

IN THE HIGH COURT OF BOMBAY AT GOA.

SECOND APPEL NO. 114 OF 2008.

1. Shri Dattaram Laximan Gawas,
Of major age, married, farmer,
2. Shri Babaji Laximan Gawas,
Of major age, married, farmer,
Both residents of Latambarcem,
Bicholim-Goa.Appellants.

Versus

1. Shri Vithoba Keshav Gawas,
Of major age, married, farmer
2. Smt. Lila Vithoba Gawas,
Of major age, married,
Housewife(expired), represented
Through her legal heirs
- 2a. Smt. Nali Nilgo Gaonkar,
- 2b. Shri Nilgo Ladulo Gaonkar,
Both residents of Goa Wada,
Uspa, Bicholim-Goa.
3. Shri Jesgav Vithoba Gawas,
Of major age, married, farmer(expired)
Through his legal representatives,
 - 3a. Shri Dnyeshwar Keshav Gawas(minor)
 - 3b. Shri Parshivram Keshav Gawas(minor)
 - 3c. Kum. Rameshwari Keshav Gawas(minor)
4. Smt. Leela Keshav Gawas,
5. Shri Shantaram Keshav Gawas(expired)
Represented through his legal representatives,
 - 5a. Smt. Shevanti Govind Ghadi (daughter)
 - 5b. Shri Govind Antulo Ghadi(son in law)
Both of major age, residing at House No. 14,
Kasarpal, Latambarcem, Bicholim-Goa.
 - 5c. Smt. Maya Ramesh Gawas(daughter)

- 5d. Shri Ramesh Gopal Gawas(son in law)
Both of major age, residing at Ravan,
House No. 15, Kerim, Sattari-Goa.
 - 5e. Smt. Bela Krishna Gaonkar(daughter),
 - 5f. Shri Krishna Gaonkar(Son in law)
Both of major age, residing at Taddi,
Usap, Latambarcem, Bicholim-Goa.
 - 5g. Sunita Shantaram Gawas (daughter)
 - 5h. Shri Deepak Shantaram Gawas(son)
 - 5i. Nirmal Shantaram Gawas(daughter)
 - 5j. Shri Sagar Shantaram Gawas (son)
All residing at Kharpal,
Latambarcem, Bicholim-Goa.
 - 6. Shantabai Shantaram Gawas,
 - 7. Shri Shankar Keshav Gawas,
 - 8. Smt. Parvati Shankar Gawas,
All residents of Latambarcem,
Kharpal, Bicholim-Goa.
- Respondents.

Mr. Nigel Costa, Advocate for the appellants.

Mr. A. Kansar, Advocate for the respondents.

CORAM : F.M. REIS, J.

DATE : 29th January, 2016.

ORAL JUDGMENT

The above appeal came to be admitted by an order dated 14.7.2009 on the following substantial questions of law:-

- A) Whether the finding of the Appellate Court that the suit was beyond limitation is bad in law and suffers from an error

apparent on the face of the record in as much as no issue was framed on the point of limitation and no opportunity was given to the Appellants to prove or disprove the said issue by leading evidence in that regard ?

- B) Whether the finding of the Appellate Court that the suit properties had not properly identified by the Appellants is perverse and contrary to the record ?
- C) Whether the Appellate Court has failed to consider the fact that the Respondents 5 to 8 had miserably failed to prove that they had any right or title to the suit properties and therefore the impugned judgment and decree upholding the dismissal of the suit as against the said respondents suffers from an error apparent on the face of the record ?

2. Mr. Nigel Costa Frias, learned Counsel appearing for the appellants points out that the appellants would press only for the relief of permanent injunction in the suit and does not press for the relief of declaration therein. Mr. Nigel Costa Frias, learned Counsel submits that the appellants have purchased a specific share of the property pursuant to the sale deed dated 11.12.1959 whereby 7/126th part of the 2/3rd of the property which according to him corresponds to the property surveyed under survey nos. 195/4, 5, 6 and 7 and survey no.196/2 of village Latambarcem, Bicholim Taluka. The learned Counsel further points out that on the basis of the sale deed which is at Exh. PW1/B, the mother of the appellants and respondent no.1 along with four others have purchased the said share of the said property

and as such, the appellants are entitled for the relief of permanent injunction against the respondents. The learned Counsel further points out that the respondent nos.5 to 8 have no right to the property and as such, the Courts below were not justified to refuse the relief of permanent injunction to the appellants. The learned Counsel further submits that the Lower Appellate Court has erroneously come to the conclusion that the relief of permanent injunction has become time barred, as it is well settled that cause of action for filing of a suit for injunction is a continues cause of action. The learned Counsel further submits that the survey record reflects the name of the appellants as well as the respondents and, as such, the findings of the Courts below that the appellants have not identified the property is totally erroneous. The learned Counsel further points out that the respondent nos. 5 to 8 have miserably failed to establish their claim that they have right to the suit property and, as such, the question of refusing the relief to the appellants against the respondent nos. 5 to 8 is totally unjustified. The learned Counsel has thereafter taken me through the findings of the learned Trial Judge in the judgment dated 30.4.2003 to point out that though the respondents have admitted that the appellants are co-owners of the property, the learned Trial Judge has erroneously come to the conclusion that the appellants have failed to establish their co-ownership right over the disputed property. The learned Counsel further submits that 7/126th part of 2/3rd of the property have been identified by the appellants and as such, the appellants was entitled for permanent injunction as prayed for. The

learned Counsel has thereafter taken me through the judgment of the Lower Appellate Court to point out that the Lower Appellate Court has erroneously dismissed the appeal filed by the appellants.

3. Mr. A. Kansar, learned Counsel appearing for the respondents on the other hand has submitted that the respondent nos. 1 to 4 are co-owners with the appellants in respect of the property purchased, pursuant to the sale deed dated 11.12.1959 to the extent of 7/126th part of 2/3rd of the said property. The learned counsel further submits that this part portion of the property purchased by the appellants has not been identified and as such, the question of granting any relief of permanent injunction would not arise. The learned Counsel further points out that the respondent nos. 5 to 8 are also co-owners as they have a right to the remaining share of the larger property and, as such, the Courts below were justified to come to the conclusion that the appellants have failed to establish or identify the suit property. The learned Counsel further submits that unless and until the share of the purchased share by the appellants is clearly identified, the question of granting any permanent injunction against the respondents is not at all permissible. The learned Counsel further submits that the substantial question of law no. 2 framed by this Court is to be answered in favour of the respondents and as such, the appeal be dismissed. The learned Counsel further submits that the respondents have produced cogent evidence on record to establish their right over the suit property, and as such, the third substantial

question of law is also to be answered in favour of the respondents.

4. I have considered the arguments advanced by the learned counsel appearing for the respective parties and I have also gone through the record.

5. On perusal of the sale deed at Exh.PW1/B, I find that the mother of the appellants and the respondent no.1 along with four others persons have inter alia purchased $7/126^{\text{th}}$ part of $2/3^{\text{rd}}$ share in the property known as "Kumar Ganvachem Borodo". Said property admittedly has not been identified on the plan. The appellants have not shown the extent of the whole property to point out the exact location of the portion of the property purchased by them. Apart from that the lower appellate Court has also held that the other third parties who have shares in the disputed property have not been made parties to the suit, and, as such, the suit filed by the appellants also deserves to be dismissed for non-joinder of the necessary parties. The appellants also did not dispute that the respondent nos. 1 to 4 are also co-owners along with the appellants of the disputed property. In such circumstances, unless physical partition has been established to show the extent of right of the appellants over the disputed property, the question of issuing any relief of permanent injunction against the remaining co-owners of the suit property which admittedly also includes the respondent nos. 1 to 4, is not at all justified. One Co-owner, cannot get an injunction against the another co-owner unless

the property has been partitioned or the co-owners established the extent of his specific share over the disputed property. Having admittedly failed to do so, the Courts below were justified to come to the concurrent conclusion that the appellants have failed to identify the disputed property. The findings of facts on that count based on appreciation of the evidence cannot be re-appreciated by this Court in Second Appeal under Section 100 of the CPC. On this ground alone the Courts below were justified to come to the conclusion that the appellants were not entitled for the reliefs in the suit. The second substantial question of law is accordingly answered against the appellants.

6. With regard to the first substantial question of law, it cannot be said that the cause of action for filing the suit is time barred as it is settled law that cause of action for filing of the suit for injunction is continues cause of action and as such, the Lower Appellate Court was not justified to come to the conclusion that the relief on that count was barred by law of limitation. The first substantial question of law is answered accordingly.

7. As regards the third substantial question of law, considering that the appellants have not established the extent of claim over the disputed property, the question of examining correctness of the findings of the lower Appellate Court in connection with the claim of the respondents over the disputed property would

not at all be necessary as the appellants have failed to establish a specific portion of the land correspond to their shares over the disputed property.

8. There is no case made out for interference in the impugned judgment and order. Hence, I find no merit in the appeal which stands accordingly rejected.

F.M. REIS, J.

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