

IN THE HIGH COURT OF BOMBAY AT GOA**SECOND APPEAL NO.61 OF 2007**

1. Shri Joaquim Antonio Pacheco,
s/o Mr. Pedro Pacheco, major,
businessman and his wife,

2. Mrs. Marcelina Fernandes,
d/o. late Mr. Caitan Fernandes,
major, housewife,
Both R/o H. No.960,
Kindlembag - Tari,
Canacona, Goa.

....Appellants

Versus

1. Shri Gopal Datta Varik,
s/o. late Datta Varik,
major, Gov t. Servant,

1(a) Pragati Datta Varik,
d/o. Gopal Varik, major of age.

1(b) Prasidhi Gopal Varik
d/o. Gopal Varik, major of age.

1(c) Parnoti Gopal Varik
d/o. Gopal Varik, major of age.

1(d) Bindiya Gopal Varik
d/o. Gopal Varik, major of age.

1(e) Deviya Gopal Varik,
d/o. Gopal Varik, major of age.

2. Shri Ulhas Datta Varik,
s/o. late Datta Varik,
Major, Businessman,

2(a) Smt. Malti Ulhas Varik
w/o. Ulhas Varik, major, housewife.

3. Shri Chandrakant Datta Varik
(since deceased thorough legal heirs)

3(a) Mrs. Anita Chandrakant Varik
w/o. Chandrakant Varik,
major, housewife.

3(b) Vishal Chandrakant Varik,
through guardian 3(a)

3(c) Diljeet Chandrakant Varik,

3(d) Chetan Chandrakant Varik,
All R/o Patnem-Colomb,
Canancona, Goa.

4. Shri Ghanshyam Varik,
s/o. late Datta Varik, major,
occupation Govt. servant.

4(a) Sapna Ghanshyam Varik
w/o Ghanshyam Varik,
major in age, housewife.
All r/o. Patnem-Colomb,
Canacona-Goa.

5. Shri Kushali Mukund Desai,
s/o. late Mukund Desai,
major, Govt. Servant,
R/o H. No. Not Known,
Pansulem, Canacona, Goa.
(deleted as per order dated 19/09/1997)

....Respondents

Mr. Anthony D'Silva, Advocate for the Appellants.

CORAM : F.M. REIS, J.

DATE : 4th SEPTEMBER, 2015

ORAL JUDGMENT :

Heard Mr. Anthony D'Silva, learned Counsel appearing for the

appellants. None for the respondents though served.

2. The above appeal came to be admitted on 30/07/2008 on the following substantial question of law:

1. Whether the first Appellate Court has misconstrued the document of title of the plaintiffs/appellants?

2. Whether the first Appellate Court wrongly cast the burden on the plaintiffs to prove that the suit was within limitation?

3. Mr. Anthony D'Silva, learned Counsel appearing for the appellants has pointed out that the appellants claim to be owners in possession of the property which came to be gifted in favour of the appellants pursuant to a Gift Deed dated 26/10/1962 executed by the parents of the appellants. The learned Counsel further points out that based on the said Gift Deed the property was described in Land Registration Office under no.26371 and inscribed in inscription no.22629 in the name of the appellants. The learned Counsel further submits that the said property is also inscribed in the matriz records under no.546 and in the survey records under no.37/3, 37/4 and 37/40-A of village Nagarcem, Canacona, Taluka. The learned Counsel further submits that when the appellants obtained a copy of the survey records they learnt that the survey records did not disclose the name of the appellants and, as such, filed a suit for declaration of title in respect of the suit property and for correction of the

survey records. The learned Counsel further submits that the respondents opposed the said suit, inter alia, contending that the suit property forms part and parcel of the property purchased by the respondents by Sale Deed dated 7/05/1962 allegedly described under no.17955. The learned Counsel further points out that both the Courts below upon appreciating the evidence on record have come to the conclusion that the respondents have failed to establish that the property recorded in the survey record corresponds to the property purchased by the respondents pursuant to the said Sale Deed. The learned Counsel further submits that the learned Trial Judge on the basis of appreciating evidence on record has come to the conclusion that the appellants have established their ownership and title over the disputed property and decreed the suit, inter alia, granting a declaration to the effect that the appellants are owners of the disputed property. The learned Counsel further pointed out that the respondents preferred an appeal before the Lower Appellate Court which came to be allowed by judgment and decree dated 27/02/2007. The learned Counsel further points out that the Lower Appellate Court has misconstrued the land registration document as well as the Gift Deed produced by the appellants to come to the conclusion that though the property is inscribed in the name of the appellants, nevertheless, as the source of title was not found for the description document the presumption under the provisions of the

Portuguese Civil Code would not be available to the appellants. The learned Counsel further points out that this consideration of the Lower Appellate Court is totally perverse as the presumption under Article 953 of the Portuguese Civil Code is available to the person in whose name the property stands inscribed. The learned Counsel further pointed out that the Lower Appellate Court has also not given any reasons as to how the finding of possession in favour of the appellants were incorrect whilst allowing the appeal preferred by the respondents. The learned Counsel further pointed out that the learned Trial Judge on the basis of appreciation of evidence has come to the conclusion that the appellants have established their possession in respect of the disputed property and that the Lower Appellate Court merely on the presumption of Section 105 of the Land Revenue Code has impliedly displaced such finding. The learned Counsel further submits that the appellants are in possession of the disputed property and, as such, the Lower Appellate Court was not justified to come to such conclusion. The learned Counsel has thereafter taken me through the finding of the Lower Appellate Court on the second point of determination to point out that the Lower Appellate Court has erroneously cast the burden on the appellants to show that the suit is not barred by limitation when no evidence was produced by the respondents to disclose that the suit was in fact barred by law of limitation. The learned Counsel further pointed out that the suit itself

was for declaration of title and unless and until such title is lost in terms of the provisions of law, the question of holding that the suit is barred limitation is totally erroneous. The learned Counsel, as such, submits that the appeal be allowed and the impugned judgment passed by the Lower Appellate Court be accordingly set aside.

4. The respondents though served failed to remain present. Records also reveal that on the earlier when the matter was taken for hearing the respondents did not appear and an opportunity was given to the parties to appear and contest the appeal. As none appeared for the respondents, I proceed to examine the appeal on merits.

5. On perusal of the finding of the Lower Appellate Court whilst deciding the first point for determination, I find that though the learned Judge has rightly recorded the effect to be drawn based on the inscription in the Land Registration Document at para 13 in terms of Article 953 and Article 267 of the Portuguese Civil Code, the Lower Appellate Court has lost sight of the fact that such premises cannot be rebutted merely because the flow of title by the appellants was not disclosed therein. The presumption in terms of Article 953 of the Portuguese Civil Code is in favour of the person in whose name the inscription stands recorded. In the present case, such inscription was stated to be in the name of the

appellants and consequently the burden shifted on the respondents to rebut such presumption. In the present case, the respondents have failed to establish that the property surveyed under no.37/3, 37/4 and 37/40-A corresponds to the property allegedly purchased by the respondents pursuant to the said Sale Deed dated 7/05/1962. There is no finding of the Lower Appellate Court to the effect that the respondents were actually in possession of the disputed property. In such circumstances, the approach of the Lower Appellate Court based on the provision of Article 953 of the Portuguese Civil Code is totally erroneous and, consequently, the finding of the Lower Appellate Court that the benefit of the provision of Article 953 of the Portuguese Civil Code are not available to the appellants cannot be accepted. Considering that the property admittedly stood inscribed in the name of the appellants, the presumption in terms of Article 953 of the Portuguese Civil Code would flow in favour of the appellants herein. As such, it was incumbent upon the respondents to adduce cogent evidence to establish that such presumption stands rebutted. As such, I find that the finding of the Lower Appellate Court that the appellants have failed to establish that they are the owners in possession of the suit property based on the Land Registration Document and other material on record cannot be sustained and deserves to be quashed and set aside. The Lower Appellate Court rejected the surveyor's report produced by PW3 merely on the ground

that such surveyor has prepared the report based on the boundaries in the Land Registration Document. As such, I find that the finding of the Lower Appellate Court on that count stands vitiated and cannot be sustained. Consequently the finding arrived at by the Lower Appellate Court are by misreading the document and the material on record. The first substantial question of law is accordingly answered in favour of the appellants.

6. With regard to the second substantial question of law, the question of limitation would depend as to whether the appellants have established that the property as described in the Land Registration Office under no.17955 corresponds to the property surveyed under no.37/3, 37/4 and 37/40-A though the learned Trial Judge has rendered a finding to that effect. The learned Lower Appellate Court has erroneously disbelieved the surveyor who was examined by the appellants in support of the said contention. In the interest of justice and considering that the respondents have not appeared, I find that this aspect would have to be examined by the Lower Appellate Court after hearing the respondents in accordance with law.

7. The finding of the learned Judge that the suit was barred by limitation as such cannot be accepted, as this aspect would have to be

examined only after the Lower Appellate Court comes to the conclusion that the property as described in Land Registration Office under no.17955 forms part and parcel of the property surveyed under no.37/3, 37/4 and 37/40-A. To that extent, I find that the Lower Appellate Court would have to consider the appeal afresh in accordance with law. Even otherwise it is well settled that a suit for declaration of title cannot be stated to be barred by law of limitation, unless, the title is lost in terms of the provisions of law. In the present case there is a specific averment by the appellants that they learnt about the erroneous entry in the Survey Record on the specific date and mere entries in the Survey Record do not create or defeat the title of the owner thereof. The Lower Appellate Court was not justified to come to the conclusion that the suit filed by the appellants, as such, was barred by limitation. The substantial question of law is answered accordingly.

8. In view of the above, I pass the following order:

ORDER

- (i) The appeal is partly allowed.
- (ii) The impugned judgment dated 27/02/2007 passed by the Lower Appellate Court is quashed and set aside.
- (iii) Regular Civil Appeal No.104/2006 is restored to the file of the Lower Appellate Court.

(iv) The Lower Appellate Court is directed to decide the appeal afresh in the light of the observations made herein above and in accordance with law.

(v) The appeal stands disposed of accordingly with no order as to costs.

F.M. REIS, J.

NH/-