IN THE HIGH COURT OF BOMBAY AT GOA

MISC.CIVIL APPLICATION NO. 679 OF 2016
IN
SECOND APPEAL NO. 15 OF 2013

SHRI FRANCISCO D'COSTA AND ANR. ... Applicants

Versus

SHRI. FRANCISCO XAVIER D'COSTA AND ANR. ... Respondents

Mr. Kaif Noorani, Advocate for the applicants.

Mr. R. G. Ramani, Advocate for the respondents.

Coram:- F. M. REIS, J.

Date:- 21st October, 2016

P.C.

Heard Mr. K. Noorani, learned counsel appearing for the applicants and Mr. R. G. Ramani, learned counsel appearing for the respondents.

2. The above application filed by the applicants is on the ground that based on the judgment passed by this Court while disposing of Second Appeal No.15 of 2013 dated 17.12.2013, the applicants who

have half share in the subject property are sought to be evicted from the house existing therein.

3. Mr. Noorani, learned counsel appearing for the applicants points out that this Court while disposing of Second Appeal has not given any finding on the contention that the applicants cannot be evicted from the subject house before the partition of the subject property by metes and bounds. It is further pointed out that as the Court has committed a mistake while disposing of the said Second Appeal filed by the applicants without examining this aspect, it is in the interest of justice to recall the judgment passed in the said Second Appeal and rehear the appeal. The learned counsel further pointed out that it cannot be disputed that this contention has been raised by the applicants in the appeal memo and in fact this Court has not dealt with such aspect while disposing of Second Appeal. In support of his submissions, the learned counsel has relied upon the judgment of the Apex Court reported in ***AIR 1999 SC 2089 in the case of Budhia Swain and others v/s Gopinath Deb and others.***

4. On the other hand, Mr. R. Ramani, learned counsel

appearing for the respondents submits that the question of recalling the judgment would not arise as no inherent powers in terms of Section 151 of the Civil Procedure Code can be exercised in favour of the applicants who had an opportunity to challenge such judgment before the Appellate forum. It is further pointed out that in the meanwhile the Execution Proceedings have already been initiated which are being defended by the applicants and as such the question of recalling the judgment would not arise at all. The learned counsel as such points out that as the application itself is not maintainable, the question of granting any relief to the applicants in such circumstances would not arise at all. The learned counsel as such points out that the application be rejected.

5. I have considered the submissions of the learned counsel and with the assistance of the learned counsel, I have also gone through the records. The premise on which the above application has been moved is that this Court while disposing of Second Appeal has failed to examine the contention of the applicants that the applicants cannot be evicted from the house located in the subject common property before the actual partition. It is further pointed out that the effect of the decree would be that the applicants would have to vacate the part of the house

in their possession even before the Collector examines the direction in the decree as to whether the whole house would fall within the share of the respondents herein. The preliminary decree passed by the learned Trial Judge which came to be up held by this Court inter alia reads thus :

> "It is hereby ordered that the suit of the plaintiff is partly decreed. The defendants are directed to quit and vacate the part of the suit house situated in the suit plot which is occupied by them. Preliminary decree is passed directing the partition of the suit plot into two equal halves. Issue letter to the Collector, South Goa, to carry out the partition with direction to separate the plots in such a manner that the suit house lies in the portion allotted to the plaintiffs, if feasible."

6. Reading the reliefs granted cumulatively as a whole, it clearly shows that the obligation on the applicants to vacate the part of the house would depend upon the decision of the Collector as to whether the entire portion of the house would fall within the share of the respondents herein. Hence, the assumption on which the application came to be filed is itself misplaced and as such the question of recalling

the judgment as sought by the applicants would not arise at all.

7. The application stands accordingly rejected.

F. M. REIS, J.

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