

IN THE HIGH COURT OF BOMBAY AT GOA**SECOND APPEAL NO.77 OF 2008**

1. Ms. Kusuma Manguesh Tirodkar,
alias Kusuma Manguesh Pednekar
aged 50 years, widow, landlady,
 2. Mr. Sunil Manguesh Tirodkar,
aged 30 years, unmarried, service,
 3. Mr. Sagar Manguesh Tirodkar,
aged 28 years, unmarried,
business,
 4. Ms. Suchita Manguesh Tirodkar,
aged 27 years, unmarried, business,
 5. Mr. Sushant Manguesh Tirodkar,
aged 26 years, unmarried, business,
 6. Mr. Jagdish Manguesh Tirodkar,
aged 25 years, unmarried, service,
All r/o Mauli Prasad Building,
2nd Floor, Mangor Hill,
Vasco-Da-Gama.
- ... Appellants

Versus

1. Mr. Dilip Satardekar,
major, married and his wife
(Since deceased)
Through Legal Representatives
1a. Devendra Satardekar,
Son of Dilip Satardekar,
Behind Mauliprasad Building,
Mangor Hill, Vasco-Da-Gama, Goa.

1b. Shri Rohan Satardekar,
aged 25 years,
1c. Kum. Deepa Satardekar,
aged 30 years,
All residents of behind
Mauliprasad Building,
House No. (Not known)
Mangor Hill, Vasco-da-Gama, Goa.

2. Ms. Deepali Satardekar,
major, married,
r/o behind Mauli Prasad Building,
H. No.(Not known), Mangor Hill,
Vasco-da-Gama, Goa.

... Respondents

Mr. J. E. Coelho Pereira, Senior Advocate with Mr. B. Fernandes,
Advocate for the Appellants.

Mr. Sudesh Usgaonkar and Ms. A. Pereira, Advocates for the
Respondents.

Coram:- M. S. SONAK, J

Reserved on: 21st January 2021

Pronounced on: 25th January, 2021

JUDGMENT

Heard Mr. J. E. Coelho Pereira, learned Senior Advocate
with Mr. B. Fernandes for the Appellants and Mr. Sudesh Usgaonkar
with Ms. A. Pereira learned counsel for the Respondents.

2. This Second Appeal was admitted on 31st March 2009 on

the following substantial question of law.

“Whether the Courts below fell in error in holding that the suit was barred by limitation and that Article 65 of the Limitation Act applies ?”

3. The Appellants are the original Plaintiffs and the Respondents are the original Defendants in Regular Civil Suit No.11/2006/D instituted in the Court of the Civil Judge Junior Division, Vasco, seeking *inter alia* the reliefs of restoration of possession, permanent and mandatory injunction.

4. By the judgment and decree dated 25th September 2007, the learned Civil Judge Junior Division, Vasco, (Trial Court) partly decreed the suit. However, the relief of restoration of possession of the suit property by demolishing the construction put up by the Defendants therein was denied.

5 The Plaintiffs, appealed to the District Court (First Appellate Court), which has dismissed the appeal vide judgment and decree dated 18th February 2008. Hence, the present Second Appeal on the aforesaid substantial question of law.

6. Mr. Coelho Pereira, learned Senior Advocate for the Appellants submits that the Plaintiffs' suit was clearly and substantially seeking the restoration of possession based upon the title of the

Plaintiffs. He, therefore, submits that in terms of Article 65 in the Schedule to the Limitation Act, 1963 (the said Act) the suit was not barred by the limitation prescribed therein. He submits that the two Courts erred in adverting to residuary provisions under Article 113 of the Schedule and non-suit the Plaintiffs on the ground that the suit was instituted beyond the period of three years from the date of accrual of the cause of action.

7. Mr. Pereira submits that though the Defendants had pleaded that they had put up the constructions on the property of the Plaintiffs somewhere in the year 1962 with the permission of the predecessor in title of the Plaintiffs, there was no proof whatsoever adduced by the Defendants in support of such pleadings. He pointed out that the two Courts have recorded the finding of fact that the Defendants encroached upon the portion of the suit property sometime in the year 2000. Therefore, in terms of Article 65 of the Schedule to the said Act, the suit which was filed well within 12 years from the date of accrual of the cause of action could not be said to have been barred by the law of limitation.

8. Mr. Pereira submits that the First Appellate Court completely misdirected itself in adverting to the aspect of alleged non-executability of the decree or holding that the burden lay on the Plaintiffs to establish when user portion of possession by the Defendants became adverse or hostile. He submits that such reasoning is contrary to

the law laid down by the Hon'ble Supreme Court in *C. Natrajan Vs Ashim Bai and another*¹, *MD. Mohammad Ali Vs Jagadish Kalita and others*² and *Sant Lal Jain Vs Avtar Singh*³.

9. For all these reasons, Mr. Pereira submits that this appeal may be allowed and the Plaintiffs' suit be decreed in its entirety.

10. Mr. Sudesh Usgaonkar, learned counsel for the Respondents submitted that the substantive relief applied for by the Plaintiffs was that of mandatory injunction to demolish the construction put up by the Defendants on the property of the Plaintiffs. He submits that the Defendants are mundkars in respect of the construction put up and consequently, the possession of the suit property continues to vest with the Plaintiffs. He submits that this was not a case for recovery or restoration of possession but this was a case where the Plaintiffs were seeking a decree of mandatory injunction to demolish the construction put up by the Defendants way back in the year 1962. He, therefore, submits that Article 65 in the Schedule to the said Act was not at all applicable but the matter was governed by the residuary clause in Article 113 which prescribes the limitation period of three years. Since the suit was admittedly instituted beyond the prescribed period of limitation of three years, there is no infirmity whatsoever in the impugned judgment and decree. He relies on the decision of the Hon'ble Supreme Court in

1 (2007) 14 SCC 183

2 (2004) 1 SCC 271

3 AIR 1985 SC 857

the case of *Antonio Lobo and another Vs Felix Fernandes and others*⁴, in support of his contentions.

11. Mr. Usgaonkar contends that from the pleadings it is apparent that the issue of mundkarship has been raised by the Defendants. Therefore, in terms of provisions of the Goa, Daman, and Diu Mundkars (Protection from Eviction) Act, 1975 the issue of mundkarship was required to be referred to the Mamlatdar for determination, and pending such determination the suit could never have proceeded.

12. Mr. Usgaonkar submits that for all the aforesaid reasons, this appeal is liable to be dismissed.

13. The rival contentions now fall for my determination.

14. The Plaintiffs, have styled their suit as one for restoration of possession, permanent and mandatory injunction. However, the styling of the suit in such a manner is not determinative of the actual character of the suit. To determine the actual character, it is essential to advert to the pleadings in the suit which, no doubt, are required to be construed in their entirety.

15. The Plaintiffs have pleaded that they are the owners of the

⁴ Civil Appeal No.190 of 2007 decided on 28.09.2011

suit property having purchased the suit property by registered Deed of Conveyance dated 16.08.1985. The suit property is stated to admeasure 340 square metres and even boundaries have been set out in paragraph 3 of the plaint.

16. The Plaintiffs have pleaded that they constructed a compound wall on the northern and southern sides of the suit property. However, while constructing such compound wall on the western side, the Plaintiffs left out a portion of land along the western boundary of the suit property having a width of 2.10 metres on the southern side and 1.50 metre on the northern side to facilitate the flow of water. The Plaintiffs have pleaded that the portion of the suit property lying to the west of the compound wall had been left out by the Plaintiffs continues to be part and parcel of the suit property admeasuring 340 square metres.

17. The Plaintiffs have pleaded that Defendant Nos. 1 and 2 have constructed a house in the property of Defendant no.3, lying to the west of the suit property. Sometime around May 2000, Defendant Nos. 1 and 2 abusively and unauthorisedly encroached into the portion of the suit property lying outside the compound wall on the western side and occupied an area of 31 square metres therein. In paragraph 10, there is a reference to the encroached area being shown in the plan annexed to the plaint. The Plaintiffs have pleaded that the portion of

the suit property encroached upon by the Defendant Nos.1 and 2 was possessed by the Plaintiffs before such encroachment by Defendant Nos.1 and 2.

18. There are further pleadings in the plaint concerning holes in the compound wall for the flow of water. The relief of mandatory injunction was claimed in the suit in the matter of blockage of such holes. Such relief is to be found in prayer clauses (b) and (c) of the plaint.

19. Mr. Pereira, learned Senior Advocate for the Appellants made it clear that the relief in terms of prayer clauses (b) and (c) of the plaint has been substantially granted by the Trial Court, and therefore, there is no subsisting grievance concerning the relief in terms of prayer clauses (b) and (c) of the plaint.

20. Based upon such pleadings, the Plaintiffs sought for a decree to direct Defendant Nos. 1 and 2 to restore the possession of the suit portion encroached by them from the suit property and identified in the plan annexed to the plaint, to the Plaintiffs, by demolishing the construction put up by them therein. The Plaintiffs have valued the relief in terms of prayer clause (a) at ₹15,500/- and even paid court fees on ad valorem basis.

21. Now, upon a reading of the plaint in its entirety, it is quite clear that the main and substantive relief applied for by the Plaintiffs, in this case, was that of recovery or restoration of possession of the portion of the suit property. Further, such recovery was based on the title of the Plaintiffs to the suit property. This was not a case where the main or substantive relief of the Plaintiffs was only for the demolition of structure put up by the Defendants as were the facts in the case of *Antonio Lobo* (supra) relied upon by Mr. Usgaonkar, the learned counsel for the Respondents. Besides, in the case of *Antonio Lobo* (supra), there was no dispute that the Defendants were declared as mundkars and therefore, the relief granted by the Trial Court in the said matter was for demolition of the structure excluding the mundkarial area as demarcated by the Mamlatdar. The Defendants were also permanently injuncted from interfering with any portion of the suit property excluding the mundkarial area as demarcated in Exhibit P-6 or from doing any construction of any nature whatsoever in the said area excluding the mundkarial area.

22. In the present case, there is no merit in the contention of Mr. Usgaonkar based on a belated plea of mundkarship attempted to be raised without the backing of any significant pleadings in the written statement. In any case, in the absence of any declaration of mundkarship, the Defendants, can place no reliance on some of the observations in *Antonio Lobo* (supra) or seek to interpret them out of

context. Besides, the reliefs in *Antonio Lobo* (supra) were different and distinct from the relief of restoration of possession applied for by the Plaintiffs in the present matter. Therefore, the decision in *Antonio Lobo* (supra) can be of no assistance to Defendant Nos.1 and 2 in the present matter.

23. From the perusal and construction of the pleadings in the plaint in their entirety, it is apparent that this was a suit seeking restoration of possession based upon the title of the Plaintiffs to the suit property. Therefore, the institution of this suit was governed by Article 65 in the Schedule to the said Act, which provides that the period of limitation for such purpose shall be 12 years when the possession of the Defendants becomes adverse to the Plaintiffs.

24. In this case, the Defendants had pleaded that they had put up the construction sometime in the year 1962 with the permission of Defendant No.3. These are not pleadings to suggest that the possession of Defendant Nos.1 and 2 become adverse to the Plaintiffs or their predecessor in the title either in the year 1962 or at any stage thereafter. That apart, it is not sufficient for the Defendants to merely plead something but the Defendants are required to adduce proof in support of such pleadings.

25. The controversy before the Trial Court was whether

Defendant nos. 1 and 2 encroached on the portion of the suit property somewhere in the year 2000 as pleaded by the Plaintiffs or somewhere in the year 1962 as pleaded by Defendant Nos. 1 and 2. Accordingly, issue no.2 was cast in the following terms:

“Does plaintiffs prove that in May 2000 defendants trespassed into portion of suit property lying outside compound wall on western side occupying an area of 31 sq.mts. ?

26. The aforesaid issue was answered by the Trial Court in the affirmative and the discussion on this issue is to be found in paragraphs 10 to 13 of the impugned judgment and decree dated 25.09.2007. This means that the Trial Court had accepted the version of the Plaintiffs that the encroachment took place sometime in the year 2000 and not in the year 1962 as pleaded by Defendant Nos.1 and 2. Since the suit was instituted in the year 2006, the same was well within the prescribed period of limitation of 12 years in terms of Article 65 in the Schedule to the said Act. The learned Trial Judge had therefore clearly erred in adverting to the residuary clause and holding that the suit ought to have been filed within three years i.e. around May 2003 for the same to be within the prescribed period of limitation.

27. The First Appellate Court, with respect, was not at all justified in adverting to the issue of identification of the encroachment or the alleged non-executability of the decree if the same were to be made. The First Appellate Court also erred in virtually shifting the onus

upon the Plaintiffs of pleading and proving the particular date or year when the possession of the Defendant Nos. 1 and 2 became adverse or hostile to the Plaintiffs. Based on such reasoning which is not acceptable, the First Appellate Court has held that Article 65 of the Limitation Act was not attracted, or in any case, the suit was barred even under Article 65 of the Limitation Act.

28. Now since Defendant Nos. 1 and 2 virtually admit that they have encroached upon the suit property of which the title vests in the Plaintiffs, it was for the Plaintiffs to have pleaded and proved to the nature of their rights or character of their possession. Defendant Nos. 1 and 2 had pleaded permissive possession and not urged any hostility or adversity in the possession. In any case, Defendant Nos. 1 and 2 have taken a specific plea that they have encroached in the year 1962, but, failed to adduce any evidence in support of such plea. Thus, the learned Trial Court returned the specific finding of fact that Defendant Nos. 1 and 2 had encroached somewhere in the year 2000 as pleaded by the Plaintiffs. This finding of fact was never challenged by Defendant Nos. 1 and 2 by filing any cross objection before the First Appellate Court. In any case, even if it is held that the First Appellate Court could have interfered with these findings even in the absence of any cross objection, there was really no evidence on record to warrant interference with this finding of fact.

29. In *C. Natrajan* (supra), the Hon'ble Supreme Court has held that the law of limitation relating to the suit for possession has undergone a drastic change. In terms of Articles 142 and 144 of the Limitation Act, 1908, it was obligatory on the part of the plaintiff to aver and plead that he not only has title over the property but also has been in possession of the same for a period of more than 12 years. However, if the plaintiff has filed the suit claiming title over the suit property in terms of Articles 64 and 65 of the Limitation Act, 1963, the burden would be on the defendant to prove that he has acquired title by adverse possession.

30. In *Md. Mohammad Ali* (supra), the Hon'ble Supreme Court has held that because of the Limitation Act, 1963 the legal position as obtained under the old Act changed. In a suit governed by Article 65 of the 1963 Limitation Act, the plaintiff will succeed if he proves his title and it would no longer be necessary for him to prove, unlike in a suit governed by Articles 142 and 144 of the Limitation Act, 1908, that he was in possession within 12 years preceding the filing of the suit. On the contrary, it would be for the defendant so to prove if he wants to defeat the plaintiff's claim to establish his title by adverse possession.

31. In this case, the First Appellate Court does not appear to have appreciated the distinction between the position of suit governed

by Limitation Act, 1908 and Limitation Act, 1963 as explained by the Hon'ble Supreme Court in the aforesaid decisions. The burden was, therefore, wrongly cast on the Plaintiffs.

32. Besides, in *Sant Lal Jain* (supra) the Hon'ble Supreme Court held that the appellant before it had not come to the Court with the suit for a mandatory injunction after any considerable delay which will disentitle him to the discretionary relief. Even if there was some delay, an attempt should be made to avoid multiplicity of suits and the party should not be driven to file another round of suit with all the attendant delay, trouble, and expense. The Hon'ble Supreme Court held that the suit was in effect one for possession though couched in the form of a suit for a mandatory injunction as what would be given to the plaintiff in case he succeeds his possession of the property to which he may be found to be entitled. Therefore, the Hon'ble Supreme Court held that the relief ought not to be denied to the party merely because he had couched the plaint in the form of a suit for mandatory injunction.

33. The Plaintiffs in the present case, are on much firmer footing. This is because the Plaintiffs in their prayer clause (a) have applied for relief of restoration of possession of the suit portion encroached upon by the Defendants by demolishing the construction put up by them thereon. This means that the suit has not been couched

as one for a mandatory injunction but this was a suit seeking restoration of possession based upon the title of the Plaintiffs. Besides, the Plaintiffs, have paid a Court fee of ₹1135/- by valuing this prayer at ₹15,500/-. In contrast in respect of prayer clauses (b) and (c) where the Plaintiffs had applied for a mandatory injunction based on the cause of action which accrued to them in the year 2005, the Plaintiffs had paid a Court fee of only ₹10/- each. Thus, in so far as the relief in terms of prayer clause (a) is concerned, the period of limitation was governed by Article 65 of the Limitation Act, 1963 and not by the residuary clause in Article 113 of the Limitation Act, 1963. The substantial question of law so framed is therefore required to be answered in favour of the Appellants-Plaintiffs.

34. From the perusal of the pleadings in the written statement, it is not possible to accept Mr. Usgaonkar's belated plea based upon mundkarship. It is pertinent to note that such a plea was advisably neither raised before the Trial Court or First Appellate Court. In the absence of the pleadings, there was no question of raising such a plea.

35. For the aforesaid reasons, the impugned judgments and decrees to the extent they deny to the Appellants herein the relief in terms of prayer clause (a) of the plaint are set aside and the Appellants' suit is decreed in terms of prayer clause (a) of the plaint as well.

36. The appeal is allowed in the aforesaid terms. There shall be no order as to costs.

M. S. Sonak, J

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