

Francisco Dâ€™costa and Another Vs. Francisco Xavier Dâ€™costa and Another

Francisco Dâ€™costa and Another Vs. Francisco Xavier Dâ€™costa and Another

SooperKanoon Citation : sooperkanoon.com/1104179

Court : Mumbai Goa

Decided On : Dec-17-2013

Judge : U.V. Bakre

Appeal No. : Second Appeal No.15 of 2013

Appellant : Francisco Dâ€™costa and Another

Respondent : Francisco Xavier Dâ€™costa and Another

Judgement :

Heard Mr. Kakodkar, learned Counsel appearing on behalf of the appellants and Mr. Ramani, learned Counsel appearing on behalf of the respondents.

2. Admit on the following substantial questions of law:

(i) Whether the Courts below erred, misconstrued and misinterpreted the Deed of Partition dated 24/07/1991 to arrive at a conclusion that the Respondent no.1 had constructed the suit house exclusively from his own expenses and he is the owner of the suit house?

(ii) Whether the Courts below committed error of law by not analysing the evidence to know the real intention of the parties for execution of the said Partition Deed dated 24/07/1991 and thus misinterpreted Section 92 of the Indian Evidence Act?

(iii) Whether the Courts below committed error of law to conclude that the possession follows ownership and that the Respondents are the only owners of the suit house when admittedly licence of the same stands in the name of father of the Appellant No.1 and the Respondent no.1 and that the Respondents along with Appellants are co-owners of the suit plot and possession of one co-owner is possession of all co-owners?

3. This Second Appeal is directed against the Judgment, Order and Decree dated 30/10/2012 passed by the learned Adhoc District Judge-I, FTC-I, South Goa, Margao (First Appellate Court) in Regular Civil Appeal No. 109/2011, which in turn was filed against the Judgment, Order and Decree dated 29/04/2011 passed by the learned Civil judge Junior Division, Margao (trial Court), in Regular Civil Suit No. 31/1999/D. The appellants are the original defendants whereas the respondents are the plaintiffs.

4. The parties shall be hereinafter referred to in the manner in which they are designated in the cause title of said Regular Civil Suit No.31/1999/D.

5. Suit plot bears survey no.172/3, of village Guirdolim and it admeasures 2400 square metres. The same is a part of a property known as Birbulem or Cautem bearing Land Registration office No.30921 and Matriz No.16. The said plot of land was purchased by Shri Joaquim DCosta by Sale Deed dated 04.06.1975 and when the wife of Joaquim DCosta died on 19.06.1986 she left behind her, her said husband and children, namely plaintiff no.1, defendant no.1, Mr. Caetano DCosta, Mr. Caetano Jose DCosta and Mr. Camilo DCosta. By Deed of Partition dated 24.07.1991, the suit plot was partitioned amongst the plaintiffs, defendants, said Joaquim D'Costa and others in two parts namely plot 'A' admeasuring 723 square metres and plot 'B' admeasuring 1599 square metres. The said plot 'A'(suit plot) is allotted jointly to the plaintiffs and defendants and plot B is allotted to Caetano DCosta and his wife, Caetano Jose DCosta and Camilo DCosta with usufruct right to Joaquim DCosta.

6. Plaintiffs' case, in short, is as follows:- In the year 1989, the plaintiff no.1 constructed the house in the suit plot with permission of his father and others with due licence from the Panchayat, exclusively with his own money and for his

residence, thought the licence for construction was obtained in the name of the father. This was because the plot of land was in the name of the father. Though the suit plot is jointly owned by both the parties, the said house exclusively belongs to the plaintiffs whereas the defendants are only entitled to half of the suit plot as allotted in the said deed of partition. The plaintiffs had allowed the defendants to occupy a part of the said house comprising of two rooms, on the right side while entering, temporarily at the request of the defendants whereas the remaining house was occupied by the plaintiffs. The plaintiff no.1 is working in Kuwait and comes down to Goa once in two years and sometimes during the absence of plaintiff no.1 the plaintiff no.2 was residing at Curchorem. The house is in the name of the plaintiff no.1 in the Panchayat records and he pays the house tax. On 06.07.1998, the plaintiff no.1 came down to Goa and while he was staying in his house in the suit plot he learnt that in his absence, the defendant no.1 got his name recorded in the Panchayat register in respect of the suit house along-with the plaintiff no.1. The plaintiff no.1 by his letter dated 21.08.1998 objected the recording of the name of the defendant no.1 and when the plaintiff no.1 questioned the defendant about the same, the defendant raised the dispute. The defendants proposed to settle the dispute saying that the plaintiffs should purchase the half share of the defendants in the suit plot for Rs.70,000/-, which the plaintiffs agreed but the defendant did not come forward to execute the Deed of Conveyance with the result that the plaintiffs had no alternative then to seek partition of the suit plot. The plaintiffs filed the said suit for partition of the suit plot and eviction of the defendants from the said house.

7. The defendants, in their written statement, alleged as follows:- The said house was constructed by the defendant no.1 with permission of the father and others and with the assistance of the plaintiff no.1 and the licence was obtained by the defendant no.1 in the name of his father and the entire expenses were borne by the defendant no.1 though the financial assistance was also obtained by the defendant no.1 from the plaintiff no.1. After the completion of the house, the same was occupied by the father of the defendant no.1 as well as by other brothers. After the marriage of the plaintiff no.1 with plaintiff no.2 and at the time of christening of the child of the plaintiffs, a quarrel took place after which the partition was effected and the father and other brothers started residing separately

in the old house. In the said house, the plaintiffs and the defendants were residing. But, in the year 1996, the plaintiff no.1 told the defendants that he desires to live separately and that he does not wish to live in the suit plot and in order to give up the right in the said property, the plaintiffs demanded a sum of Rs.1,00,000/- which was later on settled for Rs.70,000/- which the defendants were required to pay on or before 15.08.1996. The defendants started occupying the said house on the day of annual mass of the mother, much before the plaintiff no. 1 could come to Goa. Thereafter since the plaintiffs had received their share of contribution made in the said house, the plaintiff no.1 started living separately by purchasing the flat in the year 1996 at Curchorem and at that time took all his belongings with him on 15/8/1996. Since the defendant no.1 had obtained financial assistance from the plaintiff no.1 at the time of partition, it was decided to have the house jointly with plaintiff no.1 or in the alternative that the defendant no. 1 will have to return the said sum of Rs.70,000/- to the plaintiff no.1 at the option of the defendant no. 1 in case the defendant no.1 does not wish to part the said house. In the year 1990, when the plaintiff no.1 was without job, at that time on the request of the plaintiff no.1, the defendant no.1 had paid Rs.40,000/- to the plaintiff no.1. The plaintiff no.1 returned from abroad in month of July 1998 and told the defendants to keep the money ready in order to execute the deed and accordingly the defendants kept the money ready and even the draft of the deed was prepared. However, the plaintiffs instead of proceeding further filed the present suit and also managed to record the name of plaintiff no.1 in Village Panchayat against the said house. The defendants moved the application before Panchayat authorities for separating the number of the said house and accordingly the tax was shown in the name of the plaintiffs and the defendants as towards house no. 16A and 16B. The electricity connection of the said house is in the name of the defendant no.1 and the bills are regularly paid by him and he has also constructed the well in the suit plot and has done the plantation. From 15/08/1996, the plaintiff no.2 is permanently residing at Curchorem whereas the plaintiff no.1 is working in Kuwait. The total expenses incurred by the defendants for construction of the said house, well, compound wall and for plantation etc. are more than Rs.2,00,000/- and presently the defendants are in exclusive possession and enjoyment of the said property and have put the tiles, window, doors to the said house and even have

constructed a joint wall.

8. Based on the rival contentions of the parties, following issues were framed by the trial Court:

1. Whether the plaintiffs prove that the plaintiff no. 1 constructed the suit house in the suit property?
2. Whether the plaintiffs prove that the suit house belongs exclusively to the plaintiffs?
3. Whether the plaintiffs prove that they allowed the defendants to occupy a part of the suit house comprising of two rooms temporarily?
4. Whether the plaintiffs prove that they are occupying the remaining part of the suit house?
5. Whether the plaintiffs prove that the defendants had proposed to sell their half share of the suit property for Rs.70,000/-?
6. Whether the defendants prove that they constructed the suit house?
7. Whether the defendants prove that the plaintiffs agreed to sell their half share in the suit property for Rs.70,000/-?
8. Whether the plaintiff proves that Relief (aa) is within limitation?

What relief?

What order?

9. During the course of trial, the plaintiffs examined brother of plaintiff no.1, who holds Power of Attorney on his behalf as PW1 and one more witness namely Joaquim D'Costa, the father of the plaintiff no.1 and defendant no.1, as PW2. The defendants examined the defendant no.1 as DW1 and 13 more witnesses.

10. Upon minute scrutiny of all the witnesses of both the parties and consideration of the entire material on record, the trial Court held that the plaintiffs proved that

they have exclusive ownership right to the suit house and co-ownership right to the suit plot. The trial Court held that first four issues have been duly proved by the plaintiffs whereas issue no 6 was not proved by the defendants. The issues no.5 and 7 were deleted. The suit, therefore, came to be partly decreed. The defendants were directed to quit and vacate the suit house occupied by them. A preliminary decree was drawn directing partition of the suit plot into two equal halves. A letter was issued to the Collector, South Goa to carry out partition by separating the plots in such a manner that the suit house lies in the portion allotted to the plaintiffs, if feasible.

11. The plaintiffs challenged the said judgment and decree dated 29/04/2011 passed by the trial Court and in Regular Civil Appeal No.109 of 2011, the learned First Appellate Court formulated the following points for determination:-

1. Whether the plaintiffs have proved before the trial Court that the plaintiff no.1 had constructed the suit house exclusively from his own expenses and is the owner of the same?

2. Whether the learned trial Judge erred in passing the preliminary decree directing the partition of the suit plot into two equal halves in such a manner that the suit house lies in the portion allotted to the plaintiffs, if feasible?

The First Appellate Court fully agreed with the findings and reasoning of the trial Court and dismissed the appeal thereby maintaining the judgment of the trial Court. The plaintiffs have therefore filed this Second Appeal.

12. Learned Counsel appearing on behalf of the defendants submitted that by deed of partition, the plot 'A' containing the suit house has been allotted to the plaintiff no.1 and the defendant no.1 and hence the defendants were entitled to half share in the suit house. According to him, the lower Courts failed to find out the real intention of the parties behind execution of the said deed of partition. He submitted the de facto possession of the suit house was with the defendants. He relied upon the judgment of the Hon'ble Supreme Court in the case of Anathula Sudhakar Vs. P. Buchi Reddy (Dead) by Lrs. and others [(2008) 4 SCC 594]. He pointed out that DW10, an engineer had opined that the suit plot cannot be

partitioned.

13. On the other hand, learned Counsel appearing on behalf of the plaintiffs submitted that there are concurrent findings of the two Courts below and no perversity in the reasons has been pointed out. He invited my attention to the deed of partition wherein it is clearly mentioned that the house was constructed by the plaintiff no.1 and that the plot has been allotted to the plaintiff no.1 and defendant no.1. He pointed out that nowhere in the pleadings as well as in the evidence, the deed of partition has been disputed. He submitted that the defendants had falsely pleaded that the suit house was exclusively constructed by the defendant no.1, which fact is contrary to the contents of the deed of partition and thus by their own conduct, the defendants had shown that they are not fit to be relied upon. He submitted that if partition at loco is not possible, then the Collector would report, to that effect. He urged that there is no scope for interference with the impugned judgment and decree.

14. Upon perusal of the material on record and consideration of the submissions made by the learned Counsel for the parties, I am of the view that there is no scope for interference with the concurrent findings given by the Courts below.

15. There is no dispute that by deed of partition dated 24/07/1999 (Exhibit 19) which is a registered deed of partition, the plot purchased by Joaquim D'Costa vide sale deed dated 4/6/1975 (Exhibit 18) was divided into two parts namely plot 'A' with an area of 723 square metres and plot 'B' with an area of 1599 square metres. As per the said deed of partition, plot 'A' has been allotted jointly to the plaintiffs and defendants whereas the plot 'B' is allotted to Caetano D'Costa and his wife, Caetano Jose D'Costa and Camilo D'Costa with usufruct right to Mr. Joaquim D'Costa. We are not concerned with plot 'B'. The said plot 'A' jointly allotted to plaintiffs and defendants forms part of survey no.172/3 of Village Guirdolim, and is the suit plot. A perusal of the Written Statement of the defendants as well as the entire evidence on record reveals that the defendants have admitted the contents said deed of partition and have not at all challenged or disputed the same. There is oral evidence on record to the effect that in the year 1989 i.e. prior to the said deed of partition, the plaintiff no.1 constructed house in

the said plot of land, i.e. the suit plot which subsequently in terms of deed of partition came to be marked as plot 'A', with the permission of his father and others with due license from Panchayat. The said oral evidence is supported by the registered document. In the paragraph 4 of the deed of partition, it is specifically mentioned as follows :

And whereas the SECOND PARTY got converted a part of the said property into non agricultural purposes and constructed a house therein at the cost of the SECOND PARTY, Shri Francisco Xavier D'Costa;

.....

16. Therefore, it is clear beyond doubt that house has been constructed by the plaintiff no.1 with his own money and by getting the part of the land converted into non-agricultural purpose. Thus, though the suit plot belongs jointly to the plaintiffs and the defendants, however, the house therein belongs only to the plaintiffs since the same has been constructed by the plaintiff no.1. There is no legal sanctity to the submission of the learned Counsel appearing on behalf of the defendants that the oral evidence on record reveals that the above term was not intended to be incorporated in the deed of partition or that even otherwise the intention was to share the house equally. The learned trial Court as well as the learned First Appellate Court has rightly relied upon the Sections 91 and 92 of the Indian Evidence Act and have held that the defendant no.1 cannot now say that the said term included in the deed of partition was not intended to be incorporated therein.

17. As has been rightly held by the learned First Appellate Court that the defendants have not challenged the partition deed and have not filed any Counter Claim. In his evidence, DW1 has admitted that he is aware of the conditions of the said partition deed. In the original written statement there was no denial to the terms and conditions of the partition deed but only subsequently in the additional written statement it was stated that the defendants came to know about the said statement regarding the construction of the house by plaintiff no.1 with his own money only after they received summons in the suit. Both the lower Courts below have rightly refused to rely upon the above evidence. The additional written statement was filed about 12 years after the filing of the suit. As has been rightly

held by the lower Courts, though it is true that the defendants are staying in the portion of the said house, however, the said possession is allowed by the plaintiffs as established by the evidence on record and therefore is merely permissive. There is nothing wrong in the observation made by the First Appellate court that the possession follows ownership. The defendants have not put up the case of adverse possession.

18. The grievance of the defendants that the suit plot cannot be demarcated and that DW10, Nilesh Lad has opined that the suit plot cannot be partitioned is premature since only preliminary decree has been drawn by the trial Court and it is the Collector who would determine whether division is possible or not by keeping the said house in the portion to be allotted to the plaintiffs. It is pertinent to note that in the written statement, the defendants have not taken any stand that the suit plot cannot be divided.

19. In view of the concurrent findings of facts given by both the lower Courts, there is neither any perversity nor illegality in the impugned judgment and order. It cannot be said that the deed of partition dated 24/07/1991 has been misinterpreted or misconstrued by the Courts below. Merely because the licence of the said house stands in the name of the father of the plaintiff no.1 and the defendant no.1, the defendants cannot claim that they are co-owners of the said house when they have clearly admitted in the partition deed that it is the plaintiff no.1 who obtained the conversion of the part of the property and constructed house there at his own costs. The defendants have in fact taken a false defence by claiming that the said house was constructed by the defendant no.1 exclusively though financial assistance was obtained from the plaintiff no.1. The circumstances in which the license to construct the house had to be obtained in the name of the father have been duly explained by the plaintiffs and have been rightly considered by the Courts below. The suit plot was in the name of the father.

20. I have gone through the judgment of the Hon'ble Supreme Court in Anathula Sudhakar (supra), and more particularly paragraph 15 thereof wherein it is observed that in a suit for permanent injunction to restrain the defendant from interfering with the plaintiff's possession, the plaintiff will have to establish that as

on the date of the suit he was in lawful possession of the suit property and the defendant tried to interfere or disturb such lawful possession. The facts of the case supra are totally different and the suit was merely for prohibitory injunction relating to immovable property based on possession only. The said decision is not applicable to the present case.

21. In view of the discussion supra, the substantial questions formulated above are all answered against the defendants. The appeal is therefore liable to be dismissed.

22. In the result, the appeal stands rejected with no order as to costs in the facts and circumstances of the case.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com