

IN THE HIGH COURT OF BOMBAY AT GOA

SECOND APPEAL NO. 113 OF 2016

CONFRARIAS REUNIDAS DA IGREJA DE
PANJIM, THR. THE PRESIDENT, MR.
JOSEPH PINTO.,

... Appellant

Versus

MR. LUIS SALES DE ANDRADE E SOUZA
AND 2 ORS.,

... Respondents

Shri. Yogesh V. Nadkarni, Advocate for the appellant.

Coram:- F. M. REIS, J.

Date:- 20th January, 2017

P.C.:

Heard Shri Y.V. Nadkarni, learned Counsel appearing for the appellant. The challenge in the above appeal is to the Decree passed by the Lower Appellate Court whereby a permanent injunction has been granted in favour of the respondents.

2. Shri Nadkarni, learned Counsel appearing for the appellant has pointed out that though the appellants have not established their possession of the subject-property, nevertheless, the Lower Appellate Court whilst deciding the appeal preferred by the respondents has gone to the extent of holding that the respondents have established their title to the subject property. It is further pointed out that the learned Judge

whilst drawing such a conclusion has relied upon two documents of the years 1904 and 1905 which, according to him, were not part of the record and, as such, such reliance thereon itself is erroneous which calls for interference of this Court. The learned Counsel has extensively taken me through the impugned Judgment of the Appellate Court, specially paragraphs 36 and 37 to point out that the learned Judge has noted that the suit is not for declaration of title, but only for permanent injunction and accordingly, based on the documents on record has come to the conclusion that the respondents have established their possession of the property in question and based thereon the permanent injunction could be granted. The learned Counsel has, thereafter, taken me through paras 46 and 48 of the impugned Judgment whereby the learned Appellate Judge has proceeded to examine the claim of title to come to the conclusion that the respondents have established their title to the subject-property. The learned Counsel further submits that though the findings of possession are questions of fact, nevertheless, according to him, the findings of title would become res judicata and binds the appellant in any future proceedings. The learned Counsel points out that as such, as the learned Lower Appellate Judge has travelled beyond his jurisdiction in conclusively determining the title of the respondents on the basis of the documents which were not part of the record would itself be a substantial question of law for consideration in the present appeal. The learned Counsel as

such points out that the impugned Judgment passed by the learned Appellate Judge to that extent deserves to be quashed and set aside.

3. I have considered the submissions of the learned Counsel and with his assistance, I have also gone through the records. The learned Lower Appellate Court at para 36 of the impugned judgment has drawn a presumption of possession in favour of the respondents under Land Revenue Code which would entitle the respondents for decree of permanent injunction as against the appellant. As the survey records were never challenged by the appellant either by way of counter claim or any other proceedings were initiated. The learned Judge also noted that the suit was not one for declaration of title, it was enough for the respondents to prove their possession to be entitled to the permanent injunction as prayed for. The learned Judge also noted that there is no relief of declaration sought by the respondents herein. The learned Judge also took support of the provisions of Section 110 of the Evidence Act to come to the conclusion that the respondents are in possession of the subject property, the burden to prove that he is not the owner is on the person who affirms that he is not the owner. In the present case, the learned Judge found that the appellant have failed to establish their right to the subject property. Even the learned Trial Judge at para 58 based on the survey records found that the respondents

were in possession of the suit property though the learned Trial Judge found that the respondents have failed to establish their ownership that they are owners in title and possession of such property. In these circumstances, the findings of the learned Appellate Court that the respondents were in possession of the subject property cannot be faulted. The presumption drawn by the Appellate Court is in accordance with law. The suit filed by the respondents was only for permanent injunction inter alia restraining from entering, digging, cutting trees or planting trees or constructing temporary and permanent structure therein or interfering in any manner with the suit property. Considering that both the Courts have accepted that the respondents were in possession of the subject property, the learned Lower Appellate Court was justified to grant the relief sought by the respondents herein. In such circumstances, taking note of the contention of Mr. Nadkarni, learned counsel appearing for the appellant that there is no perversity in such findings of possession, I find that there is no case made out for any interference in such findings of fact on possession by re-appreciating the evidence which is not permissible in Second Appeal under Section 100 of the Civil Procedure Code specially when the appellant have not shown such perversity in such findings.

4. No doubt, while examining the suit for permanent injunction based on title, the Court has also to consider whether

the possession is traceable to any legal right to remain in possession. The learned Lower Appellate Court has not found any better title on the appellant which could entitle them to remain in possession of the subject property. In such circumstances, considering the findings of the learned Lower Appellate Court, the findings on title arrived at therein by the learned Lower Appellate Court are incidental to the relief of permanent injunction sought by the respondents herein. Such incidental findings in a suit for permanent injunction would not by itself preclude the appellant if they are so entitled to establish a better title over the subject property in appropriate proceedings.

The Apex Court in the judgment reported in 2009(10) SCC 273 in the case of Ramchandra Dagdu Sonavane (Dead) and others V/s Vithu Hira Mahar (Dead) and others has observed at para 47 thus :

"47. The same view is reiterated in Gram Panchayat of Village Naulakha Vs. Ujagar Singh & Ors. [AIR 2000 SC 3272]. This Court has stated, that, even in an earlier suit for injunction, there is an incidental finding on title, the same will not be binding in the later suit or proceedings, where title is directly in question, unless it is established that it was "necessary" in the earlier suit to decide the question of title for granting or refusing injunction and that the relief for injunction was found or based on the bindings of title. Even the mere framing of an issue may

not be sufficient as pointed out in that case."

In another judgment reported in 2007(14) SCC 200 in the case of Ramji Rai and another V/s Jagdish Mallah (Dead) and another, the Apex Court has observed at paras 10 and 11 thus :

"10. On the finding of facts, we do not wish to interfere. There is no reason to reverse the concurring findings. However, suffice it to state that the lower appellate court should have dismissed the suit filed by the appellants only on the ground that the appellants had failed to prove that they were in possession of the disputed lands. Under Section 38 of the Specific Relief Act, 1963 an injunction restraining disturbance of possession will not be granted in favour of the plaintiff who is not found to be in possession. In the case of a permanent injunction based on protection of possessory title in which the plaintiff alleges that he is in possession, and that his possession is being threatened by the defendant, the plaintiff is entitled to sue for mere injunction without adding a prayer for declaration of his rights [See: Mulla's Indian Contract and Specific Relief Acts, 12th Edn., page 2815].

11. In A.L.V.R. Ct. Veerappa Chettiar v. Arunachalam Chetti and others AIR 1936 Madras 200, it has been held that mere fact that the question of title may have to be gone into in deciding whether an injunction can be given or not is not any

justification for holding that the suit is for a declaration of title and for injunction. There can be a suit only for an injunction. The present suit is only for permanent injunction and, therefore, the lower appellate court should have, on the facts and circumstances of this case, confined itself to its dismissal only on the ground that the appellants have failed to show that they were in possession. This has been done but the declaration that the appellants are not the owners, was not necessary."

5. In the present case, the learned Lower Appellate Court found that based on possession itself, the respondents were entitled for injunction and the issue of title was not essential to grant a relief in the suit. In such circumstances, taking note of the observations of the two judgements as pointed out herein above, and considering the findings of fact on possession arrived at by the learned Lower Appellate Court, the contention of Mr. Nadkarni, learned counsel appearing for the appellant based on the findings of title arrived at in the impugned judgment would not at all be necessary. Hence, I find no substantial questions of law arise in the present appeal for consideration. As such, the appeal stands accordingly rejected.

F. M. REIS, J.

ssm.