

IN THE HIGH COURT OF BOMBAY AT GOA

SECOND APPEAL NO. 82 OF 2006

1. Shri Atmaram Xembu Poi Palondicar,
behind Fatima Convent,
Margao
 - a. Ramchandra Atmaram Pai Palondicar,
(since deceased represented by
his legal heirs)
 - aa) Rohan R. Pai Panandikar,
 - ab) Nutan Pai Panandikar,
 - ac) Rohit R. Pai Panandikar,
 - ad) Smt. Gauri Pai Panandikar,
 - b. Smt. Rajani Ramchandra Panandikar,
 - c. Shambu Atmaram Pai Panandikar,
 - d. Smt. Anjali Shambu Pai Panandikar,
 - e. Vishwambhar Atmaram Pai Panandikar,
 - f. Smt. Aruna Vishvambhar Pai Panandikar,
 - g. Shanu Atmaram Pai Panandikar,
 - h. Smt. Kunda Shanu Pai Panandikar,
 - i. Kamlesh Atmaram Pai Panandikar,
 - j. Smt. Mangala Kamlesh Panandikar,

All represented through their
Attorney Ramchandra Atmaram Pai
Panandikar,
r/o House No.262,
Behind Fatima Convent,
Margao Goa.
- Appellants

V e r s u s

1. Xencora Anant Verlekar,
(now deceased)
presently represented by his legal heirs,
 - a. Amrut Shankar Verlekar (deceased)
 - b. Smt. Kalavati Amrut Verlekar (deceased)
both r/o House No.40/C,
Layamati, Davorlim,
Navelim, Salcete Goa.
 - c. Nagesh Shankar Verlekar,
 - d. Smt. Neelavati Shankar Verlekar,
 - e. Ganpat Shankar Verlekar, (deceased)
All r/o Behind Don Bosco Technical Institute,
Fatorda, Margao.
 - f. Krishna Shankar Verlekar, (deceased)

- g. Smt. Sheela Krishna Verlekar,
Both r/o House No.445, Layamati,
Davorlim, Navelim, Salcete Goa.
(since deceased represented by
her legal heirs)
- g(a) Smt. Kalpana Gaurish Raikar,
- g(b) Shri Gaurish Parisram Raikar,
Both r/o Fatorda, Margao,
- g(c) Shri Atul Krisna Verlekar,
- g(d) Smt. Anisha Atul Verlekar,
- g(e) Shri Avadhut Krisna Verlekar, (deceased)
- g(f) Smt. Manish Avadoot Verlekar,
All r/o House No.445, Layamati,
Davorlim, Navelim, Salcete.

- 2. Mrs. Gangabai Shankar Verlekar
(deceased) ... Respondents

Mr. A. D. Bhobe, Advocate for the appellants.

Mr. G. Shirodkar, Advocate for respondent nos. 1(a) and 1(d).

Respondent no.1(c) in person.

CORAM : F. M. REIS, J

DATE : 22nd January, 2016

ORAL JUDGMENT

Heard Mr. A. D. Bhobe, learned counsel appearing for the appellants, Mr. G. Shirodkar, learned counsel appearing for the respondent nos. 1(a) and 1(d) and the respondent no.1(c) in person.

- 2. The above appeal came to be admitted by order dated 06.11.2006 on the following substantial questions of law.

(a) Whether the District Court was correct in holding that the appellants/original plaintiffs are owners and

possessors of the suit land ?

(b) Whether the Court has not misconstrued the provisions of Section 34 of the Specific Relief Act, 1963 which deals with declaratory reliefs ?

(c) Whether the Court was correct in holding that the appellants/original plaintiffs were not entitled for a declaratory decree more particularly when it was clear from the evidence on record and as also been found by the Court that the respondents/original defendants had denied the appellants' title/ownership to the suit property ?

3. Mr. Bhobe, learned counsel appearing for the appellants has pointed out that the learned Trial Judge has decreed the suit filed by the appellants inter-alia for a declaration as well as for restoration of possession. The learned counsel further submitted that it is the case of the appellants that pursuant to the sale deed executed way back in the year 1922, the appellants along with other two persons have purchased 4/5th of the disputed property. The learned counsel further pointed out that thereafter the appellants have also acquired in public auction the rights of the other two persons namely Keni and Karapurkar. The learned counsel further pointed out that based on the said acquisition in public auction, the property came to be described in the Land Registration Document under no.32228. The

learned counsel further submitted that the appellants were in possession of the disputed property and as such, filed the suit for a declaration of title as well as for restoration of possession as according to the appellants the respondents have no right to the disputed property. The learned counsel further pointed out that as per the boundaries shown in the plaint such boundaries corresponds to the boundary as shown in the Land Registration Document. The learned counsel further pointed out that the learned Lower Appellate Court has erroneously interfered with the judgment of the learned Trial Judge on the ground that there was denial of title by the appellants and as such the appellants were not entitled for the relief under Section 34 of the Specific Relief Act. The learned counsel further pointed out that it is the case of the respondents that they have acquired rights over the disputed property based on prescription. The learned counsel further pointed out that the learned Lower Appellate Court has not examined this aspect to come to the conclusion that the appellants have no right to the relief sought in the suit. The learned counsel further pointed out that the learned Lower Appellate Court has relied upon the judgment passed in the year 1907 filed by the predecessor in title of the appellants against three persons namely Surya Zoi, his wife and another wherein the disputed premises therein which was a pagoda was under reconstruction. The learned counsel further pointed out that in the said suit the Court has come to the conclusion that the

defendants therein had acquired right to such premises by prescription. The learned counsel further submitted that the learned Lower Appellate Court has relied upon the said judgment to non suit the claim of the appellants that they were the owners of the suit property on the basis of the sale deed of the year 1922 when according to him the suit property does not correspond to the entire disputed property shown in the said suit. The learned counsel further pointed out that the learned Lower Appellate Court has not at all scrutinized the material on record to non suit the appellants based on the claim of prescription raised by the respondents. The learned counsel further submitted that as such the impugned judgment passed by the learned Lower Appellate Court deserves to be quashed and set aside and the matter be directed to be reconsidered by the learned Lower Appellate Court afresh.

4. On the other hand, Mr. G. Shirodkar, learned counsel appearing for the respondent nos. 1(a) and 1(d) as well as Mr. Verlekar, respondent no.1(c) in person have vehemently opposed to the submissions of the learned counsel appearing for the appellants. Mr. Shirodkar, learned counsel has pointed out that the case put forward by the respondents is independent from the claim of the said Zoi and others in the suit filed in the year 1907. The learned counsel further pointed out that it is the case of the respondents that they were independently enjoying the disputed property for last

over 55 years. The learned counsel further pointed out that as the person whose right have extinguished by the judgment of the year 1907, the question of claiming any right to the disputed property based on such sale deed is totally erroneous. The learned counsel further pointed out that as such the learned Lower Appellate Court has rightly come to the conclusion that the appellants have no right to the property based on the sale deed of the year 1922 and as such there is no case made out by the appellants for any interference in the impugned judgment.

5. Mr. Verlekar, the respondent no.1(c) in person has pointed out that there was an order passed by the Court dismissing the suit filed by the appellants as abated and the appellants have chosen the remedy of revision before this Court when the appeal was provided in terms of Order 43 of the CPC. The said respondent further pointed out that though the revision was partly allowed and the matter was remanded to the learned Trial Judge, this issue has to be considered as it goes to the root of the matter. The said respondent further pointed out that though the Special Leave Petition challenging the order passed by this Court was filed by the respondents was dismissed, this by itself would not preclude the respondents from raising such contention. The respondent as such submits that the suit filed by the appellants deserves to be dismissed as abated. The respondent further submitted that the suit is bad for

non joinder of necessary party and as such according to him the suit deserves to be rejected on this count also.

6. I have considered the submissions of the learned counsel and I have also gone through the records. The learned Lower Appellate Court while disposing of the appeal preferred by the respondents has erroneously come to the conclusion that there was no denial of title by the respondents but however, on bare reading of the averments at pages 1 and 2 of the written statement, the respondents denied the claim of title of the appellants to the subject property. In such circumstances, the findings of the learned Lower Appellate Court to that effect cannot be sustained and deserves to be quashed and set aside. The relief sought by the appellants for declaration in terms of Section 34 of the Specific Relief Act, 1963 is as such justified in the facts and circumstances of the present case. The said substantial question of law on that count is answered accordingly.

7. With regard to the rival contentions on merits the appellants have their claim of title on the basis of the sale deed of the year 1922. It is the contention of the respondents that the said sale deed was not registered and as such it is not valid. The said contention cannot be accepted as, as per the law in force at that relevant time such sale deed was not compulsorily registered. In such circumstances, as the registration was not compulsory at that

time, the contention of the respondents that the sale deed would not create title in favour of the appellants cannot be accepted. Apart from that, the records also reveal that pursuant to the purchase by the appellants based on the public auction, somewhere in the year 1935 there were two inscriptions of two portions in the disputed property in favour of the appellants. Considering the said inscriptions in the Land Registration Document on 20.08.1953 the effect in law under Article 953 of the Portuguese Civil Code would be available to the appellants. No doubt, such presumption in law is rebuttable to be established by cogent evidence. In the present case, the only aspect as such to be examined is whether the respondents have established their claim of prescriptive title. No doubt, the contention of the respondents that the sale deed of the year 1922 is executed in favour of the appellants is by a person non domino would have to be examined on its own merits on the basis of the evidence on record. In the present case, the only material relied upon by the learned Lower Appellate Court on that count is based on the judgment passed in the year 1907. As pointed out that herein above, the said judgment refers to the land which was used as a pagoda and there is no finding of the learned Lower Appellate Court that the disputed property in the present suit includes the whole pagoda referred to in the said suit. Apart from that, Mr. Bhobe, learned counsel appearing for the appellants has pointed out that in the deposition of PW1 he has clearly identified the suit property as

plot No.4 shown in the plan produced on record. On bare perusal of the said plan, the pagoda if at all prima facie does not appear to extend to the whole disputed property in the present suit. Apart from that, it is also to be noted that the learned Lower Appellate Court has failed to consider that the claim of the respondents is independent and not based on the findings in the suit disposed of in the year 1907. In such circumstances, the learned Lower Appellate Court had to examine and scrutinize the material produced by the respondents to establish their claim of prescriptive title over the disputed property

8. Mr. Shirodkar, learned counsel appearing for the respondent nos. 1(a) and 1(d) has fairly accepted that there is no positive finding rendered by the learned Lower Appellate Court based on the scrutiny of evidence produced by the respondents on such count. The findings with regard to possession would be very material to examine the case of the respondents that they have acquired prescriptive title over the disputed property. It is well settled that the first appeal is a substantive right of the party and as such the First Appellate Court is expected to examine each and every piece of material on record while coming to the conclusion that the findings of the learned Trial Judge are not to be accepted. In the present case, the learned Lower Appellate Court has not at all scrutinized the material on record to come to the conclusion that the

respondents have established their claim of prescriptive title over the disputed property. On perusal of the Judgment of the learned Lower Appellate Court, the learned Judge has non-suited the appellants essentially on the ground that the appellants were not in possession of the suit land on the basis of the Order passed by the Sub-Divisional Magistrate, Margao. But, however, the suit itself was for restoration of possession based on title which cannot be a ground to reject such prayer if the appellants are otherwise entitled. The learned Judge has, thereafter, noted that the Sale Deed dated 28.01.1922 at exhibit 23 is bad in law without ascertaining whether the subject matter of the said Sale Deed was the same, as the one which was the subject matter of the Judgment dated 18.07.1907. As already pointed out herein above, the subject matter of the said suit was a pagoda/premises whereas the subject matter of the present suit, prima facie, is the open land as identified in the plan referred to herein above. The learned Judge has also failed to note that the respondents are independently claiming a right or prescription based on possession of the disputed property and they also admit that they have no title to the suit property. But, however, the specific case of the appellants is that the subject matter of the two proceedings were different and, in any event, the respondents are claiming an independent prescriptive right over the subject property and not through any of the parties to the said suit. In fact, on perusal of the Judgment of the learned Trial Judge, upon

appreciating the evidence of the respondents, there was a specific finding therein that the appellants have failed to establish their possession over the subject property. As already pointed out herein above, the subject property was registered in the Land Registration Office in the name of the appellants and in terms of Article 953 of the Portuguese Civil Code, there is a presumption that the inscription in the name of such person would imply ownership and possession in his favour. This crucial aspect had to be examined by the Lower Appellate Court whilst considering whether the respondents have established their prescriptive right over the disputed property. The learned Lower Appellate Court should have examined the evidence of the appellants in totality whilst coming to the conclusion whether the suit property in the present suit and the earlier suit filed by the Predecessor-in-title of the appellants was the same. But, on bare perusal of the records in the suit disposed of in the year 1907, prima facie, shows that only a pagoda/structure was sought to be repaired or reconstructed by the defendants therein which was the subject matter of such suit. As the learned Lower Appellate Court has failed to consider all the material aspects nor scrutinized each and every material on record whilst disposing of the substantive suit filed by the appellants, it would be appropriate in the interest of justice to quash and set aside the Judgment of the learned Lower Appellate Court and remand the matter to the learned Lower Appellate Court to decide the appeal filed by the respondents afresh after hearing

the parties in accordance with law.

9. Considering the above, all the remaining contentions of the parties including that of Mr. Verlekar, Respondent no. 1(c) in person are left open to be examined by the Lower Appellate Court on its own merits in accordance with law. The substantial questions of law are answered accordingly.

10. In view of the above, I pass the following :

O R D E R

- (i) The appeal is partly allowed.
- (ii) The impugned judgment and decree passed by the learned Lower Appellate Court dated 06.06.2005 is quashed and set aside.
- (iii) Regular Civil Appeal No. 99/2002 is restored to the file of the learned Lower Appellate Court.
- (iv) The learned Lower Appellate Court is directed to dispose of the said appeal afresh in the light of the observations made herein above after hearing the parties in accordance with law.
- (v) The parties are directed to appear before the learned Lower Appellate Court on 31.03.2016 at 10.00 a.m.

(vi) The appeal stands disposed of accordingly.

F. M. REIS, J

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