Jose

IN THE HIGH COURT OF BOMBAY AT GOA

SECOND APPEAL NO.22 OF 2024

Thereza D'Mello,
aged about 72 years,
r/o House No. 6/D,
Anthrza Mansion, Goulloy,
Nuvem, Salcete, Goa. … Appellant

Versus

1. Savio N. Pereira,
s/o Santano Pereira,
major of age, married,
resident of H. No. 10-9,
Goulloy, Nuvem,
Salcete, Goa.

2. Beula Pereira,
w/o Savio M. Pereira,
major of age, married,
resident of H. No. 10-9,
Goulloy, Nuvem,
Salcete, Goa.

3. Manuel F. D'Souza,
major of age,
r/o House No. 10-9,
Goulloy, Nuvem,
Salcete, Goa (Deceased).

3a. Sebastian Carvalho,
aged about 50 years,
r/o Gounlloy, Nuvem,

Salcete, Goa. (appointed
as guardian of Respondent
No. 3 by Order dated
15/04/2009)

4. Marcel D'Souza @
Marshall D'Souza,
major of age, married
r/o H. NO. E-7,
Gounlloy, Nuvem,
Salcete, Goa.

5. Antonio D'Mello,
h/o Thereza D'Mello,
major of age, married,
r/o House No. 6/D,
Anthrza Mansion,
Goulloy, Nuvem,
Salcete, Goa.

6. Treza D'Souza,
w/o Marcel D'Souza,
major of age, married,
r/o Gounlloy, Nuvem,
Salcete, Goa. ... Respondents

Mr Ryan Menezes with Ms S. Alvares, Ms Gina Almeida and Mr Nigel Fernandes, Advocates *for the Appellant*.

Mr J. Abreu Lobo, Advocates *for Respondent Nos.1 and 2*.

CORAM: M.S. SONAK, J.

DATED: 4th April 2024.

ORAL JUDGMENT:

1. Heard Mr Ryan Menezes, who appears with Ms S. Alvares, Ms Gina Almeida and Mr Nigel Fernandes for the Appellant and Mr J. Abreu Lobo for Respondent Nos.1 and 2.

2. This Second Appeal challenges concurrent Judgments and Decrees made by the Trial Court and the First Appellate Court dismissing the Appellants Regular Civil Suit No.90/2010/II instituted in the Court of Senior Civil Judge at Margao.

3. This suit concerns Plot Nos.8 and 9, as described in detail in the plaint. Regarding Plot No.8, the Appellant-Plaintiff sought a decree for cancellation of the Sale Deed dated 19.09.2000 by which her brother, i.e. Respondent No.4, sold Plot No.8 to Nos.1 and 2. This Sale Deed is dated 19.09.2000 and was registered before the Sub-Registrar of Salcete.

4. Regarding Plot No.8, the Trial Court and the First Appellate Court have held that the suit was barred by limitation because the same was instituted in the year 2007, i.e. after the Sale Deed was executed and registered on 19.09.2000.

5. Regarding Plot No.9, the Trial Court held that the Appellant was the owner in possession of this plot. However, relief of permanent injunction regarding this plot was denied on the specious plea that the

Appellant had already enclosed this plot within a compound wall and had admitted in evidence that no parties were interfering with it after such enclosing. The Appeal Court did not even deal with this issue.

6. Mr Ryan Menezes submitted that it was the Appellant's consistent case that she came to know about the Sale Deed dated 19.09.2000, only in the year 2007 when she noticed Respondent Nos.1 and 2 starting construction in Plot No.8. Mr Menezes submitted that Plot No.8 was allotted to the Appellant in Inventory Proceedings and, therefore, her brother i.e. Respondent No.4 had no right or authority to sell Plot No.8 to Respondent Nos.1 and 2.

7. Based on the above, Mr Menezes proposed the formulation of the following substantial questions of law:-

1. Whether the Hon. Appellate Court below erred in reckoning holding that limitation to file the suit challenging the execution of a deed of sale in respect of the suit property in favour of Respondent No. 1 & 2, had to be reckoned from the time when the Appellant learnt of negotiations between Respondent No. 1 & 2 and Respondent No. 4, and/or addressed a legal notice to the former drawing their attention to the fact that she was the owner thereof, and cautioning them not to enter into such sale, and not from the date on which the Plaintiff actually acquired knowledge of the

execution of such sale deed and/or in holding that the suit was filed on a concocted cause of action?

2. Whether the Hon. Courts below committed a grave error of law in attributing knowledge of the impugned deed of sale, executed by Respondent No. 4 in favour of Defendant No. 1 on 05/09/2000, in the absence of any evidence to bear out the same, and in proceeding on that basis, to hold that the suit of the Appellant was barred by limitation?

3. Whether the Hon. Appellate Court failed to appreciate that the Hon. Trial Court erred in answering issue no. 1, i.e., whether the Appellant was the owner of the properties in question, only to the extent of Plot No. 9, and not in respect of Plot No. 8, despite having held in paragraph no. 37 of its Judgment, that she had proved that she was the owner thereof?

4. Whether the Hon. Appellate Court failed to appreciate that the Hon. Trial Court could not have answered issue no. 3 as to encroachment in Plot No. 9, and denied the relief of permanent injunction sought, on the premise that the Appellant had subsequently constructed a compound wall around it, and there had been no encroachment thereafter, when the evidence on record, demonstrated sufficiently that

Respondent No. 1 & 2 had encroached upon it?

5. Whether the Hon. Trial Court erred in holding that the Appellant failed to prove that the impugned Sale Deed was null and void, premised on a finding that the suit was barred by limitation, which indeed could have only been the basis for holding that the Appellant was not entitled to the decree prayed for?

6. Whether the decisions of the Hon. Courts below are borne out of a failure of the Hon. Courts below to appreciate that the evidence led before the Hon. Trial Court, and/or from misappreciation and/or mis-interpretation thereof?

7. Whether the findings of the Hon. Courts below, against the Appellant, are perverse?

8. Mr Lobo, the learned Counsel for the 1st and 2nd Respondents, submitted that the Respondents he represents had nothing to do with Plot No.9. He submitted that Respondent Nos.1 and 2 were neither interfering nor had any intention to interfere in future with Plot No.9. He submitted that the Appellant has deposed that she had constructed a compound wall enclosing Plot No.9 and, therefore, it was inconceivable that the 1st and 2nd Respondents would interfere with Plot No.9.

9. Regarding Plot No.8, Mr Lobo submitted that there were categorical admissions in the Appellant's deposition that she was aware of the construction being put up in 2001. He submitted that even otherwise, there is evidence that the Appellant resided hardly 25 metres away, and the access to Plot No.8 was in front of the Appellant's house. He pointed out that there was evidence that some tenants were staying in the rooms constructed by the 1st and 2nd Respondents in Plot No.8 from 2001. He submits that the concurrent findings of the two Courts about the Appellant being aware of the Sale Deed in 2001 itself or that the Appellant was not diligent from 2001 onwards are supported by the evidence on record. He submitted that there is no perversity in these findings, and consequently, no substantial question of law arises in this Appeal.

10. The rival contentions now fall for determination.

11. Regarding Plot No.9, the position is quite clear. The Trial Court, in paragraph 74 of the impugned Judgment and Order dated 28.08.2019, has observed as follows:-

> "*74. As regards plot no.9, the defendants 1 and 2 have failed to produce any evidence to show right to the same. They also failed to show that they are in lawful possession of plot no.9, parking of buses and dumping of tyres cannot convey right of immoveable property. The statement of Pw1 that they have enclosed the plot and since then there is no parking of bus and dumping of tyres has remained unchallenged. The plaintiff being the owner of plot no.9 does not lose her right only on*

account of parking of buses. The defendants 1 and 2 have failed to prove any legal right to plot no.9."

12. After recording the above findings, the only reason the Trial Court denied the relief of permanent injunction to the Appellant was that the Appellant (PW1) admitted that after filing the present suit, she had enclosed Plot No.9 with a compound wall, and since then, there has been no encroachment.

13. Now that the 1st and 2nd Respondent have made it clear that they have absolutely no interest in Plot No.9 and that they have never encroached on it and have no intention of encroaching on it in future, the Appellant stands substantially protected. The decree of permanent injunction is usually issued when there is threat of interference. Considering the evidence on record, the findings recorded by the Trial Court and now the statements made on behalf of the 1st and 2nd Respondents, the apprehension or threat of interference no longer survives. The Appellant's title and possession to Plot No.9 is thus secure and held so.

14. Accordingly, in the context of plot no.9, the 4th substantial question of law proposed by Mr Menezes either does not arise or, in any case, the findings of the Trial Court and the statements now recorded in this Judgment and Order are more than sufficient to protect the Appellant's interest in Plot No.9.

15. Regarding Plot No.8, the evidence on record thus shows that the Appellant was aware of the construction activity undertaken by Respondent Nos.1 and 2 on this plot from 2001.

16. Though the Appellant has repeatedly asserted that construction in Plot No.8 started only in 2007, in her deposition, she admitted that after the 1st and 2nd Respondents purchased Plot No.8, they constructed four rooms in 2001. The Appellant also admitted that the rooms constructed had water and electricity connections and were rented to different persons.

17. This evidence has been evaluated and analysed in para Nos.61, 63, 66, and 67 of the Trial Court's Judgment and Decree. In para 67, the Trial Court observed that the admission as to the knowledge of sale in the year 2000 itself was not just at one place but at two places, and, therefore, it could not be overlooked as a mistake.

18. The First Appellate Court has also accepted the above finding of fact. The concurrent findings of fact cannot be styled as perverse because they are based on the evidence on record. In a Second Appeal, it is not for this Court to once again re-appreciate or reevaluate the evidence as if it were exercising First Appellate jurisdiction.

19. Even otherwise, it is rather unbelievable that the Appellant, who resides at a distance of hardly 25 metres away from Plot No.8, was

unaware of the construction activity, which she admitted concluded in 2001. The construction by Respondent Nos.1 and 2 was a sufficient trigger for the Appellant to undertake a search or at least find out the capacity under which Respondent Nos.1 and 2 were making such construction in Plot No.8, which, according to the Appellant, was allotted to her in the Inventory Proceedings. Reasonable diligence was expected of the Appellant in this regard. Failure to diligently make enquiries cannot extend the period of limitation. Both the Courts have disbelieved the Appellant's case that the construction started only in 2007. This case was put up only to bring the suit within the prescribed period of limitation.

20. Mr Menezes submitted that recovery of possession was sought; for this, the limitation would be 12 years. The prayer for recovery of possession was consequential to the cancellation of the Sale Deed. If the foundational relief for cancellation of the Sale Deed was barred by limitation as was held by the two Courts concurrently, the Appellant cannot fall back and contend that this was a suit simpliciter for recovery of possession based on title and without the intervention of the sale deed dated 19.09.2000.

21. The proposed first, second, third, fifth, sixth and seventh questions can hardly be regarded as questions of law, much less substantial questions of law. These are basically grounds related to re-evaluation or reassessment of the evidence on record. In any case, the

two concurrent findings of fact about the date of knowledge cannot be regarded as perverse. Accordingly, none of the questions proposed give rise to any substantial question of law.

22. No case is made to admit this Second Appeal for all the above reasons. Accordingly, it is dismissed without any order for costs.

M.S. SONAK, J.