

**IN THE HIGH COURT OF BOMBAY AT GOA**

**SECOND APPEAL NO. 6 OF 2021**

**WITH**

**CIVIL APPLICATION NO. 22 OF 2021.**

**IN**

**SECOND APPEAL NO. 6 OF 2021**

VANESSA J. FERNANDES AND ANR. .... Appellants.

VS

..... Respondents.

ANTONIO CIPRIANO FERNANDES AND  
ANR.

Shri C. A. Coutinho, Advocate for the Appellants.

Shri Sudesh Usgaonkar and Ms. R. Periera, Advocates for the  
respondents.

**Coram: DAMA SESHADRI NAIDU, J.**

**Date : 6<sup>th</sup> April 2021.**

**ORAL ORDER:**

Respondents are the plaintiffs, and the appellants the defendants. The first appellant is the wife and the second appellant her husband. As the donees of a residential property, the respondents sued the appellants for eviction. They filed Regular Civil Suit No.2/2010/A, before the Civil Judge, Senior Division, Quepem. In that suit, the respondents, as the plaintiffs, pleaded that the property originally belonged to one Ms. Regina, who died in 2005. After her death, her daughter, Ms. Philomena, succeeded to her mother's estate, including the suit property. She has in turn gifted the property to the plaintiffs. According to the respondents, the appellants had been

allowed to occupy the residential house for a certain period. In other words, their possession had been permissive, but they refused to vacate when they were asked to do so. Thus, the suit came to be filed.

2. In defence, the first appellant setup a plea that Regina had adopted her and that after the adoptive mother's death, she has succeeded to her estate. She has thus become the owner.

3. But upon trial, the trial Court refused to accept the appellants' defence; instead, it concluded that the appellants were in permissive possession of the property. It has declared that the respondents have every right to evict the appellants through due process of law. Reasoning thus, on 22.06.2017, it decreed the suit.

4. Aggrieved, the appellants filed Regular Civil Appeal No. 60/2017 before the District Judge-4, South Goa, Margao. Eventually, through its judgment dated 14.5.2019, the First Appellate Court concurred with the trial Court and dismissed the First Appeal. Further aggrieved, the appellants have filed this Second Appeal.

5. Shri Coutinho, the learned counsel for the appellants has submitted that the trial Court and the First Appellate Court have concurrently concluded that the appellants had been living in the property since 1993. This finding was, according to him, contrary to the respondents' assertion in the plaint that Philomena, being the daughter of the original owner Regina, allowed the appellants to live in the house only after Regina's death. So, Shri Coutinho contends that once the respondents' plea about the appellants' getting inducted

in 2005 failed, both the Courts ought to have concluded in the appellants' favour.

6. Shri Coutinho has also submitted that the appellants have never admitted the respondents' title. Faced with that express denial, the respondents ought to have sought a declaration of their title. In the absence of that declaration, the trial Court ought not to have entertained a suit for mere eviction. When this Court queried about the substantial questions of law, Shri Coutinho has drawn my attention to these two questions:

- B. When the Courts below concluded that the Appellants have been occupying the suit house from 1993, are the findings of the courts below are bad for concluding that the defendants were permitted to occupy the house only after 2005?
- D. When the defendants have been in settled possession of the property from 1993, was a suit for eviction maintainable without the plaintiffs' seeking a declaration of their superior right over the defendants' settled possession?

7. On the other, Shri Sudesh Usgaonkar, the learned counsel for the respondents, has submitted that the appellants have setup a false claim of adoption and it has come to be disbelieved by both the Courts below. With no legitimacy to hold on to the property for the appellants, both the Courts below, according to Shri Usgaonkar, have justly concluded that the appellants have been in permissible possession and that they could be evicted through due process of law. At any rate, he has pointed out that in the place of concurrent finding on disputed questions of fact, there is little scope for the appellants to

maintain a Second Appeal, which ought to purely turn on questions of law.

8. Shri Usgaonkar has also asserted this is not a suit for injunction. It is indeed a suit for eviction. The person who seeks eviction need not be the owner *per se*; he can even be an intermeddler of the property. So, it is for the appellants to have established before the Courts below that they have right to occupy the property. Their having failed to do so, the Courts below have inevitably concluded that the appellants had been in permissive possession and that possession stood terminated through dues process. Therefore, he has urged this Court to dismiss the second appeal

9. Heard Shri C. A. Coutinho, the learned counsel for the appellants, and Shri S. Usgaonkar, the learned Senior Counsel for the respondent.

10. Despite strenuous efforts by Shri Coutinho to impress upon this Court that this case presents a pure question of law, I am unable to persuade myself to accept that argument.

11. Indeed, the appellants dispute the legitimacy of Philomena, who has claimed herself to be the daughter of Regina, the true owner. But the fact remains that through judicial process, Philomena has established her legitimacy and secured a Deed of Succession. That succession remains unchallenged. And the first appellants, too, claimed to be Regina's adopted daughter; it is, indeed, a question of fact disbelieved by the Courts below concurrently. With that, her legitimacy to claim the property has failed. It is not the question of

the defendant's proving their title; it is, rather, a question of shifting onus. Faced with Philomena's succession certificate, the first appellant has no countervailing evidence.

12. The Courts below did acknowledge the appellants' possession. Then, the question was about the nature of that possession. The Courts have, in my view, justly concluded that the appellants had been in permissive possession. Any contrary conclusion that the appellants had been, say, trespassers, the jural relationship could have been altered and the judicial remedies, too, may have been different. Permissive possession always implies that the mediate possession lies with owner, though the immediate possession lies with the occupier.

13. Here, I may have to address the one issue: whether the appellants had been in possession since 1993 or from 2005? In either event, it makes no difference to the rights of the parties in the absence of any claim of adverse possession by the appellants. The first appellant claimed possession only as the successor to estate-leaver. Nothing more. Then, even a long, continuous possession under the colour of title never matures into an indefeasible title by long user. On this count, Shri Coutinho has fairly pointed out that having taken a plea of adoption, the first appellant could not take the plea of adverse possession. So, as rightly contended by Shri Usgaonkar, the question of the respondents' seeking declaration of title does not arise in this case of eviction.

14. Here, the respondents claim the property through a registered deed of conveyance—that of settlement. The rival plea

set up by the appellants—that of adoption—has failed. Therefore, as the respondent have been intermeddling with the property under a registered deed of conveyance, they could as well maintain a suit for eviction. Looked from either prospective, I reckon, this second appeal fails.

I, accordingly, dismiss the Second Appeal so also Civil Application stands disposed of. No order on costs.

**DAMA SESHADRI NAIDU, J.**

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