Amrut

IN THE HIGH COURT OF BOMBAY AT GOA

SECOND APPEAL NO.106 OF 2017

Jose Fernandes (since deceased) through his LRs … Appellants

Versus

Marcelina de Gama & Ors …Respondent

Mr P Talaulikar, *Advocate for the Appellants.*

CORAM: G.S. PATEL,J
DATED: 5th October 2017

PC:-

1. Heard.

2. The Second Appeal challenges the judgment and decree dated 28th December 2015 of the Ad-Hoc District Judge-1, FTC-I, South Goa, at Margao in Regular Civil Appeal No. 137/2014. That judgment resulted in a dismissal of the Appellant's appeal. The Appellant was the original Defendant to the suit. The Respondents were the original Plaintiffs. This is how I will refer to them in this order.

3. The Plaintiffs brought Special Civil Suit No.113/1980/II (old) (registered as Regular Civil Suit No.320/2000/II) seeking recovery of possession of the suit property. They claimed to be owners of the suit property and they said that the Defendant forcibly took up

residence some time in the year 1973, dispossessing the Plaintiffs from their own house thereafter. The cause of action pleaded was in trespass. The Defendant entered a written statement. He claimed to have been residing in the suit property since 1962 and said that he was in occupation as a mundkar. He also said the suit property or house was constructed by him for and on behalf of the Plaintiffs. The Defendant claimed to have acquired title by prescription.

4. The Trial Court framed an issue regarding the claim to mundkarship and referred the matter to the Mamlatdar. On 17th July 1989, the Mamlatdar decided against the Defendant and held that he had failed to prove that he was residing in the property as a mundkar. The Defendant appealed to the Additional Collector, South Goa. That appeal was dismissed on 13th April 1995. A revision to the Administrative Tribunal also failed on 19th July 2010.

5. It was in this background that the Defendant sought to amend the written statement and took a plea of acquisition of title by prescription. The amendment was permitted and additional issues were framed. For some reason the actual amendment remained to be carried out. It is said that this was inadvertent.

6. On 16th August 2014 the Trial Court partly decreed the suit and directed delivery of the possession. It held that the plea of mundkarship was unproved and proceeded to reject the plea for acquisition of title by prescription saying that there were no pleadings and no foundation in the pleadings for such a plea. The Appellant appealed to the District Court, which, as I have noted

dismissed the appeal. The District Court however specifically dealt with the question of prescription in paragraphs 14 to 20 under point no 3. In paragraph 15 the First Appellate Court recorded the plea of a prescriptive title. It examined the documents produced by the Defendant and it found that the Defendant had led no cogent evidence of any witness or by any document to substantiate this plea. In fact it went so far as to say that there were no documents to that effect. The First Appellate Court was then moved to comment on testimony of the Defendant in paragraphs 16 and 17:

> "16. It is quite surprising to note that she has clearly stated in cross that she does not know the name of the father of Defendant no.1 which means that she does not know the name of her father-in-law. She admits that she does not know how many children the mother of Defendant no.1 had. Further she states that she heard that Defendant no.1 was brought in the house of the Plaintiffs when he was six years of age which means her knowledge is hearsay in nature which is not admitted law. She has further stated in cross that after her marriage, since Defendant no.1 was working at Vasco they were staying in the rented house at Vasco. Her knowledge appears to be of hearsay nature. When it was put to her in cross that when her husband was working in Portuguese army and was residing at Panaji and Old Goa she answered that she was told that he was residing in the suit house at Verna at that time.
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> 17. DW1 also states in cross that she did not state in her affidavit in evidence that her husband was residing in the suit house since he was 10 to 12 years of age. She states that she was told by Lucinda that her husband was brought in the suit house when he was 6 years old. She further states that she was told by Defendant no.1 that he was

> coming to the suit house in the year 1961. She has also admitted that she was told that her husband/Defendant no.1 was brought in the suit house to do work for the Plaintiffs. Therefore, it is abundantly clear that Defendant no.1 was brought from Canacona to Verna to work in the house of the Plaintiffs in the capacity of a servant. From the entire evidence and the deposition of DW1, it is seen that the Defendants have not lead cogent and clear evidence to show as on which exact date they came in peaceful, exclusive, continuous possession and enjoyment of the suit house along with the suit property. Though the amendment of the written statement was granted wherein the Defendants were allowed to take the plea of acquisition of title by prescription to the suit house and to the suit property, the Defendants failed to lead sufficient evidence on this aspect."

7. It is difficult to see what other conclusion the First Appellant court could possibly have arrived at even at this stage of record. The First Appellate Court was also correct in saying that a mere assertion of lengthy possession does not automatically confer title by way of prescription. There must be a pleading and even assuming that the amendment is deemed to have been carried out, the pleadings in itself is by itself not enough, for it must be followed by evidence in support of that pleading. It is true that the First Appellate Court said that the Defendant had not carried out the amendment and that it held that it is the duty of the parties to incorporate this. Actually this is completely correct, and no party can be heard to say that its own inadvertence, negligent and oversight should be excused just for the asking. The Defendant obtained an order allowing the amendment. Additional issues were framed. Why the amendment was not carried out is never properly

explained. But even assuming that the amendment as granted can be looked into, what one must examine is the evidence that was before the Court in support of that amended pleadings. It is this that is decided by the First Appellate Court in paragraph 19 thus:

> "19. It is settled law that no length of enjoyment can establish a title which could have no legal origin which is a cardinal rule of prescription. Prescription can be defined as the effect of lapse of time in creating and destroying rights. It is the operation of the time as vestitive fact. It is of two kinds namely (1) positive or acquisitive prescription and (2) negative or extinctive prescription. Lapse of time has therefore, two opposite effects. In positive prescription, it is a title of right like exercising elementary right for over the prescribed period, but in negative prescription it is a divestitive fact, eg. prescription of title by adverse possession and limitation."

8. I believe this to be the correct position in law and in my view it calls for no interference. There is no question of law involved. The Second Appeal is rejected. There will be no order as to costs.

G. S. PATEL, J