

CASE NO.:
Appeal (civil) 7349 of 2001

PETITIONER:
Maria Colaco & Anr

RESPONDENT:
Alba Flora Herminda D'Souza & Ors

DATE OF JUDGMENT: 19/02/2008

BENCH:
A.K.MATHUR & ALTAMAS KABIR

JUDGMENT:
J U D G M E N T

CIVIL APPEAL NO.7349 OF 2001

A.K. MATHUR, J.

1. This appeal is directed against the order dated 5.3.2001 passed in Second Appeal No.55 of 2000 by the High Court of Bombay at Goa whereby learned Single Judge has set aside the order of the first appellate court and allowed the suit of the original plaintiff and granted injunction restraining the defendants from proceeding with the construction in the suit property or doing anything in the suit property and the defendants were directed to restore the suit property in its previous condition by filling up the foundation trenches and removing anything done or might have been done by the defendants in the suit property. Aggrieved against this order the present appeal was filed.

2. Brief facts which are necessary for disposal of this appeal are that the suit property was granted by the Governor General Do Estado Da India, to one Mr. Antonio D' Souza on payment of Rupees four nine anna and twenty paise payable each year to the State. Antonio D'Souza died leaving behind his heirs, his children Jose Maria D' Souza and Elisa D' Souza. Jose Maria D' Souza expired leaving behind her daughter Umbelina D' Souza. Lawrance D' Souza, husband of Umbelina D' Souza also died. Umbelina D' Souza died leaving behind the plaintiff and his brothers. As the plaintiff was staying in Bombay, he requested one Amorim Velho, son of Elisa D' Souza to look after the property and accordingly, he was looking after the suit property till 1977. Thereafter, Joildo De Aguiar looked after the property. In August, 1981 Aguiar went abroad and returned in November, 1981. On his return he found that some construction work was undertaken by M/s. Pinto Engineers and Contractors, Defendant No.3 through their agents. Then Robert D' Souza filed a regular suit in the court of the Civil Judge, Junior Division, Panjim and prayed that the defendants and their agents should be restrained by perpetual injunction from interfering in any manner with the possession of the plaintiff and his brothers in respect of the suit property and they be restrained from proceeding with the works of construction in the suit property and to return the suit property in its original condition. The defendants filed their written statement and resisted the suit. Thereafter during the pendency of the suit the plaintiff died and respondents 1 to 7 were brought on record as legal representatives of the deceased plaintiff. On 5.12.1998, learned Civil Judge, Junior Division, Panjim decreed the suit restraining the defendants by perpetual injunction from interfering with the possession of the plaintiffs in respect of

the suit property and from proceeding with the work of construction. Learned Civil Judge, Junior Division further directed the defendants to restore the suit property in its previous condition by filling up the foundation trenches and removing anything done in the suit property. Thereafter a regular civil appeal being Regular Civil Appeal No.1 of 1999 was filed in the Court of Additional District Judge, Panaji. Learned Additional District Judge by order dated 10.4.2000 allowed the appeal filed by the appellants and dismissed the suit. Thereafter, respondent Nos. 1 to 7 filed a second appeal being Second Appeal No.55 of 2000 in the High Court of Bombay at Goa. Learned Single Judge of the High Court framed the following questions of law:

(i) Whether the District Judge erred in dismissing and/or rejecting the claim of the plaintiffs for permanent injunction on the ground that from the plaint it could be inferred that the plaintiffs had admitted loss of possession of the suit property in favour of the defendants/ respondents ?"

Learned Single Judge after considering the matter allowed the second appeal and set aside the order passed by the first appellate court and confirmed the decree of the trial court. Hence the present appeal.

3. We have heard learned counsel for the parties and perused the record. Learned Single Judge after examining the matter found that in fact on the date Aguar came to know that the defendant Nos. 1 & 2 had induced the defendant No.3 to believe that they were the owners and possessors of the suit property and that on such a condition the defendant No.3 entered into an agreement with Defendant Nos.1 & 2 whereby the defendant Nos.1 & 2 had promised to sell the suit property to defendant No.3 and who was allowed to construct the building consisting of flats in the suit property and Aguar also came to know that on 1.9.1979 a deed of justification was recorded by the Registrar\026 cum-Sub Registrar and Notary, ex- Officio Ilhas, Goa wherein it was falsely declared that Defendant No.1 was the owner and was in possession with exclusion of any other persons of the suit property and had possessed the suit property for more than 30 years. On further query he came to know that the defendant No.1 managed to get the suit property registered in the records of the land revenue office in her name and thereafter they got the plan for construction sanction approved by the Panaji Municipality. But when Aguar raised objection then defendant No.3 stopped construction work for four days and thereafter he again started the work by placing the steel reinforcement for casting footing. Therefore, the plaintiff apprehended that they would proceed with further construction and therefore, the plaintiff was constrained to file the suit. Therefore, on that basis it was submitted before the learned Single Judge of the High Court that from these facts it was more than apparent that the plaintiff lost the possession. Therefore, at the relevant time the plaintiff was not in possession of the suit property. As such, there was no cause for filing the suit for permanent injunction. Learned Single Judge after considering the matter found that these averments did not constitute the basis on the part of the plaintiff that he was not in possession of the suit property. On the contrary, learned Single Judge found in reply to paragraph 13 of the plaint, the defendants in their written statement admitted that the work was stopped by the defendant No.1 for some time but they restarted the work again. This, according to learned Single Judge was a proof of the fact that the Defendant Nos.1 & 2 and Defendant No.3 were not sure about the possession and right of the defendant Nos.1 & 2 over the property. In fact, what it transpires from all these facts

that the trial court reached the same conclusion as the learned Single Judge in second appeal in High Court. It is true normally in the second appeal the High Court should not interfere on the questions of fact. But if on the scrutiny of the evidence it is found that the finding recorded by first appellate court is totally perverse then certainly the High Court can interfere in the matter as it constitutes the question of law. In the given facts it is more than apparent that the plaintiffs who are claiming the right over the property by way of prescription but that has been denied by the plaintiffs that they were the owners of the property and it was being looked after by Aguair and in absence of Aguair the defendants registered the deed of justification and on that basis they claimed the right over the property. But when the original owner protested to the so called deed of justification, then the construction work was also stopped for some time. This goes to show that the defendants were not sure of their possession as well as their title over the suit property by way of adverse possession. In these circumstances, the trial court granted injunction but the first appellate court wrongly reversed it without adverting to the finding of the trial court. The said finding of the first appellate court was set aside by the High Court in second appeal. Therefore, in these facts and circumstances of the case, we are of opinion that the view taken by the learned Single Judge of the High Court in second appeal appears to be just and proper and there is no ground to interfere with the same. Consequently, the appeal is dismissed with no order as to costs.