

Santosh

***IN THE HIGH COURT OF BOMBAY AT GOA***  
***SECOND APPEAL NO.108/2010***

1. Shri Ignatius J R. Fernandes,  
son of slate Benedicto Fernandes,  
age 55 years, Service and his wife;

2. Smt. Luisa Nora Maria E Fernandes;  
daughter of Shri Cajetan D'Souza,  
age 42 years, housewife;

3. Shri Harmalgido @ Herman Fernandes;  
son of Benedito Fernandes,  
age 42 years, bachelor,

All of them resident of Batim,  
Oxel, Siolim, Bardez, Goa.

..... Appellants.

Versus

1. Shri Shiva Puti Shirodkar,  
son of Puti Shirodkar, age 67 years,  
widower, Agriculturist,

2. Smt. Poornima Shiva Shirodkar,  
daughter of Shiva Puti Sirodkar,  
age 40 years, Spinster,

3. Shri Sanjay Shiva Shirodkar,  
son of Shiva Puti Shirodkar, age 27 years,  
bachelor, Agriculturist,

4. Shri Sameer Shiva Shirodkar,  
son of Shiva Puti Shirodkar, age 22 years,  
bachelor, agriculturist.

All 1 to 4 residing at House No.203/4,  
Batti, Oxel, Bardez, Goa.

5. Smt. Sandhya Sonu Vaigankar,  
daughter of Shiva Puti Shirodkar,  
age 30 years, married,  
Balwadi teacher, and her husband;

6. Shri Sonu Shiva Vaigankar,  
son of Shiva Vaigankar, age 39 years,  
cleaner, Both of them residing at  
House No. not known, Baman Wada,  
Oxel, Siolim, Bardez, Goa.

..... Respondents.

Mr. V.R. Tamba, Advocate for the Appellants.

Mr. J.P. Mulgaonkar, Senior Advocate with Ms. Rupa Benaulikar,  
Advocate for the Respondents.

***Coram: M.S. Sonak, J.***

***Reserved on: 29<sup>th</sup> January 2021.***

***Pronounced on: 1<sup>st</sup> February 2021.***

**JUDGMENT:-**

Heard Mr. V.R. Tamba for the Appellants and Mr. J.P. Mulgaonkar, the learned Senior Advocate with Ms. Rupa Benaulikar for the Respondents.

2. This Second Appeal was admitted by an order dated 5<sup>th</sup> January 2011, on the following substantial questions of law:

(i) *Whether in a suit for declaration that respondents/defendants have no right, title or interest in the suit property, mandatory and permanent injunction, wherein it is established that the appellants/plaintiffs are the title holders of the suit property (except the mundkarial property), it is necessary for seeking consequential reliefs of recovery of possession of the suit property ?*

(ii) *Whether on true and correct interpretation of Instrument of Sale Discharge and Cancellation dated 15/6/1966, the ownership of the appellants/plaintiffs stood established more so there being no dispute regarding the title by the respondents/defendants as well as in the absence of any evidence to the contrary led by the respondents/defendants and as such being the owners of the property, the appellants/plaintiffs were entitled to recover possession of the suit property (except the mundkarial property) apart from seeking demolition of the additional illegal structures constructed by the respondents/ defendants in the suit property and permanent injunction restraining them from interfering with the suit property ?*

(iii) *Whether the first appellate Court was justified in coming to a finding that the appellants/plaintiffs have failed to comply with the mandatory requirements of Order VII, Rule 3 of the Civil Procedure Code while approaching the Court seeking relief of removal of the alleged encroachment, when the suit property was sufficiently identified in para 3 of the plaint and there was no semblance of title shown by*

*the respondents/ defendants as against that of appellants/plaintiffs, and in any case when the Courts have not put the appellants/plaintiffs to notice to comply with the alleged requirement of Order VII, Rule 3 of C.P.C.?*

3. The appellants are the original plaintiffs and the respondents are the original defendants in Regular Civil Suit No.34/05/E, instituted in the Court of the Civil Judge, Junior Division, Mapusa.

4. The appellants, in their plaint, had pleaded that they were the owners of the property known as “MURVO” described in the Land Registration office of Bardez under No.4008 of Book B -102 and registered in the taluka Revenue office of Bardez under Matriz NO.241, situated in village Oxel, surveyed under no. 4 and subdivision no.5 and 6 of revenue village Oxel, subdivision no.5 having an area of 4000 sq. Mts and subdivision no.6 having an area of 125 sq.Mts and a total area of 4125 and is bounded as follows;

On east; by the stream of the Comunidade of Oxel and drain.

On west: by the remaining part of the property belonging to the Maria Ana Filomena Alexandra Elviza Monteiro and Rodolfo Felicissimo Monteiro;

On north: by bund belonging to Xencora Datta Harmalkar and navigable river.

On south: by property belonging to Paulina Monteiro.

This property shall hereafter be referred to as the “suit property”.

5. The appellants had pleaded that their predecessor-in-title Benedito Fernandes and his wife Valerina Fernandes had purchased the suit property by Instrument of Sale, Discharge and Cancellation dated 15<sup>th</sup> June 1966. The appellants had also pleaded that after the purchase of the suit property in the year 1966, Benedito left for Africa in the year 1969 and entrusted the suit property to one Jose Maria.

6. The appellants, in paragraphs 8 to 15, referred to the respondents claiming mundkarial rights in respect of an outhouse situated in a portion of the suit property and litigation connected therewith. The appellants also pleaded in paragraph 19 that even if it is assumed, though not admitted, that the respondents or their predecessor-in-title were indeed mundkars, the respondents would be entitled to some right only in respect of the suit outhouse and a 5 meters area surrounding the suit outhouse, which came to a maximum of 361 sq. meters. This area was referred to as the “*suit mundkarial area*” in paragraph 19 of the plaint.

7. The appellants have, thereafter, pleaded that the respondents put up certain construction beyond the suit mundkarial area and even

obstructed the appellants from the enjoyment of the suit property beyond the suit mundkarial area. This happened on or about 15/1/2005, 30/1/2005, and 7/2/2005. Based on this cause of action, the appellants instituted Regular Civil Suit No.34/2005/E and applied for the following substantive reliefs :

*(a) that without prejudice to the right of the plaintiffs to evict the defendants from the Mundcarial area of 361 sq.mts, it be declared that the defendants have no right, title or interest to the suit property beyond said mundkarial area and therefore, the plaintiffs are entitle to demolish the extension /construction of cow shed / stable built at southern side of the suit out house as well as gobar gas tank or septic tank being constructed by the Defendants in the eastern suit property bearing Survey no.4/5 of the village Oxel.*

*b) By an order and decree of mandatory injunction defendants be directed to demolish cow shed / the extension on southern side of the suit out house and also demolish the gobar gas tank made in the suit property.*

*c) By an order and decree of permanent injunction the defendants, their servants, agents and relatives be restrained from interfering, planting, occupying, trespassing in the suit property and obstructing*

*plaintiffs from plucking coconuts, mango from mango trees or any other fruit bearing trees etc. in the suit property.*

*d) By an order of mandatory injunction the defendants be directed to remove all the material such hip of grass stored at eastern side of suit out house and other material surrounding suit out house beyond the mundkar area of 19 Meters x 19 mts (362 sq.mts.)*

8. The respondents denied the case of the appellants by filing a written statement in the aforesaid suit. The respondents pleaded that somewhere in the year 1975, late Benedito erected a barbed wire fencing from east to west from the north point where Survey No.3, sub-division 1 started in a straight line. The area beyond the said fencing on the southern side was always in possession of the respondents. The trees existing in the said area were planted by the respondents or their predecessor-in-title. The appellants were never in possession or enjoyment of the southern portion beyond fencing in which the house and other structures of the respondents were existing. The respondents claimed that they were in exclusive possession of this area and had developed the same.

9. Based on the pleadings of the parties, the learned Civil Judge, Jr. Division at Mapusa framed and ultimately, vide Judgment and Decree dated 30<sup>th</sup> October 2009, answered the issues as follows:

| Sr. No. | Issues                                                                                                                                                                                                                                                  | Findings            |
|---------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------|
| 1       | Whether the plaintiffs prove that they are exclusive owners in possession and enjoyment of the suit property and the defendants have no right, title or interest to it except the mundkarial area?                                                      | Negative.           |
| 2       | Whether the plaintiffs prove that the defendants have illegally carried out extension/construction of cowshed/stable built towards the Southern side of the suit out-house and gobar gas, tank or septic tank on the Eastern side of the suit property? | Negative.           |
| 3       | Whether the Plaintiffs prove that the Defendants are interfering with the suit property?                                                                                                                                                                | Negative.           |
| 4       | Whether the Defendants prove that they are in possession and enjoyment of the Southern portion of the property in which the house and other structures of the Defendants are existing?                                                                  | Affirmative         |
| 5       | What Relief? What Order?                                                                                                                                                                                                                                | As per final order. |

10. The appellants, aggrieved by the dismissal of their suit, appealed the Judgment and Decree dated 30<sup>th</sup> October 2009 to the District Judge-1, at Mapusa vide Regular Civil Appeal No.155/2009. The learned District Judge, vide Judgment and Decree dated

13/7/2010, dismissed the appeal, with costs and confirmed the Judgment and Decree dated 30<sup>th</sup> October 2009. Hence, the present second appeal on the aforesaid substantial questions of law.

11. Mr. V.R. Tamba, the learned Counsel for the appellants, at the outset, submits that the respondents, at no stage, denied the ownership of the appellants under the Instrument of Sale, Discharge and Cancellation dated 15<sup>th</sup> June 1966. He points out that the fact that the respondents had claimed to be the mundkar of the appellants or the predecessor-in-title of the appellants, also makes it clear that the title of the appellants to the suit property was amply established. He, therefore, submits that the substantial question of law (ii) is, therefore, required to be answered in favour of the appellants.

12. Mr. Tamba submits that in this case, the plaint had very clearly described the portion encroached upon by the respondents-defendants. He pointed out that this was the portion beyond the suit mundkarial area admeasuring 361 sq. meters and, therefore, there was no further requirement of attaching a sketch as contemplated by Order VII, Rule 3 of the Code of Civil Procedure. He submitted that in any case, this requirement of attaching a sketch was not mandatory and in absence of any prejudice to the respondents, the two Courts ought not

to have non-suited the appellants on this ground. He, therefore, submits that even the substantial question of law (iii) is required to be answered in favour of the appellants.

13. Finally, Mr. Tamba submits that the appellants had applied for a declaration based on their title to the suit property and consequential relief of mandatory injunction to direct the respondents to demolish the structures put up by them on the encroached portion of the suit property. He submitted that in such a situation, there was no necessity of seeking any specific relief for recovery of possession, since, according to him, such relief was implicit in the prayer for declaration itself. He submitted that in the facts of the present case, the proviso to Section 34 of the Specific Relief Act, 1963 was either not attracted or, in any case, was so complied. He submitted that no defendants in response to a suit based on the plaintiff's title can simply claim to be in possession of the suit property or any portion thereof, without establishing any right to remain in such possession. He submitted that in this case, no plea of adverse possession had been raised by the respondents-defendants. He submitted that for all these reasons, even the substantial question of law (i) is required to be answered in favour of the appellants.

14. Mr. Tamba, in support of his aforesaid submissions, relied on *Tilak Raj Bhalla vs. Ulhas Narayan Sanvordekar (D) by LRs.*<sup>1</sup>; *Anathula Sudhakar vs. P. Buchi Reddy (Dead) by LRs. and ors.*<sup>2</sup>; *Vicente Cabral vs. Smt. Sunandabai Dayanand Bandodkar*<sup>3</sup>; *Ganesh D. Daivajna vs. Prakash S. Salkar*<sup>4</sup> and *Laxman Bisan Uke and ors. vs. Ashok Ishwar Shinde and anr.*<sup>5</sup>.

15. Mr. Mulgaonkar, the learned Senior Advocate appearing with Ms. Benaulikar for the respondents, defended the impugned Judgments and Decrees based on the reasoning reflected therein. He pointed out that there are concurrent findings of fact recorded by the learned trial Court and the First Appellate Court that the cause of action of the year 2005 pleaded by the appellants, was false and further, the respondents were in settled possession of the portion of the suit property beyond the fencing put up by late Benedito in the year 1975 from the period before 1975. He submitted that in such a situation, the appellants were not entitled to seek a mere declaration, without seeking for recovery of possession.

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<sup>1</sup> [2005] (2) Goa L.R. 182]

<sup>2</sup> (2008) 4 SCC 594

<sup>3</sup> 1991 (2) Goa L.T. 331

<sup>4</sup> 2000 (1) Goa L.T. 286

<sup>5</sup> 2018 (4) Bom.C.R. 105

16. Mr. Mulgaonkar also relied on *Anathula Sudhakar* (supra) to submit that suit of this nature was not liable to be decreed. He submitted that since the appellants had come out with a patently false case of accrual of the cause of action in the year 2005 when the evidence on record establishes that the respondents were in possession of not only the suit mundkarial area but also the area to the south of the fencing from 1975, the appellants were not entitled to any discretionary or declaratory relief from the Courts.

17. Mr. Mulgaonkar relied on *Executive Officer, Arulmigu Chokkanatha Swamy Koil Trust, Virudhunagar vs. Chandran and others*<sup>6</sup>.

18. Mr. Mulgaonkar submits that there is no merit in this appeal which may be dismissed with costs.

19. The rival contentions now fall for my determination.

20. In so far as the substantial questions of law at (ii) and (iii) are concerned, there is no necessity to deal on the same, because, even if these substantial questions of law are answered in favour of the appellants, the appellants cannot secure a reversal of the impugned

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<sup>6</sup> (2017) 3 SCC 702

judgments and decrees, unless the substantial question of law (i) is to be answered in favour of the appellants.

21. Now, from the pleadings of the parties, as well as the evidence on record, there can be no serious dispute that the appellants were indeed the owners of the suit property under the Instrument of Sale, Discharge, and Cancellation dated 15<sup>th</sup> June 1966. Based on this title document, the appellants did not seek any declaration that they are the owners in respect of the suit property, but, rather they sought a declaration that the respondents have no right, title, or interest to the suit property, beyond the suit mundkarial area admeasuring 361 sq. meters and, therefore, the appellants are entitled to demolish the extension/construction of cowshed/stable built on the southern side of the suit outhouse, as well as the gobar gas tank or septic tank constructed by the defendants in the eastern side.

22. The appellants pleaded a specific case that the cause of action first arose on 15/1/2005 when the respondents obstructed the appellants from plucking coconuts from 15 coconut trees surrounding the suit outhouse and beyond the mundkarial area. The appellants pleaded that a further cause of action arose on 30<sup>th</sup> January 2005, when the respondents *“started extending the southern side of the suit out*

*house and constructed stable/cow shed” and “on 7<sup>th</sup> February constructed Gobar gas plant beyond the mundkar area”.*

23. This means that it was the case of the appellants that the cause of action arose between 15/1/2005 and 7/2/2005, when the respondents not only obstructed the appellants from plucking the coconuts but further, when the respondents, during this period, extended the suit outhouse, constructed stable/cowshed and gobar gas.

24. The respondents specifically denied the appellants’ aforesaid case about the accrual of the cause of action between 15/1/2005 and 7/2/2005 and instead, the respondents pointed out that way back in 1975 itself, the predecessor-in-title of the appellants constructed a barbed wire fencing and the portion to the southern side of the barbed wire fencing, was always possessed by the respondents. The respondents also pleaded that the structures referred to by the appellants as the ones constructed between 15/1/2005 and 7/2/2005, were in fact put up before 1975, and further, the respondents were in settled and exclusive possession of this portion of the suit property.

25. Based on the aforesaid pleadings, as noted earlier, the learned Civil Judge, Jr. Division framed a specific issue and answered this issue

in favour of the respondents. The learned Civil Judge, Jr. Division has recorded a clear finding that the respondents had been in possession of the southern portion of the suit property surveyed under No.4/5 since before 1975 when Civil Suit No.45/1005 was filed against them by the predecessor-in-title of the appellants. The learned Civil Judge, Jr. Division has pointed out that this possession of the respondents was admitted in the pleadings and, in any case, borne out from the evidence on record. The learned Civil Judge, Jr. Division has also pointed out to the impact of the Mamlatdar's order dated 12/6/1989 in respect of the mundkarial dwelling house, as well as the impact of certain admissions brought out from the cross-examination of one of the appellants (PW.1).

26. The First Appellate Court, upon evaluating the evidence on record, has also endorsed the factual findings recorded by the learned Civil Judge, Jr. Division on the aspect of the respondents being in settled possession of the portion of the suit property beyond the fencing put up by the predecessors in title of the appellants.

27. There is neither any challenge to the findings of fact recorded by the two Courts nor is there any substantial question of law on the aspect of perversity in the record of these concurrent findings of fact framed in this matter. In any case, Mr. Tamba was unable to

demonstrate any perversity in the findings of fact, concurrently recorded by the two courts on this issue.

28. Therefore, the only issue which really arose for consideration is whether the appellants could have merely sought for a declaration that the respondents have no right in the property beyond the suit mundkarial area, without seeking any relief of recovery of possession, particularly when the findings of fact recorded by the two Courts concurrently establish that the respondents have been in possession of this portion of the suit property from 1975 or even earlier. This suit was instituted on 14/3/2005 and that too based on some alleged cause of action which arose between 15/1/2005 and 7/2/2005. As noted earlier, the appellants have failed to establish that any such cause of action accrued to them in the year 2005. The cause of action, if any, may have accrued in the year 1975. Even that is quite doubtful because the two Courts have believed the version of the respondents that it is the predecessors-in-title of the respondents who were in exclusive possession of the property to the south of such fencing. The appellants, in their plaint, failed to make any reference to this aspect and even went to the extent of claiming that the structures beyond such fencing were put up only in the year 2005, when, in fact, the evidence on record establishes that the same were put up before 1975.

29. In ***Anathula Sudhakar*** (supra), the Hon'ble Supreme Court has held that even where the plaintiff's title is not in dispute or under a cloud, but he is out of possession, he has to sue for possession with a consequential injunction. It is only where there is merely interference with the plaintiff's lawful possession or threat of dispossession, it is sufficient to sue for an injunction simpliciter.

30. Now, in the present case, the evidence on record establishes that though the appellants' title was not in dispute, the appellants were clearly out of possession from at least 1975. In such a situation, for full and effective relief, the appellants had to sue for recovery of possession. Instead, the appellants tried to portray that this was a case of mere interference with the appellants' lawful possession and sued for a declaration and injunction to restrain such interference. As noted earlier, the findings of fact recorded by the two Courts, concurrently make it clear that this was not a case of mere interference with the appellants' possession or some threat of dispossession. But, rather, this was a case where the appellants were out of possession from the year 1975. Therefore, in terms of the ruling of the Hon'ble Supreme Court in ***Anathula Sudhakar*** (supra), the appellants were required to sue for possession with a consequential injunction. Since this was not done, the first substantial question of law cannot be answered in favour of the appellants.

31. ***Tilak Raj Bhalla*** (supra), turns on its own facts which bear no resemblance to the facts of the present case. That was a case where the plaintiff had sought a declaration that the defendant was a trespasser in respect of the suit shop and also claimed mesne profits. The first issue framed by the Trial Court in the said matter was, whether the plaintiff proves that he is entitled to vacant possession of the suit premises. It is in these circumstances, that the learned Single Judge of this Court held that although the plaintiff had not specifically sought for recovery of possession of the suit premises, the fact remains that issue no.1 about the entitlement of the plaintiff's vacant of the suit premises was framed and the parties went to trial with full knowledge of the case set out by each of them. In these circumstances, it was held that the plaintiff was entitled to recovery of possession even though there may not have been any specific relief seeking recovery of possession.

32. In ***Vicente Cabral*** (supra), there was material evidence on record that the defendant, for at least a couple of months, did not have possession of the place where the house of Pasquinha Cabral, through whom the defendant was claiming, was existing. In such circumstances, the title-holder was entitled to maintain a suit for declaration that the defendant had no right whatsoever to reconstruct

the suit house and/or to appropriate or to take the material of the old house in which Pasquinha was residing, even without seeking any consequential relief of restoration of possession. Besides, the decision in *Vicente Cabral* (supra), was delivered in a Civil Revision Application to decide whether the applicant's application for a temporary injunction was correctly dismissed. Again, this decision can be of no assistance to the appellants, in the facts and circumstances of the present case.

33. *Ganesh D. Daivajna* (supra), was again a matter dealing with applications for a temporary injunction. Therein, the learned Single Judge of this Court has observed that the possession ought to be lawful to enable a party to seek protection from the Court by way of equitable relief. This was a case where a party claiming to be a sub-tenant, sought some interlocutory relief. But the Court found that such party failed to establish prior written consent from the landlord for creation of sub-tenancy by the original tenant in favour of the sub-tenant. Such an issue is not involved in the present matter and, therefore, even this decision is of no assistance to the appellants.

34. In *Laxman Bisan Uke and ors.* (supra), the learned Single Judge of this Court has held that when a plaintiff has clear documents, supported by documents and the defendants without any claim of title,

merely denies the title of the plaintiff, that would not amount to raise a cloud over the title of the plaintiff and it would not be necessary for the plaintiff to sue for declaration. A suit for injunction, in such circumstances, would be sufficient and maintainable. Again, this is not at all the issue involved in the present matter and, therefore, even this decision is of no assistance to the appellants.

35. In *Arulmigu Chokkanatha Swamy Koil Trust* (supra), relied upon by Mr. Mulgaonkar, the Hon'ble Supreme Court was concerned with a case where the plaintiff, who was not in possession, had, in the suit claimed only declaratory relief along with mandatory injunction. The plaintiff being out of possession, the relief of recovery of possession was a further relief, which ought to have been claimed by the plaintiff. The suit filed by the plaintiff for mere declaration, without relief of recovery of possession, was clearly not maintainable and the Hon'ble Supreme Court held that the Trial Court had correctly dismissed the suit. The Hon'ble Supreme Court further held that the High Court neither adverted to such findings of the Trial Court nor has set aside such reasoning given by the Trial Court for holding the suit as not maintainable. The Hon'ble Supreme Court held that the High Court, in the exercise of its jurisdiction under Section 100 of the Code of Civil Procedure, could not have reversed the decrees of the

Courts below without holding that the reasoning given by the Courts below was legally unsustainable.

36. In the present case as well, there are concurrent findings of fact that the appellants were out of possession of the suit property, yet, the appellants chose to merely seek a declaration, along with mandatory injunction. No relief of recovery of possession was ever sought. Therefore, applying the principles laid down in *Arulmigu Chokkanatha Swamy Koil Trust* (supra), there is no good ground to interfere with the impugned judgments and decrees made by the Trial Court and the First Appellate Court.

37. For all the aforesaid reasons, the first substantial question of law, which is the main substantial question of law, is required to be decided against the appellants in the facts and circumstances of the present case. As a result, this appeal fails and is, hereby dismissed. There shall be no order as to costs.

38. Interim relief, if any, is hereby vacated.

***M.S. Sonak, J.***