

Amrut

IN THE HIGH COURT OF BOMBAY AT GOA

***MISC. CIVIL APPLICATION NO.754 OF 2017
IN
SECOND APPEAL NO.116 OF 2005***

Tanaji Yeshwant Pal & Anr. Applicants
Versus
Shashikant Yeshwant Pal & Anr Respondents

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

Mr. Valmiki Menezes and Mr. A. Shirodkar, Advocates for the Respondents.

Coram : N.M. Jamdar, J.

Date : 30 November 2017.

P.C.:

By this Civil Application, the original Plaintiffs have sought to recall the order dated 20 March 2017 in Second Appeal No.116 of 2005.

2. By detailed judgment and order dated 20 March 2017, the learned Single Judge of this Court (*F. M. Reis, J*) had partly allowed the appeal and set aside the order passed by the Lower

Appellate Court and modified the judgment and decree passed by the Trial Court and partly granted the counter claim filed by the Appellants.

3. Though in the application, the judgment and order dated 20 March 2017 is sought to be recalled on the ground that it is an ex-parte order, the Applicants were served however, did not remain present. The case made out in the application for recall of the order is that the Applicants are senior citizens, they were represented by an Advocate who had withdrawn his appearance as he was unwell. They state that since the Applicant No.1 required assistance to travel out of his house on account of his age, they could not make any alternate arrangement and the judgment and order came to be passed.

4. The rights accrued to the Respondents by judgment and decree passed by this Court after the service to the Applicants cannot be lightly taken away. The Applicants were served with the notice and that even their Advocate had sought to take a discharge, their responsibility as litigants in the matter does not go away merely because they engage an Advocate. The appeal was pending in this Court since 2005 and was disposed of in the year 2017 and the Applicants ought to have kept track of the matter. The Respondents-original Appellants in the application are also equally old, yet they

have kept track of the appeal and ensured that the Advocate remains present.

5. Therefore, the reason given to recall the order dated 20 March 2017 is only on the ground that the Advocate did not remain present does not appear to be cogent.

6. Considering the fact that the dispute is between two brothers and their wives, who are residing in one dwelling house, I have considered the merits of the matter to find out whether any injustice has been caused and what is the exact nature of the controversy and what would be the argument of the Applicants, if the matter is to be restored.

7. The Applicants had filed a suit bearing Regular Civil Suit No.35 of 98 in the Court of the Civil Judge Junior Division, Bicholim in respect of property survey No.3/23 of village Bordem. This property has been purchased by sale deed dated 3 July 1967. According to the Applicants-Plaintiffs though the sale deed showed that the property was purchased by both the Plaintiffs and the Defendants i.e. the Applicants and Respondents in this application, it was exclusively owned by the Applicants-Plaintiffs. The Respondents-Defendants filed the counter claim and sought partition of the

property. The learned Civil Judge rejected the contention of the Applicants-Plaintiffs that the property was exclusively owned by the Applicants-Plaintiffs and accepted the contention of the Respondents-Defendants that the property needs to be partitioned. Accordingly, the learned Civil Judge dismissed the suit and allowed the counter claim by judgment and order dated 31 March 2003. Thereafter, Regular Civil Appeal No.115/2003 was filed by the Applicants-Plaintiffs in District Court, Mapusa. The learned District Judge by judgment and order dated 7 May 2005 partly allowed the appeal and struck off the defence of the Respondents-Defendants and directed the Respondents-Defendants to demolish the bathroom constructed by them in violation of the order directing to maintain status quo. The learned District Judge confirmed the finding that the property is jointly owned by the Applicants-Plaintiffs and the Respondents-Defendants.

8. When the Second Appeal came up for consideration, the learned Single Judge held that the findings of the learned District Judge that the defence of the Respondents-Defendants needs to be struck out solely based on the position that the provisions of Order 39 Rule 2-A of the Code of Civil Procedure is mandatory and since the Respondents-Defendants had constructed the bathrooms in violation of the order of status quo, there was no option to struck out

the defence of the Respondents-Defendants, was not correct. The learned Single Judge held that this view was not correct in law and the provision is directory. Since there was a concurrent finding that the suit property is owned by both the brothers i.e. the Applicants and Respondents jointly, the learned Single Judge passed the order dated 20 March 2017 which is sought to be recalled.

9. According to the learned counsel for the Applicants if an opportunity is given to the Applicants, it would have been pointed out that the matter needs to be remanded to the Appellate Court since the finding of the Appellate Court is based only on the ground of Order 39 Rule 2-A of the Civil Procedure Code being mandatory and if it is to be held directory then there needs to be a decision upon consequent legal position. The learned counsel for the Respondents on the other hand has pointed out that the finding of the Appellate Court is not based solely on the Order 39 Rule 2-A of the Civil Procedure Code but on the other grounds as well.

10. As stated earlier, I have considered the facts and merits of the rival contentions only to understand whether there should be end to the dispute pending between two brothers since 1998. Ultimately, what the Applicants seek is a total possession of the house by evicting Respondents-Defendants-brother and that the claim is based on the

sale deed of the year 1967 which does not give exclusive right to the Applicants. Therefore, the finding of both the Courts that the parties are co-owners was correctly considered by the learned Single Judge.

11. Therefore, even if the application is to be allowed and the Applicants were given an opportunity, the Applicants cannot succeed in view of the facts which have been narrated above.

12. In these circumstances, neither any case is made out by the Applicants for recalling of the order dated 20 March 2017 neither any grave prejudice caused to the Applicants to exercise the powers of recalling an order, especially when the Applicants were served and did not prosecute the appeal. Considering all these facts, the Misc. Civil Application is rejected.

N.M. Jamdar, J.