

IN THE HIGH COURT OF BOMBAY AT GOA

SECOND APPEAL NO. 59/2019

1. MAHALAXMI CONSTRUCTION,
Having its office near Hotel Annapurna
Near Railway overbridge, Margao, Goa
Represented by its proprietor
Shri Subhiraj Prabhakar Naik

2. Shri Subhiraj Prabhakar Naik
Son of late Prabhakar Naik
Major of age, married,
Businessman, Indian National,
R/o H. No. 96/7, Nagmodem,
Navelim, Salcete – Goa.

... Appellants.

Versus

1. MR. ADITYA RAMA KERKAR
Son of Rama Mahadev Kerkar
Major of age, married,
Businessman, Indian National

2. MRS. SUSHMA ADITYA KERKAR
Wife of Aditya Rama Kerkar
Major of age, housewife,
Indian National,
Both residents of H. No. 271,
Matura Niwas, Navelim Road,
Margao, Salcete – Goa.

... Respondents.

Mr. Galileo Francisco Teles, Advocate for the Appellant.

Mr. Anoop Atchut Gaoker, Advocate for Respondents No.1 and 2.

Coram : M.S. SONAK, J.
Date: 16th February 2021

ORAL JUDGMENT:

Heard Mr. Teles for the appellant and Mr. Anoop Gaoker for Respondents 1 and 2.

2. This is a second appeal questioning the Judgments and Decrees made by the Trial Court and the First Appellate Court decreeing the respondents – plaintiffs' suit seeking perpetual injunction against the appellants (original defendants) and dismissing the counterclaim raised by the appellants (original defendants).

3. Mr. Teles, learned Counsel for the appellants urges the formulation of the following substantial questions of law from out of the array of substantial questions of law set out in paragraph 23 of the memo of appeal:-

A. Whether the Suit is filed by the Respondents was a Suit simpliciter for Perpetual Injunction without seeking for any Declaratory Reliefs and as such the Suit by itself was not maintainable in law?

B. Whether the Respondents were entitled to obtain a Decree of Permanent Injunction restraining disturbance of possession under Section 38 of the Specific Relief Act, 1963 based on Agreement dated 02/12/2004 in the absence of any documentary evidence showing the actual use and possession of the Suit Office by the Respondents on the date of filing of the Suit?

C. Whether the Ld. Appellate Court erred in holding that the Respondents were in physical possession of the Suit Office since 17/01/2007 based on Letter of Possession at Exhibit 59 Colly and Exhibit 60 respectively?

4. Mr. Teles submits that the findings recorded by the two Courts that possession of office premises (office no.5) was delivered by the defendants to the plaintiffs are based on no evidence or in any case based on misreading the evidence on record. He, therefore, submits that such findings are perverse and that by itself gives rise to a substantial question of law.

5. Mr. Teles submits that in this case, the agreement dated 02.12.2004 was never registered and in any case, the First Appellate Court has held that such agreement did not create any right or interest in the immovable property i.e. the suit office. He, therefore, submits that in such a situation, the suit for perpetual injunction simplicitor was not at all maintainable and a declaration ought to have been sought since more than a cloud was created over the alleged title of the plaintiffs in respect of the office premises. He, therefore, submits that the suit for perpetual injunction simplicitor without seeking any declaration was not even maintainable and the two Courts erred in decreeing the same.

6. Mr. Teles submits that in the present case, there is no documentary evidence showing the actual use and occupation of the suit office by the plaintiff as on the date of the institution of the suit. In the absence of these jurisdictional facts, the two Courts could not have decreed the suit.

Such a decree failed to take into account provisions of section 38 of the Specific Relief Act, 1963.

7. Mr. Anoop Gaoker, learned Counsel for the respondents No. 1 and 2 (original plaintiffs) defended the impugned Judgment and Decree based on the reasoning reflected therein. He points out that this is a case where the two Courts have concurrently recorded findings of fact. There is no perversity whatsoever to warrant interference. Therefore, submits that this appeal may not be entertained.

8. The principles concerning the necessity to seek a declaration in a suit about immovable properties have been discussed by the Hon'ble Supreme Court in **Anathula Sudhakar vs P. Buchi Reddy (Dead) By Lrs & Ors.**¹ The following principles will apply to the facts of this case:-

“(i) Where a plaintiff is in lawful or peaceful possession of a property and such possession is interfered or threatened by the defendant, a suit for an injunction simplicitor will lie. A person has a right to protect his possession against any person who does not prove a better title by seeking a prohibitory injunction. But a person in wrongful possession is not entitled to an injunction against the rightful owner.

(ii) Where the title of the plaintiff is not disputed, but he is not in possession, his remedy is to file a suit for possession and seek in addition, if necessary, an injunction. A person out of possession, cannot seek the relief of injunction simplicitor, without claiming the relief of possession.

¹ 2008 4 SCC 594

(iii) Where the plaintiff is in possession, but his title to the property is in dispute, or under a cloud, or where the defendant asserts title thereto and there is also a threat of dispossession from defendant, the plaintiff will have to sue for declaration of title and the consequential relief of injunction. Where the title of the plaintiff is under a cloud or in dispute and he is not in possession or not able to establish possession, necessarily the plaintiff will have to file a suit for declaration, possession and injunction.”

9. In the present case, the plaintiffs had applied for a perpetual injunction simplicitor. This injunction was applied based on the possession of the plaintiff. The two Courts have returned concurrent findings that the plaintiff was not only in possession of the suit office as on the date of filing of the suit, but further, such possession was delivered to him vide the document at Exhibit 60. Further, the two Courts have also held that the delivery of possession vide the document at Exhibit 60 was in terms of the agreement at Exhibit 58. There is no perversity in the record of such concurrent findings of fact. In a Second Appeal, it is not possible to re-evaluate or reassess the evidence as if it were a first appeal. This is certainly not a case where the findings suffer perversity because there is both oral as well as documentary evidence on record in support of the concurrent findings of fact concerning the possession of the plaintiffs.

10. Since, no case of perversity is made out in the record of concurrent findings of fact on the aspect of the plaintiff's possession to the suit office, applying the principles laid down in *Anathula Sudhakar's* case

(supra), the plaintiffs did not need to seek declaratory relief. A suit for perpetual injunction simplicitor was maintainable and the view taken by the two Courts on this aspect suffers from no legal infirmity.

11. Further, since this is not a case of absence of documentary evidence showing actual use and occupation of the suit office by the plaintiffs, the substantial question of law based on section 38 of the Specific Relief Act, 1963 also does not arise and in any case, will have to be answered against the original defendants.

12. According to me, this is a case where the two Courts, based on the material on record have essentially recorded findings of fact. There is no perversity in the records of such findings of fact. No legal error has also been pointed out to warrant any interference in the Second Appeal. The impugned Judgments and Decrees are quite consistent with the law laid down by the Hon'ble Supreme Court in the case of *Anathula Sudhakar's* case (supra).

13. Therefore, for all the aforesaid reasons, this Second Appeal is not required to be entertained as it does not give rise to any substantial question of law. The Second Appeal is consequently dismissed.

14. There shall be no order as to costs.

M.S. SONAK, J.

jfd/-