

IN THE HIGH COURT OF BOMBAY AT GOA.

APPEAL FROM ORDER NO. 66 OF 2015

Shri Vijay A. Palekar
Major of age,
r/o Anand Bhavan,
Durgavadi, Taleigao,
Goa 403 002
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V/S

- 1] The State of Goa
Through the Chief Secretary,
Secretariat Complex,
Porvorim, Bardez, Goa.
- 2] The Economic Development Corporation of Goa
EDC Building,
Dr. Atmaram Borkar Road,
Panaji Goa.
- 3] Shri Narhari Jagannath Parsekar,
Major of Age,
r/o Varcha Wada, Arambol (Harmal)
Goa.
- 4] Shri Laximan Vishnu Thakur,
Major of age.
Mapusa, Bardez,
Goa.
- 5] Mamlatdar of Pernem,
Collectorate Building,
Pernem goa.
- 6] Shri Apa Narayan Naik
Major of age,
r/o House No.45, Hankhane,
Pernem Goa.

Respondents

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Shri A.D.Bhobe, Advocate for the appellant.
Shri D.J. Pangam, Advocate for the respondent no.2.
Shri V. Sardessai, Advocate for the respondent nos.1
and 5.
Shri Nigel Da Costa Frias, Advocate for the
respondent no.6.
None appeared on behalf of the respondents no.3
and 4.

CORAM : NUTAN D.SARDESSAI, J.
RESERVED ON :22/07/2016.
PRONOUNCED ON :05/08/2016

JUDGMENT :

1. Shri A.D. Bhobe, learned Advocate for the appellant, Shri D.J. Pangam, learned Advocate on behalf of the respondent no.2, Shri V. Sardessai, learned Advocate on behalf of the respondents no. 1 and 5 and Shri N.Costa Frias, learned Advocate for the respondent no.6 came to be heard. None appeared on behalf of the respondents no.3 and 4.

2. This appeal takes exception to the Order passed by the learned Adhoc District Judge-I by which she directed the appellant and the respondent no.6 to maintain the status quo while disposing of their applications for injunction giving rise to the present appeal. It needs reckoning that there were no cross-objections filed at the instance of the respondent no.6 whose application too was decided by the Adhoc District Judge-1 while passing the order as it did.

3. Shri A.D. Bhobe, learned Advocate for the appellant submitted that he was a bonafide purchaser and had purchased the suit plot in auction held by the respondent no.2 and the suit property was allotted to him on 28.12.2009. He had paid the purchase price in January 2010 and the Sale Deed was executed in his favour on 19th December 2013. He had exercised the acts of possession from December 2009 onwards. The plaint filed by the respondent no.6 did not refer to any acts of interference by the appellant prior to January 2014. It was also his contention that the respondent no.4 had executed the Sale Deed on the basis of the Power of Attorney allegedly forged in favour of the respondent no.3 and who in turn had mortgaged the property to the respondents no.2 having availed a loan facility. His acts of default with the respondents no.2 had entailed the re-possession of the property after due process and the Tender Notice and the appellant was the successful bidder.

4. Shri A.D.Bhobe, learned Advocate for the appellant submitted that the case of the respondent no.6 was that the Power of Attorney was a fraud and all the acts subsequent thereto were false and fabricated. In such circumstances, therefore it was incumbent on the respondent no.6 to have obtained the declaratory relief regarding the forged Power of Attorney. The property in question had vested in the respondents no.2 pursuant

to Section 29 of the State Financial Corporations Act, 1951 ("SFC Act" for short). He adverted to the photographs on record to show the acts of possession exercised by the appellant, adverted to the pleadings of the respondents no.2 which had acknowledged the ownership and possession of the appellant and, therefore, submitted that the respondent no.6 as the plaintiff was not entitled to the equitable relief of injunction. The burden was heavily on the respondent no.6 to establish a fraud which had failed to show. He adverted to the impugned Order to show that it was capricious when the learned Court had held clearly that the appellant was in defacto possession and he had directed him to maintain the status quo. He also adverted to Section 29(1) and sub-section (2) of the SFC Act to show how the rights were vested in the respondents no.2 and, therefore, the appellant had to be secured with the order of injunction against the respondent no.6 and that in favour of the respondent no.6 in a nature of the direction to maintain the status quo had to be vacated.

5. Shri V. Sardesai, learned Advocate for the respondents no.1 and 5 submitted that these respondents had no role to play which were the formal parties to the proceedings and therefore, he would not address on the tenability or otherwise of the impugned Order. Shri D.J. Pangam, learned Advocate for the respondents no.2 submitted that the Sale Deed was executed in

1998 pursuant to which the respondent no.6 had sold the property to the respondent no.3 by a registered Sale Deed having its own effect and yet the Sale Deed was sought to be challenged in the Suit filed 16 years later. The respondents no.2 had exercised their statutory rights and taken action under the said Act in the public domain. It had published the notices in the three local dailies for auction of the mortgaged property and, therefore, the respondent no.6 could not maintain the application for temporary injunction several years later which was liable for rejection on the ground of delay and laches. The respondent no.6 had also not challenged the mortgage between the respondent no.3 and the respondents no.2 and no case was made out for the grant of temporary injunction in his favour. He too urged that though the respondent no.6 had claimed that the Power of Attorney was forged, it was, however, not challenged in the proceedings nor any declaratory relief was sought in that regard and supported the case of the appellant.

6. Shri N.Costa Frias, learned Advocate for the respondent no.6 submitted at the outset that there was no necessity to challenge the Power of Attorney in the Suit filed by him. Although the appellant claimed that the transfer was effected as early as 1998, the Survey Records Form I and XIV continued to show his name in the occupant's column and

therefore, the presumption under Section 105 of the Land Revenue Code, 1968 accrued in his favour and supported his case of his possession to the suit property. There were no mutation proceedings initiated at the instance of the appellant and on that count too his case of possession to the suit property could not be entertained. It was his submission next in line that though the respondents no.2 had executed the Sale Deed in favour of the appellant, there was no document to show when it had taken over the possession of the suit property nor acts of taking over the possession was spelt out anywhere in the Sale Deed.

7. Shri N. Costa Frias adverted to the Written Statement filed on behalf of the respondents no.2 and submitted that there were no affidavits to support such a case. He also contended that though the appellant carved out the acts of possession and title to the suit property, there were no supporting affidavits. He relied in **Brahmbhatt Diwaliben Chhabildas Vs. Suraksha Co-operative Housing Society Ltd.[1997 0 Supreme (Guj) 77]** and that in **Maharwal Khewaji Trust (Regd.), Faridkot Vs. Baldev Dass [AIR 2005 SC 104]** to substantiate his case. No exceptional circumstances were made out by the appellant to vacate the Order passed by the learned Court nor to secure him with the order of injunction and, therefore, the appeal had to be dismissed. Shri A.D. Bhobe,

learned Advocate for the appellant submitted in reply that the judgment in *Brahmbhatt (supra)*, was not at all attracted in the facts of the case. The appellant had amply made out a case and, therefore, there was no basis to entertain the objection on behalf of the respondent no.6 and his appeal had to be allowed.

8. At the outset, it must be observed that the learned Trial Court while passing the impugned Order was, no doubt, seized of the fact on the pre-requisites for the grant of temporary injunction namely of the party having to establish a prima facie case, that the balance of convenience was in his favour and that it would suffer irreparable loss and injury apart from being aware of the law laid down by the Hon'ble Apex Court in **Dalpat Kumar Vs. Prahlad Singh and Others [AIR 1993 SC 296]**. Yet, however, the learned Trial Court abruptly wrapped up its discussion on the case carved out by the parties and without giving any findings on the prima facie case, balance of convenience and irreparable loss and injury held that the present appellant was in defacto possession of the suit property without in any manner spelling out what were the acts of possession prima facie established by him and directed the parties i.e. the respondent no.6 and the appellant herein to maintain status quo till further orders.

9. Such an Order on the face of it, justifies interference by an order of the remand with a direction to the learned Trial Court to address itself on the case of the parties at least on the prima facie considerations and to decide appropriately. However, i must hasten to add that having heard the parties for a considerable length of time, such an exercise would not be justified nor warranted in the facts of the case and, therefore, i would deal with the case in all its facets while deciding the appeal finally. The respondent no.6 had filed a Suit in 2014 carving a case that he was the owner and in possession of the property bearing the distinct survey number i.e. the suit property, that during one of his regular visits to the property on 10.1.2014 he had noticed the appellant interfering with his possession of the suit property and further shocked to notice that trees in the property were felled by some labourers with the help of Heavy Earth Moving Machinery by the appellant and questioned him.

10. The respondent no.6 had further carved a case that the appellant had informed him that he had purchased the suit property and even volunteered to show the Sale Deed to him. It was only then that he realised that a fraud was played on him by the respondent no.4 and the respondent no.3 in turn was the beneficiary under the Sale Deed in his favour who had mortgaged the property with the respondents no.2. It was also the case of

the respondent no.6 that he had not executed any Power of Attorney in favour of the respondent no.4 and that the respondents no.4 and 3 had played a fraud on him for which he had set the law in motion and in the circumstances, therefore, no right accrued in favour of the appellant and he was entitled to the relief of declaration that the Sale Deed of 1998 was null and void, that the Sale Deed in favour of the appellant was also null and void and for its cancellation, permanent injunction to restrain the appellant from interfering in the suit property and from assigning it or transferring it to any third parties.

11. As rightly submitted by Shri A.D.Bhobe, learned Advocate for the appellant, no relief whatsoever was sought to declare the Power of Attorney null and void which was purportedly executed by him in favour of the respondent no.4 and being the substratum or foundation of all the further transactions in a chain reaction, one giving rise to another. The respondent no.6 had also taken a plea in his pleadings that he was not conversant with any other language than Konkani and Marathi and only knew to read and write in Marathi and that the auction was not published nor made known to the general public or him in particular. This aspect of his pleadings is shown to be a clear falsehood from the pleadings of the respondents no.2 which had clearly averred at the outset that the respondent no.3 had

approached them for a term loan and mortgaged the suit property and another by way of an equitable mortgage in 1998, that they had carried out the inspection of the documents through a Competent Advocate and subsequently on account of his default were they compelled to attach the suit property under Section 29 of the SFC Act.

12. It was also their case that they had advertised the auction of the suit property in which the appellant was the successful bidder to whom it was sold pursuant to the Sale Deed dated 19.9.2013. The respondents no.2 as the Government Company and the deemed State Financial Corporation owned by the respondents no.1 had processed the loan only after getting clearance about his title and who had not played any fraud on the respondent no.6 as claimed by him. Materially they had stated that being a Government owned Corporation, they had adhered to the strict and transparent scrutiny of the documents before sanctioning the loan and that the date of the auction was published in **Marathi** and English Newspapers, 'The Navhind Times', 'Herald' and 'Tarun Bharat' on the specific dates being widely circulated in Goa. Therefore, as rightly submitted by Shri A.D. Bhobe, learned Advocate for the appellant, it cannot at all be heard on behalf of the respondent no.6 that he had no knowledge of the auction which was conducted by the respondent

no.2.

13. Besides Section 29 of the State Financial Corporations Act, reads thus:-

"29. Rights of Financial Corporation in case of default:-(1) Where any industrial concern, which is under a liability to the Financial Corporation under an agreement, makes any default in repayment of any loan or advance or any installment thereof [or in meeting its obligations in relation to any guarantee given by the Corporation] or otherwise fails to comply with the terms of its agreement with the Financial Corporation, the Financial Corporation shall have the [right to take over the management or possession or both of the industrial concerns], as well as the [right to transfer by way of lease or sale] and realise the property pledged, mortgaged, hypothecated or assigned to the Financial Corporation.

(2) Any transfer of property made by the Financial Corporation, in exercise of its powers [***] under sub-section (1), shall vest in the transferee all rights in or to the property transferred [as if the transfer] had been made by the owner of the property."

Therefore, there is again force in the contention of Shri A.D.Bhobe, learned Advocate for the appellant, that the respondents no.2 had acted as per the requirements of the statute and, therefore, it was not open to the respondent no.6 to

question either the auction and/or the execution of the Sale Deed in favour of the appellant.

14. The appellant had specifically carved a case that he had read the notice in the local daily, participated in the auction and after inspecting the suit property had decided to participate in the auction in which he had finally purchased the suit property. He was given the letter of allotment dated 28.12.2009 pursuant to which he had paid the entire Purchase price to the respondents no.2 on 28.1.2010 and ultimately the Sale Deed was executed in his favour on 19.9.2013. He had visited the property every year since the time of the allotment and during one of his visits to the property in March 2013 he had found that the water body was filled up with earth and made inquiries. He had also carved a case that he had started the cleaning and clearing work during the Diwali Vacation which was completed by 1.12.2013, thereafter started the preparation for a barbed wire fencing and with the assistance of his friend and the labourers had started the work in the suit property. It was only in January 2014 that the labourers were asked to stop the work when he had the first interaction with the respondent no.6 and whom he kept in the loop about the purchase of the suit property by him and also furnished him with the documents to substantiate his case.

15. The records reveal that he had produced the photographs to substantiate his case on the various acts of possession in the nature of clearing the property, carrying out the excavation and erecting the barbed wire fencing apart from using a Bulldozer in the property. The respondent no.6 had challenged the Sale Deed of 1998 executed by the respondent no.4 in favour of the respondent no.3 in a Suit filed 16 years later and sought the relief of temporary injunction alongwith it. The application on the face of it was defeated by delay and laches. Even assuming that the challenge to the Sale Deed is ignored and it was the acts of the appellant alone which propelled him into motion, nonetheless it must be said from the evident material that the respondent no.6 had not been able to meet the case of the appellant on his definite acts of possession apart from having come in rightful possession of the suit property pursuant to the auction sale at the instance of the respondents no.2.

16. The learned Trial Court had rightly held that he was a bonafide Purchaser and, therefore, his possession had to be protected unlike the respondent no.6 who had nothing to fall back upon including any affidavits to substantiate his case of possession when the respondent no.4 had transferred the property in favour of the respondent no.3 who in turn had secured it with the respondents no.2 on availing loan from them.

Therefore, merely falling back on the presumption arising in his favour under Section 105 of the Land Revenue Code in terms of the Survey Records entries would not stand him in good stead when the appellant had carved not only his title but also the acts of possession in respect of the suit property.

17. Maharwal Khewaji Trust (*supra*), held that unless and until a case of irreparable loss or damage is made out by a party to the suit, the Court should not permit the nature of the property being changed which also includes alienation or transfer of the property which may lead to a loss or damage being caused to the party who may ultimately succeed and may further lead to a multiplicity of proceedings. In the case at large no case of irreparable loss was made out except contending that the legal proceedings are likely to take a long time, and therefore, the respondent should be permitted to put the scheduled property for better use. In the facts and circumstances of the case, the lower Appellate Court and the High Court were not justified in permitting the respondent to change the nature of property by putting up construction as also by permitting the alienation of the property, whatever may be the condition in which the same was done.

18. Brahmhatt (*supra*), challenged in appeal the rejection of injunction application to restrain the defendant from

disturbing or interfering with the possession. The finding of fact as regards the actual and the physical possession was not in favour of the plaintiff. There was a specific and positive finding upheld by the Appellate Court that the defendant was in possession of the disputed property and in view of that the impugned order was justified. However, the Court simultaneously directed the defendant not to change the nature and character of the disputed land during the pendency of the suit. The plaintiff was not granted any interim injunction simply on the ground that the defendant was found to be in possession.

19. This judgment would rather support the case of the appellant and not that of the respondent no.5. In any view of the matter, the learned trial Court could not have abruptly directed the appellant to maintain status quo when he had established his right to the suit property and was the bonafide purchaser for value, otherwise having established his acts of possession to the suit property. The respondent no.6 on the contrary had not shown any acts of possession and quite on the contrary it was borne out that the respondents no.2 which had come in possession of the suit property by virtue of its mortgage at the instance of the respondent no.3 had sold the property in auction to the appellant. The Trial Court, therefore, could not have secured the respondent no.6 with the order even of maintaining

the status quo and ought to have rather secured the appellant with the order of injunction when the equities lay in his favour, the balance of convenience too was in his favour and moreover unlike the respondent no.6 he had approached the Court with clean hands and without any delay and laches. The impugned order, therefore, warrants interference in appeal and hence, I pass the following order:-

Order

The appeal is allowed whereby the impugned order directing both the parties to maintain status quo is quashed and set aside and the appellant is secured with the relief of injunction as prayed for in the application.

NUTAN D.SARDESSAI, J

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