

**IN THE HIGH COURT OF BOMBAY AT GOA****SECOND APPEAL NO.80 OF 2019  
AND  
MISC. CIVIL APPLICATION NO.146 OF 2020**

OLAVO BENEDITO PEREIRA & ANR. .... APPELLANTS

VERSUS

SHIVKRUPA CONSTRUCTIONS  
(BUILDERS, DEVELOPERS AND  
CONTRACTORS) & 3 ORS. .... RESPONDENTS

Shri G. Agni, Advocate for the Appellants.

Shri S.N. Joshi, Advocate for the Respondents No.1 to 3.

Shri A.D. Bhobe with Shri C. Angle, Advocate for the Respondent No.4.

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

**Date:- 6 APRIL 2021**

**ORAL ORDER:**

The appellants are the plaintiffs. They sued the defendants-respondents for perpetual injunction. They wanted the Court to restrain the defendants no.1 to 3 from evicting the appellants and demolishing the structures. On 27.10.2016, the Civil Judge, Junior Division, Ponda, dismissed that Regular Civil Suit No.109/2012/A. Aggrieved, the appellants appealed to District Judge – 2, Panaji, sitting at Ponda: Regular Civil Appeal No.119/2016. The First Appeal also came to be dismissed through judgment and decree, dated 31.08.2019. Further aggrieved, the appellants have filed this Second Appeal.

2. Heard Shri G. Agni, the learned counsel for the appellants, Shri S.N. Joshi, the learned counsel for the respondent nos.1 to 3, and Shri A.D. Bhobe, the learned counsel for respondent no.4.

3. Ever so briefly we may advert to the facts. The suit property with certain structures originally belonged to one Raikar family. From that family, respondents no.1 to 3 purchased it in October 2008. They wanted

to develop the property, especially, by raising structures at the rear of the property. The existing structure was said to comprise six tenements, accommodating both businesses and residences. Then, to have easy access, the purchasers proposed to demolish the structures towards that end. The respondents worked out a remedy with the existing tenants, but the appellants refused to be part of the arrangement. They filed Regular Civil Suit No.109/2012/A, as noted above, seeking a perpetual injunction. The appellants pleaded before the trial Court that they had been residing in tenement no.4 and that defendants no.1 to 3 had been trying to evict them and demolish the structure despite their subsisting tenancy. And that was without the defendants' following the due process.

4. On the other hand, defendants no.1 to 3 contended that the plaintiff had never been in possession of the property, much less was he a tenant. According to them, the fourth defendant, who runs a wine shop there, is said to be the tenant. Indeed, the fourth defendant filed a written statement supporting the defendants no.1 to 3 but has not got into the witness box. As we have noted, eventually, the trial Court dismissed the suit; so did the first appellate Court.

5. In this Second Appeal against the concurrent findings, Shri G. Agni, the appellants' counsel, has strenuously argued that the appellant has produced abundant documentary evidence to establish his possession. Still, the Courts below have ignored that evidence. To elaborate, Shri Agni has submitted that the appellants have produced telephone bills and water bills, both of which record the appellants' or their predecessor's name. It seems the appellants have also filed certain photographs to emphasize their possession. Shri Agni has also drawn my attention to Exhibit C-145, which is the judgment, dated 23.08.2016, in Civil Suit No.10/2013 before the District Judge, Panaji, Ponda.

6. According to Shri Agni, in Civil Suit No.10/2013 the dispute concerns the water connection. The District Court has conclusively held that the appellants had been living in tenement no.4 and that water

connection should belong to that tenement. In addition, Shri Agni has also laid much emphasis on Exhibit C-116, which is said to be a sketch. As an excise licensee, the fourth respondent submitted that sketch to the Excise Authority, marking tenement no.5 as the property in his possession.

7. As to the oral evidence, Shri Agni has drawn my attention to the evidence of PW5, who is an Excise Inspector. He has, as Shri Agni points out, deposed that the respondent's wine shop existed in tenement no.5. Eventually, Shri Agni has urged this Court to allow the appellants' application for leading additional evidence: Misc. Civil Application No.146/2020, filed under Order 41 Rule 27 of CPC. In that Misc. Civil Application, the appellants have filed certain documents, having secured them from the village panchayat. According to Shri Agni, though secured recently, those documents unmistakably establish that the appellants' names have been recorded as the occupants of one of the tenements on the disputed property. Therefore, he has urged the Court to consider both documentary and oral evidence on record and hold that the Courts below have concurrently erred. Faced with the problem whether possession is a question of law, Shri Agni has articulated that misreading of document relating to possession should also be treated as an error giving rise to a substantial question of law.

8. On the other hand, Shri Joshi, the learned counsel for respondents no.1 to 3, and Shri A.D. Bhobe, the learned counsel for respondent no.4, have supported the concurrent findings. They have, besides, have argued in unison that the Courts below have concluded against the appellants on a question of fact—possession—and, therefore, under section 100 of CPC this Court ought not to revisit that question of fact.

9. As I gather from the pleadings, the appellants want the Court to consider the Second Appeal on these substantial questions of law:

A. Have the Courts below illegally rejected the Appellant's plea of being in possession of the suit property by misconstruing the fundamental documentary evidence establishing that the appellants possessed the suit tenement?

B. Have the Courts below illegally rejected appellants' claim to possession even though the Defendants had failed to establish that the appellants were trespassers on the suit property for they had failed to examine either the Landlord or Defendant No.4 to disprove the appellants' possession?

C. Have the Courts below mis-appreciated the fundamental documents the appellants produced establishing their possession and their right to the suit property?

D. Have the Courts below erred in deciding Issue No.2 in the negative and deleting Issue Nos. 3 and 4, which cast upon the defendants the burden of establishing their specific pleas raised in defence?

10. To begin with, the Courts below have observed that the appellants have not examined the original owner or any member of that family to establish that the appellants had been in possession as the tenants. To counter that finding, the appellants have contended that even when the respondents no.1 to 3 purchased the property, it was a matter of record, and never denied, that there had been tenements and tenants occupying those tenements.

11. That assertion is true: there were tenements, and there were tenants. But the question was and still is whether the appellants have been in possession of the property as tenants or otherwise. We cannot lose sight of the fact that it is the appellants who have gone before the Court, and it is the appellants that have the primary burden of proof. Among the witnesses examined, PW5 is an excise inspector. He did depose that the fourth respondent had his wine shop in tenement no.5. The licence granted by the department, nevertheless, shows that it was in tenement

no.4. Given the presumption an official document enjoys under section 114 of the Indian Evidence Act, the retired excise official's testimony cannot carry much conviction. Besides that, even if Exhibit C-116, the sketch, showed a different physical location, it does not alter the position because the licence reflected tenement no.4 as the property having the wine shop. That said, this finding as to the identity of the property is a question of fact, and the trial Court had been best suited to decide the controversy. Later, that finding stood confirmed by the First Appellate Court—the court that has the co-extensive powers with the trial Court to decide the questions of both the law and the facts. Indeed, that Court, too, concluded against the appellants on the question of possession.

12. Though the appellants have filed telephone bills and water charge bills, the water bill did not bear the house number. Though the telephone bills did have the tenement number, it cannot be conclusively said that that singular document would establish tenancy. And, indeed, both the Courts below have given cogent reasons while they did not rely on those documents.

13. As to the judgment, dated 23.08.2016, in Civil Suit No.10/2013, I am afraid it is a *lis pendens* development. When the suit out of which this Second Appeal arises had been pending, the appellants allegedly had a dispute with the Water Department. That dispute has led to the judgment. First, as I have noted, it is a *post litem motam* document; second, none of the defendants was a party to that judgment. Thus, the very suit was filed pending the suit, and so was the judgment.

14. Now I may have to focus on the appellants' application under Order 41 Rule 27 of CPC: Misc. Civil Application No.146 of 2020. The established proposition of law is that an application under Order 41 Rule 27 of CPC can be filed at any stage of the appellate proceedings. That said, it is only to enable the appellate Court to decide the dispute completely and effectively. In other words, if the appellate Court reckons that the documents produced after the trial Court's judgment, shorn of

suspicion, shows the disputes in a better light and helps the appellate Court decide the case correctly, it always has the discretion to rely on that additional evidence. Even if the documents are authentic, it is in the appellate Court's remit to accept or reject them. In other words, additional evidence at the appellate stage—more particularly in the second appeal—is not to cure the party's lapses before the trial Court.

15. Here, the appellants are said to have secured those documents from the village panchayat under the Right to Information Act. Those documents were issued pending this Second Appeal. One of the entries in those documents shows the fourth respondent, admittedly a tenant, as the owner. So much so for the accuracy of those documents. At any rate, the whole dispute concerns possession, and possession is a question of fact. The trial Courts have considered the issue elaborately and, through reasoned judgments, have held against the appellants.

16. Therefore, on a pure question of fact as to possession, I can reappreciate neither the documentary evidence nor the oral evidence; much less can I enter a different conclusion under section 100 of CPC. Thus, despite the best efforts of the learned counsel for the appellants, I remain unconvinced. As a result, the Second Appeal is dismissed. No order as to costs.

At this juncture, the appellants' counsel wants the Court to suspend the operation of the judgment for six weeks. Of course, the learned counsel for the respondents no.1 to 3 strenuously objects. Nevertheless, as it concerns eviction, the judgment shall not come into operation for six weeks from the date the judgment is uploaded.

**DAMA SESHADRI NAIDU, J.**

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