

(2011) 06 BOM CK 0105

In the Bombay High Court

Case No : Second Appeal No's. 34 and 39 of 2000

Shri Krishna Hari Vaingankar, (Since deceased) represented by legal heirs (Shri Suresh K. Vaingankar and Others) **APPELLANT**

Vs

Shri Tukaram Bhiva Vaingankar, (Since deceased) through legal representatives (Satish Tukaram Vaigankar and Others), Shri Babuso Laxman Vaingankar and Smt. Bhanumati Bhanudas Vaingankar
 Babuso Laxman Vaingankar and Smt. Bhanumati Bhanudas Vaingankar Vs Tukaram Bhiva Vaingankar, (Since Deceased) represented by his legal heirs (Satyawas Tukaram Vaingankar and Others) and Krishna Hari Vaingankar (Since Deceased) (Sudan alias Suresh K. Vaigankar and Others) **RESPONDENT**

Date of Decision : 07-06-2011

Acts Referred:

Goa Land Revenue Code, 1968 — Section 105
Specific Relief Act, 1963 — Section 38

Citation : (2011) 5 BomCR 92

Hon'ble Judges : A.P. Lavande, J

Bench : Single Bench

Advocate : S. Dessai and V. Parsekar, in Second Appeal No. 34 of 2000 and Sudin M. Usgaonkar, in Second Appeal No. 39 of 2000, for the Appellant; S.D. Lotlikar and S. Pai Kir, for the Respondent No. 1 and Sudin M. Usgaonkar, for the Respondent Nos. 2 and 3 in Second Appeal No. 34 of 2000 and S.D. Lotlikar and S. Pai Kir, for the Respondent Nos. 1(a) to 1(e), S. Dessai and V. Parsekar, for Respondent Nos. 2 in Second Appeal No. 39 of 2000, for the Respondent

Final Decision : Allowed

Judgement

A.P. Lavande, J.—Both these Second Appeals are being disposed of by common judgment since they arise out of the judgment and decree dated 28.10.1999 passed by the Additional District Judge, Mapusa , in Regular Civil Appeal No. 86/1994 whereby the lower Appellate Court allowed the appeal preferred by the Plaintiff Tukaram Shiva Vaigankar (since deceased) preferred against judgment and decree dated 5.9.1994 passed by the Civil Judge, Junior Division, Pernem in

Regular Civil Suit No. 1/1986 whereby the suit filed by the Plaintiff for permanent injunction was dismissed.

2. Shri Tukaram Bhiva Vaigankar, filed the above suit against the Defendants Shri Krishna Hari Vaigankar, Shri Babuso Laxman Vaigankar, Smt. Bhanumati Bhanudas Vaigankar seeking relief of permanent injunction in respect of the property "Uttarekadil Tekdi" bearing survey No. 190/0 situated in the village of Arambol, in Pernem Taluka. The suit was contested by the Defendants and by judgment and decree dated 5.9.1994, the trial Court dismissed the suit. The lower Appellate Court allowed the appeal preferred by the original Plaintiff by judgment and decree dated 28.10.1999.

3. The parties shall hereinafter be referred to as per their status before the trial Court.

4. The Plaintiff filed the above suit seeking permanent injunction on the ground that by Alvara No. 752 dated 22.9.1938 erstwhile Portuguese Government granted suit property to his father Bhiva Vaigankar. The suit property consists of cashew trees and paddy field portion. Plaintiff's father expired in the year 1964 and thereafter the Plaintiff was in exclusive possession of the suit property and even before the death of his father he was managing and possessing the suit property along with his father. Prior to his death he was paying rent of Rs. 6.35 to the Government regularly. Vide an application dated 27.11.1984 he applied to the Mamlatdar of Pernem for the bestowal of the suit property to him being the legal heirs of late father but the said application was not decided. According to the Plaintiff, Defendant No. 1 started interfering with the suit property. On 16.10.1985 he lodged complaint before the Mamlatdar Pernem which was drafted by Raya Desai who was not educated. According to the Plaintiff it was not correctly drafted as per his instructions. Defendant No. 1 objected to the said application on the ground of jurisdiction and as such he was advised by the Advocate to withdraw the same. On these pleadings the Plaintiff filed above suit simplicities seeking permanent injunction against the Defendants.

5. The case of the Defendant Nos. 1 and 2 was that the grandfather of the Plaintiff and Defendant No. 2 and father of Defendant No. 1, Hari Moso Vaigankar was not in good health and because of his old age he requested his eldest son Bhiva to obtain Alvara in his name and as such Alvara stood in the name of father of Plaintiff and therefore his name was inserted in form I and XIV. It was further case of the said Defendants that though Alvaro stood in the name of Bhiva it was in fact obtained on behalf of Shri Hari Vaigankar. It is further their case that there was common economy between father of the Plaintiff, Defendant No. 1 and their three brothers namely Laximan, Shivram and Vithal. All the five brothers developed the suit property and carried out cashew plantation. However about two years prior to death of Bhiva, the suit property was partitioned amicably and possession and enjoyment of separate share of five brothers was confirmed. Defendant No. 1 developed whole of cashew garden portion by planting cashew trees and started enjoying the cashew trees exclusively as

tenant of other brothers by paying them an annual rent of Rs. 560/-. It was their case that Plaintiff was never in possession and enjoyment of cashew trees and paddy portion of the suit property was enjoyed by the Plaintiff and Defendants separately since two years prior to death of Bhiva.

6. On the basis of the pleadings of the parties the trial Court framed following issues:

1 Whether the Plaintiff proves that he is in possession of the suit property?

2 Whether the Defendants prove that the suit property was partitioned among the Plaintiff and the Defendants as stated in para 5 of the written statements, and the Plaintiff and the Defendants

3 Whether the Defendant No. 1 proves that he is in exclusive possession of the cashew garden portion of the suit property?

7. In the said suit the Plaintiff examined himself as Pw1 and his brother in law Sudan Kalangutkar as Pw2. On behalf of the Defendants five witnesses were examined namely Krishna Vaigankar, DW1, Babuso Vaigankar, DW2, Ladu Naik, DW3, Manuel D'Souza, DW4 and Jairam Satelkar, DW5. The parties also produced documentary evidence.

8. The trial Court upon appreciation of the evidence, oral and documentary held that the Plaintiff has not proved that he was in possession of the suit property but Defendants have proved that the suit property was partitioned between the Plaintiff and the Defendant and parties were in possession of their respective portions. The trial Court also held that Defendant No. 1 had proved that he was in exclusive possession of cashew garden portion of the suit property.

9. The Plaintiff filed Regular Civil Appeal No. 86/1994 challenging the judgment and the decree passed by the trial Court. The lower Appellate Court framed the following points for determination:

1 Whether the Appellant proves that the title and possession of the suit property is with him?

2 Whether the Respondents prove that the suit property was jointly enjoyed and possessed by Appellant and Respondents?

3 Whether the Respondent No. 1 proves that he is the lessee of the cashew plantation and paying yearly rent of Rs. 560/- to others?

10. The lower Appellate Court held that the Plaintiff had proved title and possession of the suit property and Respondents have not proved that the suit property was jointly enjoyed and possessed by both the parties and Defendant No. 1 had not proved that he was lessee of cashew plantation on a yearly rent of Rs. 560/-.

11. Both the appeals have been admitted on the following substantial questions of law:

- i. Whether the learned District Judge has committed jurisdictional error or error of law apparent on the face of the impugned decree, or substantive error of law in exercising contrary discretion over discretion exercised by the Trial Court in refusing relief of permanent injunction when the Appellate Court failed to reach a finding or raise a point for determination that the trial Court had reached a perverse finding or had exercised jurisdiction arbitrarily?
- ii. Whether in a suit for permanent injunction, on the ground that the Defendant has invaded or threatened to invade right to, or enjoyment of property, it is necessary as a principle of law to prove individual and exclusive title to the property by the Plaintiff and whether derivative title is not sufficient for the purpose of relief u/s 38 of the Specific Relief Act, 1963 ?
- iii. Whether presumption u/s 105 of the Goa Land Revenue Code, 1968, is not available to the Plaintiff in a suit for permanent injunction, when he has not proved title, exclusive and individual to the suit property ?
- iv. Whether the Id. District Judge has framed point No. 2 for determination, contrary to the pleadings of the parties, more particularly when the Defendant had pleaded partition of the suit property, and separate enjoyment in definite portions of the same and thereby has committed jurisdictional error or error of law apparent on the face of the impugned decree, or substantive error of law ?
- v. Whether the suit had to be dismissed on admission of the Plaintiff that the Defendant No. 1 (Appellant), was in possession of the suit property and was enjoying it as spelt out from the complaint dated 16.10.1985 because the Plaintiff had failed to prove the basic ingredient of enjoyment of the property in terms of Section 38 of the Specific Relief Act?

12. Mr. Dessai, learned Senior Counsel appearing on behalf of the legal representatives of Defendant No. 1/the Appellants in Second Appeal No. 34/2000 submitted that the lower Appellate Court erred in allowing the appeal by reversing the decree passed by the Trial Court without advertting to the findings given by trial Court. Learned Counsel further submitted that the suit filed by the Plaintiff simplicities for permanent injunction was not maintainable since there was cloud on the title of the Plaintiff and as such declaration ought to have been sought by the Plaintiff. According to learned Counsel although Alvara was in the name of Bhiva, actually it was taken by Hari, father of Bhiva and Krishna, Laxman, Shivram and Vithal since Bhiva was the eldest son and Hari was not keeping good health. Learned Counsel further submitted that since there was cloud on the title of the Plaintiff, the suit simplicities for permanent injunction filed by the Plaintiff was not maintainable. Mr. Desai further submitted that much prior to the death of Bhiva in the year 1964 there was amicable oral partition of the suit property and all the five brothers enjoyed separate portion of the suit property and cashew portion was allotted to the Krishna exclusively on condition that he should pay Rs. 560/-per year to other brothers. According to learned Counsel in any case the lower Appellate Court could not have held that Plaintiff

had title and possession in respect of the suit property by reversing the finding of the trial Court that Plaintiff had failed to prove exclusive possession of the suit property. According to learned Counsel Plaintiff had neither proved the title nor proved the possession in respect of the suit property. Learned Counsel further submitted that Raya Desai who drafted the complaint dated 16.10.1985 ought to have examined by the Plaintiff to prove that complaint was not properly drafted as per his instructions and since the Plaintiff had not examined Raya Desai, the said document clearly disproves the case set up by the Plaintiff. According to learned Counsel the grant made in favour of Hari was provisional and the same was not heritable. Learned Counsel further submitted that the evidence led by the Plaintiff to prove his possession was not sufficient to prove exclusive possession of the suit property by the Plaintiff. According to learned Counsel the State of Goa being the owner of the suit property was a necessary party and as such the lower Appellate Court had erred in decreeing the suit without State of Goa being joined as party in the suit. Learned Counsel further submitted that lower Appellate Court has not exercised the appellate jurisdiction in accordance with settled principles governing interference with the judgment of the trial Court. According to learned Counsel the findings recorded by the lower Appellate Court are perverse and as such decree passed by the lower Appellate Court deserves to be set aside. In support of his submission Mr. Desai relied upon the following judgments:

- i. Anathula Sudhakar Vs. P. Buchi Reddy (Dead) by LRs. and Others,
- ii. Santosh Hazari Vs. Purushottam Tiwai (Dead) by Lrs.,
- iii. Ramji Rai and Anr. v. Jagdish Mallah(dead) through L.R.s and Anr. (2007) 14 SCC 200.
- iv. The Printers (Mysore) Private Ltd. Vs. Pothan Joseph, .
- v. Hero Vinoth (minor) Vs. Seshammal, .

13. Mr. Usgaonkar, learned Counsel appearing for the Defendant Nos. 2 and 3/ Appellants in Second Appeal No. 39/2000 adopted the submissions made by Mr. Dessai learned Senior Counsel.

14. Per contra Mr. S.D. Lotlikar, learned Senior Counsel appearing for the legal representatives of original Plaintiff in both the appeal at the outset submitted that the substantial questions of law framed at the time of admission of second appeal do not arise and as such both the appeals deserve to be dismissed. Learned Counsel further submitted that having regard to the fact that the Plaintiff had filed suit simplicities for permanent injunction based on the title it was not necessary for the Plaintiff to seek declaration in as much as having regard to the defiance taken by the Defendants, it cannot be said that there is cloud over the title of the Plaintiff. According to the learned Counsel defiance taken by the Defendants that although Alvira was in the name of Bhiva, the same was meant for all five brothers is neither sustainable in law nor on facts.

According to learned Counsel the trial Court had not appreciated the evidence led by parties in correct perspective but the lower Appellate Court has correctly appreciated the evidence, oral and documentary led by the parties and has come to the right conclusion that the title and possession in respect of the suit property was with the Plaintiff. According to learned Counsel Defendants at no point of time challenged the title of the Plaintiff based on Alvara and as such there was no question of seeking declaration of title by the Plaintiff. According to the learned Counsel the suit filed by the Plaintiff was based on possessory title and as such the lower Appellate Court was justified in granting injunction in favour of the Plaintiff. According to learned Counsel since the suit is for permanent injunction the State Government is not a necessary party more particularly having regard to the fact that at no point of time Government had claimed any right in respect of the suit property. According to learned Counsel the defiance taken by the Defendant No. 1 that he was tenant of his own brothers in respect of cashew plantation is highly unsustainable both in law and on facts and in any case the same has not been established by Defendant No. 1. According to learned Counsel although the grant was provisional in terms of Article 36 the same is heritable and mere fact that no formal document was executed with the Government for a permanent grant, the same is not fatal to the case of the Plaintiff. According to learned Counsel there is no provision for resumption of the land and the Plaintiff has title in respect of suit property and as such lower Appellate Court was perfectly justified in holding that the Plaintiff had title and possession in respect of the suit property. According to learned Counsel so called admission in the documents dated 16.10.1985 has been explained by Plaintiff and as such the lower Appellate Court has rightly not used the said document against the Plaintiff. According to learned Counsel jurisdiction of the first Appellate Court is not restricted and the first Appellate Court is entitled to re-appreciate the entire evidence and come to the finding based on evidence led by the parties. Learned Counsel further submitted that since name of the Plaintiff appears in form I and XIV there is presumption that he is in possession of the suit property and as such the lower Appellate Court was right in reversing the decree passed by the trial Court and dismissing the suit filed by the Plaintiff. Learned Counsel further submitted that no interference is warranted with the decree passed by the lower Appellate Court. In support of his submission Mr. S. D. Lotlikar, relied upon the following judgments:

- i. Goswami Shri Mahalaxmi Vahuji Vs. Ranchhoddas Kalidas and Others,
- ii. Seth Ramdayal Jat Vs. Laxmi Prasad,
- iii. Udham Singh v. Ram Singh (2007) 15 SCC 529.

15. I have carefully considered the rival submissions, perused the record and the judgments relied upon.

16. In so far as the submission made by Mr. Lotlikar that substantial questions of law formulated do not arise in the present Second Appeal is concerned, I do not

find any merit in as much as both the appeals were admitted after hearing learned Counsel for the parties and as such at this stage I do not find any justification to hold that the substantial questions of law framed do not arise in the appeals.

17. The next question which arises for consideration is whether the suit ought to have been dismissed on the ground that no declaration in the suit was sought by the Plaintiff.

18. In the case of *Anatula Suhakar* (supra), the Apex Court has held that where a Plaintiff is in lawful and peaceful possession of a property and such possession is interfered or threatened by the Defendant, a suit for injunction simplicities will lie since person in possession has right to protect his possession against any person who does not prove a better title. The Apex Court further held that where Plaintiff is in possession, but his title to the property is in dispute, or under a cloud or where the Defendant asserts title thereto and there is also a threat of dispossession from Defendant the Plaintiff will have to sue for declaration of title and the consequential relief of injunction, where the title of Plaintiff is under a cloud or in dispute and he is not in possession or not able to establish possession, necessarily the Plaintiff will have to file a suit for declaration, possession and injunction. The Apex Court further held that a prayer for declaration will be necessary only if the denial of title by the Defendant or challenge to Plaintiff's title raises a cloud on the title of Plaintiff to the property. A cloud is said to raise over a person's title, when some apparent defect in his title to a property, is made out or shown. The Apex Court further held that where the title of the Plaintiff is not disputed but he is not in possession, his remedy is to file suit for possession and seek in addition, if necessary, an injunction. A person out of possession, cannot seek the relief of injunction simplicities without claiming relief of possession.

19. A careful perusal of the plaint filed in Regular Civil Suit No. 1/1986 discloses that Plaintiff had sought permanent injunction against the Defendants on the ground that he has been in possession of the suit property and the Defendants were disturbing his possession. In my considered view the suit filed by the Plaintiff is not based on title. Reference in the plaint to the grant in favour of the father of the Plaintiff is only to show as to how the Plaintiff came into the possession of the suit property. This being the position, in my view the suit filed by the Plaintiff cannot be termed as a suit based on title. Therefore, I do not find any merit in the submission of Mr. Dessai that in the absence of prayer for declaration the suit filed by the Plaintiff was not maintainable. Similarly the contention of Mr. Dessai that the State Government is necessary party to the suit also has no merit for two reasons. Firstly the suit is simplicities for injunction filed by the Plaintiff who claimed that he was in possession of the suit property, pursuant to the grant by Government in favour of his father Bhiva and as such there was no question of joining State of Goa as party in the suit. Secondly no such ground has been raised in the written statement filed by the Defendants

and as such the Defendants cannot be permitted to raise this plea for the first time in Second appeal.

20. Since the suit is for simplicities for permanent injunction based on possession, I do not deem it necessary to deal in detail the submissions made by learned Senior Counsel for the parties on the aspect of title to the suit property. Since the suit filed is simplicities for permanent injunction, the main question which arises for consideration is whether the Plaintiff was in possession of the suit property on the date of passing of the decree so as to justify the grant of relief of permanent injunction in his favour.

21. The trial Court upon appreciation of the evidence led by the parties held that Plaintiff had failed to prove that he was in possession of the suit property. To prove the possession of the suit property Plaintiff examined himself and his brother in law Sudan Kalangutkar. The Plaintiff Tukaram in his examination in chief stated that the suit property consisted of cashew trees and other miscellaneous trees and a part of the suit property consisted of paddy portion. He claimed that he was in possession of the suit property but thereafter he stated as under " I cultivated the paddy field in the year 1986 but in the following year Defendants cultivated the suit paddy field and also harvested the same. In the third year neither the Plaintiff nor the Defendants cultivated the paddy field. At present the paddy field is lying fallow. I did not cultivate the paddy field although there is an order of the Court because Defendants are not allowing me to enter the suit paddy field." In his further examination in chief the Plaintiff stated as under "prior to institution of the suit I was enjoying the cashew trees however, after the suit Defendant No. 1 is enjoying the same."

22. Mr. Sudan Kalangutkar, PW2 deposed that he knew the suit property consisting of cashew trees and paddy field. In between he claim that he was doing the work of ploughing as the property belonged to his brother in law. In cross examination he states that he ploughed the suit property for the last time in the year 1984 and he must have ploughed for about 6 to 7 years.

23. From the evidence of the Plaintiff and witnesses, it is evident that on the date of passing of the decree by the trial Court i.e 5.9.1994 the Plaintiff was not in exclusive possession of the suit property. This being the position, the trial Court was justified in dismissing the suit for injunction filed by the Plaintiff on the ground that Plaintiff had not proved the possession of the suit property.

24. The lower Appellate Court went into the issue of title and possession of the suit property and held that title and possession was with Plaintiff. In my view the lower appellate Court ought not have gone into the issue of title since the suit was for simplicities for permanent injunction based on possession. The lower Appellate Court placed heavy reliance upon the record of right in form I and XIV Exh. PW1/A in which name of the Plaintiff appears. No doubt in terms of Section 105 of the Land Revenue Code survey records have presumptive value but this presumption is rebut table. As stated above, the Plaintiff in his examination in

chief itself admitted that he was not in possession of the entire suit property. This being the position entry in the record of right would not advance the case of the Plaintiff. The lower Appellate Court therefore, was not justified in placing reliance upon the record of right Exh.PW1/A to hold that he was in exclusive possession of the suit property. In so far as communication dated 16.10.1985 Exh. DW1/D relied upon by the Defendants is concerned, perusal of the same discloses, that Plaintiff complained to the Mamlatdar that though he had cashew plantation in the land bearing No. 5 belonging to the Government, Mr Krishna Hari Vaigankar Defendant No. 1 was looking after the plantation forcibly. On his asking his share in it he came to beat him and not paying rent for last 10 years and forcibly enjoying the plantation. The lower Appellate Court held that it cannot be used in evidence as an admission firstly on the ground that Plaintiff was not confronted with the said document. The second ground on which the appellate Court held that the document could not advance the case of the Defendant was that since the Plaintiff had taken a stand that the Plaintiff himself was uneducated and it was written by the person who was half educated and not as per his say, the burden was on the Respondent to prove that the same was written as per his instruction since Plaintiff had put his thumb impression. In my opinion the lower Appellate Court has clearly erred in not placing reliance upon the said document to support the case of the Defendants in as much as Plaintiff in his plaint has stated that he was uneducated and it was drafted by Raya Desai of Pernem who was half educated and was not correctly drafted as per his instructions in view of this stand taken by the Plaintiff. The burden was on the Plaintiff to prove that the contents were not as per his instructions by leading evidence in support thereof. Plaintiff having not led any cogent evidence in this regard (except his own statement) in my opinion Defendants were justified in placing reliance upon the same in support of their case that the Plaintiff was not in possession of the cashew portion of the suit property on the date of filing of the application. In my opinion reliance placed by Mr. Lotlikar upon the judgment of Udham Singh(supra) does not advance the case of the Plaintiff. In the said case it has been held that person making admission should be confronted with his statement and given an opportunity to explain the same and what weight should be given to an admission would depend upon whether it is clear, unambiguous and relevant. In the present case the Plaintiff himself made a reference to the said document and claimed that it was not as per his instructions and except for his bare statement there is nothing on record to hold that although Plaintiff was uneducated and affixed his thumb impression on the said letter, the communication was not written as per his instructions. In the case of Seth Ramdayal Jat (supra) the Apex Court held that the question as to whether the explanation offered by the Appellant that he was wrongly advised by his counsel is accepted or not is the realm of appreciation. The said judgment also does not advance the case of the Plaintiff.

25. In view of above, what emerges is that the Plaintiff on the date he deposed and the date of passing of the decree was not in exclusive possession of the suit

property. This being the position, the lower Appellate Court was not justified in reversing the finding of the trial Court that the Plaintiff had not proved exclusive possession of the suit property and interfering with the decree of the trial Court dismissing the suit for permanent injunction.

26. In the case of Ramji Rai(supra), the Apex Court has held that in a suit for permanent injunction based on possession there is no need for prayer for declaration of title and Court should confine itself regarding possession only. The ratio of the said case is squarely applicable to the present case.

27. In so far as the finding given by the trial Court that the Defendants had proved that the suit property was partitioned as stated in paragraph 5 of the written statement and Plaintiff and Defendants were in possession of the respective portion and further that Defendant No. 1 was in exclusive possession of the cashew garden is concerned, I find that in the absence of any documentary evidence having been produced by the Defendants showing exact portions of the suit property in possession of the parties, the trial Court was not justified in giving such a finding and as such finding deserves to be set aside. In so far as finding given by the trial Court that the Defendant No. 1 is in exclusive possession of cashew portion of the suit property is concerned the said finding though supported not only by the evidence of the Defendants but also by the evidence of Plaintiff himself, there is absolutely no documentary evidence on record showing the exact portion of the suit property in possession of the Defendant No. 1.

28. In view of the findings given above, I do not deem it necessary to refer to other authorities relied upon by both the sides.

29. In view of above discussion, substantial questions of law at Serial Nos. i and v, mentioned in paragraph 11 are answered in favour of Appellants. Having regard to the finding given it is not necessary to answer substantial questions of law formulated at serial Nos. ii, iii and iv.

30. In the result therefore, both the appeals are allowed. Judgment and decree dated 28.10.1999 passed by the Additional District Judge, Mapusa, in Regular Civil Appeal No. 86/1994 is quashed and set aside and the suit filed by the Plaintiff stands dismissed.

31. Having regard to the facts and circumstances of the case, parties to bear their own costs.