

IN THE HIGH COURT OF BOMBAY AT GOA**SECOND APPEAL NO.104/2015**

MR.ANTONIO PINTO AND 12
ORS. Appellants

V E R S U S

MRS.MARIA AIDA ESTRELINA
MARQUES
AFONSO E SOUZA AND ANR. Respondents.

Mr. Vilas P. Thali, Advocate for the appellants.

Mr. S. D. Lotlikar, Senior Advocate with Ms. Aditi Naik, Advocate for the respondents.

CORAM :- SMT. R.P. SONDURBALDOTA. J.

Date : - 22nd December, 2016.

P.C.:

This second appeal challenges the concurrent findings rendered by the Trial Court in Judgment and Decree dated 17th March, 2009 passed in Special Civil Suit No.12/2009/B(New) i.e. Regular Civil Suit No.25/2002/C (old) and confirmed by the First Appellate Court by the Order dated 1st September 2014, in Regular Civil Appeal No.70/2010.

2. Brief facts of the case are that the respondents herein had filed the suit on 2nd March, 2002, seeking removal of the encroachment, restoration of possession of the encroached portion; for permanent injunction restraining the appellants from interfering with the remaining portion of the suit property, and for mesne profits. Later, the suit was amended to add a prayer for possession of any further portion that might be found subsequently encroached by the appellants. The defence of the appellants to the suit was of denial. According to the appellants, the respondents and other co-owners had filed Civil Suit No.26/1966, which was decreed on 14th June, 1976, declaring the respondents and others as owners of the suit property. The appellants had challenged that decree by filing a first appeal, without impleading all the original parties to the appeal. The respondents were though decree-holders, were omitted from the proceedings. The First Appellate Court allowed the appeal. The second appeal was dismissed. According to the appellants, though the respondents were not impleaded to the first appeal, the order of

the First Appellate Court, dismissing the suit would be binding on the respondents. The Trial Court denied this claim and by its Judgment and Order dated 3rd February, 2009, decreed the suit. The First Appellate Court found no infirmity with the findings of the Trial Court and dismissed the first appeal. The decree in Civil Suit No.20 of 1966 declared the plaintiffs therein, including the present respondents as the owners of the suit property. When the appellants challenged that decree by filing an appeal against only some of the plaintiffs, it would only mean that they did not dispute the title of the respondents herein. Hence, the decree in Civil Suit No.26 of 1966 remained intact in favour of the respondents.

3. The second contention of the appellants is that the present suit was barred by the law of limitation. Mr. Thali, learned Counsel for the appellants submits that in the earlier suit also the respondents had sought a relief of possession of the property and since the appellants had been in possession since much prior to the year 1977, the suit must be held to be barred by the law of

limitation. It is his argument that the prayer for decree of possession should be considered as a prayer for mandatory injunction bringing in the limitation of three years for filing of the suit. The argument needs to be only stated to be rejected. The prayer seeking recovery of possession of the property can never be treated as the prayer for mandatory injunction. The appellants had also set up the defence of adverse possession. The Trial Court has rejected the same by holding that the appellants have failed to establish that their possession of the encroached portion was open and hostile to the respondents. It is to be noted that the possession sought in the suit herein is of the portion encroached upon by the appellants subsequent to the decree in Civil Suit No.26 of 1966. Therefore, the suit cannot be said to be barred by the law of limitation.

4. The next argument of Mr. Thali is that the suit as filed is not maintainable in view of the bar under Order 2, Rule 2 C.P.C.. According to him, since the earlier suit filed was in respect of the entire property, it was necessary for the respondents to seek leave

of the Court under Order 2 Rule 2 CPC.. to sue the appellants for recovery of possession of the encroached portion of their land. There can be no substance in the submission because as already seen above the property, in question, was subsequently encroached. Trial Court has also held that the appellants can be said to be in possession of the property at the highest from the year 1977 which is subsequent to even the decree in the suit. In these circumstances, there is no substantial question of law arises in this second appeal. Hence, the second appeal is dismissed.

SMT. R.P. SONDURBALDOTA, J.

ssm.