

(2010) 08 BOM CK 0192

In the Bombay High Court

Case No : Second Appeal No. 51 of 2006

Shri Shaikh Mohammad Sharif Ibrahim Mamlekar and Smt.
Hawa Bi APPELLANT

Vs

Shri Shaikh Mohammad Ali Abdul Razad Mamlekar and Smt.
Sakhina Bi RESPONDENT

Date of Decision : 10-08-2010

Acts Referred:

Citation : (2010) 5 BomCR 563

Hon'ble Judges : U.D. Salvi, J

Bench : Single Bench

Advocate : Parag Rao, for the Appellant; M. Amonkar, for the Respondent

Final Decision : Allowed

Judgement

U.D. Salvi, J.—This second appeal questions the dismissal of the counterclaim in RCS No. 49/1998/C and its endorsement in RCA No. 6/2004 by the Trial Court - CJJD at Bicholim and the First Appellate Court ? Additional District Judge, Mapusa respectively.

2. The respondents/plaintiffs prayed for declaration that they are the absolute owners of the suit property including the house bearing No. 23 in occupation of the appellants/defendants being the part of the property popularly known as Gharbhatule surveyed under Survey No. 40/15 of Bicholim, Muslimwada, Goa and for consequential deletion of entries of the names of the defendants in occupant's column of the suit property, and for the order directing the defendants to vacate the said house and deliver its vacant possession and further for permanent injunction restraining them from interfering in any manner in the suit property.

3. According to the plaintiffs (the respondents herein), the father of the plaintiff No. 1 Shaikh Mohammad Ali had purchased 1/7th part of the said property popularly known as Gharbhatule in public auction held on 10th November, 1915

and the other 1/7th part of the said property adjoining thereof along with the said house was originally belonging to the father of the plaintiff No. 1 thereby giving rise to the suit property being 2/7th part of the big property Gharbhatule; and the defendants' mother being close relative of the plaintiff No. 1 was allowed to stay in the said house property as a caretaker and after some years the defendant No. 1 Shaikh Mohammad Sharif (the appellant No. 1 herein) had started residing in the suit house with his mother. It was also the case of the plaintiffs that in the month of April 1993, the defendant No. 1 Mohammad Sharif had deceptively obtained a "No objection" from the plaintiff No. 1 upon a misrepresentation that such "no objection" was required for undertaking minor repairs to the said house and for water connection; and as such the said "no objection" is void-ab-initio. In the written statement resisting the plaintiffs' case, the defendants (the appellants herein) besides denial specifically contended that the suit house was constructed by the mother of the defendant No. 1 in 1953 with the money given to her by the defendant No. 1 at the same place where one storeyed family house of the defendants was standing; and the defendants are in possession and enjoyment of the suit house and all the open area in front of it upto the public road since 1953 peacefully, openly, continuously and without obstruction from any person whatsoever as owners thereof. The Counterclaim to: the declaration that the defendants have acquired title to the defendant's property falling in Survey No. 40/15 of Bicholim, and bounded on the East by compound wall supporting the house possessed by the plaintiff, and on the West by property of Nanhe Xaculi, on the North by the property of Yunus and on the South by Mapusa-Valpoi Road by way of prescription and/or adverse possession; and the injunction restraining the plaintiffs or the persons claiming through them from interfering in any manner with the possession and enjoyment of the defendants with respect to the said property - was duly made by the defendants in the said suit.

4. Parties led the evidence and upon considering the evidence and hearing the parties, the Trial Court dismissed the suit as well as the counterclaim. The First Appellate Court found no merit in the appeals preferred by the parties to the said suit and confirmed the judgment and decree of the Trial Court dismissing the suit as well as the counterclaim.

5. The Second Appeal preferred by the respondents herein challenging the dismissal of the suit, came to be dismissed at the admission stage. However, the present second appeal preferred by the defendants came to be admitted on the following substantial questions of law:

1. Whether the impugned decree upholding the Judgment and Decree of the trial Court is vitiated by perversity and non-application of mind, inasmuch as the learned trial Court despite recording a categorical finding that the appellants were entitled to injunct the respondents from interfering with the part of the suit property in the exclusive possession of the appellants, in the body of the Judgment, which was one of the prayers in the counter claim filed by the

appellants, being prayer 6(b), proceeded to dismiss the counter claim in totality, when the same ought to have been partly decreed by its own reasonings?

2. Whether the Court below ignored the plea of ownership raised by the appellants on the basis of prescription in terms of Articles 528 and 529 of the Portuguese Civil Code on a misconception that prescription under the Portuguese Civil Code is akin to claim of ownership on the basis of adverse possession under the Indian Limitation Act, 1963?

3. Whether the first appellate Court erred in not declaring the appellants as owners of the suit property, in possession and enjoyment of the appellants, despite recording of finding that the appellants were in possession of the suit house for more than four decades and by failing to observe that as a consequence of which in terms of Articles 528 and 529 of the Portuguese Civil Code, the appellants had perfected the title to the suit property?

6. Perusal of the trial Court's judgment reveals that the trial Court gave negative finding as regards the issues requiring the plaintiffs/respondents to prove that the house No. 23 occupied by the defendants/appellants as caretaker was ancestral house belonging to the plaintiffs respondents and that the entry of names of the defendants in occupant's column in record of rights remained liable to be deleted as being wrong. While discussing the recasted issue No. 6 regarding the ownership of the suit property by adverse possession or prescription, the trial Court did come to the conclusion that the defendants/appellants are in possession and enjoyment of the property referred to in the counterclaim i.e. the suit house and all the open area in front of it up to public road since prior to construction of the house of the plaintiffs in 1964 or 1966. It further held that from the undertaking-cum-no objection at Exh.PW1/F-D-1, it could be seen that the defendants are in possession and enjoyment of the said suit house property and the defendants are entitled to restrain the plaintiffs from interfering with the possession and enjoyment of the said property including the suit house.

7. In light of these findings, the learned Advocate Parag Rao for the appellants submitted that the relief of injunction sought by the appellants through their counterclaim ought to have been granted, particularly when the plaintiffs/respondents had failed to establish their ownership of the said property described in the counterclaim as the property in possession of the defendants/appellants.

8. Learned Advocate Parag Rao for the appellants further pointed out that he did agitate the first appeal preferred against the dismissal of the counterclaim in the said suit before the learned District Judge, Panaji, Goa on the ground that the trial Court had committed a gross error in recording a finding in the favour of the defendants/appellants and yet, dismissed the counterclaim in the operative part of the judgment as well as in the decree. However, he pointed out from paragraph No. 41 of the judgment of the First Appellate Court that the First Appellate Court despite making the following observations:

quite on the contrary, the records have borne out that the suit house was in possession of the defendant over last more than 4 decades and that the house was constructed by the plaintiffs more than a decade thereafter.

had proceeded to endorse the decision of the trial Court of dismissing the counterclaim without application of mind. Learned Advocate Amonkar for the respondents plaintiffs fairly conceded that in view of the consistent finding of the fact both by the trial Court and the First Appellate Court in favour of the defendants/appellants in respect of the possession of the suit house and the landed property as described in the counterclaim the injunction in favour of the defendants ought to have followed as a matter of course.

9. M. Kallappa Setty Vs. M.V. Lakshminarayana Rao, cited on behalf of the appellants further reinforces the submissions of the appellants with a rationale that the party in possession of suit property on the strength of his possession can resist interference from the other who has no better title than himself and get injunction restraining the other from disturbing his possession. The first substantial question of law as framed, therefore, requires to be answered in affirmative.

10. A close scrutiny of the reasons adduced by the trial Court for answering the recasted issue No. 6 in respect of the ownership by adverse possession and or prescription negatively i.e. against the defendants reveals that all along the trial Court remained engaged with the thought of adverse possession and completely overlooked the acquisition of title by positive prescription as envisaged under Portuguese Civil Code under Article 505 of Portuguese Civil Code. This lapse on the part of the trial Court, learned Advocate Parag Rao for the appellants submitted, was illuminated before the First Appellate Court, particularly with the ground Nos. IV and V in the memo of appeal. Yet, he argued, the First Appellate Court misdirected itself by misreading Jose Da Costa and Another Vs. Bascora Sadashiva Sinai Narcornim and Another, .

11. The learned First Appellate Court did read from the Jose Da"Costa"s case that the passivity and inertness of the plaintiffs (plaintiffs therein) thereafter for over 40 years till the institution of the suit in 1961 clearly established the plea of prescription set up by the defendants and, therefore, the defendants must be held to acquire title by prescription. The learned District Judge, however, commented that the said case had no application to the present case as the defendants (appellants herein) had not shown anywhere, either in the pleadings or evidence, that they were asserting title to the suit property openly, clearly and hostile to that of the plaintiffs (respondents herein) over a period of time.

12. Jose Da"Costa and his wife the appellants before the Apex Court were the defendants in the suit instituted by Bascora Sadashiva Sinai Norcornim and his wife in the Court of Judge of Quepem-Comarca on February 27, 1961 in accordance with Portuguese Law then in force in those territories for ejectment of the defendants from the suit property. Bascora"s parents had inherited the suit

property from their ancestors and eventually Bascora following the death of his parents acquired the rights pertaining the property from some of his sisters and became the owner of the suit property with other heirs. The father of Bascora had permitted the ancestors of the defendants to build house for their residence on the part of the property subject to the condition that they shall have a vacated plot when called upon to do so. Caetana, the mother of the appellant executed a deed on November 16, 1920 before the Notary Public of Comarca indicating that she and her family members were the owners of the plot; and on the basis of this deed, the defendants asserted ownership of that plot of land on which the house built by their ancestors stood. These facts were pleaded by the plaintiffs i.e. the respondents in the said suit seeking declaration of ownership of the said plot and its vacant possession.

13. The defendants denied the allegations and pleaded that it was Vishnu Narcornim, an ancestor of the plaintiffs, who had given the suit property on perpetual lease to Bascora Da"Costa, an ancestor of the defendants in the year 1875 at annual rent of Rs. 2/4/- and no such rent has been paid for over 40 years before the suit nor has any rent ever been claimed by the family of the plaintiffs; and Bascora Da"Costa possessed the plot as his own and originally built one house on it. The defendants further averred that the suit property has been in their "open, peaceful and continuous" possession including that by their predecessors-in-interest as owners for a period of more than 50 years and that they had acquired title by prescription.

14. The evidence in Jose D"Costa's case revealed that the defendants' ancestors and after them, the defendants have been in possession of the lands since 1875 and this was coupled with construction of the house by the defendants' ancestors and repudiation of title of the plaintiffs openly in the year 1920. It is in this context, the Apex Court made comments regarding the acquisition of the title by the defendants by prescription due to the passivity and inertness of the plaintiffs for over 40 years till the institution of the suit in 1961. The Hon"ble Apex Court further observed that there being no proof whatsoever of permissive possession under the plaintiffs or their ancestors, the question of application of the rule laid down under Article 510 of the Portuguese Civil Code did not arise. The Hon"ble Apex Court pointed out the mistake of the Judicial Commissioner in holding the defendants' admission of the alleged perpetual lease under Vishnu Narcornim as permissive occupation under the plaintiffs even after holding that the defendants had failed to establish perpetual lease, and in view of the plaintiffs avowed denial that Vishnu Narcornim had anything to do with the land.

15. Article 510 of the Portuguese Civil Code reads as under:

Whoever possesses in the name of another cannot acquire by way of prescription the thing possessed, except where there is an adverse claim of title of possession, either arising from the third party, or arising from the objection raised by the possessor which is adverse to the right of the owner, in whose name the possession was being exercised and not repelled by the latter; but in

such case, prescription will start from the date of claim of adverseness.

Sole Paragraph - It is said that there is adverse claim of title when the same is substituted by any other party capable of transfer of possession or dominion.

16. Essentially, this Article of the Portuguese Civil Code deals with the claim of adverse possession. As observed above, the Hon'ble Apex Court found no application of the Article 510 in Jose Da"Costa's case and declined to decree the suit for title to the land in occupation of the defendants and for their eviction therefrom. However, it appears that the learned First Appellate Court completely misread Jose Da"Costa's case and examined the case at hand only from one angle that the case was one of adverse possession. The First Appellate Court completely overlooked or ignored the other provision of Portuguese Civil Code governing the acquisition of title by prescription. On the backdrop of the facts established in evidence showing the possession of the suit house in the hands of the appellants/defendants for more than decades, the Courts ought to have given thought to the plea of ownership raised by the appellants defendants on the basis of prescription in terms of Articles 528 and 529 of the Portuguese Civil Code.

17. Learned Advocate Amonkar for the respondents, however, continued to harp on the point that the learned Courts below had not committed any error in declining to grant the declarative relief regarding the acquisition of the said house property by prescription in the counterclaim of the defendants as the defendants had failed to indicate the true owner of the said house property against whom they were claiming right, title and interest in the said property. Learned Advocate Parag Rao for the appellants for countering these submissions took pains to acquaint this Court with English translation of the relevant provisions of Portuguese Civil Code namely Article 474, 475, 476, 505, 517, 518, 520 to 529, 548, 552. To further elucidate the concept of prescription, he cited judgment reported in 2001(1) GLT 355 Shri Trivicrama Sinai Candeparkar since deceased through L.Rs. and Anr. v. State of Goa and Anr.

18. Learned Single Judge of this Court in Trivicrama Candeparkar's case drew strength from Salmond's jurisprudence to clarify that transfer and adverse possession are not the only modes of acquiring the ownership, and prescription is also one of the most important modes of acquisition of ownership or destruction of ownership. Paragraph Nos. 16 and 18 of the said judgment can be profitably reproduced herein to understand why the learned Single Judge of this Court had made such valuable comments regarding the modes of acquisition of ownership.

16. Salmond further observed:

Lapse of time, therefore, has two opposite effects. In positive prescription, it is a title of right, but in negative prescription it is a divestitive fact. Whether it shall operate in the one way or in the other depends on whether it is or is not accompanied by possession. Positive prescription is the investitive operation of lapse of time with possession, while negative prescription is the divestitive

operation of lapse of time without possession. Long possession creates rights, and long want of possession destroys them. If I possess an easement for twenty years without owing it, I begin at the end of that period to own as well as to possess it. Conversely if I own land for twelve years without possessing it, I cease on the termination of that period either to own or to possess it. In both forms of prescription, fact and right, possession and ownership, tend to coincidence. *Ex facto oritur jus*. If the root of fact is destroyed, the right growing out of it withers and dies in course of time. If the root of fact is destroyed, the right growing out of fact is destroyed, the right growing out of it withers and dies in course of time. If the fact is present, the right will in the fullness of time proceed from it.

18. Salmond further observed:

The rational basis of prescription is to be found in the presumption of the coincidence of possession and ownership, of fact and of right. Owners are usually possessors, and possessors are usually owners. Fact and right are normally coincident; therefore, the former is evidence of the latter. That a thing is possessed *de facto* is evidence that it is owned *de jure*. That it is not possessed raises a presumption that it is not owned either. Want of possession is evidence of want title. The longer the possession or want of possession has continued, the greater is its evidential value.

He further observed:

...Positive prescription, however, is possible only in the case of rights which admit of continuing exercise and enjoyment. Most rights of this nature are rights in rem.

19. Article 474 of the said Code defines possession as the retention or enjoyment of anything or right excluding the permissive act or acts of mere tolerance. Article 475 recognises that the possession can be acquired either in good faith or bad faith. Possession with good faith, Article 476 says, is that which arises from title, the defects of which are not known to the possessor, and the inverse of which is the possession in bad faith. Despite permitting presumption of ownership (*vide* Article 477), Article 505 recognises acquisition of things and rights by virtue of possession, and further goes to define the prescription and calls this process of acquisition of things and rights as prescription in the following terms:

Article 505 - Things and rights are acquired by virtue of possession, just as obligations are extinguished by the fact of not demanding their fulfillment. The law lays down conditions and the period of time, that is necessary, for one, as well as for the other. This is called prescription.

Sole paragraph: The acquisition of things and rights by possession is known as positive prescription; the discharge of obligations by reason of not demanding their fulfillment is known as negative prescription.

It can, therefore, be seen that Portuguese Civil Code recognises the concept of

Prescription, particularly acquisition of property by positive Prescription.

20. Article 517 stipulates: possession for the purpose

of prescription should be (i) with title (ii) in good faith (iii) peaceful (iv) continuous (v) open. In the instant case, the Courts below have held that the appellants were in peaceful, continuous and open possession of the property in question for over 4 decades. Nowhere there is whisper in the pleadings and in the evidence that the respondents/plaintiffs were the owners of the property in question. Both the Courts below endorsed the view that the petitioners/defendants had not occupied the said property as the "caretaker" of the plaintiffs. On this backdrop, Article 529 of the Portuguese Civil Code, which reads as under:

Article 529 ? When however the possession of corporeal immovables or incorporeal immovables mentioned in the preceding article, has lasted for 30 years, prescription shall operate, regardless of bad faith or lack of title, except what is provided in Article 510.

operates as was applied in Jose Da"Costa's case. The present case being not one of a permissive possession under the respondents/plaintiffs, there is no question of application of the rule laid down under Article 510 of the Portuguese Civil Code.

21. In view of the aforesaid discussion, it is not difficult to find that the Courts below ignored the plea of ownership raised by appellants on the basis of prescription in terms of Article 529 of Portuguese Civil Code on a misconception that the prescription under the Portuguese Civil Code is akin to the claim of ownership of adverse possession under the Indian Limitation Act, 1963. By virtue of Article 529 of Portuguese Civil Code, the appellants/defendants had perfected their title to the suit property i.e. house and the landed property described in the counterclaim. The First Appellate Court, therefore erred in not declaring the appellants as the owners of the said property despite recording of finding that the appellants were in possession of the said property for more than 4 decades. The remaining substantial questions of law are, therefore, answered accordingly.

22. This appeal is, therefore, allowed with costs. The impugned judgments and decrees so far as they relate to dismissal of the counterclaim made by the appellants/defendants are set aside. It is declared that the defendants have acquired title to the suit house and all the open area in front of it up to the public road falling in Survey No. 40/15 of Bicholim, more particularly described in the sketch annexed to the written statement by way of prescription. The plaintiffs or any person claiming through them are restrained from interfering in any manner with the possession and enjoyment of the defendants in respect thereof.