

IN THE HIGH COURT OF BOMBAY AT GOA

SECOND APPEAL NO. 76 OF 2007

1. Shri Krishna Bombo Naik Dessai,
alias Krishna Bombo Desai,
s/o. Bombo Xaba Naik Desai Fugri,
major in age, service, and his wife;
2. Smt. Yamuna Krishna Bombo Desai,
d/o. Late Chandrakant Gurav,
major in ae, housewife,

Both r/o. Fonsekar Chawl,
Harijali Village Vikhroli (East),
Bombayu – 400 083,
now at H. No. 65 (Old 784), Patnem,
Canacona, South Goa.

..... Appellants

V e r s u s

1. Shri Shaba Bombo Fogir,
alias Shaba Bombo Desai,
s/o. Of Bombo Xaba Fugri
major in age, and his wife
(expired, through his legal representatives)
 - a. Shri Baburao Shaba Desai,
major in age and his wife;
 - b. Anupama Baburao Desai,
major in age,

Both residing at H. Nop. 783M
Patne, Colomba of Canacona.
 - c. D. N. Desai, (deleted by order dated
23.08.2006) major in age,
 - d. Priya Dayanand Rane,
major in age, and her husband
 - e. Shri Dayanand Rane,
major in age,

Both residing at J. B. Nagar,
Andheri, Mumbai – 400 059.

2. Smt. Sallu Shaba Fogir,
alias Devalei,
major in age, housewife,
r/o. H. No. 66, Patnem, Canacona, Goa.
(Since deceased) represented by her heirs,
Respondent nos. 1(a), 1(b), 1(d) and (e)
(Amendment carried out as per Order dated
05.05.2015 in MCA no. 298/15). Respondents

Mr. Sudin Usgaonkar, Senior Advocate with Ms. Vinita Palyekar, Advocate for the Appellants.

Mr. V. G. P. Dukle, Advocate for the Respondents.

Coram :- F. M. REIS, J

Date : 3rd September, 2015.

ORAL JUDGMENT

Heard Shri Sudin Usgaonkar, learned Senior Counsel appearing for the Appellants and Shri Dukle, learned Counsel appearing for the Respondents.

2. The above Appeal was admitted by this Court by an Order dated 01.04.2009, on the following substantial questions of law :

(a) Whether the Courts below committed illegality in finding fault with the Appellant for not proving the source of acquisition of title of his predecessor in title, when such a challenge could only have been thrown by the heirs of Bozro or Fulu and the same was not available to the Respondents?

(b) Whether the First Appellate Court committed illegality in discarding the Sale Deed on the ground

of identity, when identity of the property was not in issue before the Trial Court; the parties being ad-idem on the same?

(c) Whether the First Appellate Court overlooked that the counterclaim of the respondents filed in the Trial Court to declare the Sale Deed of 1974 null and void having been dismissed, and there being no challenge thereto before the Appellate Court, the said Sale Deed was good title against the Respondents?

(d) Whether the Courts below committed illegality in holding that the suit is barred by limitation, when clearly, the cause of action for the relief of injunction had arisen well within the period of limitation?

3. Shri Sudin Usgaonkar, learned Senior Advocate appearing for the Appellants, has pointed out that the suit filed by the Appellants is on the basis of a Sale Deed executed on 28.05.1974, whereby a distinct one-fourth share of the entire property was purchased by the Appellants of the property inscribed in the Matriz records in the name of Bozro Naik, from his sole heir Fulu Gaonkar. Learned Senior Advocate further submits that the Respondent who is his brother had acquired one-eighth share in the disputed property on the basis of the Gift Deed dated 09.03.1971, whereby one-eighth share was gifted in favour of the Respondent by Sukdo Pursso Naik, Learned Senior Advocate further submits that after purchase of the said property, the Appellants had put up a construction therein of the residential house and was occupying such house on the date of filing of the suit. Learned Senior Advocate further pointed out that in the year 1977, as the

Respondents started numbering the trees which were located in the portion belonging to the Appellants, the suit came to be filed for declaration that the Appellants are owners in possession of the distinct portion of a property as identified in para 4 of the plaint. Learned Senior Advocate further submits that the Respondents were unlawfully taking advantage of an erroneous entry in the Survey Records to claim that the disputed property belongs to the Respondents. Learned Senior Advocate further pointed out that as per the Deed of Gift, the Respondent was entitled to one-eighth share of the property and, as such, the question of claiming to be owner of the whole property based on the Survey Records is not justifiable and that the learned Trial Judge has erroneously come to the conclusion that the Appellants have not established their title through said Pursso Naik to claim a declaration as claimed for in the suit. Learned Senior Advocate further pointed out that the Respondents have no locus to challenge the said Sale Deed as they are neither ascendants or descendants of the said Pursso Naik. Learned Senior Advocate further pointed out that once the Respondents have accepted the existence of the house which is being occupied by the Appellants, the presumption, if any, in terms of Section 105 of the Land Revenue Code stands rebutted and, as such, it is not open to the Respondents to rely upon such presumptions. Learned Senior Advocate has thereafter taken me through the Judgments of the Lower Appellate Court to point out that on some erroneous considerations, the learned Appellants Court has dismissed the Appeal filed by the Appellants. Learned Senior Advocate as such submits that the Appeal be allowed and the substantial questions of law framed by this Court be answered in favour of the Appellants.

4. On the other hand, Shri V. G. P. Dukle, learned Counsel appearing for the Respondent, has vehemently brought to my notice that the claim of the Appellants is totally misconceived as, according to him, there is no evidence on record to establish any right of Pursso Naik over the disputed property. Learned Counsel further pointed out that the flow of title from Pursso Naik to Fulu Gaonkar has not been established by the Appellants by any evidence on record and, as such, both the Courts were justified to come to the conclusion that the Appellants have failed to establish their case. Learned Counsel further submits that the suit property is not the property inscribed in Matriz no. 561 and, as such, the question of claiming any right to the disputed property based on the Sale Deed relied upon by the Appellants is totally incorrect. Learned Counsel further pointed out that the disputed house was in fact belonging to the Respondents and the Appellants were allowed to occupy such house merely because the Appellant was the brother of the Respondent. Learned Counsel has extensively taken me through the findings of the learned Trial Judge as well as the Appellate Court to point out that both the Courts below have rightly come to the conclusion that the Appellants have failed to prove their title and ownership over the disputed property. Learned Counsel further pointed out that the Appellants have not identified their property by producing any plan or croqui to claim the purported area of 1500 square metres. Learned Counsel further pointed out that all the fruit bearing trees in the disputed property were planted by the Respondents and there is no reason for any interference in the impugned Judgments and, consequently, the Appeal be rejected.

5. I have carefully considered the submissions of the learned Counsel

appearing for the respective parties. I have also gone through the records. On perusal of the Judgment passed by the Courts below, I find that the Courts below have erroneously come to the conclusion that the identity of the suit property has not been established. The fact that the property is inscribed under Matriz no. 561 is in fact not at all disputed by the Respondents. Apart from that, part of the property bearing survey no. 61/3, is also in dispute. On perusal of the written statement filed by the Respondents, I find that the identity of the property was not at all in dispute and, consequently, the Courts below were not justified to proceed to examine whether the Appellants have identified the suit property to be one which was the subject matter of the suit. To that extent, the findings of the Courts below are not at all justified and deserves to be quashed and set aside.

6. With regard to the contention of Mr. Sudin Usgaonkar, learned Senior Counsel appearing for the Appellants that one-fourth share of the property purchased by the Appellants correspond to an area of 1500 square metres, I find that Shri Dukle, learned Counsel appearing for the Respondents, is justified to contend that the location of the said area of 1500 has not been established by any cogent evidence on record by the Appellants. But, however, on perusal of the Sale Deed, I find that the Appellants have purchased one-fourth share of the property. In such circumstances, the right of the Appellants to the extent of an undivided one-fourth share of the property, cannot be doubted. Mr. Dukle, learned Counsel, fairly accepts that at the most, the Appellants can be entitled to only undivided one-fourth share in the disputed property.

7. The contention of Mr. Dukle, learned Counsel appearing for the Respondents, that the Appellants have not established the flow of title from Pursso Naik and Fulu Gaonkar, cannot be accepted. The Respondents have no locus standi to raise such contention. The Respondents do not claim to be ascendants or descendants of said Pursso Naik. The first substantial question of law is accordingly answered in favour of the Appellants.

8. For the reasons stated here in above, both the Courts below were justified to refuse the relief of injunction as the Appellants having failed to establish their alleged area attributed to one-fourth share of the disputed property. But, however, upon going through the material on record, I find that the Appellants are entitled to a declaration to the effect that they are the owners in possession of an undivided one-fourth share in the disputed property.

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

ORDER

(i) The Appeal is partly allowed.

(ii) The impugned Judgments passed by the Courts below are quashed and set aside.

(iii) The Appellants are declared to be owners in possession of the one-fourth undivided share of the whole property inscribed under no. 561 surveyed under no. 61/3 of Nagarcem Village,.

(iv) Decree to be drawn accordingly.

(v) Appeal stands disposed of with no orders as to costs.

F .M. REIS, J.

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