

Santosh

IN THE HIGH COURT OF BOMBAY AT GOA
SECOND APPEAL NO. 123 OF 2011
WITH
MISC. CIVIL APPLICATION NO. 214 OF 2020

1. SHRI CEZARIO F. D'SOUZA,
 Major of age, occupation Service,
 Married, and his wife .

2. SMT. UBALDINA D'SOUZA,
 Major of age, housewife,
 Both r/o House No. not known,
 Santacruz vado, Bastora,
 Bardez — Goa.

..... Appellants.

Versus.

1. SHRI JONN FERNANDES,
 S/o Damaciano Fernandes,
 Major of age, occupation Taxi Business,
 married and his wife

2. SMT. REGINA FERNANDES,
 d/o Bapris Sequeira, major of age,
 housewife, Both r/o House No. 64-G,
 St. Cruz waddo, Bastora,
 Bastora, Bardez — Goa.

3. SHRI PANDURANG
 ADU KHANOLKAR,
 s/o Sadu Khanolkar, widower,
 major of age, r/o H. No. 97/9,
 St. Cruz waddo, Bastora,
 Bastora, Bardez — Goa.

4. SHRI ROITDAS PANDURANG
KIHANOLKAR s/o Pandurang Khanolkar,
major of age, married and his wife,
5. SMT. ROSHAN ROIIIDAS
KHANOLKAR, Major of age,
housewife, Both r/o St. Cruz waddo,
Bastora, Bastora, Bardez — Goa.
6. SHRI JAGANNATH SADU
KHANOLKAR, s/o Shri Sadu Khanolkar,
major of age; and his wife,
7. SMT. SAVITRA JAGANNATH
KHANOLKAR, Major of age, housewife,
Both r/o St. Cruz waddo, Bastora,
Bastora, Bardez — Goa.
8. SMT. PELIGRINA D'SOUZA
(since deceased)
Represented by her legal representative
Shri Alvito Velho, Major of age,
r/o St. Cruz waddo, Bastora,
Bastora, Bardez ~ Goa.
9. SHRI SUVRAT
SHUBHASHCHANDRA BHOBE,
Architect, F/3 Milan Apartments,
Castano Albuquerque Road, Panaji Goa,
10. SMT. ABELINA MONTEIRO
Major of age, r/o St. Cruz waddo,
Bastora, Bastora, Bardez ~ Goa.
11. SHRI BAPCINO GEROME D'SOUZA,
Major of age, r/o. C/o Smt. Abelina Monteiro,

St. Cruz waddo, Bastora,
Bastora, Bardez — Goa.

12. SMT. PAULINA MONTEIRO

(since deceased),

Represented by her son

Mr. Francis Monteiro,

r/o St. Cruz waddo, Bastora,

Bastora, Bardez — Goa

..... Respondents.

Mr. A.D. Bhobe, with Ms. Kalpa Govekar, Advocate for the Appellants.

Mr. V.P. Thali, with Mr. Rajdeep Prabhudessai, Advocate for the Respondents No.1 and 2.

CORAM: M. S. SONAK, J.

DATE: 11th March 2021.

ORAL JUDGMENT:

Heard Mr. A.D. Bhobe for the Appellants and Mr. V.P. Thali, who appears along with Mr. Prabhugaonkar for Respondents No.1 and 2.

2. The Appellants are the original Defendants No.6 and 7 and Respondents No.1 and 2 are the original Plaintiffs in Regular Civil Suit No. 107/99/D, instituted in the Court of Civil Judge, Jr. Division, at Mapusa (Trial Court).

3. The Trial Court, vide Judgment and Order dated

16/2/2009, decreed the suit and declared, *inter alia*, that the Plaintiffs have acquired title by way of adverse possession/prescription to the suit part of the courtyard, admeasuring 11 sq. meters and the fenced garden admeasuring 13 sq. meters within survey No.80/23 of Village Bastora, Bardez, Goa (suit property for this Second Appeal). The impugned Judgment and Decree concerns other properties, as well as other issues. However, in this Second Appeal, the Appellants and Respondents No.1 and 2 (original Plaintiffs) are concerned with only the aforesaid suit property admeasuring in all 24 sq. meters and forming part of the property survey No.80/23 of Village Bastora, Bardez, Goa.

4. By the Judgment and Decree dated 30th April 2010, the learned Ad-hoc District Judge-1, Mapusa upheld the aforesaid Judgment and Decree, dismissing the Appeal instituted by the Appellants herein. Hence, the present Second Appeal.

5. This Second Appeal was admitted on 12th October 2011, on the following substantial questions of law :

1. Whether the suit filed by the Respondent No. 1 and 2 claiming an area from property bearing Survey No. 80/18, 80/22, 80/23, 80/27 and 80/28 could be decreed when the Respondent Nos. 1 and 2 had themselves admitted that though the total area of the property claimed by the Respondent no.1 was admeasuring 1341 sq. mtrs as per the old cadastral survey plan whereas the said property was shown to be 1500 sq. mtrs in the records of right i.e. in the

new survey.

2. Whether the Courts below could have decreed the suit filed by the Respondent nos. 1 and 2 and held that the Respondent Nos. 1 and 2 had acquired title by adverse possession/by law of prescription in the absence of the Respondent Nos. 1 and 2 satisfying the essential ingredients of adverse possession namely the fact of the Respondent Nos. 1 and 2 were in actual and continuous possession of the suit courtyard and fence garden along with the necessary animus to perfect the title to the suit part of the courtyard and the fenced garden ?

6. In so far as the first substantial question of law is concerned, Mr. Thali, the learned Counsel for the Plaintiffs stated that the claim of the Plaintiffs was only to the property admeasuring 1314 sq. meters and, therefore, this aspect may be clarified.

7. Accordingly, it is clarified that the claim of the Plaintiffs was only to an area of 1314 sq. meters and not to 1500 sq. meters. In any case, according to me, whichever way this question is answered, the same is not likely to impact the claim in respect of the suit property admeasuring 24 sq. meters.

8. The second substantial question of law relates to whether or not the Plaintiffs have pleaded and established that they acquired title by adverse possession/by law of prescription to the suit property admeasuring 24 sq. meters, as aforesaid.

9. Paragraph 25 of the plaint, reads as follows :

“25. The Plaintiffs' Court yard partly occupies an area of 11 sq. mts. of land of survey no.80 sub-division 23. Similarly the plaintiffs fenced part of the garden area partly covers an area of 13 sq. mts. of the land under said Survey no.80 sub-division 23. The said area of 11 sq. mts. of Court yard and 13 sq. mtrs of the fenced part of the garden is shown in the plan annexed hereto as annexure “D” under blue shade. The said area of 11 sq. mts. of Court yard and 13 mts of fenced part of the garden area hereinafter referred as “the Suit parts of the Court yard and the garden.”. So by virtue of continuous and uninterrupted use and enjoyment of the said suit parts of the Court yard and the garden as of theirs' or the period more than 55 years, the plaintiffs have acquired title to the said suit part of Court yard and the garden by adverse possession/ by law of prescription. The plaintiffs are therefore entitled for declaration to that effect.”

10. According to me, though there are no specific pleadings that the suit property was used by the Plaintiffs as a matter of right, the Plaintiffs have pleaded about continuous and uninterrupted use and enjoyment of the suit property “as of theirs'” for a period more than 55 years. This phrase can be construed as the user as a matter of right and, therefore, it cannot be said that there are no pleadings sufficient to make out a case of adverse possession/by the law of prescription.

11. Besides, there are pleadings in paragraphs 7 and 8 of the plaint on this aspect and, therefore, it cannot be said that there was

any lack of pleadings based on which the Decrees could not have been made by the learned Trial Court and the First Appellate Court.

12. Now, most of the Defendants, including, in particular, Defendants No.1, 2, and 3 to the plaint, filed their written statements admitting to the pleadings in paragraph 25 of the plaint. Though such admissions cannot bind Defendants No.6 and 7 *i.e.* the present Appellants, it is necessary to record that in this case, Defendants No.6 and 7 chose not to step into the witness box or lead any evidence in the matter. Instead, it is the Plaintiffs who stepped into the witness box and deposed to the pleadings in the plaint.

13. The two Courts have considered both, the documentary, as well as oral evidence on record and returned concurrent findings that the Plaintiffs were indeed in adverse possession of the suit property and, as a matter of law, had acquired title by adverse possession/law of prescription. The evidence on record also indicates that this portion of the suit property is beyond the compound wall of the Appellants' property. This is also an additional circumstance taken into consideration by the two Courts in recording the concurrent findings. Though, no specific issue regards perversity is framed, suffice to note that in this state of the oral and documentary evidence on record, it will be difficult to hold that the findings on fact, recorded by the two Courts concurrently, suffer from any perversity,

and give rise to any substantial questions of law warranting interference with the impugned Judgments and Decrees.

14. Mr. Bhobe, however, pointed out that Defendant No.1- Pandurang Sadu Khanolkar had instituted Regular Civil Suit No.185/98/I/Addl in the Court of Civil Judge, Junior Division, Mapusa, which was disposed of by a Consent Decree dated 4/5/1999. In terms of this consent decree, Defendants No.6 and 7 were obliged to provide access to Defendant No.1 precisely from the suit property admeasuring 24 sq. meters, now claimed by the Plaintiffs *i.e.* Respondents No.1 and 2 herein. He submits that if the impugned Decrees are confirmed, then, the Appellants may be placed in a piquant situation, in which the Appellants would no longer retain any rights towards the suit property and at the same time, are required to provide access in terms of the Consent Decree dated 4/5/1999. Mr. Bhobe submits that this is a good ground to warrant interference with the impugned Judgments and Decrees.

15. At this stage, it is not possible to agree with the contention of Mr. Bhobe that the aforesaid constitutes a good ground to interfere with the impugned Judgments and Decrees made by the two Courts. Further, from the material on record, it does not appear that the apprehension now expressed by Mr. Bhobe will pose any serious problems to the Appellants. This is because, Defendant No.1 and, for

that matter, his Legal Representatives —Defendants No.2 and 3 were very much parties to the present suit. All these Defendants have filed written statements in response to the plaint.

16. In paragraph 19 of the plaint, the Plaintiffs had made the following averments concerning Regular Civil Suit No.185/1981 and the Decree obtained therein:

“The Plaintiffs later on obtained a copy of the Commissioner's report i.e. the report submitted by the defendant no.9 in the said Suit, from the defendant no.2 and could know that the report submitted by the defendant no.9 was false and fraudulent and does not depict true facts as existed at the time of measurements taken by him. In fact, the defendant no.9 who was appointed as Commissioner by the Court was required to place before the Court true facts existing at the site. Even the defendant No.1 and defendant no.7 who were represented by their respective advocates have suppressed the material facts with a sole intention to obtain order from the Hon'ble Civil Judge by playing fraud against the Court and these plaintiffs. A copy of the report with the sketch drawn by the defendant no.9 and submitted in the said suit are produced herewith as annexure “F”.”

17. Defendants No.1, 2 and 3, in their respective written statements, admitted the aforesaid contents of paragraph 19 of the Plaint, unconditionally.

18. Similarly, in the context of the averments relating to adverse

possession of the Plaintiffs in respect of the suit property admeasuring 24 sq. meters, Defendant No.1 at paragraph 27 of his written statement admitted the contents in the following terms :

“The contents of para 25 are admitted, since the defendant No.1 knows the fact for last many years.”

19. Similarly, Defendants No.2 and 3, in paragraph 28 of their written statement, admitted the contents of paragraph 25 of the plaint, in the following terms :

“28. With reference to para no.25 of the plaint these defendants states that there exist court yard and the garden of the plaintiff and the same are enjoyed and possessed by the plaintiff for last many years till today as the defendant no.2 know this fact from his childhood.”

20. This means that the Plaintiffs in Regular Civil Suit No.185/98, as also their legal representatives, admitted the case of the Plaintiffs in the present suit *i.e.* Respondents No.1 and 2 herein. They even went to the extent of admitting the allegations of fraud and collusion concerning the proceedings in Regular Civil Suit No.185/1998.

21. In such circumstances, even assuming any proceedings are taken out for the execution of the Consent Decree dated 4/5/1999, it is obvious that both, the Appellants, as well as Respondents No.1 and 2, will have sufficient ammunition to resist such execution. It is in this context that it must be held that the apprehension expressed by

Mr. Bhobe is not sufficient to warrant interference with the impugned Judgments and Decrees.

22. For the aforesaid reasons, the substantial questions of law are answered accordingly and this Appeal is disposed of. There shall be no order as to costs.

23. Misc. Civil Application does not survive and is disposed of.

M.S. Sonak, J.

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