

IN THE HIGH COURT OF BOMBAY AT GOA

SECOND APPEAL NO. 63 OF 2016

1. Raymond Fernandes & anr. Appellants

V e r s u s

1. Winfred Martha D' Souza and 3 Ors. Respondents

Mr. Ryan Menezes, Advocate for the Appellants.

Coram :- F. M. REIS, J

Order Reserved on : 12th August, 2016

Order Pronounced on: 15th October, 2016

ORDER

Heard Shri Ryan Menezes, learned Counsel appearing for the Appellants.

2. The above Appeal challenges the Judgments passed by the Courts below whereby the suit filed by the Respondents was partly decreed and the Appellants are directed to hand over the vacant and peaceful possession of the suit property bearing survey no. 5/14 of Village Colva, Salcete and the suit structure to the Respondents. Further the Appellants are restrained from interfering in the suit property and the suit structure after vacant possession is delivered to the Appellants and also for an inquiry in terms of Order 20 Rule 12 sub-Rule (1)(c) of the Code of Civil Procedure as to the mesne profits to be paid to the Appellants.

3. Briefly, the facts of the case are that the Appellants filed the suit inter alia on the ground that there exists a property known as "Dande" surveyed under no. 5/14 admeasuring an area of 2575 square metres situated at Colva and that the father of the Respondent Sebastiao Menino Fernandes, was the original owner in possession of the suit property who expired on 06.02.1991 whose name was figuring in the occupant's column of the suit property. There exists several structures in the suit property including an old residential house of the Respondent bearing House no. 66. It is further their case that both the parents expired on 06.02.1991 and 03.12.1996 leaving behind two children namely Respondent no. 1 and Fr. Francis Xavier Fernandes who was a Priest and Bachelor. It is further the case of the Respondent that late brother of the Respondent no. 1 namely Fr. Francis Xavier Fernandes had to visit different places in Goa and abroad on account of his spiritual and religious obligations but he used to return home occasionally. It is further their case that Appellant nos. 1 and 2 used to visit the said Priest whenever he used to come to Goa. As the said brother could not manage the suit structure in Goa, he engaged the services of the Appellants as servants to take care of the affairs in respect of the suit property and the suit structure and temporary permitted the Appellants to occupy the outhouse as their servant quarters. It is further their case that after the death of the late brother, the Respondent no. 1 published a public notice on the Navhind Times on 14.07.2007 informing the public that she being the legal heirs of her late parents and the late brother, no one should deal with the suit property and the suit structure. But, however, the Appellant no. 1 raised an objection to such notice. The Respondent no. 1 after coming down to India visited the suit property and the suit structure and

was surprised to find that the Appellants had forcefully opened the lock of the suit house and were illegally occupying the suit house. It is further their case that the Appellants are rank trespassers and, as such, filed the suit for the relief referred to herein above.

4. The Appellants filed their Written Statements and denied that the Respondents were the owners of the suit property. It is further their case that said Sebastiao Menino Fernandes had a residential house in the suit property and he was residing alone in the suit house and that said Sebastiao Menino Fernandes was residing along and he had requested the Appellant no. 1 sometime in the year 1985 to give him company at night and accordingly the Appellant no. 1 was giving company to the said Sebastiao Menino Fernandes at night. It is further their case that the said Sebastiao Menino Fernandes had a son named Francis Xavier Fernandes and that the son was also not staying with said Sebastiao Menino Fernandes. It is also their contention that said Sebastiao Menino Fernandes had told the Appellant no. 1 that though the son was not staying with him, he would make a Gift of the suit property in the name of said son with instructions that the suit property should be given to the Appellant no. 1. It is further their case that in the year 1985, the said Sebastiao Menino Fernandes executed a Gift Deed dated 05.03.1985 in favour of his son. The said son Francis Xavier Fernandes accepted the Gift by a separate Deed of Acceptance dated 24.03.1986 and that said Francis Xavier Fernandes was ordained Priest on 03.12.1995 and was attached to Kuwait Diocese and was mostly staying in Kuwait. It is further their case that from the year 1985, the Appellant no. 1 was continuously staying in the suit structure and taking

care of the suit house administrating the suit house and also giving company to Sebastiao Menino Fernandes who expired in February, 1991. It is also contended that the Appellants are in exclusive possession of the suit house and the suit property from the year 1991. It is also their case as per the wishes of Sebastiao Menino Fernandes, his son Fr. Francis Xavier Fernandes had given a Declaration dated 30.06.2005 when he was sick and had to undergo an operation in the hospital at Delhi. It is also contended that the Declaration transferred the suit property in the name of the Appellants. It is further pointed out that the suit cottages are in absolute possession of the Appellants from the year 1991 till date. The Appellants also denied that they were engaged as servants of the suit house.

5. The learned Trial Judge framed issues and recorded evidence and by Judgment and Decree dated 06.12.2013 partly decreed the suit in the terms referred to herein above. The learned Judge after appreciating the evidence on record both documentary and oral, found that the final Chart of Partition at exhibit C-55 and the Judgment and Decree dated 26.08.2008 at exhibit 56 in Special Inventory Proceedings nos. 69 of 2007, shows that the suit property including the suit structure has been allotted to the Respondents herein. The learned Judge further noted that in the cross examination, the Appellant no. 1 had stated that his claim to the suit proerty and the suit house was on the basis of the declaration dated 30.06.2005 at exhibit C-60. The learned Judge further noted that the witnesses to the said Declaration were not examined by he Appellants. The learned Judge as such on the basis of the evidence of Dw. 2 examined the genuineness of the document exhibit 60. The learned Judge on perusal of the said

Declaration found that it is only stated that the father of Fr. Francis Xavier Fernandes had told him that the suit house and the suit property shall belong to the Appellant no. 1 and that he undertakes to execute a proper document transferring the suit house and the suit property in the name of the Appellant no. 1. The learned Judge noted that such document does not confer any title on the Appellant no. 1 as it merely recognises that the Appellants are in possession of the suit property and the suit structure. The learned Judge thereafter examined the claim of adverse possession to note that mere possession for long length of time does not result in covering permissive possession into adverse possession. The learned Judge also noted the Judgment of the Apex Court to hold that in the eyes of law, an owner would be deemed to be in possession of the property so long as there is no intrusion. Non-use of the property by the owner even for longer time would not affect his title but the position would be altered if some other person takes possession and asserts a right over it as adverse possession is a hostile possession. The learned Judge as such found that the claim of adverse possession by the Appellants cannot be accepted as there are no ingredients pleaded or established to claim adverse possession. The learned judge further noted that possession of a care-taker or a servant is permissible possession and, as such, rejected the contention of the Appellants that there was no pleading that the Appellants were in permissible possession of the suit property and the suit structure. The learned Judge also noted that the declaration at exhibit 60 also supports the contention of the Respondents that the Appellant no.1 was given permissive possession of the suit property. The learned Judge further noted that the evidence of Respondents clearly discloses that the Appellants are in

permissible possession of the suit property including the suit structure. The learned Judge rejected the contention of the Appellants that they were in absolute/exclusive possession of the suit property and the suit structure taking note of the admitted position that Fr. Francis Xavier Fernandes whenever he used to come to Goa would reside in the suit house and he would return twice in a year and stay for around one month in the suit house. The learned Judge also noted that the land line telephone connection was also in the name of the said Fr. Francis Xavier Fernandes. The learned Judge also noted that the Appellant no. 1 does not have a ration card in respect of the suit house. The learned Judge also noted that even in the year 2005 said Fr. Francis Xavier Fernandes, resided in the suit house whenever he came down to Goa. The learned Judge also noted that the suit house and the suit cottages are registered in the name of Fr. Francis Xavier Fernandes and even the water bills and the electricity bills are in the name of said Fr. Francis Xavier Fernandes. The learned Judge also noted that in terms of Article 528 of the Portuguese Civil Code, in order that the right to an immoveable property can be prescribed the claimant should be in possession of the property for 15 years as his own property which was not the case in the present proceedings. The learned judge as such found that the Respondents have established that they are the exclusive owners of the suit property and the suit structures and that the Appellants were engaged only as care takers and were in permissible possession of the suit property and the suit structures and that the Appellants failed to establish that they are in exclusive possession of the suit property. The learned Trial Judge as such partly decreed the suit of the Respondents by granting the reliefs as referred to herein above.

6. The Appellants preferred an Appeal before the learned Lower Appellate Court being Regular Civil Appeal no. 14 of 2014 which came to be dismissed by Judgment and Decree dated 15.10.2015. The Lower Appellate Court has re-appreciated the evidence on record and has noted that it is not the case of the Appellants that they are in adverse possession and that their case comes under Article 528 of the Portuguese Civil Code. The learned Judge after examining the relevant provisions of the Civil Code has found that there is nothing on record that the Appellants are occupying the house and the property as their own. The learned Judge also noted that the very fact that the said Fr. Francis Xavier Fernandes was occupying the house till the year 2005 shows that the Appellants are not in exclusive possession of the suit property and the suit structure. The learned Judge further noted that the Respondent no. 1 was the co-owner of the property and, as such, the question of claiming that Fr. Francis Xavier Fernandes was the exclusive owner of the property is misplaced. The learned Judge further noted that the exclusive ownership of the property vested on the Respondents pursuant to the Orders passed in the Inventory Proceedings and prior to that as co-owners of the said property. The learned Judge also examined the declaration at exhibit 60 and noted that the said declaration shows that there was an understanding between Fr. Francis Xavier Fernandes that after the death, the house would belong to Raymond and he would have mundkarial right to the same. The learned Judge noted that the Appellants are not claiming any mundkarial or tenancy rights and further noted that the Gift Deed executed by the Fr. Francis Xavier Fernandes did not disclose any of the wishes claimed by the Appellants. The learned Judge further noted that the declaration exhibit 60 clearly shows that it was only a permission for the Appellants

to occupy the structure and the property and not as of right as claimed by the Appellants. The learned Judge also noted that in the reply to the public notice, they claimed to be Mundkars and tenants of the suit property which however they do not claim in the suit. The learned Judge as such noted that the Respondents were entitled to the relief sought and dismissed the Appeal filed by the Appellants.

7. Shri Ryan Menezes, learned Counsel appearing for the Appellants, has forcefully argued that the claim, of the Appellants has been wrongly examined in the context of adverse possession when according to him the Appellants had acquired right by prescription. Learned Counsel further pointed out that Exhibit 60 further confirms that the Appellants were in possession of the suit property and the suit house after the death of the father of the said Fr. Francis Xavier Fernandes. Learned Counsel further pointed out that as the possession of the Appellants began from the year 1991 and the suit was filed in the year 2007, the Appellants have acquired a prescriptive right of the subject property. Learned Counsel further pointed out that the very fact that the Respondents had not filed any proceedings to evict the Appellants from the subject property and the suit house would itself suggest that the possession of the Appellants has crystalised into a prescriptive right in the subject property. Learned Counsel further pointed out that there are substantial questions of law on this count which requires consideration by this Court.

8. I have duly considered the contentions of the learned Counsel appearing for the Appellants. The admitted position is that the ownership of the

property and the structures originally belonging to the father of the said Fr. Francis Xavier Fernandes as well as Respondent no.1 named Sebastiao Menino Fernandes. During the lifetime of said Sebastiao Menino Fernandes, though it is claimed by the Appellants that in the Gift Deed executed in favour of said Fr. Francis Xavier Fernandes it was understood that the subject property would be transferred in favour of the Appellants, both the Courts below upon appreciating the evidence on record and the documents have concurrently found that no such clauses were found in the Gift Deed. Apart from that the Gift Deed was on account of disposable quota and as such the legitime of the Respondent no. 1 could not be affected by such execution of the Gift Deed. In the Inventory Proceedings which were initiated, the property had devolved in favour of the Respondent no. 1. The Courts below have rightly found that the exclusive ownership of the property belonged to the Respondent no. 1 herein.

9. Both the Courts below have also concurrently found upon appreciating the evidence on record and the documents produced by the parties that the occupation of the Appellants was permissive as he was a care taker of the subject property during the absence of Fr. Francis Xavier Fernandes. The Courts below have also noted that even up to the year 2005 whenever said Fr. Francis Xavier Fernandes would return to Goa, he was residing in the suit house. All this material conclusively establishes that the occupation of the Appellants of the suit house as well as the suit property was permissive. In fact, there are pleadings in the plaint to suggest that it was the claim of the Respondents/Plaintiffs that the Appellants were in permissive possession of the property in question.

10. In the Judgment of the Apex Court reported in **(1976) 3 SCC 766** in the case of ***Jose Da Costa & anr. vs. Bascora Sadashiva Sinai Narcornim*** it has been observed at Paras 21, 22, 23, 24, 25 and 29 thus :

“21. According to Article 474 of the Portuguese Civil Code,

“possession is defined as holding or fruition of any thing or right. Para 1. The acts done by licence or permission do not constitute possession....”

22. According to Article 505.

“things and rights are acquired by virtue of possession, just as obligations are extinguished by reason of not demanding their fulfillment. The law lays down conditions and the period of time that are necessary for one as well as for the other thing. This is called prescription.”

Proviso. The acquisition of things and rights is known as positive prescription; the discharge of the obligations by reason of not demanding their fulfillment is known as negative prescription.

23. Article 528 reads thus:

“In the absence of registration of possession or title of acquisition, prescription with respect to immovable property or rights to immovable property will operate by virtue of possession for 15 years.”

24. Article 529 of the Code is as follows:

“When however, the possession of immovable property or rights to immovable property referred to in the foregoing article has lasted for a period of 30 years, prescription will operate; and no

mala fide or absence of title can be averred, except the provisions of Article 510.”

25. Thus even under the Portuguese law what appears to be clear is that permissive possession is not sufficient to prescribe title of the owner of the land.

26. ...

27. ...

28. ...

29. Article 510 reads thus:

“One who possesses a thing in another’s name cannot acquire it by prescription except if the title of possession has been inverted, either due to an act of a third party, or by objection raised by the possessor to the right of the other in whose name he was possessing it and not refuted by the latter; but in such event the prescription shall run from the date of inversion of the title. Sole para: The title is said to be inverted when it is substituted by another title capable of transferring the possession or ownership (dominio).”

Taking note of the said observations, the fact finding Courts have come to the conclusion that the Appellants were in permissive possession of the property in question and in any event there is nothing on record to show that by any act by a third party or the Appellants, there was any inversion of title in terms of the said provisions.

11. As pointed out herein above, mere permissive possession for whatever length of time cannot lead to prescriptive title unless there is a inversion of title. In the present case, the Appellants never asserted their right over to the

suit property for the statutory period of time which could lead to prescriptive title in their favour. In fact as pointed out by the Courts below the claim of the Appellants is on the basis of the declaration at exhibit 60 which clearly shows that the Appellants have admitted the title of said Fr. Francis Xavier Fernandes over the disputed property. Apart from that, the very fact that the Courts below have found that said Fr. Francis Xavier Fernandes was also residing in the suit house whenever he used to come to Goa, would clearly negate the claim of Appellants that they have asserted their right over the property in question. The fact finding Courts below have concurrently found that the Appellants were in permissive possession of the suit property, the suit has been filed in the year 2007 and the declaration in the year 2005, can in no way assist the Appellants for their claim of prescriptive title over the subject property.

12. In such circumstances, I find that there are no substantial questions of law which arise in the present Appeal for consideration. The Appeal stands accordingly rejected.

F .M. REIS, J.

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