Jose Da Costa & Another vs Bascora Sadashiva Sinai Narcornim & Anr on 7 April, 1976

Equivalent citations: 1976 AIR 1825, 1976 SCR (3)1067, AIR 1976 SUPREME COURT 1825, 1976 3 SCC 766 1976 3 SCR 1067, 1976 3 SCR 1067, 1976 3 SCR 1067 1976 3 SCC 766, 1976 3 SCC 766

Author: P.K. Goswami

Bench: P.K. Goswami, Hans Raj Khanna

PETITIONER:
JOSE DA COSTA & ANOTHER

Vs.

RESPONDENT:
BASCORA SADASHIVA SINAI NARCORNIM & ANR.

DATE OF JUDGMENT07/04/1976

BENCH:
GOSWAMI, P.K.
BENCH:
GOSWAMI, P.K.
KHANNA, HANS RAJ

CITATION:
1976 AIR 1825 1976 SCR (3)1067
1976 SCC (3) 766

ACT:
Ownership by prescription or adverse possession-Knowledge of possession-Possession for a long time-Peaceful-Permissible possession whether sufficient.
Portuguese Civil Code-Articles 474, 505, 510, 528 and 529.

HEADNOTE:
The respondent plaintiffs instituted a suit in 1961 in accordance with the Portuguese law then in force in those territories for ejectment of the defendant-appellants from the suit property. It was alleged in the plaint that on the death of father of the plaintiff No. 1. Sadashiva the suit land was assigned to Sitabai mother of plaintiff No. 1 and that on the death of Sitabai the property devolved on the

respondent No. 1 and his 6 sisters. It was also contended that the house built on a portion of the land in dispute and occupied by the defendants should be removed by the defendants and the defendants should be directed to hand-over vacant possession of the plot to the respondents. The appellants in their written statement pleaded that the suit property was given on perpetual lease to the ancestors of the appellants and that no rent was paid for over 40 years. The appellants further contended that the suit property was in their open peaceful and continuous possession including that of their predecessors in interest as owners for a period of more than 50 years and that the have acquired a title by prescription.

The trial court decreed the suit. An appeal filed by the appellants before the learned Additional Judicial Commissioner was dismissed. When the matter came up before this Court by special leave this Court remanded the matter to the court of the Judicial Commissioner for a finding on the plea of prescription raised by the appellants. The learned Judicial Commissioner after remand came to the conclusion that the appellants have failed to prove the acquisition of full title to the suit property by prescription under the law in force at the relevant time. The learned Judicial Commissioner also held that the appellants failed to establish their plea of perpetual lease.

Partly allowing the appeal.

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HELD: (1) In view of the earlier decision of this, Court this Court would be justified in deciding the appeal only on the question of plea of prescription. The appellants had been in continuous possession of the entire plot of land described in para 1 of the plaint which has a larger area including the portion where the house of the appellant stands. In the year 1920, the respondents sought to make their construction on the vacant portion of the land close to the appellants' house which led to opposition and obstruction from the appellants. Later on, the appellants agreed to the construction by the respondents. However, so far as the land on which the appellants had their house is concerned there was no proof nor any evidence of any change on the part of the appellants to their open hostility to the respondents' title to the same. The respondents did not give any evidence of any such amicable solution. On the other hand, it is admitted that they had reported to the Administrator without even caring to know the result of such action against the appellants. The further fact that the respondents annexed to the plaint a certified copy of the partition deed of 1920 which was obtained as early as in 1920 goes to show that they were fully cognizant of the public assertion by the appellants of their own title, to the land on which their house stands repudiating that of the respondents. The learned Judicial Commissioner has erred in

holding that the appellants have not been able to prove an overt act of possession to the knowledge of the respondents. According to Art. 474 of the Portuguese Civil Code possession is defined as holding or fruition of anything or right. The acts done by licence or permission do not constitute possession. According to Article 505 things and rights are acquired by virtue of possession, just as obligations are extinguished by reason of not demanding their fulfillment. The law lays down conditions and the period of time
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that are necessary for one as well as for the other thing and that is called prescription. Under Article 528 of the Portuguese Code in the absence of registration of possession or title of acquisition prescription with respect to immovable property or rights to immovable will operate by virtue of possession for 15 years. Under Art. 529 when the possession of immovable property or rights to immovable property has lasted for a period of 30 years prescription will operate. Under the Portuguese law what appears to be clear is that permissive possession is not sufficient to prescribe title of the owner of the land. There is no evidence whatsoever for the conclusion of the Judicial Commissioner that the possession of the appellants was permissible under the respondents. On the other hand, evidence is against recognition by the appellants of any title in the respondents. We are, therefore, left with the long continuous and peaceful, possession by the appellants of the land with the residential house thereon since the time of their ancestors after a clear repudiation of the title of the respondents to the land in 1920. The fact that the appellants set up title in Vishnu Narcornim describing him as respondents' ancestor does not affect the position in view of the respondents' denial that Vishnu had anything to do with the land. The Judicial Commissioner fell into an error by not keeping the distinction between Vishnu's title and the respondents' title. The origin of ownership of land being dipped in the misty past what emerges from the evidence in the absence of proof of lease or permission by the respondents' own ancestors is that the appellants have been in long and open possession of the land over which they have constructed their house for a period long enough for that possession to ripen into ownership. The appellants have acquired title to the said land by prescription. Since there is no proof of permissive possession under the respondents or their ancestors there is no question of application of Article 510. The learned counsel for the appellants has confined his claim in this case only to the land on which appellants have their house. The suit of the respondents so far as it relates to the portion of the land on which the appellants have their house is dismissed and in respect of the remaining portion of land is decreed. [1070G, 1072A-D, 1073A-H, 1074A-C, 1075D-E]

JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 1521 of Appeal by special leave from the judgment and decree dated the 20th January, 1968 of the Court of Addl. Judicial Commr., Goa Daman Diu in Civil Appeal No. 213 of 1966.

U. R. Lalit, K. Rajendra Chowdhary, Mrs. Veena Khanna and S. L. Setia, for the appellants.

V. M. Tarkunde, V. N. Ganpule and A. G. Ratnaparkhi, for the respondents.

The Judgment of the Court was delivered by GOSWAMI, J.-The appellants in this appeal by special leave Jose da Costa and his wife, Isabela Braganca, are the defendants and the respondents, Bascora Sadashiva Sinai Narcornim and his wife, Durgabai Narcornim, are the plaintiffs in the original suit.

The plaintiffs instituted a suit in the court of Judge of Quempem Comarca on February 27, 1961, in accordance with the Portuguese law then in force in those territories for ejectment of the defendants from the suit property. It was alleged that on the death of Sadashiva, father of the plaintiff, Bascora, in partition proceedings with minors (inventario), this plot was assigned to Bascora's mother, Sitabai, towards her moiety in the estate. On Sitabai's death, the property devolved on the plaintiffs, Bascora and his six sisters. Before the partition of the property among the legal heirs of Sitabai, Bascora acquired the rights from some of his sisters and became the owner of the suit property with other heirs. Bascora's parents had inherited this property from their ancestors. The father of Bascora had permitted the ancestors of the defendants to build a house for their residence on a part of the property subject to the condition that they shall have to vacate the plot when called upon to do so. In the latter event, they shall be entitled to remove the super-structures of the building raised by them.

Even so, the plaint goes on to say that Caetana Esperanca Fernandes, the mother of the appellant, Jose da Costa, executed a deed on November 16, 1920, before the notary public of Comarca, which indicated that she and her family members were owners of the plot. On the basis of this deed, the defendants asserted ownership of that part of the plot on which stands the house built by their ancestors and now in their occupation.

On the above allegations, the plaintiffs prayed for a declaration that the plaintiff, Bascora, and the other heirs of his mother, Sitabai, are the only owners of the plot in dispute and that the house in the occupation of the defendants on a part of that plot was constructed in the circumstances and subject to the terms mentioned in the plaint. They further prayed that the defendants be directed to vacate the plot after removing the materials of their house.

The defendants denied the allegations and pleaded that it was Vishnu Bascora Sinai Narcornim, an ancestor of the plaintiffs, who had given the suit property on perpetual lease to Pascoal da Costa, an ancestor of the defendants in the year 1875, at an annual rent of rupees 2/4/-. It was stated further

that no such rent has been paid for over forty years before the suit nor has any rent ever been claimed by the family of the plaintiffs for such a long time. It was Pascoal da Costa who possessed the plot as his own and originally built one house on it but subsequently his descendants constructed more houses so that at present there are three houses and one stable on the plot in dispute. On Pascoal de Costa's death, in inventario proceedings, this property on November 16, 1920, was "consolidated in full ownership in the patrimony of the descendants of the said Pascoal da Costa."

The defendants further aver in their written statement that the suit property has been in their "open, peaceful and continuous" possession including that of their predecessors- in-interest, as owners for a period of more than 50 years and that they have acquired title by prescription.

The trial court decreed the suit on April 30, 1966, directing the defendants to remove their superstructures on the land or in the alternative to receive from the plaintiffs Rs. 1084/- which was found to be the value of the materials of the house in question as per estimate of the experts appointed for the purpose. On appeal the learned Additional Judicial Commissioner dismissed the same on January 20, 1968, and affirmed the decree of the trial court. The defendants came to this Court by special leave against the judgment of the Additional Judicial Commissioner and this Court by its order dated August 1, 1975, which has since been reported in AIR 1975 S.C. 1853, remanded the appeal to the Judicial Commissioner for a finding on the plea of prescription raised by the defendants by observing as follows:-

> "The plea of prescription goes to the root of the matter. It was raised by the defendants in their pleadings and the matter was put in issue. It was again taken up in the grounds of appeal filed in the Court of the Judicial Commissioner, but was left undecided. For the purpose of doing complete justice in the case, we think it necessary to have the advantage of the finding of the court below on this issue. Accordingly, we remit this case to the Court of the Judicial Commissioner, Goa Daman and Diu with the direction that it should after rehearing the parties record a specific finding on the issue as to whether the defendants had acquired full title to the suit property by prescription under the law in force at the relevant time. The Judicial Commissioner shall submit his report with reasons therefor to this Court within four months from the date on which the records are received in his court. In the meantime the appeal shall remain pending in this Court."

We have actually taken the facts of this case from the above decision.

The Judicial Commissioner has since submitted his report dated December 5, 1975, and the appeal has come up before us for final hearing.

After examining the entire evidence, oral and documentary, the Judicial Commissioner has come to the conclusion that the defendants have failed to prove their acquisition of full title to the suit property by prescription under the law in force at the relevant time.

During the hearing we did not have before us any printed Portuguese Civil Code or any standard legal treatise to which we would have ordianily liked to refer. Counsel for the appellants, however, produced certain extracts from various articles to which counsel for the respondents has not taken any exception. There is also reference to certain articles from the Portuguese Civil Code in the earlier judgment of this Court as also in the Report submitted by the Judicial Commissioner, Both the parties accept those articles as correct, although the original books are not before us.

In view of the earlier decision of this Court and after hearing the parties we feel that we will be justified to decide this appeal only on the question relating to the plea of prescription.

Since the original perpetual lease was not produced in court and a certified copy of the original translation of the perpetual lease issued on November 23, 1920, was alone produced, we have no reason to disagree with the conclusion of the Judicial Commissioner that the defendants failed to establish their plea of perpetual lease of, the land.

Before we may proceed further it will be appropriate to note that even the plaintiffs themselves laid a nucleus for the plea of adverse possession to be easily taken up by the defendants. Para 5 of the plaint may, therefore, be quoted:-

> "5. Notwithstanding this, the mother and mother- in-law of the defendants Caetana Esperanca Fernandes with the ambition of alleging to the said plot of the plaintiffs rights that do not assist her, participated as an executing party, in a deed drawn up on 16 November, 1920, by the former notary public of this Comarca, Salinho da Silva, wherein a plot having the denomination of "Deulacodil tucda" or "Mordi" was partitioned, one-third of which was assigned to the said Caetana, and with basis in that partition the defendants allege to be the owners of the ground whereon the said house raised by their ascendants is situate."

Indeed this repudiation of title of the plaintiffs by the defendants gave rise to the cause of action. We cannot accept the submission of Mr. Tarkunde on behalf of the respondents that the word "allege" in the above paragraph in the present tense makes any difference in the matter of the plea.

Not only in the plaint, but also in the evidence, the plaintiff Bascora gave further reinforcement to the plea of adverse possession when he stated thus:

> "... in 1920 the deponent (that is the plaintiff), desiring to build the house existing in the plot of land, there were disputes raised by defendant's mother and by one Santana Costa and then the deponent (that is the plaintiff) notified them through the Administration Office of Sanguem to vacate the plot land. He does not know what subsequent course his petition had.."

Mr. Tarkunde submits that there might have been some dispute which, however, was settled and the plaintiffs built the house on the suit land and the defendants also continued on the land under the earlier permissive arrangement. Mr. Tarkunde draws our attention to the following passage in the

evidence of defendant No. 1:-

> "In 1920 more or less, the plaintiff built a house in the plot in question and begun to stay there. The same house was built very near the house where the deponent (that is the defendant No. 1) stays and which already existed at the time of that building. The dependent was about 14 or 15 years old. The grandfather of the deponent Pascoal da Costa and his uncle Francisco Piedade Costa and even the deponent's mother opposed the said building raised by the plaintiff. The question was amicably solved at the house of Narcornins Bencares to which the plaintiff belongs, to the effect that the plaintiff should build the house and reside in it as well as the said persons who had their houses in it should continue to reside therein. The deponent came to know of these facts regarding the dispute and its solution after hearing his said uncle Francisco Piedade da Costa."

Apart from the fact that the above is hearsay evidence we are clearly of the view that the statement is not sufficient to annihilate the theory of repudiation of the title of the plaintiffs to the property. It stands to reason that the defendants had been in continuous possession of the entire plot of land described in para 1 of the plaint which is a larger area including the portion where the house of the defendants stands. In the year 1926 the plaintiffs sought to make their construction on the vacant portion of the land close to the defendants' house which led to opposition and obstruction from the defendants. At that time apparently the defendants later agreed to the construction by the plaintiffs and that seems to be the reference to the "amicable" solution in the above extract.

So far as the land on which the defendants had their house, there was no proof nor any evidence of any change on the part of the defendants to their open hostility to the plaintiffs' title to the same. The plaintiffs did not give any evidence of any such amicable solution. On the other hand, it is admitted that they had reported to the Administrator without even caring to know the result of such action against the defendants. The further fact that along with the plaint the plaintiffs annexed a certified copy of the partition deed of November 16, 1920, which copy was obtained as early as on December 22, 1920 goes to show that they were fully cognizant of the public assertion by the defendants of their own title to the land on which their house stands repudiating that of the plaintiffs. Mr. Tarkunde submits that there is no evidence that this document had been actually obtained by the plaintiffs, but production of the document without any explanation from the side of the plaintiffs speaks a volume about their knowledge of the repudiation of title.

Mr. Tarkunde also invited our attention to the statement of defendant No. 1 to the effect:

> "that the plaintiff for reasons of enmity does not receive this rent nor he ever asked for its payment to the deponent (that is defendant No. 1) and other members of his family."

This statement cannot be torn from the context of the alternative plea set up by the defendants. This statement is fairly consistent with the alternative plea of perpetual lease of the land set up by the defendants. According to the defendants the land had been in their occupation on perpetual lease

from Vishnu Narcornim, the plaintiffs' paternal uncle and once that would have been acknowledged by the plaintiffs the defendants would perhaps be willing to pay even to the plaintiffs the annual rent. But it is the clear case of the plaintiffs that the story of perpetual lease was false and fraudulent and besides that Visnum Narcornim had no interest in the land and was not competent or authorised to lease out the same. We, therefore, cannot accept the exaggerated importance to the above statement of the defendant No. 1 in his cross-examination.

The Judicial Commissioner, however, rightly observed that "an overt act of possession to the knowledge of the plaintiffs and their ascendants must be shown to have taken palce." From the above discussion, we have no hesitation in arriving at the conclusion that the defendants have been able to establish the same and the Judaical Commissioner is not right in taking a contrary view.

According to Article 474 of the Portuguese Civil Code, "Possession is defined as holding or fruition of any thing or right. Para 1. The acts done by licence or permission do not constitute possession..."

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

Proviso. The acquisition of things and rights is known as positive prescription; the discharge of the obligations by reason of not demanding their fulfillment is known as negative prescription."

Article 528 reads thus:

> "In the absence of registration of possession or title of acquisition, prescription with respect to immovable property or rights to immovable will operate by virtue of possession for 15 years."

Article 529 of the Code is as follows:-

> "When, however, the possession of immovable property or rights to immovable property referred to in the foregoing article has lasted for a period of 30 years, prescription will operate; and no mala fide or absence of title can be averred, except the provisions of Article 510."

Thus even under the Portuguese law what appears to be clear is that permissive possession is not sufficient to prescribe title of the owner of the land.

The Judicial Commissioner was not right in holding that possession of the defendants was permissive under the plaintiffs. There is no evidence is against recognition by the defendants of any title the evidence is against recognition by the defendants of any title in the plaintiffs as such. The Judicial Commissioner mistook the defendants' admission of the alleged perpetual lease under Visnum Narcornim as permissive occupation under the plaintiffs even after holding that the defendants failed to establish perpetual lease.

We are, therefore, left with the long, continuous and peaceful possession by the defendants of the land with the residential house thereon since the time of their ancestors after a clear repudiation of the title of the plaintiffs to the land in 1920. The fact that the defendants set up title in Visnum Narcornim describing him as plaintiffs' ancestor, does not affect the position in view of the plaintiffs' avowed denial that Visnum Narcornim had anything to do with the land. Visnum Narcornim is survived by his own descendants and we are not dealing with a case where Visnum Narcomim's heirs as such have sought eviction of the defendants from the land. The plaintiffs do not accept Visnum Narcornim's title to the land as their title. The Judicial Commissioner fell into an error because of not keeping the distinction between Visnum Narcornim's title to the land and the plaintiffs' title to the same. The origin of ownership of the suit land being dipped in the misty past what emerges from the evidence, in the absence of proof of lease or permission by the plaintiffs' own ancestors, is the defendants have been in long and open possession of the land over which they have constructed their house for a period long enough for that possession to ripen into ownership. The defendants in our opinion should be held to have acquired title to the said land by prescription.

There being no proof whatsoever of permissive possession under the plaintiffs or their ancestors, there is no question of application of the rule laid down under Article 510, relied upon by Mr. Tarkunde.

Article 510 reads thus:

> "One who possesses a thing in another's name cannot acquire it by prescription except if the title of possession has been inverted, either due to an act of a third party, or by objection raised by the possessor to the right of the other in whose name he was possessing it and not refuted by the latter; but in such event the prescription shall run from the date of inversion of the title. Sole para: The title is said to be inverted when it is substituted by another title capable of transferring the possession or ownership (dominio)."

According to the Judicial Commissioner the above Article is applicable and since the defendants could not prove that there had been at some time "inversion of title"

> their possession was merely "detencao" (namely, a precarious possession) and such physical detencao without "animus"

cannot be invoked for the purpose of claiming any effect that possession in one's own name or as of right connotes. It is difficult to see how Article 510 can be attracted to the instant case. The defendants had at no time possessed the land on which their house stands in the name of the plaintiffs. They were never accepting the position of permissive possession under the plaintiffs and had asserted perpetual lease under Visnum Narconim, who, even according to the plaintiffs, was an unauthorised person. Article 510 would not be attracted to this case when the defendants alternatively were possessing in the name of Visnum Narornim or his descendants. Article 510 is, therefore, clearly out of the way. We are, therefore, not even required to consider whether there was any "inversion of title" in this case or not.

It is clear that the defendants' ancestors and, after them, the defendants have been in possession of the land since 1875. Title of the plaintiffs was repudiated openly in the year 1920. The defendants are in possession by occupying the house standing on the land and the house was constructed by the defendants' ancestors. The plaintiffs had made a complaint about their conduct in denying their title to the land and in opposing their construction as early as in 1920. The passivity and inertness of the plaintiffs thereafter for over forty years till the institution of the suit in 1961 clearly establishes the plea of prescription set up by the defendants.

It is significant that even the plaintiffs, being out of possession of the land in suit for a long number of years and having constructed their house on a house on portion of the land only in the year 1920, sought to establish the title to the property "by virtue of the prescription that operated in their favour" (see paragraph 3 of the plaint).

Mr. Tarkunde has made a further submission, which appears to have received approval of the Judicial Commissioner, that the defendants' witnesses while describing the land in suit acknowledged it as "the plaintiffs' land". It may not be overlooked that the plaintiffs also have their own house on a part of the land. We, therefore, cannot agree that the defendants' witnesses by identifying the land in suit in that manner defeated the claim of the defendants with regard to the adverse possession.

We may observe that Mr. Lalit, the learned counsel for the appellants, fairly conceded that he was confining his claim in this case only to the land on which the defendants have their house.

The appeal is, therefore, partly allowed. The plaintiffs' suit for title to the land in occupation of the defendants and for their eviction so far as that portion of the land with their house on it is concerned is dismissed. The plaintiffs' suit for declaration in respect of the remaining portion of the land, however, is decreed. As there is no prayer for eviction of any person other than the defendants, that claim is rejected. We express no opinion with regard to the claim of persons who may be in occupation of the land other than the defendants who are not impleaded in the suit and against whom no relief has been claimed. The judgment and decree of the Additional Judicial Commissioner to the extent indicated in this judgment are set aside. There will be, however, no order as to costs.

P.H.P. Appeal allowed in part.