

IN THE HIGH COURT OF BOMBAY AT GOA

SECOND APPEAL NO. 10 OF 2009

Shri Shiva K. Gadekar,
r/o House No.29, Gaunsavaddo,
(near Chapel) Mapusa, Bardez,
Goa, (since deceased) through his
legal heirs;

1(a) Smt. Prabhavati P. Gadekar,
major, wife of late Shiva Gadekar,
Housewife,

1(b) Ashok P. Gadekar,
major,
s/o Shiva Gadekar, major,

1(c) Manoj P. Gadekar, major,
S/o Shiva Gadekar, major,

1(d) Krishna P. Gadekar, major,
s/o Shiva Gadekar, major,

1(e) Mahesh P. Gadekar, major,
s/o Shiva Gadekar, major,

1(f) Neeta P. Gadekar, major,
d/o Shiva Gadekar,
all r/o House No.29, Gaunsavaddo,
(near Chapel) Mapusa, Bardez Goa.

... Appellants

V e r s u s

1. Shri Ludovigo G. Rodrigues,
son of Pedro Sebastiao Rodrigues,
aged about 77 years, married,
residing at Masjid Panwala Chawl,
Room No.3,
Opp. Kurla Police Station, Kurla,
Bombay 400 070 through his attorney
Mrs. Diana Rodrigues, daughter of
Shri Ludovigo G. Rodrigues,
wife of Savio Rodrigues, major,
housewife, resident of
Pequeno Gauvoim, House No.241,
Tivim, Bardez Goa.

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2. Mrs. Diana Rodrigues,
 3. Mr. Savio Rodrigues, in service,
Both major, resident of house No.241,
Tivim, Bardez Goa.
 4. Miss Cacilda Rodrigues,
in service, resident of Masjid Panwala
Chawl, Room No.3,
Kurla (W), Mumbai.
- ... Respondents

Mr. S. D. Lotlikar, Senior Advocate with Ms. G. Xettigar, Advocate for the appellants.

Mr. M. B. Da Costa, Senior Advocate with Ms. K. Betquekar, Advocate for the respondent no.4.

CORAM : F. M. REIS, J

DATE : 12th February, 2016

ORAL JUDGMENT

Heard Mr. S. D. Lotlikar, learned Senior Counsel appearing for the appellants and Mr. M. B. Da Costa, learned Senior Counsel appearing for the respondent no.4.

2. The above appeal came to be admitted by an order dated 09.10.2009 on the following substantial questions of law :

1. Whether in the facts and circumstances of the case, the basic point for determination which arose before the First Appellate Court was whether the plaintiffs/respondents had established their ownership

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and possession of the suit property, and the judgment and decree is vitiated on account of non-formulation and non-determination of this point ?

2. Whether in view of the fact that neither of the parties to the suit, produced any document establishing ownership of the suit property, the case had to be decided on the basis of possessory title, and unless and until the plaintiff established settled prior possession of the suit property, he could not succeed in getting the relief of demolition of the structures constructed by the appellants, and restoration of the suit property ?

3. Whether the denial of the ownership of the respondents by the defendants could be considered as vague denial, merely because the defendants had failed to state in the written statement to whom the suit property actually belonged ?

3. Mr. S. D. Lotlikar, learned Senior Counsel appearing for the appellants in support of the first substantial question of law points out that the suit filed by the respondents is on the ground that they are the owners in possession of the suit property which is surveyed under Chalta No. 8, sub division 1 of P.T. Sheet No.127 of Mapusa City. The learned Senior Counsel further points out that the appellants had

disputed that the respondents were the owners of the suit property and as such unless there is a specific finding that the respondents are the owners of such property, the question of granting relief of mandatory injunction would not arise at all. The learned Senior counsel further submits that the respondents have not produced any document of title to substantiate their claim of ownership and as such the Courts below were not justified to pass the impugned judgments. The learned Senior Counsel further submits that the respondents have relied upon an area statement of the city survey records which does not create any title in favour of the respondents. The learned Senior Counsel further points out that besides such evidentiary document, there is no document produced by the respondents to substantiate the claim of ownership. The learned Senior Counsel thereafter has taken me through the judgment of the learned Lower Appellate Court to point out that the learned Judge has not even framed the point for determination on that count when such aspect is very much crucial for decision in a suit for mandatory injunction. The learned Senior Counsel further points out that it is the case of the respondents that they are in possession of the disputed property for the last over 30 years. The learned Senior Counsel thereafter has taken me through the judgment of the learned Lower Appellate Court to point out that the findings therein are erroneous and the learned Lower Appellate Court has not decided the crucial issue as to whether the respondents have established their title over the disputed property. The learned Senior Counsel as such submits

that the first question of law is to be answered in favour of the appellants.

4. With regard to the second and third substantial questions of law, the learned Senior Counsel points out that as the appellants and the respondents have not established their title, the suit would have to be decided based on the possessory title. The learned Senior Counsel further submits that admittedly the appellants were in possession of the suit structure three years prior to the filing of the suit and as such on this ground alone the suit filed by the respondents deserves to be dismissed. The learned Senior Counsel further points out that as the possession of the property was admittedly with the appellants, the respondents were not entitled to get the relief of mandatory injunction as they have failed to establish their title over the disputed property. The learned Senior Counsel has thereafter taken me through the judgments of the learned Lower Appellate Court as well as the learned Trial Court to point out that the findings rendered by the Courts below are based on the evidence on record which has no presumptive value. The learned Senior Counsel has thereafter taken me through the pleadings of the parties as well as the findings of the Courts below to point out that the Courts below have erroneously relied upon the pleadings of the in the suit filed by the appellants against the Municipality which are irrelevant for the purpose of deciding the matter in controversy. The learned Senior Counsel as such submits that as the

appellants are in possession of the disputed property, the respondents are not entitled for the relief of mandatory injunction as granted by the Courts below.

5. On the other hand, Mr. M. B. Da Costa, learned Senior Counsel appearing for the respondent no.4 has supported the impugned judgment. The learned Senior Counsel has first taken me through the judgment of the learned District Judge which came to be passed during the course of the disposal of the temporary injunction application in the suit to point out that the Court had come to the conclusion that the respondents were in possession of the disputed property. The learned Senior Counsel further submits that in the suit filed by the appellants against the Municipality pursuant to the notice issued by the Municipality for demolition of the subject structure there is a specific averment therein to the effect that the disputed property belongs to the family of Mr. Ludovigo Rodrigues. The learned Senior Counsel further points out that the original plaintiff in the suit was Mr. Ludovigo Rodrigues and as such the findings of the Courts below to the effect that the appellants had admitted in such pleadings that the property belonging to the respondents cannot be faulted. The learned Senior Counsel has thereafter taken me through the inventory proceedings which were initiated upon the death of the father of the said Mr. Ludovigo Rodrigues to point out that the subject property was described at item no.4 and allotted to the original plaintiff. The learned

Senior Counsel further pointed out that the allotment in the inventory proceedings would convey the ownership of such property in favour of the person in whose favour such property is allotted. The learned Senior Counsel has thereafter taken me through the judgments of the Courts below to point out that the Courts below have rightly appreciated the evidence on record and come to the conclusion that the appellants have failed to establish their alleged claim of ownership and possession over the disputed property. The learned Senior Counsel further submits that the act of the appellants is of a trespasser in the property of the respondents and the Courts below have rightly decreed the suit filed by the respondents. The learned Senior Counsel as such submits that the appeal preferred by the appellants deserves to be rejected.

6. I have considered the submissions of the learned Senior Counsel and I have also gone through the records. On consideration of the rival contentions raised by the learned Senior Counsel for the appellants and respondents, the dispute boils down to ascertain whether the respondents have established their ownership and possession in respect of the disputed property. On perusal of the plaint filed by the respondents, I find that the respondents have clearly pleaded that the property belonging to the respondents is known as "Arodichem Bhatta" situated at Gaunsavaddo, Mapusa, surveyed under Chalta No.8 sub division 1 of P. T. sheet No.127 not registered in the

Land Registration Office but registered in the Land Revenue Office under No.1226. It is further stated that in the records of new city survey, the said property stands in the name of the plaintiffs. While dealing with the said averment at para 1, the respondents in their written statement have stated that the contents of para no.1 of the plaint are partly admitted. It is further stated that the appellants admit that the name of the property is "Aradichem Batta" which is surveyed under Chalta No.8 sub division 1 of P.T. Sheet No.127. However, it is further denied that the respondents are the owners in possession of the said property described in para 1 of the plaint. On plain reading of the said pleadings, the facts clearly admitted by non- traversed by the appellants are that the property known as "Aradichem Batta" stands surveyed in the New City survey records under Chalta No.8 and that the property is inscribed under Matriz number 1226 and the property stands in the name of the plaintiffs in the City survey records. Considering the above, the contention of Mr. Lotlikar, learned Senior Counsel appearing for the appellants that the respondents have failed to establish the identity and ownership in respect of the disputed property cannot be accepted. Apart from that, besides the said admission the respondents have also produced the City Survey records coupled with the allotment made in the Inventory Proceedings. The allotment in the Inventory Proceedings transfers the ownership and possession in favour of the person in whose favour it was so allotted. In such circumstances, considering the cumulative effect of the

documentary evidence on record, the contention of Mr. S. D. Lotlikar, learned Senior Counsel appearing for the appellants that the respondents have failed to establish the ownership and possession over the disputed property cannot be accepted. Besides that, both the Courts below upon appreciating the evidence on record have concurrently come to the conclusion that the respondents are in possession of the disputed property. The finding on possession is a finding on fact. In such circumstances, as no perversity is disclosed in such finding, the question of re-appreciating the evidence on record to come to a contrary conclusion by this Court in a Second Appeal under Section 100 of C.P.C. will not be justified. The contention of Mr. Lotlikar, learned Senior Counsel appearing for the appellants that the appellants were in possession of the disputed property for last over 30 years has been rightly rejected by the concurrent findings of both the Courts below. So also, the contention that the appellants were at least in possession of the disputed structure for a period of three years cannot confer any benefit to the appellants to claim that the respondents are not entitled for the relief in the present suit. The cause of action to file the suit is that the appellants have trespassed into the property and put up the disputed structure. As such, both the Courts below have found that the act of the appellants is contrary to law and in fact, an intrusion into the property of the respondents. The reliance upon such alleged possession to claim that the appellants are in possession of the disputed property cannot in any way help the appellants to defeat the

suit filed by the respondents who are held to be the owners in possession of the disputed property. Besides that, on going through the judgment of the learned Trial Judge dated 16.02.2006, I find that the learned Judge while examining the first and second issue has taken note of the judgment and order dated 12.11.1993 passed in Regular Civil Suit No. 238/84/C which was filed by the original defendants against the Municipality which was at Exhibit PW1/D and the said suit came to be dismissed. The learned Judge in the said judgment found that the appellants herein had failed to establish the alleged contention that the cow shed was in existence for last 40 to 50 years. The learned Judge also found that the said structure which is the subject matter of the present suit was illegal structure and as such, the learned Trial Judge decreed the suit inter-alia granting permanent injunction restraining the appellants from constructing/reconstructing or doing any masonry work in the suit property or interfere with the same in whatsoever manner and to restore the suit property to its original condition by demolishing the illegal construction along with new construction done in the suit property. On perusal of the judgment of the learned Lower Appellate Court dated 16.10.2008, I find that the learned Judge had framed two points for determination and while appreciating the evidence on record noted that the plan from the Survey Department does not show any structure in the entire portion of the suit property and that the contention of the appellants that such structure was in existence for last 30 years cannot be accepted. The

learned Judge also noted that in the earlier suit of year 1994, it was held that there was an illegal structure constructed by the present appellants in the disputed property. The learned Judge also took note of the report produced at Exhibit PW2/A Colly wherein the structures were shown by letters A, B, C and D having been marked and shown as illegal structures. The learned Judge also noted that no permission has been produced by the appellants to show that they were permitted to put up such structures. The learned Judge also took note of the Inventory Proceedings and other material on record including the survey records to come to the conclusion that the appellants have no right to the subject property. Considering the said findings of both the Courts below, Mr. Lotlikar, learned Senior Counsel appearing for the appellants was unable to substantiate his contention that there is any perversity in the findings recorded therein. The documentary evidence on record conclusively establish the ownership of the respondents over the subject property and in absence of any material produced by the appellants to the contrary, the findings of the Courts below that the respondents are owners in possession of the subject property cannot be faulted. In such circumstances, the contention of Mr. Lotlikar, learned Senior Counsel appearing for the appellants that the respondents have failed to establish the ownership and possession over the disputed property cannot be accepted. Apart from that, the matríz records which were revenue records before coming into force of the Land Revenue Code in respect of the disputed property also stand in the name of the

respondents herein. The entries in the matríz records are co-related with the entries in the City Survey Records prepared under the Land Revenue Code. In such circumstances, the Courts below have rightly drawn a presumption in favour of the respondents which the appellants have failed to rebut by any acceptable evidence on record. In such circumstances, I find that there is no merit in the above appeal. The substantial questions of law are answered against the appellants. The appeal stands accordingly rejected.

7. During the course of the proceedings, it is noted from the records that the operation of the impugned judgment and decree was stayed subject to the appellants depositing Rs.10,000/- every year in this Court till disposal of the above appeal. The record reveals that subsequent thereto the appellants have deposited Rs.30,000/- in this Court. The Registry is accordingly directed to pay the said amount of Rs.30,000/- to the respondents along with interest accrued thereon. The appeal stands disposed of accordingly.

F. M. REIS, J

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