

Santosh

IN THE HIGH COURT OF BOMBAY AT GOA
SECOND APPEAL NO. 28 OF 2015

- 1. DEVENDRA RAGHURAJ
DESHPRABHU**, of major age,
Indian National, married,
businessman, resident of Nanerwada,
Pernem-Goa
- 2. JITENDRA RAGHURAJ
DESHPRABHU**,
of major age, Indian National,
married, businessman, resident of
Nanerwada, Pernem-Goa

...Appellants

~ VERSUS ~

- 1. RAJENDRA VASSUDEO
DESHPRABHU (DECEASED)**
through heirs:
 - 1 a) VASUDEO R DESHPRABHU;**
(major of age)
 - 1 b) NAYANTARA R DESHPRABHU**
(major of age)
- 2. APARNA R DESHPRABHU**
of major age, housewife, resident of
Nanerwada, Pernem-Goa

... Respondents

APPEARANCES

FOR THE APPELLANTS

Mr Devidas Pangam

FOR THE RESPONDENTS

Mr SD Lotlikar, Senior Advocate
with Ms M Furtado

CORAM : G.S.Patel, J

DATED : 21st September 2017

ORAL ORDER:

1. I have heard Mr Pangam for the Appellants and Mr. Lotlikar, learned Senior Counsel for the Respondents at some length. I am not persuaded that any substantial questions of law arise justifying the admission of the second appeal. For the rest of this discussion, I will refer to the parties as they were arrayed before the Trial Court.

2. A few facts will be necessary. The Appellants are the original Defendants in Regular Civil Suit No.440/2000/C-B(new)/Special Civil Suit No.82/1990/A-B(old). This was filed in the Court of the Civil Judge, Senior Division at Panaji. The Respondents sought a decree of eviction and mesne profits against the Appellants. The premises in question were described in the plaint thus:

“The house property situated at Panaji described in the Land Registration Office, Ilhas under No.437, Book B-6, Old Series, surveyed under No.245 of P.T. Sheet No.36 of Panaji. Thereafter, the Respondents had amended the Plaint and gave a complete different description of the property by adding Paragraph 1-A to 1-E. In the amended Plaint, the Respondents describe the Suit Property as House Property enrolled in the Taluka Revenue Office, Tiswadi under Matriz No.703. It is alleged that the said old house existing in the said property was demolished sometime in the year 1959 and two Buildings were constructed thereon being Matriz Nos.1434 and 1435. It is pleaded that the Ground Floor bearing Chalta No.345 of P.T. Sheet No.36; and Survey bearing Matriz No.345 of P.T. Sheet No.36 of Panaji City;

and Survey bearing Matriz No.1434, was a Suit Property. There was complete change in the identification of the property. Consequently, the nature of the Suit stood completely changed”.

3. The Defendants took several pleas including, interestingly, a plea of adverse possession and, simultaneously, that they enjoyed something called a “permanent licence”. The Defendants claimed the land in question was purchased by the original Plaintiffs’ father and the Appellants’ grandfather one Vassudeo Deshprabhu. The Plaintiffs and the Defendants are first cousins. The Defendants’ father was, they claimed, in exclusive possession of these premises from 1961 onwards.

4. The Trial Court framed issues, took evidence, heard parties and ultimately decreed the suit, ordering the Defendants’ eviction and payment of mesne profits of Rs.3,000/- per month. The Defendants filed Regular Civil Appeal No.75/2009 in the District Court, North Goa, at Panaji. The Defendants also challenged an earlier order allowing an amendment of the plaint.

5. On 5th March 2013, the first Appellate Court dismissed the appeal. It allowed three months to the Appellants to vacate, and directed mesne profits to be paid at the rate fixed by the Trial Court, Rs.3,000/- per month from 15th June 1991. This is the judgment and decree that the Defendants assail in the present Second Appeal.

6. The Defendants have set out several proposed questions of law, and in these they say, *inter alia*, that the suit property or

premises were not properly identified. They also say that the findings of the Lower Court suffer from perversity. They say that there is no factual basis to the award of mesne profits. The plea of adverse possession has been given up before me. Instead, it is argued that the correctly placed plea should be one of prescription and not “adverse possession” properly so called.

7. The order of the First Appellate Court impugned is from page 61 onwards. The First Appellate Court, after setting out the seven issues framed by the Trial Court, listed two points that arose for determination of the First Appeal; (1), whether the Defendants had any right to remain in possession of the shop on the ground floor of Chalta No.345 of P.T. Sheet No.36 of Panaji City; and (2) whether the learned Trial Court was justified in awarding compensation of Rs.3,000/-. The First Appellate Court answered the first of these in the negative and the second in the affirmative.

8. Before I proceed further, I must note that despite the some what arid description of the property in the pleadings, it is not in dispute that the premises are in Panaji proper, at a location quite close to this Court near the Municipal Garden. This is an area that has several shops, many given on leave and licence and some of the distinctly high-end variety. I say this only to provide some context to the reason why a settlement attempted by both sides at my instance has not come to fruition. There is a considerable bad blood in the family as well. This is but one of several properties locked in litigation.

9. Returning to the factual narrative, the Plaintiffs said in the suit — before it was amended — that they were owners in possession. In 1962, Plaintiff No.1, at the request of his brother Raghunathrao (since deceased) allowed him the occupation of a shop on the ground floor of the house. The brothers were then on good terms. The plaint went on to say that by a registered letter dated 10th November 1987 issued to Raghunathrao, that permission was revoked and terminated and he was asked to refrain from using the shop from 30th April 1988. They said the notice was returned unserved since Raghunathrao died on 10th November 1987, the very date the notice was posted. The plaint proceeded on the footing that the permission to Raghunathrao was personal to him and it came to an end on his death. It matters not, they say, that a notice was issued terminating Raghunathrao's occupancy; his right, such as it was, ended with him. Raghunathrao was also known in his life time as Raghuraj and this name appears throughout these papers at different places. He used his office for a travel agency or a group of travel agencies. The Plaintiffs said that after Raghunathrao died his sons took over this business. In any case, a notice was addressed jointly to both Defendants by registered post on 25th November 1987 by the 1st Plaintiff's Advocate, again calling upon the Defendants to refrain from using the shop. This notice was delivered on 18th December 1987, but, according to the Plaintiffs, the 1st Defendant attempted to avoid service.

10. This was the background to the suit before the amendment. Then came the additional paragraphs 1-A to 1-E in which the Plaintiffs now said that the 1st Plaintiff bought this property on 17th November 1941 and it was enrolled in the Taluka Revenue Office

Tiswadi under Matriz No.703. They said the old house was demolished sometime in 1959. Two new buildings were then built at the site. These bore Matriz Nos.1434 and 1435 in the records of the Panaji Municipal Council (“**PMC**”). The property was registered to the original 1st Plaintiff Rajendra as house No.25 in Ward No.12. Part of the ground floor, Chalta No.345 of P.T. Sheet No.36 of Panaji City Survey, Matriz No.1434 is the suit property in question. The Plaintiffs therefore said the entire property falls in Chalta Nos.345 to 349 of P.T. Sheet No.36. The PMC issued ownership and occupancy certificates in respect of the entire row of structures, house No.25 to house No.25/7 all in ward No.12. The 1st Plaintiff Rajendra leased out bits and pieces of the old house to various persons. The new house was leased to the erstwhile Portuguese Government for its Centre for Information and Tourism. The whole of the property was mortgaged to the Goa Urban Co-operative Bank under a Mortgage Deed of 30th March 1973.

11. The Defendants, on entering their written statement, wholly denied the Plaintiffs’ claim to ownership. They said that it was their grandfather Vassudev who purchased the property under a Deed of 17th November 1941 — there is apparently no dispute about the date — but he did so in the name of the 1st Plaintiff, Rajendra, then a minor, who, therefore, had no funds or income of his own. There is the case made out that what Vassudev actually did was to gift the larger property to the 1st Plaintiff, Rajendra. The Defendants also said that at some point the old house was pulled down, but they claimed that Vassudev put up the new structure himself and in doing so, built on the ground floor a separate independent stand-alone structure which was to be given to the Defendants’ deceased

father Raghunathrao as an owner. The Defendants said that Rajendra, then still unmarried, handed over this portion to Raghunathrao, and Raghunathrao continued to be in open and continuous possession of this portion for over 30 years since 1953. In the written statement the Defendants thus claimed *absolute ownership* of this so-called independent structure. Then comes an averment that since the Defendants and Raghunathrao made alterations and improvements to this portion “worth lakhs of rupees” and that the Plaintiffs knew about this but never objected, the Defendants’ claim to independent ownership elevated from being a merely permissive personal licence to a more defensible title of absolute ownership. After the plaint was amended, the Defendants filed an additional written statement. There are denials of the history set out by the Plaintiffs in the suit.

12. The Trial Court framed seven issues, including placing the burden on the Plaintiffs to prove ownership, whether Raghunathrao was allowed to occupy the shop on the ground floor and whether the possession of the Defendants was illegal. Issues No.5, 6 and 7 placed on the Defendants the burden of proving that the ground floor of the separate structure was earmarked for Vassudeo and whether they proved continuous and open possession of it as owners. The Trial Court decreed the suit, and directed possession and payment of mesne profits.

13. Before the Appeal Court attention was drawn to the additional written statement. This is important because it establishes that far from being nebulous, the property was actually quite correctly identified though each side may have used different

language in the description of it. The Chalta Number, PT Sheet Number and so on are all accepted as matters of record. Indeed there is no challenge to a City Survey Form B produced on record. PW1 confirmed that during a recent survey the property was found to be under Chalta Nos.345 to 349 of PT Sheet No.36. PW3 in cross examination confirmed that he visited the premises to make a report in 1989 and found there an airline booking office being run Raghuraj/Raghunathrao. I will for the moment not give much weightage to the evidence of PW4, but there seems to be no denial that the premises in dispute are known as “Sushila Niwas” and the Defendants have there a travel agency. I found the evidence of PW5, part of the record, and noted by the Appellate Court, to be of particular interest. This is one Percival Noronha who was an Assistant Information Officer to the erstwhile Portuguese Centre for Information and Tourism from 1960 till liberation. He said that the Centre had its office in a newly constructed building that belonged to the late Raghuraj and this was at Church Square Panjim. After Liberation, the Centre shifted away and there was then a travel agency by the name Rauraje Deshprabhu Travel Agency. This is the name of the Defendants’ agency.

14. The evidence of the Defendants was broadly consistent with their written statement.

15. Before the Trial Court however there was no issue raised about the property not being sufficiently identified and this seems to have surfaced for the first time before the First Appellate Court. I believe it was correctly rejected. This is after all a fundamental aspect. It speaks to the subject matter of the litigation. It is not

something that can be raised simply in arguments across the Bar. It must have foundational pleadings. This plank of attack was therefore unsustainable and in my view, the First Appellate Court rightly repelled the arguments in that regard.

16. The claim for absolute ownership was based, as I have noted, on the averment of continuous possession for 30 years. Now this plea is not precisely sated and it is unclear whether this is actually some sort of prescription, a licence in perpetuity or, as was one suggested till recently abandoned, “adverse possession”. It could not have been adverse possession. For the question then arises adverse to whom and since when? The law in that regard is well-settled and this plea does not fit the frame of a plea for adverse possession. The submission was that the Defendants’ claim “*animo domini*” would show or support a plea of adverse possession. Unfortunately this leads them directly to a conflict. They cannot at the same time say that the property is insufficiently identified and yet maintain a plea of adverse possession. If their possession be adverse, surely the property is known and not unidentified. The Defendants found themselves, so to speak, caught between the Scylla of their pleadings and the Charybdis of their counsel’s arguments. The two situations were mutually destructive.

17. Nor does it end there. The moment such a plea was raised before the Trial Court, it automatically meant that the Defendants accepted the Plaintiffs’ ownership. One can only ever claim adverse possession against a true owner. One can never simultaneously deny ownership and claim adverse possession. These are all, therefore, aspects correctly noted and correctly dealt with by the First

Appellate Court. It is impossible to find fault with the findings of the First Appellate Court that a claim for permissive possession cannot be converted into adverse possession without proof that the person in possession openly asserted an adverse title to the property to the knowledge of true owners for a period of 12 years or more.

18. The question is why should this be laboured if the plea is not being pressed today? The reason suggests itself: it simply cannot be that the Defendants constantly shift the goal-posts in this fashion, or that they take pleas and advance arguments in this near-seasonal manner. In the springtime of the suit at the stage of pleadings, they make one claim of the property not being identified; in the litigation summer before the trial court and appellate court, they raise conflicting pleas of adverse possession and prescription; in the monsoon of this second appeal, they abandon altogether the plea of adverse possession. Unfortunately for them, now it is very much the winter of this litigation's discontent.

19. Once the Defendants have taken a plea and based a case on it, they must stand or fall by it. If, therefore, the plea of adverse possession, one that has run through out this case goes, then it is difficult to see what remains except the subsidiary plea of a permanent licence.

20. I will turn directly now to that, noting only that in paragraph 42 the First Appellate Court correctly found that the plea of adverse possession was not one that could be accepted. As to the other plea taken of an irrevocable permanent licence, the Defendants argue

here as they did in the first Appellate Court that they had executed works of a permanent character and incurred expenses in the execution of these, and that this therefore gave them ownership or, at any rate, transmogrified what might have once been a permissive temporary licence into permanent ownership. What were these works? There was a toilet. There was a septic tank. There were some renovations. PW1 was asked if the Defendants' father or his successors ever sought any permission for these works. He answered saying no such improvements were ever made. The 2nd Defendant came in as DW1. His written statement and evidence did not specify the renovations. There was no documentary evidence. He claimed that the toilet and septic tank had municipal permissions. He said he could produce them. He never did. DW3 said that he applied to the Municipal Corporation of Goa for permission for an internal toilet and some covering. Again there was no evidence of this. Absent evidence, it is very difficult to see even now how this claim could be said to fit within Section 60 of the Indian Easements Act. I only note this because this is sought to be raised as a substantial question of law. To my mind it is not one that can fairly be said to arise in the facts and circumstances of the case.

21. As to the question of the termination notices being served or not served, this is purely a question of fact and does not lend itself to re-evaluation in a Second Appeal.

22. I can only end by endorsing the views of the First Appellate Court, especially those in paragraph 48, where it is once again noted that the plea of an irrevocable licence would defeat that of an adverse possession.

23. In any case, the refrain of insufficient identification of the suit property is not one that plays well with either of these pleas of adverse possession or even of an irrevocable license. The claim to either is predicated on an *a priori* assumption that the property *is* sufficiently identified; without that identification, there can be no ‘adverse possession’ nor a license of any kind. Both pleas demand absolute certainty in regard to the property in question. A person may not say ‘I know not what the property is, but whatever it is, I have possession of it adverse to the true owner; and if I do not, to this unknown and insufficiently identified property, I have a permanent license that equates to ownership.’

24. What remains is this: that without any evidence on any of the foundational pleas, having lost in both Courts below, the Defendants ask that the second appeal be admitted and they frame before me questions that, first, do not fairly arise and, second, require a complete re-appreciation of the evidence, something that is quite impermissible.

25. The second appeal is rejected. There will be no order as to costs.

26. Since this matter has been pending for some time, I will extend the time for delivery of possession by three months from today.

(G.S. PATEL, J.)