

Niti

IN THE HIGH COURT OF BOMBAY AT GOA

SECOND APPEAL NO.84 OF 2023

JOSE LUIS SEBASTIAO
SEQUEIRA ALIAS JOSEPH
LUIS SEQUEIRA AND ANR.

...APPELLANTS

Versus

RAFAEL PASCOAL NEVES
SEQUEIRA (SINCE
DECEASED REPRESENTED
BY HIS HEIRS AND LRS)

.... RESPONDENTS

Mr Mr V. Braganza with Mr Sagar Rivankar and Mr P. Phadte,
Advocates for the Appellants.

CORAM: M. S. SONAK, J.

DATE : 25th JANUARY 2024

ORAL ORDER:

1. Heard Mr V. Braganza for the appellants.
2. The challenge in this Second Appeal is to the concurrent judgments and decrees made by the Trial Court and the First Appellate Court in Regular Civil Suit No.26/2003/F and Regular Civil Appeal No.104/2017.

3. The appellant was the original defendant No. 1. The predecessor in title of respondent nos.1 and 2 and defendant No. 1 are brothers. The suit concerns co-ownership of the property.

4. Mr Braganza submits that in 1989, the original plaintiff no.1 had instituted a suit objecting to the appellants constructing a house in the alleged common property. This suit was withdrawn with liberty to institute a fresh suit. He submits that the fresh suit was instituted in 2003. He submits that in the 1989 suit, there was a statement about the house being constructed about two and a half years before the institution of the suit, i.e. in 1986 or 1987.

5. Mr Braganza submits that the suit, which has now been decreed, was barred by limitation. In any case, he submits that the appellants had specifically raised a plea of adverse possession by making necessary averments in the written statement and also seeking a counter-claim. He submitted that since the house was constructed in 1986 or 1987 and this suit was instituted only in 2003, the appellants' possession from at least 1986 till 1987 was hostile to the other co-owners. He submitted that the other co-owners were clearly ousted. Since they did not bother to sue within 12 years, the appellant had perfected his title by adverse possession to the portion of the common property on which the bungalow was constructed.

6. Mr Braganza submitted that despite clear pleadings in the written statement, the Trial Court non-suited the appellants on the grounds of

lack of pleadings. He submitted that the First Appellate Court has also, to a certain extent, non-suited the appellants on the grounds of lack of pleadings. He submits that both pleadings and evidence support the case of adverse possession.

7. Based on the above, Mr Braganza submits that the following substantial questions of law arise for determination in this appeal:

B. Whether the Ld. Trial Court as well as the first Appellate Court have exercised jurisdiction illegally and/or with material irregularity in having failed to frame an issue as to whether the Plaintiffs' claim in Regular Civil Suit No.23/2003/F would be barred by law, being one which would be hit by the principle of estoppel, in view of the fact that the averments and pleadings in the plaint in Regular Civil Suit No. 23/2003/F, are completely contrary to the averments in the plaints in the earlier suits filed by the Plaintiffs viz. Special Civil suit No. 390/1989/A and Regular Civil Suit No.145/1999/B.

C. Whether the Plaintiffs in Regular Civil Suit No.23/2003/F would be entitled in law to make averments in the plaint completely contrary to the averments in Special Civil Suit No.390/1989/A and Regular Civil Suit No.145/1999/B after having withdrawn the suit.

D. Whether the Ld. Trial Court as well as the First Appellate Court have exercised jurisdiction illegally and/or with material irregularity in having answered issue no.vii, and the point for determination at Serial No.vi respectively in the negative, despite the overwhelming evidence brought on record by the Defendants to establish

and prove that they are exclusive owners of the suit property and suit houses, by way of adverse possession.

8. As regards questions (B) and (C), they raise no substantial questions of law. Firstly, the appellants did not apply for casting of any issue based on the principle of estoppel. There are no pleadings for casting any issue on estoppel. The 1989 suit was withdrawn with liberty. Therefore, raising a plea in a Second Appeal that the issue of estoppel should have been gone into by casting an issue is not proper. There is not even any clarity that such contention was seriously raised before the Trial Court or the First Appellate Court.

9. As regards the question at (C), the same is again not very different from the question at (D) as proposed. Firstly, there is no contradiction in the averments, and secondly, specific leave was granted by the Court in the filing of a fresh suit. In both the suits, the plaintiffs asserted that they were the co-owners, which was the fundamental basis of the suit. This was never denied except for the plea of adverse possession.

10. Accordingly, questions (B) and (C) do not arise, and, in any case, they can hardly be styled as substantial questions of law.

11. As regards (D), it is true that there were some pleadings about ouster and adverse possession. However, the two Courts have held that such pleadings were not at all sufficient to make out a case of either ouster or adverse possession. The two Courts have held that this was a matter between co-owners. Therefore, possession of one co-owner can be deemed to be possession on behalf of the remaining co-owners. In

such a situation, the adverse possession or ouster pleadings have to be clear and specific and not general or vague.

12. In this case, apart from asserting that a house was constructed on the common property, there are no clear pleadings about when the other co-owners were ousted and when the other co-owners were made aware that the appellants' possession had turned hostile. Although the First Appellate Court has referred to the necessity of quoting a specific date and although there may not be any such requirement, the party pleading ouster or adverse possession has to, with some clarity, plead when actually there was any ouster and such ouster was made known to the other co-owners.

13. The First Appellate Court has referred to several decisions which show that mere construction by one of the co-owners does not mean that the other co-owners were completely ousted. No inference could be drawn that the co-owner making such construction came into adverse possession qua the other co-owners based only upon the factum of such construction. Both the Courts have recorded concurrent findings of fact. There is no perversity of such record of finding of fact. Both the Courts have applied correct principles of determining whether any case of adverse possession or ouster was made out. Accordingly, even the third substantial question of law as proposed does not arise or, in any case, will have to be answered against the appellants.

14. For the above reasons, this appeal is dismissed because it raises no substantial questions of law. There shall be no order for costs.

M. S. SONAK, J.

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