

IN THE HIGH COURT OF BOMBAY AT GOA

SECOND APPEAL NOS. 25, 28, 29, 30, 31 OF 2009 AND 60 OF 2010

SECOND APPEAL NO. 25 OF 2009

1. Purshottam Yeshwant Fal Dessai (deceased)
 - a) Shri Yeshwanta alias Jayesh Purushottam Fal Dessai,
major in age, resident of H. No. 936,
Velwadda, Poinguinim,
Talouka, Canacona, Goa.
2. Smt. Chitrakal Purshottam Fal Dessai,
Widow of late Purshottam Yeshwant Fal Dessai
Age 60 years, landlady,
R/o. H. No. 936, Velwadda, Poinguinim,
Taluka, Canacona, Goa.

..... Appellants/
Original Plaintiff

V e r s u s

Shri Ramakant Painguinkar,
Son of Durga Painguinkar
Major of age, businessman,
R/o. H. No. 869/F,
Velvada, Poinguinim,
Canacona, Goa,

..... Respondents
Original Defendant

SECOND APPEAL NO. 28 OF 2009

1. Purshottam Yeshwant Fal Dessai (deceased)
 - a) Shri Yeshwanta alias Jayesh Purushottam Fal Dessai,
major in age, resident of H. No. 936,
Velwadda, Poinguinim,
Talouka, Canacona, Goa.
2. Smt. Chitrakal Purshottam Fal Dessai,
Widow of late Purshottam Yeshwant Fal Dessai
Age 60 years, landlady,
R/o. H. No. 936, Velwadda, Poinguinim,
Taluka, Canacona, Goa.

..... Appellants/
Original Plaintiff

V e r s u s

1. Shri Narayan Vithoba Pagui
Son of Shri Vithoba Pagui,
Major of age, agriculturist,
and his wife,

2. Smt. Narayan Pagui,
of major age, housewife,

Both residents of H. No, 941/J,
Velvada, Poinguinim,
Canacona, Goa.

..... Respondents
Original Defendant

SECOND APPEAL NO. 29 OF 2009

1. Purshottam Yeshwant Fal Dessai (deceased)
a) Shri Yeshwanta alias Jayesh Purushottam
Phal Dessai,
major in age, resident of H. No. 936,
Velwadda, Poinguinim,
Talouka, Canacona, Goa.

2. Smt. Chitrakal Purshottam Fal Dessai,
Widow of late Purshottam Yeshwant Fal Dessai
Age 60 years, landlady,
R/o. H. No. 936, Velwadda, Poinguinim,
Taluka, Canacona, Goa.

..... Appellants/
Original Plaintiff

V e r s u s

1. Shri Keshav Deu Pagui,
Son of Shri Deu Pagui,
of major age, agriculturist and his wife;

2. Smt. Keshav Pagui,
of major age, housewife,

Both residents of H. No., 941,
Velvada, Poinguinim,
Canacona, Goa.

..... Respondents
Original Defendant

SECOND APPEAL NO. 30 OF 2009

1. Purshottam Yeshwant Fal Dessai (deceased)
 - a) Shri Yeshwanta alias Jayesh Purushottam Phal Dessai,
major in age, resident of H. No. 936,
Velwadda, Poinguinim,
Talouka, Canacona, Goa.
2. Smt. Chitrakal Purshottam Fal Dessai,
Widow of late Purshottam Yeshwant Fal Dessai
Age 60 years, landlady,
R/o. H. No. 936, Velwadda, Poinguinim,
Taluka, Canacona, Goa.

..... Appellants/
Original Plaintiff

V e r s u s

1. Shri Shashi Painguinkar,
son of Dattu Painguinkar,
of major age,
Businessman,
and his wife;
2. Smt. Sheela Shashi Painguinkar
of major age, Housewife,

Both residents of H. No. 948,
Velvada, Poinguinim,
Taluka, Salcete, Goa.

..... Respondents
Original Defendant

SECOND APPEAL NO. 31 OF 2009

1. Purshottam Yeshwant Fal Dessai (deceased)
 - a) Shri Yeshwanta alias Jayesh Purushottam Phal Dessai,
major in age, resident of H. No. 936,
Velwadda, Poinguinim,
Talouka, Canacona, Goa.
2. Smt. Chitrakal Purshottam Fal Dessai,
Widow of late Purshottam Yeshwant Fal Dessai
Age 60 years, landlady,
R/o. H. No. 936, Velwadda, Poinguinim,
Taluka, Canacona, Goa.

..... Appellants/

Original Plaintiff

V e r s u s

Smt. Radha Vithoba Pagui,
Widow of Shri Vithoba Pagui
resident of H. No. 94/D,
Velvad, Poinguinim,
Canacona, Goa.

..... Respondent
Original Defendant

Mr. Sudesh Usgaonkar and Ms. Rosette Marie Pereira, Advocates for the Appellants.

Mr. Shivan Desai, Advocate for the Respondents in Second Appeal nos. 25, 28, 29, 30 and 31 of 2009

A N D

SECOND APPEAL NO. 60 OF 2010

1. Purshottam Yeshwant Fal Dessai (deceased)
 - a) Shri Yeshwanta alias Jayesh Purushottam Fal Dessai,
major in age, resident of H. No. 936,
Velwadda, Poinguinim,
Talouka, Canacona, Goa.
2. Smt. Chitrakal Purshottam Fal Dessai,
Widow of late Purshottam Yeshwant Fal Dessai
Age 60 years, landlady,
R/o. H. No. 936, Velwadda, Poinguinim,
Taluka, Canacona, Goa.

..... Appellants/
Original Plaintiff

V e r s u s

1. Shri Tatu Naik, (since deceased)
through legal representative,
 - a) Shri Naguesh Naik,
Major of age,
Resident of H. No. 941/E,
Velvada, Poinguinim, Taluka
Canacona, Goa.

..... Respondent
Original Defendant

Mr. Sudesh Usgaonkar and Ms. Rosette Marie Pereira, Advocates for the Appellants.

Mr. R. G. Ramani, Advocate for the Respondent in Second Appeal no. 60 of 2010.

Coram :- F. M. REIS, J

Date : 20th November, 2015.

ORAL JUDGMENT

Heard Shri Sudesh Usgaonkar, learned Counsel appearing for the Appellants, Mr. Shivan Desai, learned Counsel appearing for the Respondents in Second Appeal nos. 25 and 28 to 31 of 2009 and Shri R. G. Ramani, learned Counsel appearing for the Respondent in Second Appeal no. 60 of 2010.

2. Shri Sudesh Usgaonkar, learned Counsel appearing for the Appellants, in support of the above Appeal and the substantial questions of law framed by this Court, has pointed out that before the learned Lower Appellate Court, the Appellants had produced the document of the Land Registration Records pertaining to the property described under no. 6352 which, according to the Appellants, corresponds to the suit property. Learned Counsel has thereafter taken me through the Judgment of the Lower Appellate Court to point out that though an application under Order 41 Rule 27 of the Civil Procedure Code was filed by the Appellants which was allowed granting leave to the Appellants to produce such document, the learned Judge has erroneously taken a view that such document was not produced and, consequently, the Land Registration document was not considered whilst passing the impugned Judgment. Learned Counsel further

pointed out that this itself vitiates the findings of the Lower Appellate Court to the effect that the Appellants have failed to establish their claim with regard to the disputed property. Learned Counsel has thereafter extensively taken me through the documents on record to point out that the property way back in the year 1895 was purchased by the ancestors of the Appellants namely Purshottam Krishna Fal Desai, in whose name the property came to be inscribed. Learned Counsel has thereafter taken me through the document executed in the year 1919 whereby the property described under no. 7836 was purchased by said Purshottam. Learned Counsel has thereafter taken me through the private document executed in the year 1964 to point out that the property which is subject matter of the suit property was partitioned between Ramchandra Fal Desai and Yeshwant Purshottam Fal Desai, who is the son of the said Purshottam Fal Desai whereby the subject property corresponding to five-sixth was allotted to said Yeshwant and one-sixth of the property was allotted to said Ramchandra. Learned Counsel thereafter pointed out that as far as the case of the Appellants, as pleaded in the plaint, the property described under nos. 6352 corresponds to the property surveyed under no. 89, 90/1 and other sub-divisions. Learned Counsel further pointed out that on perusal of the Survey Plan on record, it clearly demonstrates that the eastern boundary of the property surveyed under no. 89 stands in the name of said Ramchandra which, according to him, corresponds to one-sixth of the property allotted to him in the said private document executed in the year 1964. Learned Counsel further pointed out that as far as the land registration document in respect of the property registered under no. 6352, the eastern boundary is the property of one Bote who is in fact enjoying the property allotted towards the eastern side of the property

surveyed under no. 89 and 90 in the Survey Records of Poinguinim Village. Learned Counsel further pointed out that as per the western boundary of the whole property surveyed under no. 6352, the name of the Predecessors in title of the Respondents also figured. Learned Counsel as such pointed out that the Appellants have conclusively established that the property is subject property surveyed under nos. 89 and 90 of Poinguinim Village and forms part of the property described under no. 6352 and, consequently, the Appellants have established their title in respect of the property and they are entitled to the claim as prayed for in the suit.

3. On the other hand, Shri Desai, learned Counsel appearing for the Respondents pointed out that the Respondents are relying upon the Sale Deed executed in the year 1988 whereby one Indiribai and her son had sold different plots of the property surveyed under no. 90/1 in favour of the Respondents. Learned Counsel further pointed out that pursuant to the said Sale Deed, the Respondents have put up their respective residential houses therein and have been occupying such house since the time of its construction. Learned Counsel further pointed out that even prior to the execution of the Sale Deed, some of the Respondents had already put up their houses with the consent of the Predecessor in title. Learned Counsel as such submits that the Appellants have failed to establish their title in respect of the disputed property and, consequently, the question of directing the restoration of possession of such area is not at all justified. Learned Counsel further pointed out that both the Courts below upon appreciating the evidence on record have come to the conclusion that the Appellants have failed

to establish their possession at any point of time in respect of their subject property. Learned Counsel further pointed out that such concurrent findings of fact cannot be re-appreciated by this Court in a Second Appeal under Section 100 of the Civil Procedure Code. Learned Counsel has thereafter taken me extensively through the Judgment of the Lower Appellate Court to point out that the learned Judge has rightly appreciated the evidence on record to come to the conclusion that the Appellants have failed to establish their claim in respect of the disputed property. Learned Counsel further pointed out that there is no plan produced to establish their alleged encroachment in respect of the suit property nor any expert has been examined by the Appellants to establish their case that the property surveyed under no. 89, 90 and 108 forms part of the property described under no. 6352. Learned Counsel further pointed out that such concurrent findings of fact arrived at by the Courts below, cannot be unsettled by this Court as there is no perversity in the findings and, consequently, the substantial questions of law are to be answered in favour of the Respondents.

4. Shri R. G. Ramani, learned Counsel appearing for the Respondents in Second Appeal no. 60 of 2010, pointed out that the property surveyed under no. 108/2 forms part of the property belonging to the Respondents therein known as “Madantil tican” and which is not part and parcel of the property described under no. 6352. Learned Counsel further pointed out that the mother of the said Respondent was one of the vendors in respect of the property which were subject of the Sale Deeds which are disputed by the Appellants herein. Learned Counsel further submits that the property claimed by the Respondents in the above Appeal

is not part and parcel of the property registered under no. 6352 in the Land Registration Record. Learned Counsel as such pointed out that the Appeal be rejected.

5. Upon hearing the learned Counsel appearing for the respective parties and on perusal of the Judgment of the Lower Appellate Court, Shri Sudesh Usgaonkar, learned Counsel appearing for the Appellants, is prima facie, justified to contend that the Lower Appellate Court was not correct to hold that the Land Registration document was not part of the records of the Lower Appellated Court. It is not disputed that the application under Order 41 Rule 27 of the Civil Procedure Code was filed by the Appellants whereby leave was granted to the Appellants to rely upon the said document. Though, apparently, the document was not taken on record, nevertheless, the Lower Appellate Court could have examined such document to ascertain whether the document would support the case put forward by the Applicant. With the assistance of Mr. Sudesh Usgaonkar, learned Counsel appearing for the Appellants, I perused the said document which has been produced in the paper book. On perusal of the description of the said property described under no. 6352, I find that there is an inscription whereby only one-seventh of the said property was registered in the name of the ancestor of the Appellants' family Purshottam Fal Desai. On going through the pleadings in the plaint, at para 11 thereof, it is the case of the Appellants that the property claimed by the Appellants is registered in the Land Registration Office under no. 6352 which forms part of the property surveyed under no. 89, 90 and 108 of Poinguinim Village. This clearly suggest that it is the case of the Appellants that the whole

property is registered under no. 6352 and corresponds to the property surveyed in the Records of Rights of Poinguinim Village under no. 89, 90 and 108. This averment of the Appellants is totally contrary to the said document of land registration which clearly suggests that only one-seventh of the said property was described in the name of the ancestors of Yeshwant Purshottam Fal Desai.

6. Mr. Sudesh Usgaonkar, learned Counsel fairly accedes that neither in the plaint nor any material has been brought on record to identify such one-seventh part of the property described under no. 6352 which was registered in the name of said Purshottam Fal Desai but, however, Mr. Usgaonkar, based on the private document of the year 1964 was attempting to curl out an averment to the effect that one-seventh of the said property would correspond to the property as described under the Land Registration no. 7836. The said submission of Mr. Usgaonkar, learned Counsel appearing for the Appellants, cannot be accepted nor there is any foundation to that effect in the plaint nor in the material produced on record.

7. With the assistance of Mr. Usgaonkar, learned Counsel appearing for the Appellants, I have also examined the boundaries as shown in the Land Registration document in respect of the property described under no. 6352. On perusal of the boundaries in respect of the property surveyed under no., 89, 90 and 108 and the boundaries as shown in the Land Registration document, prima facie, it appears that the said survey numbers namely 89, 90 and 108 encompasses the whole property as described under Land Registration no. 6352. Considering that only one-seventh of the property stands registered in the name of the ancestors of

the Appellants, the question of Appellants now seeking a declaration that the suit property which has been purchased by the Respondents forms part of the said property, cannot be accepted when admittedly one-seventh part of the property has not been separately identified nor established by any material on record. In the absence of such identification of the one-seventh part of the property described under no. 6352, I am afraid that the contention of Mr. Usgaonkar, learned Counsel, that the property claimed by the Respondents forms part of the property belonging to the Appellants, cannot be accepted. On perusal of the Judgments passed by the Courts below, I find that the Courts below on minutely marshalling the evidence on record, have concurrently come to the conclusion that the Appellants have failed to establish their claim that the disputed property claimed by the Appellants forms part of the property as registered in the Land Registration document under no. 6352. I find no perversity in the said findings and the document produced before the Lower Appellate Court further establishes that only one-seventh of the property described under no. 6352 belonged to the ancestors of the Appellants. The contention of Mr. Usgaonkar, learned Counsel appearing for the Appellants, based on the recitals in the private document of the year 1964, cannot assist the Appellants to contend that the disputed property forms part of the property registered under no. 6352. As there is no material on record to establish that the whole property as described in the Land Registration Office under no. 6352, belongs to the ancestors of the Appellants and corresponds to the property which has been purchased by the Respondents from the said Indirabai and her son, the question of granting any relief to the Appellants in the present proceedings would not arise at all.

8. There was also a dispute raised by the Appellants to the effect that one of the Respondents have encroached into the property surveyed under no. 89/1 by putting up the subject construction in Appeal nos. 28/2009 and 29/2009. But, however, it is the contention of Mr. Shivan Desai, learned Counsel appearing for the Respondents, based on the Sale Deed of the said Respondents as well as the pleadings in the written statement, that the Respondents therein are restricting their right only to the portion of the property surveyed under no. 90/1 as recorded in the Sale Deed. In any event, there is no material on record to establish that in fact the Respondents therein have encroached in the property surveyed under no. 89/1. In such circumstances, considering the submission of Mr. Shivan Desai, based on the pleadings as well as the Sale Deed in favour of the Respondents, that the property of the Respondents is surveyed under no. 90/1, the contention of Mr. Usgaonkar, learned Counsel appearing for the Appellants that the Respondents are also claiming a right in respect of the property surveyed under no. 89/1, cannot be accepted.

9. Considering the evidence on record and the documentary evidence produced on record, I find that there is no case for any interference in the Judgments passed by the Courts below. Mr. Usgaonkar, learned Counsel, also submitted that the Respondents have failed to establish their claim of title in respect of the disputed property. These aspects need not be gone into when the Appellants in the suit have failed to establish that the disputed property forms part of the property described under no. 6352.

10. For the aforesaid reasons, I find that as the Appellants have failed to identify the extent of their property based on the land registration documents produced by the Appellants, as referred to herein above, the question of examining whether there was any admission on the part of the Respondents with regard to the occupation of the subject property by the Appellants, is not at all required to be considered. Even assuming that the properties surveyed under nos. 89/1 and 90/1 were part of the said property, the extent of the title of the Appellants based on the title documents produced by the Appellants, has not been established and, as such, the Appellants have failed to establish their claim in the suit. In such circumstances, the correctness of the findings of the Lower Court on the title of the Respondents to the property is not at all required to be examined as the Appellants, who are the Plaintiffs in the suit, have failed to establish their claim as pleaded in the plaint filed by them. For the aforesaid reasons, the substantial questions of law framed by this Court are, accordingly, answered against the Appellants.

11. Hence, the Appeals stand rejected, with no order as to costs.

F. M. REIS, J.

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