

IN THE HIGH COURT OF BOMBAY AT GOA

AO No.3 of 2020

ANTONIO OSWALD
ALVARO FURTADO.,

..... APPELLANT

VS

ANTONIO VERNON
RAIMONDO FURTADO AND
6 ORS.,

..... RESPONDENTS

Mr. Nigel Da Costa Frias, Advocate for the Appellant.
Mr. V. Menezes, Advocate for Respondent no.1 and 2.
Mr. S. Sardessai, Advocate for the Respondent no.7.

CORAM: DAMA SESHADRI NAIDU, J.
Date: 16th March 2021.

ORDER:**Facts:**

There are three brothers: the appellant, the first respondent, and the third respondent. Their sister is the fifth respondent; their mother, the seventh respondent.

2. In 2016, the appellant, his two brothers, and his sister had the family properties partitioned. It seems they inherited those properties from their father, uncle, and aunt.

3. In that partition, one piece of property with structures, in survey no.64/1 of village Varca, was divided into three parts:

Plot "A" with a structure was allotted to the appellant;

Plot "B" with a part of the ancestral house was allocated to the third respondent and his wife, who is the fourth respondent;

Plot "C" again with a structure, having the main ancestral house, was allotted to the first respondent and his wife, the second respondent.

4. Before the partition in 2016, the appellant lived in the U.S.A for many years; he now lives in Goa, though. The first respondent, an Australian resident, still lives there. So, in his absence, allegedly, his staff takes care of his property: Plot C.

5. When the partition took place, in the house on plot A, allotted to the appellant, a lady with her family was staying. She is said to have claimed her right as an earlier 'caretaker' of the joint family. As the appellant could not occupy the house on plot A, all the three brothers have had a Memorandum of Understanding("MOU"). This is an admitted fact.

6. Through that MOU, the brothers agreed thus: (a) that they all should contribute Rs.10.00 lakhs each and build a house on an alternative site for their employee occupying the house in plot A; (b) that until that house was built, the appellant could live in the house on plot C, allotted to the first respondent, who lives in Australia. Through that arrangement, the appellant occupied the house on plot C and continued to live there. Meanwhile, he is said to have contributed his share of Rs.10.00 lakhs for the alternative house to be built for their employee, who would then vacate the house in plot A belonging to the appellant.

7. Over time, the appellant wanted to mutate the Revenue records and sell plot A. With the prospective purchasers' enquires, the appellant, for the first time, came to know that plot A had no independent access. In fact, the other brother, that is the third defendant (Plot B), blocked the access. And it has made it difficult for the appellant to enjoy his property. Soon, even the first respondent obstructed, as the access begins from his property—that is, plot C.

8. According to the appellant, only then when he came to know about the access-problem did he realise that he had been tricked; he had been tricked into having the property partitioned without any benefit to him. So, he has sued his brothers. In Special Civil Suit No.62/2018 before the Civil

Judge, Senior Division, Margao, the appellant sought a declaration that the partition deed is void because it is fraudulent. He has sought other consequential reliefs as well.

9. In that suit, the appellant applied for an interim injunction under Order 39, Rules 1 and 2, of C.P.C. He sought these reliefs: (i) the defendants should not create any third-party interest over the properties in dispute; (ii) they should not change the nature of the proprieties.

10. When that application was pending, the first respondent tried, as the appellant alleges, to dispossess him by using force and by not following the due process. Therefore, the appellant again applied to the trial Court to have the interim injunction application amended with an additional prayer that parties must maintain *the status quo* regarding the house on plot C. That amendment was allowed. Besides, he has also filed an independent interim application for injunctive relief of the *status quo*. Initially, on 5/12/2018, the trial Court granted an order of *status quo*. But despite the *status quo*, the first respondent allegedly evicted the appellant forcibly, which has led to the appellant's filing an FIR against the first respondent and others. So pleads the appellant. He wanted the possession restored.

11. The other respondents, especially the first respondent, joined the issue. They have contended that with the contribution made by all the three brothers, they built a house at the alternative site for that employee. As a result, in May 2018, the employee vacated the house on the appellant's plot A. Soon after that, the appellant voluntarily vacated the house on plot C and handed over the possession. Therefore, as the first respondent contends, the appellant no longer possessed the house on plot C when he filed the suit. The question of forcible dispossession pending the suit, thus, does not arise.

12. Eventually, through an order, dated 4/5/2019, the trial Court dismissed the appellant's injunction application. Aggrieved, he has filed this Appeal From Order.

Submissions:**Appellant:**

13. Shri Nigel Costa Frias, the learned counsel for the appellant, has submitted that the appellant has filed many documents to show that he had been in possession of the house on plot C when he filed the suit. But the trial Court disregarded them. According to him, the appellant is not a trespasser; on the contrary, he has still been in possession of the property. Therefore, any dispossession must have been only under due process of the law. Yet, the first respondent took the law into his hands, used muscle, and threw the appellant out of the house.

14. Taking me through the impugned judgment, Shri Frias has also pointed out that the first respondent lives in Australia. Therefore, the question of the appellant vacating the house and handing over the keys to a stranger does not arise. According to the appellant's counsel, the respondents planted a witness to establish before the trial Court as if the appellant on his own vacated the house and handed over the keys to a lady said to be the first respondent's employee. Even if we were to believe, the learned counsel stresses, this improbable story, either the first respondent or his employee, who allegedly took the keys, must have insisted on the appellant for a letter acknowledging the handing over of possession. That has not taken place.

15. Summing up his submissions, Shri Frias has submitted that viewed from any perspective, the trial Court's order suffers from incurable legal laches and that it needs to be interfered with. Shri Frias has also submitted that though the interim application contained other reliefs, such as creating third party interest or changing the physical features, the impugned order confines itself to one single relief: dispossession.

Respondents:

16. Mr. Menezes, the learned counsel for respondents no1 and 2, has

denied all the appellant's assertions. According to him, the trial Court has appreciated the evidence on record and has justly concluded. In this context, he points out that the first respondent placed on record the affidavit of the lady who had been living in the house on plot A. And that affidavit affirms that she did vacate the house and occupied the new one constructed for her by the three brothers in May 2018. He has also pointed out that the first respondent's employee or the manager filed an affidavit attesting to the fact that she supervised the construction of the house for the family's former employee and, later, received the house keys from the appellant.

17. Shri Menezes points to another affidavit—that of a neighbour, who has affirmed that the appellant is now living in the new house on plot A. In the end, the respondents' counsel has also drawn my attention to what is said to be the Judgment, dated 6/10/2020, in case No. LRC/Part/Varca/400/ 2019/ 98, rendered by the Court of Deputy Collector and the Sub Divisional Officer, Salcete, at Margao. According to Shri Menezes, this is an order by the Revenue Court, through which the appellant had his share of the property physically divided and demarcated.

18. In this context, Shri Menezes points out that, on the one hand, the appellant assails the whole partition as fraudulent and maintains the case for its nullification. On the other hand, he takes advantage of that very partition and gets his portion of the property physically divided and allotted to him through Revenue Court proceedings. Therefore, the appellant, according to Shri Menezes, has been estopped from blowing hot and cold.

19. Shri Sardessai, the learned counsel for the seventh respondent (mother), submits that the seventh respondent has her own independent right, and she has not been a party to the partition. So, whatever be the disputes amongst her children, that should not affect her right.

20. Heard Shri Nigel Costa Frias, the learned counsel for the

appellant. Shri V. Menezes, the learned counsel for the respondent nos.1 and 2 and Shri S. Sardessi, the learned counsel for the seventh respondent.

Discussion:

21. Indeed, the deed of partition, to which the appellant is a party, is at the core of the dispute in the pending suit. We need not visit that controversy. Nor should we cogitate on the impact of the Judgment or Order, dated 4/5/2019, the appellant secured from the Revenue Court to have his share of the property partitioned. It was based on the very same partition deed now under challenge, though. We will, instead, entirely focus on the injunction application and its outcome.

22. Plot C in survey no.64/1 indisputably belongs to the first respondent, who lives in Australia. Through the MOU, the first respondent allowed the appellant to live in the house on plot C allotted to him. It was because the house on plot A allotted to the appellant had been occupied by their erstwhile employee. As per the terms of the MOU, the appellant was allowed to live in the house on plot C until all the three brothers constructed a house for their employee, and she moved over to that house. Thus, the appellant's right to occupy the house on the first respondent's plot is limited and contingent. The question is whether that contingency has arisen.

23. The appellant had pleaded that he had been in possession of the house on plot C by the time he filed the suit. But the first respondent used muscle and dispossessed him. To support his contentions, he has filed certain documents, as mentioned in para 51 of the impugned order. Nevertheless, for the reasons given in that paragraph, the trial Court disbelieved those documents.

24. Indeed, the appellant also contends that the trial Court has not looked into the other documents, such as telephone bill and driving licence. In this context, I may observe that nobody disputed that the appellant had

been in possession of the property. The only question is, has he vacated the property on his own or has he been dispossessed? In other words, was he in possession of the property when he filed the suit? After appreciating the evidence, the trial Court has held that he has vacated the house and surrendered the possession.

25. To arrive at that conclusion, the trial Court has relied on, to begin with, the affidavit filed by the lady—the erstwhile employee—who had been occupying the house on the appellant's plot. Had she not vacated the house on the appellant's plot and moved over to the new house built for her, I reckon, she would not have deposed before the Court through an affidavit to her own prejudice. She would otherwise be prejudiced because with her affirmation, now she lost her right to live in the house on plot A.

26. Even now, the appellant agrees that the house on his plot is vacant. But his singular contention is that he had been dispossessed pending the suit and without due process.

27. The second piece of evidence that persuaded the trial Court to dismiss the injunction application is another affidavit: that of a person who is said to be the first respondent's employee. She affirmed that with the three brothers' money, she had a house constructed for the erstwhile employee. Indeed, the 'contribution part' does not find any denial; on the contrary, the appellant admits that he did contribute his share of the money. According to her, once the house was completed in May 2018, the erstwhile employee vacated the house on plot A and moved over to the new house. Only under those circumstances did the appellant voluntarily vacate, she affirms, the house on plot C and handed over the keys to her. This statement corroborates the version of the lady who initially occupied the house on the appellant's plot. The third affidavit is by a neighbour. She, too, affirms that the appellant is now living in the house other than the one on plot C.

28. Of course, the appellant has also filed one affidavit, and that was

by an advocate who is not his counsel, though. That advocate affirms that he visited the appellant in the house on plot C on many occasions—including on 3/12/2018—pending the suit. But in the face of other consistent, corroborative evidence produced by the first respondent, the trial Court has disbelieved that piece of evidence. At any rate, in para 52 of the Judgment, it has observed that the appellant has no right to plot C, and the house existing on it was admittedly allotted to the defendant nos.1 and 2. In the end, it has also observed that the appellant has failed to establish that he was in lawful possession of the suit house on or before 4/12/2018. I reckon these findings are based on evidence and that evidence stands well appreciated. Under these circumstances, I express my inability to interfere with the impugned order. As a result, I dismiss the Appeal From Order.

29. After all, interlocutory applications are steps in aid to preserve the principal *lis*. And, by the same token, interim adjudication is always subject to the ultimate adjudication of that principal *lis*—the suit. During the trial, the impugned order does not shut the appellant's doors on his efforts to prove otherwise about the possession. That is, the impugned judgment is without prejudice to his rights and contentions in the main suit. So this Court will not overturn the trial Court's decision for the mere asking as it is a product of judicial discretion well exercised.

As the litigation is amongst the members of a family now broken, let this simmering litigation not engender further hostility in the family. So, I urge the trial Court to endeavour to dispose of the suit expeditiously.

DAMA SESHADRI NAIDU, J.

AP/-

**MARIA
AURA
PEREIRA**

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by MARIA AURA
PEREIRA
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