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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

**APPEAL FROM ORDER (L) NO. 23536 OF 2015
WITH
CIVIL APPLICATION (L) NO. 23537 OF 2015
IN
APPEAL FROM ORDER (L) NO. 23536 OF 2015**

Marie Therese De Menezes & Ors. ...Appellants
Vs.
Nazareth Pascol Baptista & Ors. ...Respondents

Mr. Joaquim Reis, Sr. Advocate i/b. Mr. Abhijeet A. Joshi
for the Appellants
Mr. Shekhar Jagtap a/w. Mr. Akshay Kapadia
i/b. Shri J. Shekhar & Co., for the Respondents

**CORAM : MRS. ROSHAN DALVI, J.
DATED : 5TH OCTOBER, 2015**

P.C. :

Rule. Returnable forthwith.

1. The appellants (plaintiffs) have challenged the interim order in the above suit passed by the City Civil Court on 7th August, 2015. That is the second interim order after the suit was initially decreed and the decree was set aside and the suit was remanded to trial. Initially in the suit the first notice of motion was taken out for protection of the plaintiffs' possession in certain structures as also in the open land. The

Court had observed that the plaintiffs had made out the case of possession only in respect of the structures, but not in respect of the open land for which adverse possession was claimed. The Court had also observed that the claim of adverse possession was disturbed by the plaintiffs' own letter dated 17th May, 1981 in which the plaintiffs claimed to be lessees. The Court had also observed that the possession of the lands was not shown and hence the Court dismissed the notice of motion of the plaintiffs.

2. Thereafter the suit came to be decreed. That decree came to be set aside upon seeing that the issue of the adverse possession of the plaintiffs was not answered as it was found to be redundant. The plaintiffs sought the relief of amendment of the plaint and further relief of injunction. The plaintiffs were allowed to amend the plaint by adding a schedule and a prayer. The plaintiffs would contend that the averments relating to adverse possession were already made in the plaint and no further averments were made. The plaintiffs applied for interim relief of injunction against the construction to be put up by the defendants.
3. The fact that the plaintiffs claimed to be in adverse possession would show that the defendants were the true owners. The plaintiffs must show the possession hostile to the defendants for the required number of years for the relief

that they claim in respect of that part of the suit property. The relief that they claimed was in respect of the open land. The plaintiffs' initial notice of motion was dismissed and hence the plaintiffs had no relief in respect of the open land. Consequently the defendants, as the true owners, sought to put up certain construction on the open land. The plaintiffs sought to prevent it after the suit was remanded to the City Civil Court and after the decree was set aside.

4. Consequently when the application for injunction was moved before the City Civil Court it had to consider the plaintiffs' case of adverse possession. It would at least require to consider the plaintiffs' case of settled possession. The case of adverse possession or settled possession would be the possession of the plaintiffs not at the time the notice of motion was taken out, but for the period well prior to the notice of motion. It had to be so prior to the filing of the suit. In fact that case on merits was considered pending the suit and before the grant of the decree.

5. The plaintiffs have shown to this Court the case made out by the plaintiffs for grant of the injunction after the decree was set aside and the suit was remanded to trial. This case is made out under public notice issued by the defendants in 2014 which was opposed by plaintiffs and certain photographs of showing what was the position of the open

land which formed a part of the suit property at the time of the second notice of motion.

6. These documents could not show the plaintiffs' adverse possession or even settled possession. These documents would only show what was transpiring at the time the notice of motion was taken out.

7. If the plaintiffs do not make out a prima facie case of adverse possession which was averred in the plaint or even settled possession which was otherwise claimed in the plaint, the plaintiffs would not deserve to protect the possession as on the date of the application.

8. It is for this aspect of possession that the learned Judge has made a fundamental error. If the plaintiffs are granted the injunction against the defendants who are the true owners of the suit land pending the suit without making out a case for possession well prior to the suit there would be travesty of justice.

9. The situation in law would be better appreciated when considered as follows:

1. The plaintiff claims to be in adverse possession or settled possession.

2. The plaintiff sues for protection of such possession.
3. The plaintiff does not show any document well prior to the filing of the suit to show even settled possession.
4. The plaintiff shows the Court only what the defendant was doing at the time of the suit.

If an injunction has to be granted in such a suit any plaintiff who would make any claim of adverse or settled possession would only obtain an injunction upon showing that the suit property was used by the defendant in a particular manner. That would not be making out a prima facie case of adverse possession. Without making any prima facie case there would be no question of considering the balance of convenience in favour of the plaintiffs. No injunction could be granted in such a suit.

10. In this case the plaintiffs' suit for protection of possession was filed. The prima facie case of the plaintiffs was considered. The plaintiffs' initial notice of motion by way of interim application was rejected. The structures of the plaintiffs were allowed to remain. No order was passed for protection of the open land. A decree came to be passed without considering the plaintiffs' seminal case of adverse possession. The issue in that regard was found unanswered.

That decree has been set aside. The suit is restored to file. The initial interim order would, therefore, continue pending the suit. The plaintiffs chose to file another application for interim relief. The plaintiffs must make out the case of adverse possession or settled possession. The plaintiffs did not make out such a case. The plaintiffs only made out a case that in the open land for which injunction was refused initially in the suit in which the decree was set aside, the defendants, who were the owners, were using the suit property. Hence the plaintiffs only made out a case of possession as on the date of the second application for interim relief after the decree was set aside. No such injunction could be granted.

11. The learned Judge in the impugned order has set out the relief claimed by the plaintiffs and the case of bar of limitation of the defendants as also the case of the defendants that the plaintiffs had created third party interest.
12. Though the learned Judge has recorded that the plaintiffs were found in settled possession, no document is shown by the plaintiffs to evidence any settled possession which would be possession long prior to the filing of the suit as also the second notice of motion. That having not being seen the grant of injunction is an aleagal order. The law for possession and the law of injunction has not been considered.

The order against the defendants not to create any third party interest to maintain the position “as it is” which is a status-quo order is seen to be incorrectly passed.

13. Consequently the impugned order dated 7th August 2015 is set aside.
14. Appeal as also the civil application are disposed off accordingly.
15. On the application of the plaintiffs / respondents herein the impugned order shall continue for 2 weeks.

(ROSHAN DALVI, J.)

CERTIFICATE

**Certified to be true and correct copy of the original signed
Judgment /order.**