

IN THE HIGH COURT OF BOMBAY AT GOA

APPEAL FROM ORDER NO. 24 OF 2019

MARIANO MESQUITA AND 10 ORS., ... Appellants

Versus

SELVA RAJU NADAR AND 6 ORS., ... Respondents

Mr. S. G. Desai, Senior Advocate with Adv. Shalaka V. Shelke for the Appellants.

Adv. Gaurang D. Panandiker Respondent No. 1.

Coram:- DAMA SESHADRI NAIDU, J.

Date:- 22nd January 2020

Oral Order:

The appellants, as the plaintiffs, filed Special Civil Suit No.16/2013/B before the Civil Judge, Senior Division, at Vasco-da-Gama. That suit was for perpetual injunction.

2. In that suit, the appellants applied under Order 39 Rule 1 of C.P.C., for a temporary injunction, but the trial Court refused to grant it. Aggrieved, the appellants have filed Appeal against Order before the District Judge, at Margao. Then, reversing the trial Court's findings, the District Court granted an *ad interim* injunction. Thereafter, it was the respondents' turn, as the defendants, to question the appellate Court's order before this Court. Thus, they have filed W. P. No.780/2015.

3. This Court, through its judgment, dated 13.10.2016, has substantially reversed the appellate Court's findings. But on a concession made by the respondents here, it has passed the following order:

(a) The petition is partly allowed. The impugned order is modified.

(b) The petitioners are restrained from carrying out any construction and/or creating any third party rights in respect of 2,600 square metres of land (which the petitioners shall set apart), during the pendency of the suit.

(c) It is made clear that, transfers if any, made by the petitioners, after the filing of the suit, in respect of the land excluding the area of 2,600 square metres as above, shall be subject to lis pendence under Section 52 of the Transfer of the Property Act.

(d) Rule is partly made absolute in the aforesaid terms, with no order as to costs.

4. When the matter reached the trial Court, during the trial, the appellants, as the plaintiffs, amended the pleadings by incorporating para 6-A in the plaint. They have contended that they believed that their predecessor in interest had sold the property through three sale deeds to the vendors of the respondents. But on their enquiry, they came to know that their predecessor executed only the first sale deed and not the remaining ones. Therefore, under the amended pleadings, the appellants have again applied to the trial Court under Order 39 Rule 4 of C.P.C for modification of this Court's Judgment, dated 13.10.2016.

5. The trial Court through its order, dated 3.7.2018, has held that whatever the allegations, whatever be the allegations the appellants have brought on record through para 6-A of the plaint, they are matters of merit to be tried and established. It has also held that as a trial Court, it cannot modify the High Court's judgment. Aggrieved, the appellants have filed this Appeal From Order.

6. Indeed, initially before the trial Court, the appellants could not secure any *ad interim* injunction. But before the first Appellate Court, they succeeded. That success was short lived, though. Soon thereafter, this Court,

again, reversed the appellate Court's finding. It only protected the appellants' interest on the principle of *lis pendens*. Besides, it granted an *ad interim* injunction to an extent of 2,600 sq. meters, based on the respondents' concession. That was in 2013. To this date, that position has prevailed.

7. Now, the respondents' counsel informs me that even the defendants' evidence is all set for closure, with one more witness to be examined in the next week or so. After that, the trial Court may proceed with the oral arguments.

8. By sheer efflux of time, I reckon, it is inappropriate for this Court to introduce a new set of conditions, at this stage, in the name of modification. In the midst of trial, the appellants had their pleadings amended. They may have alleged fraud or falsification of documents. They are, at best, allegations, and are, indeed, matters for trial.

9. As rightly held by the trial Court, if at all the appellants desired to have the injunction order, dated 13.10.2016, modified under Order 39 Rule 4 of C.P.C., they ought to have approached this Court. For they did not want fresh injunctive relief under the changed circumstances; instead, they wanted the earlier order modified. And that order sought to be modified was passed by this Court. In essence, they wanted the trial Court to modify the High Court's judgment. Impermissible.

10. In this context, the learned Senior Counsel for the appellants has argued that the doctrine of merger applies. According to him, the High

Court's order of injunction has merged with that of the trial Court's. To support his contention, the learned Senior Counsel has cited *Kunhayammed v. State of Kerala*¹. I am afraid the doctrine applies on the converse.

11. According to *Kunhayammed*, the doctrine of merger is neither a doctrine of constitutional law nor a doctrine statutorily recognised. It is a common law doctrine founded on principles of propriety in the hierarchy of justice delivery system. It has quoted with approval its earlier decision in *Gojer Brothers Pvt. Ltd. v. Shri Ratanlal*², for the proposition that so far as merger is concerned, on principle, there is no distinction between an order of reversal of modification or an order of confirmation passed by the appellate authority. "In all the three cases, the order passed by the lower authority shall merge in the order passed by the appellate authority whatsoever be its decision—whether of reversal, or modification, or only confirmation.

12. *Kunhayammed* has reiterated the principle of law on the doctrine of merger that once the superior court has disposed of the *lis* before it either way—whether the decree or order under appeal is set aside or modified or simply confirmed—it is the decree or order of the superior court, tribunal, or authority that is final, binding, and operative. In that merges the decree or order passed by the court, tribunal, or the authority below.

¹(2000) 6 SCC 359

²[1975] 1 SCR 394

Under these circumstances, I find no reasons to interfere with that impugned order. The situation prevailing as of now shall be maintained by the parties. So observing, I dispose of the Appeal from Order.

DAMA SESHADRI NAIDU, J.

ap/-