

Niti

IN THE HIGH COURT OF BOMBAY AT GOA

SECOND APPEAL NO.65 OF 2019

JEAN ELVIN THEAMUDO E
BRAGANZA

... APPELLANT

Versus

ANTONIO PIEDADE
LUDGERIO GOMES, REP.
BY THEIR ATTORNEY,
MARIA AUGUSTA
THEMUDO AND ANR.

.... RESPONDENTS

Mr. J.J. Mulgaonkar, Advocate for the Appellant.

Mr. Salil Saudagar, Advocate for the Respondents.

CORAM: M. S. SONAK, J.

DATE : 7th OCTOBER 2022

ORAL ORDER :

- 1.** Heard Mr. J.J. Mulgaonkar for the appellant and Mr. Salil Saudagar for the respondents.
- 2.** This Second Appeal questions concurrent decrees made by the trial Court and the first appellate Court dismissing the appellant's – plaintiff's suit seeking a declaration that she is the

owner in possession of the suit property by virtue of “positive prescription”.

3. Mr. Mulgaonkar proposes the following substantial questions of law:

a. Whether the Learned Trial Court and the Learned Appellate Court committed concurrent errors while dismissing the suit and the appeal in ignorance of the essential ingredient of section 34 of the Specific Relief Act i.e. a suit for declaration is maintainable when the defendants are interested to deny plaintiffs title and have erroneously held that there is no cause of action to file the present suit?

b. Whether the Trial Court and the Appellate Court committed concurrent errors by ignoring the plaintiffs case of acquisition of ownership by prescription under Article 505 read with Article 517 to Article 531 of the Portuguese Procedure Code applicable to the state of Goa and that the Plaintiff was entitled to be declared as the owner based on the same ?

c. Whether the courts below committed concurrent errors by not examining the Plaintiffs evidence about possession particularly since the Plaintiff was claiming prescription under Article 505 of the Portuguese Civil Code?

4. In order to make out a case of prescription under Article 505 of the Portuguese Civil Code, Mr. Mulgaonkar adverted to the provisions of Article 517 of the Portuguese Civil Code, 1867. On perusing the said provision, it is apparent that the pleadings necessary for making up the case of positive prescription are simply not available in the plaint. Besides, the two Courts have held that the apprehension expressed by the appellant - plaintiff may not be justified and it is even possible that the suit was collusive.

5. Even if we for a moment exclude the observations about the suit being collusive, the suit had to fail for want of proper pleadings. A claim of prescription or positive prescription cannot be lightly allowed in the absence of proper pleadings. On perusing the entire plaint it is apparent that there are no pleadings sufficient to sustain the claim of prescription or positive prescription. A simple though alleged possession is not sufficient in such matters.

6. Accordingly, the substantial questions of law now proposed do not arise in this matter. This appeal is liable to be dismissed and is hereby dismissed. There shall be no order for costs.

M. S. SONAK, J.

NITI K
HALDANKAR

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