

IN THE HIGH COURT OF BOMBAY AT GOA**SECOND APPEAL NO. 39 OF 2007**

1) Smt. Nirmala Vithal Porob Kapadi,
widow of late Vithal Jaidev Kapadi,
age about 58 years, landlady,

2) Shri Vaman Vithal Porob Kapadi,
son of late Vithal Jaidev Kapadi,
unmarried, aged 30 years,

3) Miss Vanita Vithal Porob Kapadi
daughter of late Vithal Jaidev Kapadi,
aged 26 years, unmarried.

4) Miss Kalpana Vithal Porob Kapadi,
daughter of late Vithal Kapadi,
aged 26 years, unmarried.

5) Shri Jaidev Vithal Porob Kapadi
son of late Vithal Kapadi,
age 23 years, unmarried,

6) Shri Ramesh Vithal Porob Kapadi,
son of late Vithal Kapadi,
aged 21 years, unmarried,

7) Shri Yogesh Vithal Kapadi,
son of late Vithal Kapadi,
aged 19 years, unmarried,

All residents of Sundarpeth,
Bicholim, Goa.

..... Appellants.

Versus

1) M/s. Dempo Mining Corporation Ltd.,

A Company incorporated under the Companies Act, 1956, with head office at Dempo House, Campal, Panaji, Goa.
Represented by Mr. Subhash Karmali, aged 54 years, Manager (Mines Administration.)
resident of Panaji, Goa.

2) Smt. Shrimati Shankar Raul, major,

3) Shri Datta Shankar Raul, major,

4) The Comunidade of Bicholim,
Bicholim, Goa.

..... Respondents.

Shri S. D. Lotlikar, Senior Advocate with Ms. Aditi Naik, Advocate for the appellants.

Shri Sudin Usgaonkar, and Ms. V. Palyekar, Advocates for the respondents.

CORAM :- F.M. REIS, J.

Date :- 28th April, 2015.

ORAL JUDGMENT :-

Heard Shri S. D. Lotlikar, learned Senior Counsel appearing for the appellants and Shri Sudin Usgaonkar, learned Counsel appearing for the respondents.

2. The above appeal was admitted by this Court by an order dated 3rd May, 2007, on the following substantial questions of law :

(1) Whether the first appellate Court exceeded its jurisdiction in interfering with the judgment and decree of the trial Court which was not under challenge before it ?

(2) Whether the impugned Judgment and Decree is vitiated on account of the fact that it is rendered contrary to the pleadings of the parties and had a wrong assumption that the entire suit property given to the appellants by the Comunidade ?

3. During the course of hearing of the above appeal, Shri S. D. Lotlikar, learned Senior Counsel appearing for the appellants has not pressed for the second substantial question of law.

4. Shri S. D. Lotlikar, learned Senior Counsel appearing for the appellants, during the course of hearing, has pointed out that the suit filed by the appellants was for a declaration and permanent injunction, restraining the respondents from interfering with the disputed property. The learned Senior Counsel further points out that the learned Trial Judge, after appreciating the evidence on record and

hearing the parties, decreed the suit, *inter alia*, holding that the appellants are owners in possession of the property in dispute, as also granted injunction against the respondent No.1 not to interfere with the disputed property. The learned Senior Counsel further points out that the Comunidade had not challenged the said Judgment and Decree passed by the learned Trial Judge, but, however, only the respondent No.1 preferred an appeal, challenging the part of the Judgment granting the permanent injunction against such respondent. The learned Senior Counsel further points out that during the pendency of the proceedings, a lease agreement was executed between the appellants and the respondent No.1 in respect of a portion of the property in dispute admeasuring an area of about 34,000 sq. metres on payment of rent for a period of 15 years from 1996. The learned Senior Counsel further points out that in view of the said lease agreement, the learned Lower Appellate Court has set aside the Judgment with regard to grant of permanent injunction restraining the respondent No.1. The learned Senior Counsel, however, points out that though there was no appeal preferred by the Comunidade challenging the declaration of ownership, nevertheless, the learned Lower Appellate Court whilst passing the impugned Judgment granted

the declaration subject to payment of *foro* which was not even a grievance raised by any of the respondents. The learned Senior Counsel has, thereafter, taken me through the document on record at page 125 of the Paper Book to point out that a part of the property which was an usurpation the payment of remission was already effected by the predecessor-in-title of the appellants. The learned Senior Counsel, as such, points out that the learned Judge was not justified to impose such a condition in the declaration granted by the Trial Court. The learned Senior Counsel has, thereafter, taken me through the rent receipt document, as well as the lease agreement in favour of the appellants to point out that the useful domain of the subject-property was conveyed in favour of the appellants herein. The learned Senior Counsel, as such, points out that in such circumstances, at the most the learned Judge should have granted a declaration that the ownership is with the appellants herein. The learned Senior Counsel, as such, submits that the condition imposed by the learned Judge to the effect that ownership is subject to payment of *foro* deserves to be deleted.

5. On the other hand, Shri Sudin Usgaonkar, learned Counsel

appearing for the respondents has pointed out that as far as respondent no.1 is concerned, no grievance is subsisting with regard to the area occupied by the respondent No.1 in view of the lease agreement executed between the parties.

6. I have given my thoughtful consideration to the rival submissions and gone through the relevant documents. On perusal of the document at page 125 of the paper book which is a certificate issued by the Comunidade of Bicholim, it clearly discloses that payment of annuity was effected by the predecessor-in-title of the appellants. In such circumstances, the condition imposed by the learned Judge while declaring the ownership of the appellants is not at all justified. Apart from that, on going through the registration document, I find that the beneficial ownership of the property was conveyed in favour of the ancestors of the appellants herein. In such circumstances, the declaration granted by the learned Lower Appellate Court deserves to be modified to the effect that the appellants are beneficial owners of the disputed property “Zambolecha Molapoiquim”. The substantial question of law is answered accordingly.

7. In view of the above, I pass the following :

O R D E R

((I) The appeal is partly allowed.

((II) The impugned Judgment and Order dated 8th January, 2006, passed by the Ad-hoc District Judge-3, Mapusa in Regular Civil Appeal No.53/2006 stands partly modified and the plaintiffs-appellants herein are declared to be the beneficial owners of the suit property. Needless to say, on the basis of the declaration granted by the Civil Court, the appellants may move the Revenue Authorities, if so advised, to get their property demarcated and/or separated in accordance with law.

((III) The appeal stands disposed of accordingly. No order as to costs.

F.M. REIS, J.

ssm.