

IN THE HIGH COURT OF BOMBAY AT GOA.**APPEAL FROM ORDER NO. 15 OF 2017.**

- (1) Mrs. Joaquim D'Souza,
(Deceased)
aged about 73 years.
 - (2) Mr. George D'Souza,
aged about 44 years.
 - (3) Mrs. Loretta D'Souza,
aged about 43 years.
 - (4) Mr. Jose Santan D'Souza,
alias Joseph D'Souza,
aged about 45 years.
 - (5) Mr. Victor D'Souza,
aged about 48 years,
all R/o H. No.2/174-B,
Naikwado, Calangute,
Bardez, Goa.
- Appellants.

Versus

M/s Ecotech Projects Pvt. Ltd.
Having office at A-3/4, First Floor,
Acharya Niketan Mayur - 1,
New Delhi 110 091.

..... Respondent.

Shri Sarvesh Kamat Malyekar, Advocate for the appellants.

Shri Surendra G. Desai, Senior Advocate with Shri Pavithran A. V.,
Advocate for the respondent.

Coram:-PRITHVIRAJ K. CHAVAN,J.
Reserved on 4th September, 2017.
Pronounced on :-13th September,2017.

JUDGMENT

Heard.

2. Admit.

3. Shri Pavithran A. V., learned Counsel waives notice on behalf of the respondent.

4. Feeling aggrieved with the rejection of an application for temporary injunction by the trial Court on 18.11.2016, the plaintiffs have come in appeal before this Court. The case has chequered history.

5. The appellants have filed a suit under Section 6 of the Specific Relief Act against the respondent in respect of the property bearing survey no.168/2 known as "Bolleacamolichi Xir" situated at Calangute Bardez Goa. The appellants contend that they have been in possession of the suit property for more than 40 years but on 9.5.2013 the respondent, by use of force, dispossessed them.

6. One Mr. Nigel Coutinho and Mr. Charlotte Coutinho are admittedly the owners of the said property. According to the appellants, in the year 2007 some unknown persons tried to dispossess them, on behalf of the owner from the suit property but they thwarted the attempt. The appellants have filed the first suit against the owners bearing no.106/2007/C in the Court of Civil Judge, Junior Division, Mapusa seeking a declaration of the ownership of the suit property by prescription and adverse

possession. The said suit was dismissed by the judgment and order dated 15.12.2007. An appeal preferred by the appellants against the said judgment bearing Civil Appeal No.190/2008 came to be dismissed against which there is no Second Appeal filed by the appellants, instead, they preferred a review application bearing no.01/2012/FT which is pending. On 12.7.2008 owner had filed a complaint with Panchayat of Calangute against the appellants for carrying out illegal construction in the suit property. The Block Development Officer by his report dated 29.3.2010 to the Director of Panchayat pointed out construction of two sheds in the suit property and the house alongwith Panchanama and Sketch which was stated to be illegal and directed the appellants to demolish the said construction. In an order passed in Panchayat Appeal No.83/2010, the order dated 19.3.2010 of the Village Panchayat was set aside on 4.5.2011.

7. The appellants thereafter filed another suit in the month of June, 2010 in the Court of Civil Judge, Senior Division, Mapusa bearing no.147/2010/D for cancellation of Power of Attorney dated 19.02.1993 given by the owners *inter alia* seeking reliefs of declaration and permanent injunction. However, the appellants withdrew the said suit on 4.3.2013. It is the contention of the appellants that the owner of the suit property assured the appellants a proposed settlement on 23.07.2011 and assured transfer of ownership of the said property in view of the surrender of rights in

property bearing survey no.168/2. However, owner did not adhere to the said assurance but instead sold the suit property to the respondents by registered sale deed dated 20.08.2011.

8. The appellants came to know about the said transfer of ownership when some unknown persons entered into suit property for taking possession on 02.04.2013. According to the appellants they have plantation and two huts in the suit property.

9. The appellants thereafter filed third suit bearing Special Civil Suit No.29/2013/B for Specific Performance of Contract against the owner and sought for relief of permanent injunction against the respondent restraining the respondent from interfering with the suit property. In order to defeat injunction application respondent started interfering with the possession of the appellants in the suit property through the constituted power of attorney holder namely one Mr. Ritesh Chodankar who tried to demolish huts by trespassing into the suit property on 03.05.2013 and 08.05.2013. The appellants filed a complaint against the attempt to trespass with Calangute police station, however, on 9.5.2013 the appellants were dispossessed by the power of attorney holder of respondent with the help of 30 gundas and JCB machine.

10. In the written statement, the respondent has denied the possession of the appellants over the suit property. The respondent

reiterated that by virtue of Sale Deed dated 20.8.2011 it became the owner of the suit property which was purchased from Nigel Coutinho and Charlotte Coutinho. In order to substantiate its contention as regards its possession, various suits brought by the appellants have also been stated in the written statement. The respondent has also drawn attention of this Court to a letter dated 23.7.2011 about which reference shall be made while assigning the reasons.

11. Heard Shri S. Malyekar, learned Counsel appearing for the appellants. He drew my attention to a complaint to the Sarpanch of Calangute Panchayat Goa dated 12.7.2008 lodged by owner indicating illegal encroachment over the suit property requesting him to evict the trespasser pursuant to which an inquiry was conducted and notice under sub section (3) of Section 66 of the Goa Panchayat Raj Act came to be issued to the appellants as regards the two illegal erection of sheds in the suit property. The Secretary of Panchayat, vide his order directed the appellants to demolish the house and two sheds erected in the suit property within 15 days of the receipt of the order. Against the order dated 19.3.2010 passed by the Panchayat, the appellants preferred an appeal challenging the order of demolition which was set aside on 4.5.2011, which indicates that Additional Director of Panchayat by the aforesaid order in Appeal no. 83/2010 quashed the impugned order and remanded the matter back to the respondent Panchayat to determine it afresh, according to law, by giving an opportunity of being heard to the

appellants.

12. That is how, according to the learned counsel for the appellants, they have been shown to be in possession of the suit property and that respondent had no right to dispossess them without following due process of law. The learned Counsel prays for *status quo* as it is not his prayer in appeal that the possession be restored. He placed reliance on a case law reported in **(2004) 1 SCC 769 in case of Rame Gowda(Dead) by Lrs Vs M. Varadappa Naidu(Dead) by Lrs. and another.** The learned Counsel thus prayed for relief of *status quo* restraining the respondent from making any construction till the decision of the suit.

13. On the other hand, Shri Desai, learned Senior Counsel reiterated that several rounds of litigation have been started by the appellants who were never in settled possession of the suit property. According to the learned Senior Counsel the trial Court has rightly appreciated the facts on record and refused equitable relief of temporary injunction. The learned Senior Counsel has also relied upon the same authority in case of **Rame Gowda(Dead) by Lrs** (supra) as well as a case law reported in **1990(Supp) SCC 727, Wander Ltd and another Vs. Antox India Pvt. Ltd and 2004(STPL) 2280 Sopan Sable Vs. Assistant Charity Commissioner.** The learned Senior Counsel has, therefore, supported the impugned order and prayed for dismissal of appeal

with exemplary costs.

14. The scope of Order XLIII Rule 1 R of the Code of Civil Procedure is limited in the sense that the Appellate Court has to see whether the exercise of discretion by the trial Court in respect of grant or refusal of interim relief is proper or otherwise. If the discretion has been exercised correctly and properly, the Appellate Court is not expected to interfere unless such exercise is palpably incorrect or untenable. If the view taken by the trial Court is a possible view, the same is not liable to be interfered with by the Appellate Court. Here in the case at hand, the appellants have placed reliance on certain documents in order to show a prima facie case in support of their contentions that they were in a settled possession of the suit property. Pursuant to a complaint by the owner of the suit property namely Nigel Coutinho to the Sarpanch of Panchayat, Calangute, dated 12th July, 2008 which indicates that a trespasser had erected certain illegal construction in suit property and, therefore, the Sarpanch of Panchayat was requested to remove the same. Pursuant to the said complaint, the Secretary of the Calangute Panchayat issued a order-cum-notice under Section 66 of sub-section (3) of the Goa Panchayat Raj Act, 1994 to the appellants to remove two unlawfully erected sheds from the suit property. After hearing the appellants by an order dated 19th March, 2010, the Secretary directed the appellants to demolish two unauthorisedly erected sheds from the suit property as those structures were not

constructed by obtaining due permission. The said order was challenged by the appellants before the Block Development Officer. The Appellate Authority remanded the matter only, with a direction to give an opportunity of hearing to the appellants. The said order is dated 4th May, 2011. Interestingly, the appellants took a stand before the Additional Director of Panchayats-II, Panaji that the said structures do not belong to the appellants but it belongs to their mother Joaquina D'Souza. The appellants are blowing hot and cold in the sense that on one hand they say that it was their structure which was illegally demolished by the respondent but they took an altogether different stand, which is indicative of the fact that they have not approached the Court with clean hands and do not have any prima facie case. Admittedly, merits are not required to be gone into at the interlocutory stage but what is required to be seen as to whether there is serious question to be tried on merits.

15. The basic question in the matter is whether the appellants are in settled possession in the light of the fact that their suit is under Section 6 of the Specific Relief Act. Undoubtedly, from the affidavit-in-reply, more particularly, paragraphs no.15 and 16 filed on behalf of the respondent it reveals that after purchasing the suit property, the respondent had erected a barbed wire fencing to secure the same and kept a part open to serve as an access. However, in the absence of the respondent and taking undue advantage of the absence of its Director, who was looking after the

suit property on behalf of the respondent and who was in Paris between 20.4.2013 to 2.5.2013, the appellants clandestinely placed a prefabricated temporary sheds in the suit property at about 11.00 p.m. Therefore, on 9.5.2013, the respondent, being rightful owners in possession of the suit property, demolished the said temporary sheds and removed the unlawful encroachment in order to protect its property.

16. The Hon'ble Supreme Court in case of **Rame Gowda (Dead) by LRS. Vs. M. Varadappa Naidu (Dead) by LRs. and another, (2004) 1 SCC 769** defined what is, "settled possession". Paragraphs no.8 and 9 of the judgment can be quoted for advantage, which read thus:-

"8. It is thus clear that so far as the Indian law is concerned, the person in peaceful possession is entitled to retain his possession and in order to protect such possession he may even use reasonable force to keep out a trespasser. A rightful owner who has been wrongfully dispossessed of land may retake possession if he can do so peacefully and without the use of unreasonable force. If the trespasser is in settled possession of the property belonging to the rightful owner, the rightful owner shall have to take recourse to law; he cannot take the law in his own hands and evict the trespasser or interfere with his possession. The law will come to the aid of a person in

peaceful and settled possession by injuncting even a rightful owner from using force or taking law in his own hands, and also by restoring him in possession even from the rightful owner (of course subject to the law of limitation), if the latter has dispossessed the prior possessor by use of force. In the absence of proof of better title, possession or prior peaceful settled possession is itself evidence of title. Law presumes the possession to go with the title unless rebutted. The owner of any property may prevent even by using reasonable force a trespasser from an attempted trespass, when it is in the process of being committed, or is of a flimsy character, or recurring, intermittent, stray or casual in nature, or has just been committed, while the rightful owner did not have enough time to have recourse to law. In the last of the cases, the possession of the trespasser, just entered into would not be called as one acquiesced to by the true owner.

9. *It is the settled possession or effective possession of a person without title which would entitle him to protect his possession even as against the true owner. The concept of settled possession and the right of the possessor to protect his possession against the owner has come to be settled by a catena of decisions. Illustratively, we may refer to Munshi Ram and Ors. Vs. Delhi*

Administration (1968) 2 SCR 455, Puran Singh and Ors. Vs. The State of Punjab (1975) 4 SCC 518 and Ram Rattan and Ors. Vs. State of Uttar Pradesh (1977) 1 SCC 188. The authorities need not be multiplied. In Munshi Ram & Ors.'s case (supra), it was held that no one, including the true owner, has a right to dispossess the trespasser by force if the trespasser is in settled possession of the land and in such a case unless he is evicted in the due course of law, he is entitled to defend his possession even against the rightful owner. But merely stray or even intermittent acts of trespass do not give such a right against the true owner. The possession which a trespasser is entitled to defend against the rightful owner must be settled possession, extending over a sufficiently long period of time and acquiesced to by the true owner. A casual act of possession would not have the effect of interrupting the possession of the rightful owner. The rightful owner may re-enter and re-instate himself provided he does not use more force than is necessary. Such entry will be viewed only as resistance to an intrusion upon his possession which has never been lost. A stray act of trespass, or a possession which has not matured into settled possession, can be obstructed or removed by the true owner even by using necessary force. In Puran Singh and Ors.'s case (supra), the Court clarified that it is difficult

to lay down any hard and fast rule as to when the possession of a trespasser can mature into settled possession. The 'settled possession' must be (i) effective, (ii) undisturbed, and (iii) to the knowledge of the owner or without any attempt at concealment by the trespasser. The phrase 'settled possession' does not carry any special charm or magic in it; nor is it a ritualistic formula which can be confined in a strait-jacket. An occupation of the property by a person as an agent or a servant acting at the instance of the owner will not amount to actual physical possession. The court laid down the following tests which may be adopted as a working rule for determining the attributes of 'settled possession' :

i) that the trespasser must be in actual physical possession of the property over a sufficiently long period; ii) that the possession must be to the knowledge (either express or implied) of the owner or without any attempt at concealment by the trespasser and which contains an element of animus possidendi. The nature of possession of the trespasser would, however, be a matter to be decided on the facts and circumstances of each case; iii) the process of dispossession of the true owner by the trespasser must be complete and final and must be acquiesced to by the true owner; and iv) that one of the usual tests to determine the quality of settled possession,

in the case of culturable land, would be whether or not the trespasser, after having taken possession, had grown any crop. If the crop had been grown by the trespasser, then even the true owner has no right to destroy the crop grown by the trespasser and take forcible possession".

17. The ratio is crystal clear, which indicates that an occupation of the property by a person as an agent or a servant acting at the instance of the owner will not amount to actual physical and settled possession. The ratio is squarely applicable to the present set of facts in the light of a very important document placed on record by the appellants themselves, which is a letter dated 23.7.2011 written by the appellants to the Power of Attorney of the owner. It would be advantageous to reproduce the relevant portion of the letter which reads thus":-

"You will appreciate that with great difficulties and hardships to our mother and ourselves we have looked after the properties bearing survey No.168/2 and 182/11 all these years and prevented all sorts of encroachments that were attempted by various people into these properties. It was a word given by the mother of Mr.Nigel Coutinho to our mother when we were very young and our mother was toiling in the property that the smaller portion under survey No.182/11 was to be granted to us in return for all the work done and for protecting the property.

We have never ever had any confrontation with our Bhatcar Mr. Coutinho. When we made all attempts to contact Mr.Nigel Coutinho in Canada, he was refusing to hear us and he failed to even clarify that you were his lawful power of attorney holder. It is in these circumstances that based on legal advice we were forced to challenge your power of attorney.

We deeply regret our actions and offer our sincere apologies for the inconvenience caused to you and for placing obstacles in the way of your peaceful possession of the said properties. At the same time, we are also thankful for all the efforts and your intervention with Mr. Nigel in agreeing to grant us the property under survey No.182/11.

As it was never our intention to take the property under survey No.168/2 and all our acts of keeping possession was in good faith to protect the property from encroachers, we hereby solemnly state that you are free to deal with that property and we have no encumbrance over the same."

18. From this letter, it is apparent that the appellants were just a custodian or care taker of the suit property on behalf of its owner and had never carried any intention to retain possession of the suit property. Rather they exhibited their regret and tendered apology and inconvenience caused by placing obstacles in the way of lawful owners of the suit property.

19. As already stated herein above, that the appellants have already lost in earlier suits including the suit claiming an adverse possession against the lawful owners, which has attained finality as there is no Second Appeal preferred against the judgment rendered by the District Judge in Civil Appeal No.190/2008. The Hon'ble Supreme Court in the case of **Sopan Sukhdeo Sable Vs. Assistant Charity Commissioner, 2004 STPL 2280 SC** has again clarified the aspect of settled possession. Paragraphs 24 and 25 of the judgment read thus:

"24. There are two different sets of principles which have to be borne in mind regarding course to be adopted in case of forcible dispossession. Taking up the first aspect, it is true that where a person is in settled possession of property, even on the assumption that he has no right to remain in property, he cannot be disposed by the owner except by recourse of law. This principle is laid down in [Section 6](#) of the Specific Relief Act, 1963. That Section says that if any person is dispossessed without his consent from immovable property other wise than in due course of law, he or any person claiming through him may, by suit, recover possession thereof, notwithstanding any other title that may be set up in such suit. That a person without title but in "settled" possession as against mere fugitive possession can get back possession if forcibly dispossessed or rather, if dispossessed otherwise than by due process of

law, has been laid down in several cases. It was so held by this Court in *Yashwant Singh v. Jagdish Singh* (AIR 1968 SC 620), *Krishna Ram Mohate v. Mrs. Shobha Venkata Rao*, (1989 (4) SCC 131, at p.136), *Ram Rattan v. State of U.P.* (1977 (1) SCC 188), and *State of U.P. v. Maharaja Dharmender Prasad Singh* (1989 (2) SCC 505). The leading decision quoted in these rulings is the decision of the Bombay High Court in *K.K. Verma v. Union of India* (AIR 1954 Bom. 358).

25. Now the other aspect of the matter needs to be noted. Assuming a trespasser ousted can seek restoration of possession under [Section 6](#) of the Specific Relief Act, 1963 can the trespasser seek injunction against the true owner? This question does not entirely depend upon [Section 6](#) of the Specific Relief Act, but mainly depends upon certain general principles applicable to the law of injunctions and as to the scope of the exercise of discretion while granting injunction? In *Mahadeo Savlaram Sheike v. Pune Municipal Corporation* (1995 (3) SCC 33), it was held, after referring to Woodroffe on "Law relating to injunction; L.C. Goyal 'Law of injunctions; David Bean 'Injunction' Jayce on Injunctions and other leading Articles on the subject that the appellant who was a trespasser in possession could not seek injunction against the true owner. In that context this Court quoted *Shiv Kumar Chadha v. MCD* (1993 (3) SCC 161)

wherein it was observed that injunction is discretionary and that:

"Judicial proceedings cannot be used to protect or to perpetuate a wrong committed by a person who approaches the Court".

20. Thus, it is clear from the aforesaid ratio that while seeking relief under Section 6 of the Specific Relief Act, if any person is dispossessed without his consent from immovable property otherwise than in due process of law, he or any person claiming through him may, by suit, recover possession thereof, notwithstanding any other title that may be set up in such suit. The person without title should be in "settled possession" as against mere fugitive possession.

From the aforesaid discussion, it cannot be said that the appellants were in settled possession and, therefore, they are not entitled to claim equitable relief which has rightly been refused by the trial Court.

21. A cumulative effect of the aforesaid discussion and the case laws are that the appellants have failed to establish prima facie case, balance of convenience as well as irreparable loss. There is no question of any irreparable loss, in view of the fact that the appellants were not in a settled possession of the suit property. These observations are, prima facie, without going deeper into the

merits. The appellants have failed in multiple round of litigation as stated hereinabove that is one of the factors, which needs to be considered.

22. Consequently, I do not find any reason to interfere with the impugned order. The appeal, therefore, stands dismissed. Needless to say that the trial Court shall not get influenced by the observations made hereinabove while deciding the suit on merits.

PRITHVIRAJ K. CHAVAN,J.

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