the defendants his family

members, servants, agents be directed to remove the suit construction and restoring the land underneath to its original position. ”

6. The appellant no.1 filed written statement and opposed the claim. It was contended that the respondent has suppressed material facts and there is no cause of action to file the suit. It was denied that the respondent is in possession and enjoyment of property known as 'APEM' bearing Land Registration No.13577 and surveyed under No.22/1 and 23/1 known as 'MATA' and 'DEVACHEM'. It was denied that the property known as 'APEM' comprises of the properties 'MATA' and 'DEVACHEM'. It was contended that the property better known as 'APEM' is distinct and independent property, situated at Mollem, bearing Land Registration No.13577, surveyed under old Survey No.52 and enrolled under matrize No.11 and it is bounded on all sides by property known as 'OLIECHEM MOLA' also known as 'MATA', situated at Mollem, surveyed under Old Survey No.51, which is belonging to the Government. Thus, the material defence of the appellant no.1 was that he is in exclusive possession and enjoyment of the portion of the said property and has acquired prescriptive title to the same against the Government. The contents of the plaint as regards the deed of Succession, Gift and Relinquishment were denied. It was contended that it was the

father of appellant no.1, who had constructed the hut in the said property somewhere in 1965 to the knowledge of the Government, to whom the property belongs. It was contended that the property in his possession is approximately 3300 square metres. It was contended that because the old structure was in bad condition, it was only repaired recently. An application was also sent to the Village Panchayat on 01/06/1997 to register the said house. That application is pending. In short, it was contended that the appellant no.1 has become owner by adverse possession against the Government.

7. The learned Trial Court framed the following issues :

“(1) Does Plaintiff proves that they are owner in possession of suit property ?

(2) Does Plaintiffs proves that Defendant no.1 interfered in suit property by raising illegal structure of 9 X 5 sq.mtrs ?

(3) Does Plaintiff proves that they are entitled for Mandatory Injunction ?

(4) What relief ? What Order ?

Addl. Issue (5) : Whether Plaintiff proves that Shri. Piedade Fernandes is a Lawfully constituted Power of Attorney of Plaintiff ?”

8. The parties led evidence. The Trial Court answered the issue no.1 in the negative, however, answered the issue nos.2

to 3 in affirmative and decreed the suit. The learned Trial Court on the basis of evidence, including that of DW1 found that DW1 had admitted that the encroachment on the land known as 'MATA' was done by his father. The learned Trial Court further found that, on his own saying, it was the case of the appellant no.1 in the written statement (paragraph 6) that he is in possession of the hut in the property for about more than 35 years i.e. somewhere from 1965. The learned Trial Court, placing reliance on the decision of this Court in the case of ***State of Goa Vs. Maruti Sinai @ Ananda Nilcontainai Narcorni Surlekar and others***, reported in 2001(2) GLT 310, found that still it will not be sufficient to establish prescriptive title over the Government. The suit came to be decreed, essentially, on the ground that the respondent has a better title. Feeling aggrieved, the appellants filed an appeal before the First Appellate Court.

9. The First Appellate Court framed the following points for determination :

- "1. Whether the plaintiff has proved before the trial Court that the plaintiff is in lawful possession of the suit property bearing survey No.22/1, situated at Mollem, Sanguem?*
- 2. Whether the plaintiff proves that the defendant has encroached into the suit property and has done illegal*

construction in the suit property?

3. Whether the impugned Judgment and Order is erroneous and illegal?"

10. The First Appellate Court has noticed that the respondent has not asked for any declaration of ownership over the suit property, but has prayed for injunction on the basis of its lawful possession. Since the suit is for injunction simpliciter, it was found that it was not incumbent on the part of the respondent to prove its title over the suit property and it would be sufficient for the respondent to prove its lawful possession over the suit property. The First Appellate Court referred to Form No.I and XIV pertaining to Survey No.22/1 (Exhibit P-36), in order to find that the name of the property was mentioned as 'MATA', situated at Mollem, Sanguem and the name of the respondent was recorded in the occupant's column along with names of other persons and also the Government of Goa. The First Appellate Court found that the respondent was a co-occupant of the suit property. The First Appellate Court also placed reliance on the Deed of Succession, Gift and Relinquishment (Exhibit 34) to hold that the respondent was in lawful possession of the suit property.

11. At this stage, it would be necessary to refer to Civil Suit No.52/2005 decided on 14/03/2008, of which a copy was

produced at Exhibit 55. That was a suit filed by the respondent against the Government, which was dismissed. The matter had come to this Court in First Appeal No.143/2008. That appeal was allowed to be withdrawn on 11/04/2004 in view of the submission on behalf of the respondent (appellant in First Appeal No.143/2008) that due to passage of time, the claim in respect of the wooden logs, (which was the dispute involved in the suit), does not survive as the wooden logs are not in existence. This Court, in view of the fact that the appeal was allowed to be withdrawn, had observed that the findings recorded by the learned District Judge in that suit would not survive.

12. Coming to the present case, on behalf of the appellants, it was urged before the First Appellate Court, that in view of the judgment in Civil Suit No.52/2005 and the findings recorded therein, the respondent would have no case against the appellants. The First Appellate Court had refused to rely on the judgment (Exhibit 55) on the ground that it was held therein that there is presumption in favour of the respondent being in possession of the suit property.

13. The First Appellate Court, after extensively referring to the evidence of the appellant no.1 in the cross-examination, came

to the conclusion that the construction done by the appellants is illegal and secondly, the hostile possession against the Government was also not proved. In that view of the matter, the appeal was dismissed.

14. It was submitted by Shri Bhobe, the learned Counsel for the appellants that admittedly, the respondent has filed an application under Section 14(3) of the Land Revenue Code against the Government, which would show that even as per the respondent, it is the Government, which is the owner of the property. It is submitted that in such circumstances, a cloud having been raised on the title over the said property, the respondent ought to have filed a suit for declaration of their title and the suit simpliciter for injunction was not maintainable.

15. On the contrary, it is submitted by Shri Pereira, the learned Senior Counsel for the respondent that unless and until a cloud is raised on the title of the plaintiff, it is not necessary that a declaration of title is claimed. It is submitted that in the absence of any adverse title being set up against the respondent or any cloud being raised on the title of the respondent, a suit simpliciter for injunction was maintainable. Reliance in this regard is placed on the decision of the Hon'ble Supreme Court in the case of

Anathula Sudhakar Vs. P. Buchi Reddy (Dead) by L.Rs. And Ors., reported in AIR 2008 SC 2033. It is submitted that the appellant no.1 had admitted, to be an encroacher, although the case is that of a prescriptive title against the Government. It is submitted that as against this, the respondent has an entry, which has been referred to by the Courts below in the Revenue Record about the suit property, in their favour. It is, therefore, submitted that the concurrent finding recorded by the Courts below, does not require any interference.

16. The Hon'ble Apex Court in the case of **Anathula Sudhakar** (supra), had considered the scope of the prohibitory injunction relating to immovable property under Section 38 of the Specific Relief Act. The Hon'ble Supreme Court has set out the general principles as to when a mere suit for permanent injunction will lie and when it is necessary to file a suit for declaration and /or possession with injunction, as a consequential relief. It is held thus in paragraphs (11.1), (11.2) and (11.3), of the judgment :

"11.1) Where a plaintiff is in lawful or peaceful possession of a property and such possession is interfered or threatened by the defendant, a suit for an injunction simpliciter will lie. A person has a right to protect his possession against any person who does not prove a better title by seeking a prohibitory

injunction. But a person in wrongful possession is not entitled to an injunction against the rightful owner.

11.2) Where the title of the plaintiff is not disputed, but he is not in possession, his remedy is to file a suit for possession and seek in addition, if necessary, an injunction. A person out of possession, cannot seek the relief of injunction simpliciter, without claiming the relief of possession.

11.3) Where the plaintiff is in possession, but his title to the property is in dispute, or under a cloud, or where the defendant asserts title thereto and there is also a threat of dispossession from defendant, the plaintiff will have to sue for declaration of title and the consequential relief of injunction. Where the title of plaintiff is under a cloud or in dispute and he is not in possession or not able to establish possession, necessarily the plaintiff will have to file a suit for declaration, possession and injunction.”

17. It has been further held in paragraph 12 as under :

“12. We may however clarify that a prayer for declaration will be necessary only if the denial of title by the defendant or challenge to plaintiff's title raises a cloud on the title of plaintiff to the property. A cloud is said to raise over a person's title, when some apparent defect in his title to a property, or when some prima facie right of a third party over it, is made out or shown. An action for declaration, is the remedy to remove the cloud on the title to the property. On the other hand, where the plaintiff has clear title

supported by documents, if a trespasser without any claim to title or an interloper without any apparent title, merely denies the plaintiff's title, it does not amount to raising a cloud over the title of the plaintiff and it will not be necessary for the plaintiff to sue for declaration and a suit for injunction may be sufficient. Where the plaintiff, believing that defendant is only a trespasser or a wrongful claimant without title, files a mere suit for injunction, and in such a suit, the defendant discloses in his defence the details of the right or title claimed by him, which raises a serious dispute or cloud over plaintiff's title, then there is a need for the plaintiff, to amend the plaint and convert the suit into one for declaration. Alternatively, he may withdraw the suit for bare injunction, with permission of the court to file a comprehensive suit for declaration and injunction. He may file the suit for declaration with consequential relief, even after the suit for injunction is dismissed, where the suit raised only the issue of possession and not any issue of title."

18. The legal position has been summarised in paragraph 17 of the judgment as under :

"17. To summarize, the position in regard to suits for prohibitory injunction relating to immovable property, is as under :

(a) Where a cloud is raised over plaintiff's title and he does not have possession, a suit for declaration and possession, with or without a consequential injunction, is the remedy. Where the plaintiff's title

is not in dispute or under a cloud, but he is out of possession, he has to sue for possession with a consequential injunction. Where there is merely an interference with plaintiff's lawful possession or threat of dispossession, it is sufficient to sue for an injunction simpliciter.

(b) As a suit for injunction simpliciter is concerned only with possession, normally the issue of title will not be directly and substantially in issue. The prayer for injunction will be decided with reference to the finding on possession. But in cases where de jure possession has to be established on the basis of title to the property, as in the case of vacant sites, the issue of title may directly and substantially arise for consideration, as without a finding thereon, it will not be possible to decide the issue of possession.

(c) But a finding on title cannot be recorded in a suit for injunction, unless there are necessary pleadings and appropriate issue regarding title [either specific, or implied as noticed in Annaimuthu Thevar; (2005 AIR SCW 3516). Where the averments regarding title are absent in a plaint and where there is no issue relating to title, the court will not investigate or examine or render a finding on a question of title, in a suit for injunction. Even where there are necessary pleadings and issue, if the matter involves complicated questions of fact and law relating to title, the court will relegate the parties to the remedy by way of comprehensive suit for declaration of title, instead of deciding the issue

in a suit for mere injunction.

(d) Where there are necessary pleadings regarding title, and appropriate issue relating to title on which parties lead evidence, if the matter involved is simple and straight-forward, the court may decide upon the issue regarding title, even in a suit for injunction. But such cases, are the exception to the normal rule that question of title will not be decided in suits for injunction. But persons having clear title and possession suing for injunction, should not be driven to the costlier and more cumbersome remedy of a suit for declaration, merely because some meddler vexatiously or wrongfully makes a claim or tries to encroach upon his property. The court should use its discretion carefully to identify cases where it will enquire into title and cases where it will refer to plaintiff to a more comprehensive declaratory suit, depending upon the facts of the case."

It can, thus, be seen that as far as a suit for injunction simpliciter, based on possession is concerned, the issue of title will not be directly and subsequently in issue. In such a case, the prayer for injunction will have to be decided with reference to the finding on possession. The Hon'ble Apex Court in the case of **Anathula Sudhakar** (supra), has held that in respect of a property, which is an agricultural land, the possession may be

established with reference to actual use and cultivation. Where the property is vacant site, which is not physically possessed, used or enjoyed, the principle that possession follows title would apply and if two persons claim to be in possession of a vacant site, one, who is able to establish a title thereto, will be considered to be in possession as against the person, who is not able to establish title.

19. Turning to the present case, insofar as the finding recorded in Civil Suit No.52/2005 is concerned, this Court, while allowing withdrawal of the First Appeal No.143/2008, had held that the findings recorded by the learned District Judge would not survive. So, these findings cannot come in the way of the respondent. The respondent has a document which dates back to the year 1934 (Exhibit 34) having Revenue Entry in Form No.I and XIV pertaining to Survey No.22/1 (Exhibit P-36) as against the appellant no.1, who admittedly claims adverse possession against the Government. Both the Courts have concurrently found that the respondent was in possession of the suit property. In the fact and circumstances, it cannot be said that there was any cloud on the title of the respondent, which was created in the suit, requiring the respondent to file a suit for declaration of title. It may be mentioned that the appellants are not claiming any right as against the respondent much less of adverse possession, which

they are claiming against the Government. So, as between the appellants and respondent, certainly it is the respondent, who had a document of Succession, Gift and Relinquishment dated back to the year 1934 and a revenue entry in its favour and in that view of the matter, it cannot be said that the suit for want of declaration could not have been decreed.

20. In the result, the points are answered in the affirmative. The Second Appeal is, accordingly, dismissed, with no order as to costs.

C. V. BHADANG, J.

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