

IN THE HIGH COURT OF BOMBAY AT GOA**SECOND APPEAL NO. 6 OF 2017**

SHRI. RAM DEU GAUDO @ GAUDE
(EXPIRED) THR. LRS. AND ANR., ... Appellants

Versus

SHRI. ANTA DEU GAUDO AND 5 ORS., ... Respondents

Mr. Shivan Desai, Advocate for the appellants.

Coram:- F. M. REIS, J.

Date:- 10th February, 2017

ORAL ORDER :

Heard Mr. Shivan Desai, learned counsel appearing for the appellants.

2. The above appeal challenges the judgment dated 21.10.2011 passed by the learned Trial Court in Regular Civil Suit No. 15/2011 and the judgment passed by the learned Appellate Court dated 30.06.2016.

3. Mr. Shivan Desai, learned counsel appearing for the appellants has submitted that both the Courts below have refused the relief of injunction though granting a declaration to the effect that the appellants and the respondents are joint owners in possession of the property. The learned counsel further pointed out that it is the case of the appellants that they are in exclusive possession of the subject property as according to him the respondents have failed to establish any right to the disputed property. The learned counsel further pointed out that the grant was in favour of the grandfather and there is nothing on record to suggest that any right to the property developed upon the ancestor of the respondents. The learned counsel further pointed out that though the father of the appellants and the respondents are brothers and sons of the said grandfather nevertheless, as there is no material on record to show that any right devolved upon the father of the respondents, the question of granting any declaration by the Courts below is not at all justified. The learned counsel has thereafter taken me through the findings of the Courts below to point out that though it is the case of the appellants that they were in exclusive

possession of the subject property, the Courts below have erroneously taken a view that the appellants have failed to establish their possession. The learned counsel further pointed out that though the survey records stand in the name of the ancestor of the appellants and the respondents, nevertheless, according to him as the appellants have established that they were in exclusive possession of the subject property no relief of declaration was justified. The learned counsel further submitted that as the respondents have failed to establish their claim of title over the subject property, the question of granting any declaration in favour of the respondents is totally unjustified. The learned counsel has thereafter taken me through the pleadings in the plaint and pointed out that both the Courts below have found that the cause of action as pleaded in the plaint has not been established and as such according to him the question of granting any relief in favour of the respondents would not at all be justified. The learned counsel further pointed out that there is no document or any material shown as to how the property had devolved upon the respondents, and as such the question of granting any relief of declaration would not

arise at all.

4. I have given my thoughtful consideration to the rival contentions. The basic contention of the learned counsel appearing for the appellants is that there is nothing on record to show how the property developed from the grandfather in favour of his two sons namely Rama Deu Gaudu and Anta Deu Gaudu who are admittedly the parents of the appellants and the respondents respectively. It is further their case that unless this devolution of right is established or proved by the respondents, the question of granting any declaration in favour of the respondents would not arise. On perusal of the judgments of the Courts below, both the Courts upon appreciating the evidence on record have concurrently come to the conclusion that the claim of the appellants that they were in exclusive enjoyment of the subject property has not been established. The Courts have also concurrently found that the respondents are also in possession of the subject property. In fact, the receipts of the sale of cashew nuts and other fruit bearing trees are produced by the respondents in support of their case that they

were in possession of the subject property. There are also receipts produced with regard to the purchase of fertilizer etc. On the basis of such documentary evidence on record, the Courts below have found the claim of the appellants that they were in exclusive possession of the property cannot be accepted. The Courts below have also noted that besides examining DW1, there is no evidence produced by the appellants to show that they were in exclusive possession of the subject property. The Courts below have as such noted that both the parties were in possession of some different portion of the property and as such the question of granting any permanent injunction in favour of the respondents would not arise at all. These concurrent findings of fact cannot be reappreciated by this Court in the present Second Appeal under Section 100 of the Civil Procedure Code.

5. In such circumstances, the only aspect which remains to be examined is the contention of Mr. Desai, learned counsel appearing for the appellants that there is no material produced of devolution of right upon the death of the grandfather in favour of

his two sons. The fact that there was a grant in favour of the grandfather of the appellants and the respondents is not in dispute. There is also material on record to show that the grandfather in fact has planted fruit bearing trees in the subject property. In such circumstances, in terms of the provisions of Article 2011 of the Portuguese Civil Code, upon the death of the estate leaver, the ownership of the possession of the deceased stands transmitted in favour of his legal heirs. Article 2011 reads thus :

"The transmission of the ownership and possession of the inheritance to the heirs whether instituted or legal, takes place from the moment of the death of the estate-leaver."

6. Article 2015 of the Portuguese Civil Code provides that when one or more persons are entitled to such inheritance, the right of such person is in joint ownership and possession until the partition has been made. In such circumstances, reading the said provisions, there can be no doubt to hold that upon the death of the grandfather as admittedly there is no partition proceedings the

ownership and possession of the property which devolved upon the death would continue to be in joint ownership and possession of the legal successors. The fact that the father of the appellants and the respondents are legal successors of the grandfather are not in dispute. In such circumstances, the contention of Mr. Desai, learned counsel appearing for the appellants that there is no material produced as to how rights in the subject property devolved in favour of the parents of the appellants and the respondents cannot be accepted. The claim of adverse possession raised by the appellants to claim exclusive right to the subject property has not been established. It would also be pertinent to note Sections 13 and 16 of the Goa Succession, Special Notaries and Inventory Proceeding Act, 2012 (Goa Act 23 of 2016) which read thus :

"13. When the ownership and possession is transmitted.- The ownership and possession of the inheritance is transmitted to the heirs, whether testamentary or intestate, the moment the estate leaver dies.

16. *Inheritance is indivisible till partition is effected.*- Where more than one person has a claim to the inheritance, their rights shall be indivisible both in respect of ownership and possession, till the partition is effected."

7. Taking note of the said provisions and for the reasons stated herein above, I find that there are no substantial questions of law which arise in the present appeal for consideration and hence, the above appeal stands rejected.

F. M. REIS, J.

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