

IN THE HIGH COURT OF BOMBAY AT GOA

CIVIL REVISION APPLICATION NO. 6 OF 2016

MR. NARAYAN DHOLO GAONKAR AND 2
ORS.,

... Petitioners

Versus

MRS. BELA ROSA ALMEIDA E COLACO
AND 2 ORS.

... Respondents

Mr. Ashwin D. Bhobe, Advocate for the petitioners.

Mr. Jagannath Jayant Mulgaonkar, Advocate for the respondent nos.
1 and 2.

Coram:- F. M. REIS, J.

Date:- 15th November, 2016

ORAL ORDER :

Heard Mr. A. D. Bhobe, learned counsel appearing for the petitioners and Mr. J. J. Mulgaonkar, learned counsel appearing for the respondent nos. 1 and 2.

2. The above petition takes exception to the judgment passed by the learned Lower Appellate Court whereby an application under Order VII Rule 11 of Civil Procedure Code filed by the

respondents which came to be allowed by the learned Trial Judge was set aside by the impugned judgment dated 08.09.2015.

3. Mr. Bhobe, learned counsel appearing for the petitioners has taken me through the averments in the plaint to point out that as per the case advanced by the respondents themselves the alleged erroneous entry came to be known in the year 1970 and as such though it is contended in the plaint that the cause of action is continuous, there is no specific mention in para 11 as to when the cause of action arose to file such suit. The learned counsel further pointed out that on the basis of the averments in the plaint itself the suit has been filed after 12 years, which stands barred in terms of Order VII Rule 11(d) of the Civil Procedure Code and plaint deserves to be rejected. The learned counsel further pointed out that as there is no specific mention in the plaint to ascertain as to when the cause of action arose, the learned Appellate Court was not justified to interfere in the judgment of the Trial Court. The learned counsel as such points out that the impugned judgment passed by the learned Lower Appellate Court cannot be sustained and deserves to be quashed and set aside.

4. On the other hand, Mr. J. J. Mulgaonkar, learned counsel appearing for the respondent nos. 1 and 2 has supported the impugned judgment of the learned Lower Appellate Court. The learned counsel has pointed out that it is clearly the case of the respondents that the cause of action is continuous as the suit was for declaration of the title and such title gets divested only in case the respondents established the acquired right by adverse possession. In support of his submissions, the learned counsel has relied upon the judgment of this Court reported in **CDJ 2014 BHC 1156** in the case of ***Pedro do Rosario Fernandes alias Pedro Antonio Miguel Fernandes V/s Wilfredo Xavier Jose Monteiro and others.***

5. I have considered the submissions of the learned counsel and I have also gone through the records. It is now well settled that to examine an application under Order VII Rule 11 of the Civil Procedure Code, the averments in the plaint have to be examined and not the defence raised by the defendants. In the present case, it is the contention of the respondents/plaintiffs that the cause of action is continuous and the suit is for declaration of the title. In the present case, the question of examining the defence of the petitioners while

dealing with such application under Order VII Rule 11 of the Civil Procedure Code would not be justified. This Court in the judgment in the case of ***Pedro do Rosario Fernandes*** (supra) has taken a view at para 5 which reads thus :

“5. I have carefully considered the submissions of the learned Counsel. I have also gone through the records. Shri J. E. Coelho Pereira, learned Senior Counsel appearing for the Appellant, is justified to contend that the averments in the plaint that the Appellant obtained the certified copy of the survey records only in August, 1996 have not been disputed by the Respondents in the written statement. Be that as it may, the suit filed by the Appellant is for declaration of title. Under the provisions of the Limitation Act, specially Section 27 of the Limitation Act of 1963, the right to immoveable properties stands prescribed as per the period provided in the schedule of the said Act. Article 65 and 66 of the Limitation Act, 1963, provides that title to the property is lost only by adverse possession for the specified period. In the present case, the

finding of the learned Judge that the suit for declaration of title is barred by limitation, cannot be accepted. The cause of action to file a suit for declaration of title is continuous and, as such, a suit can be filed as long as the title to the property subsists. In the present case, unless and until the Respondents establish that they have become owners by adverse possession, the findings of the learned Judge that the suit is barred by limitation is unsustainable and deserves to be quashed and set aside. The Apex Court in the Judgment reported in *(2010) 2 S.C.C. 194* in the case of ***Daya Singh & anr. vs. Gurudev Singh (Dead) by Lrs & Ors.***, has observed at Para 18 has stated thus :

“18. In this view of the matter, we do not find any ground to agree with the findings of the high Court that the suit was barred by time because of its filing after 18 years of entering into the compromise. The question of filing the suit before the right accrued to them by compromise could not arise until and unless infringement of

that right was noticed by one of the parties. The High Court in the impugned Judgment, in our view, had fallen in grave error in holding that the suit was barred by time and had ignored to appreciate that the rights of the appellants to have the revenue record accrued first arose in 1990 when the appellants came to know about the wrong entry and the respondents failed to join the appellants in getting it corrected. In our view, the High Court was not justified in holding that mere existence of a wrong entry in the revenue records does not, in law, give rise to a cause of action within the meaning of Article 58 of the Act. No other point was urged before us by the learned counsel for the parties.”

Considering the ratio laid down by the Apex Court, merely entering the name in the Survey Records by itself would not give a cause of action to the Appellant/Plaintiff to file a suit for

declaration unless his right to enjoy the property has been infringed or at least there is a clear and unequivocal threat to infringe the right of the Appellant/Plaintiff in the suit property. As such, the Lower Appellate Court, was not justified to come to the conclusion that the suit for declaration was barred by limitation taking note of the cause of action as pleaded in the plaint. The first substantial question of law is answered accordingly.”

6. Taking note of the observations in the said judgment, I find that there is no jurisdictional error committed by the learned Lower Appellate Court by allowing the appeal preferred by the respondents and dismissed the application under Order VII Rule 11 of the Civil Procedure Code. Hence, no case is made out by the petitioners for interference in the impugned judgment. Consequently, the petition stands rejected.

F. M. REIS, J.

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