

Niti

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

**MISC. CIVIL APPLICATION NO.223 OF 2021  
AND  
STAMP NUMBER MAIN NO.727 OF 2013**

LAXMAN GANESH  
GAONKAR (SINCE  
DECEASED THR. LRS)

....APPLICANTS

*Versus*

KISHORI SHARAD  
GAITHONDE & ORS.

....RESPONDENTS

**Mr Preetam Talaulikar, Advocate for the Applicants.**

**CORAM: M. S. SONAK, J.**

**DATE : 2<sup>nd</sup> DECEMBER 2022**

**ORAL ORDER :**

1. Heard Mr Talaulikar for the applicants.
2. Misc. Civil Application No.223/2021 is for restoration of the Second Appeal bearing Stamp Number Main No.727/2013, which came to be dismissed for non-prosecution on 02.05.2019 because the appellants, despite several opportunities failed to clear the office objections and take steps to process the appeal. This Application was filed after a delay of 169 days on 16.11.2019.

3. After this Application was filed again, no steps were taken even to serve the respondents and to bring on record the legal representatives of some of the deceased respondents.

4. Therefore, Mr Talaulikar was requested to address the Court on the merits of the Second Appeal, though this Court is conscious that unless the appeal is restored, there is no question of going to the merits of the matter. The Second Appeal was instituted in the year 2013 and, to date, has not been taken up for admission. The Application for restoration could not be considered because of the failure to take effective steps to complete service and to bring on record the legal representatives of some deceased respondents.

5. Therefore, even if a liberal approach were to be adopted and the Second Appeal was to be restored, the issue of the merits of the Second Appeal would assume relevance. Accordingly, the matter was adjourned earlier to enable Mr Talaulikar to address the merits.

6. In this case, the Trial Court and the First Appellate Court have concurrently decreed the respondents' suit seeking a permanent injunction. This Court had earlier allowed Second Appeal No.32/2001 instituted by the appellants on the ground

that the First Appellate Court had failed to consider the appellants' Application under Order XLI, Rule 27 of the Civil Procedure Code and further the principles in ***Santosh Hazari V/s. As a result, Purushottam Tiwari***<sup>1</sup> had not been followed.

7. Upon remand, the First Appellate Court allowed the Application under Order XLI Rule 27 of the CPC. Further, from the perusal of the First Appellate Court's order, it is seen that it has reflected its conscious Application of mind and affirmed the findings recorded by the Trial Court. The First Appellate Court has independently assessed the material evidence on record and agreed with the findings recorded by the Trial Court.

8. Mr Talaulikar, however, proposes the following substantial questions of law:

*a. Whether the learned Appellate Court ought to have dismissed the suit for non-joinder of Government of Goa, once the learned Appellate Court did not consider the claim of the Appellant as Tenant as the suit property was Government Land?*

*b. Whether the learned Appellate Court and the Trial Court rightly appreciated the evidence produced by the Appellant?*

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<sup>1</sup> 2001 (3) SCC 179

*c. Whether a mere suit for injunction simpliciter without a prayer for recovery of possession would be maintainable?*

9. The first question was never raised before the two Courts and, even otherwise, clearly does not arise in this matter. The suit was for simpliciter injunction, and the plaintiffs were expected to prove their possession, which, as held by the two Courts concurrently, they have.

10. The second question gives rise to no substantial question of law. In any case, the First Appellate Court, usually the final Court on facts, has correctly appreciated the evidence on record.

11. The third question does not arise because the plaintiffs claim they were in possession. Accordingly, there was no question of seeking recovery of possession. As noted earlier, the two Courts have concluded that the plaintiffs were in possession of the suit property.

12. The fourth question as proposed also does not arise because the findings of the two Courts are not based exclusively upon the entry in the survey records. Instead, the survey records have been relied upon primarily to raise a presumption and decide the issue of onus.

13. The fifth question also does not arise because the record bears out that the appellants have filed an application before the Mamlatdar claiming to be the tenants, but such an application was ultimately dismissed. The appellants never challenged such dismissal.

14. Thus, this appeal were to be restored even without service upon the respondents or without bringing the legal representatives of some of the deceased respondents on record. On merits, the appeal would have to be dismissed because it raises no substantial questions of law.

15. For the above reasons, the Misc. Civil Application is hereby dismissed.

16. As a consequence, the appeal is also dismissed. Accordingly, there shall be no order for costs.

**M. S. SONAK, J.**

NITI K  
HALDANKAR

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