

IN THE HIGH COURT OF BOMBAY AT GOA**SECOND APPEAL NO.11 OF 2008**

Shri Kuro Bhikaro Gaonkar
(deceased) represented by
his legal representatives

- 1 Smt. Rukmini Kuro Gaonkar
(since deceased)
wife of late Kuro Gaonkar
and her sons
- 2 Shri Mhalgo Kuro Gaonkar,
son of late Kuro Bhikaro
Gaonkar, major in age,
agriculturist, and his wife
- 3 Smt. Saraswati Mhalgo
Gaonkar,
daughter of late Thulo
Gaonkar, major in age,
housewife
- 4 Shri Dhaklo Kuro Gaonkar
(since deceased) through LR's
 - a) Shri Guru Dhaklo Gaonkar
aged 31 years, bachelor.
 - b) Shri Kisan Dhaklo Gaonkar
aged 23 years, bachelor,
both r/o. 41F, Karvem,
Gaondongarim, Canacona,
Goa.
 - c) Smt. Nandisha Nandesh Velip
aged 30 years, married to
 - d) Shri Nandesh Govind Velip

aged 32 years
both r/o. 969, Kuddi Khola,
Canacona, Goa.

- 5 Smt. Draupadi Dhaklo
Gaonkar
daughter of Janu Velip,
major in age, housewife
- 6 Shri Bhisso Kuro Gaonkar
son of late Kuro Bhikaro
Gaonkar, major in age,
agriculturist and his wife
- 7 Smt. Sunita Bhisso Gaonkar
daughter of Bab Gaonkar
major in age, housewife
- 8 Shri Keshav Kuro Gaonkar
son of late Kuro Bhikaro
Gaonkar, major in age,
agriculturist, and his wife
- 9 Smt. Kunda Keshav Gaonkar,
major in age, housewife.
- 10 Shri Katu Kuro Gaonkar
son of late Kuro Bhikaro
Gaonkar major in age,
agriculturist and his wife.
- 11 Smt. Gulabi Katu Gaonkar,
daughter of D. Gaonkar,
major in age, housewife,
all residents of house No.14,
Karvem, Gaondongrem,
Canacona, Goa.

Shri Molu Bhagdo Gaonkar
(deceased) represented by his

legal heirs:

- 12 Shri Ram Molu Gaonkar,
Son of late Molu Bhagdo
Gaonkar, major in age,
agriculturist and his wife.
- 13 Smt. Parvati Ram Gaonkar,
Daughter of Mhalgo Velip,
Major in age, housewife,
- 14 Shri Arjun Molu Gaonkar,
Son of late Molu Bhagdo
Gaonkar, major in age,
agriculturist, and his wife
- 15 Smt. Rukmini Arjun Gaonkar,
Daughter of Bab Velip,
Major in age, housewife,
all residents of House No.26,
Karvem, Gaongongrem,
Canacona, Goa.

.... Appellants

V/s

- 1 Shri Purso Bab Velip
(since deceased) through LR's
- 1a. Bab Purso Velip (son)
and his wife
- 1b. Mrs. Shrimati Bab Velip,
both residents of Carvem,
Gaondongrem, Canacona.
- 1c. Shanu Purso Velip (son)
and his wife
- 1d. Mrs. Kalpana Shanu Velip

both resident of Carvem,
Gaondongrem, Canacona.

- 1e Smt. Sumitra Ram Velip
(daughter)
wife of late Ram Velip and
her children
- 1f Ashok Ram Velip
- 1g Lalita Ram Velip
all resident of Gaondongrem,
Canacona.
- 1h Sudhakar Purso Velip (son)
and his wife
- 1i Mrs. Sunanda Sudhakar Velip
both resident of Carvem,
Gaondongrem, Canacona.
- 1j Mrs. Prabhawati Prakash
Gaonkar (daughter) and her
husband
- 1k Prakash Purso Gaonkar
both residents of
Gaondongrem, Canacona.
- 1l Mrs. Mayawati Bhisso
Gaonkar (daughter) and her
husband
- 1m Bhisso Vithoba Gaonkar
Bioth residents of Satorli,
Gaondongrem, Canacona.
- 1n Mrs. Kavita Kusta Velip
(daughter) and her husband

1o Kust Govind Velip
both residents of Mudcheli,
Agonda, Canacona. Respondents

Mr. R.G. Ramani, Advocate for the Appellants.
Mr. M.P. Almeida, Advocate for the Respondents.

CORAM : F.M. REIS, J.

DATE : 28th AUGUST, 2015

ORAL JUDGMENT :

Heard Mr. R.G. Ramani, learned Counsel appearing for the appellants and Mr. M.P. Almeida, learned Counsel appearing for the respondents.

2. The above appeal came to be admitted by an order dated 16/07/2008 on the following substantial question of law:

(i) Whether the findings of the learned first appellate Court that the respondents had acquired right to the property bearing survey no. 206/9 admeasuring 3,600 sq. mts. is perverse in the absence of pleadings as well as evidence.

3. During the course of the hearing of the above appeal, Mr. M.P. Almeida, learned Counsel appearing for the respondents has pointed out that the appeal was admitted ex-parte but, however, an additional substantial question of law also arises in the present appeal.

4. Upon hearing the learned Counsel, the following additional substantial question of law is framed as under:

Whether the suit filed by the appellants for declaration was maintainable in terms of Section 34 of the Specific Relief Act.

5. The parties were put to notice on the above substantial question of law before proceeding to hear the appeal on merits.

6. Mr. R.G. Ramani, learned Counsel appearing for the appellants has pointed out that by three Sale Deeds all dated 8/02/1991, one third of half of the property came to be purchased by the ancestors of the original plaintiff no.1 and the original plaintiff no.2 besides one Bombo Velip, who had sold his share thereafter to the original defendant, who is respondent herein. The learned Counsel further pointed out that thereafter the said three persons by three Sale Deeds all dated 27/01/1972, purchased the remaining one third of half of the property from the main vendor. The learned Counsel further pointed out that, as such, each of the plaintiffs were entitled to one third share in the said property and the said Bombo Velip was also entitled to one third share of the property. The learned Counsel further pointed out that though for the purpose of possession and enjoyment of the said property there were specific areas enjoyed by the respective purchasers of the said property,

nevertheless, there was no partition of the property by myths and bounds. The learned Counsel further pointed out that this enjoyment in any event did not create any ownership right to the independent portion of the said property. The learned Counsel further pointed out that by Sale Deed dated 15/03/1982, the said Bombo Velip sold his one third share, being a specific portion of 3600 square metres, from the disputed property surveyed under no.206/9 to the respondent herein and further pointed out that in the year 2002, when the ancestors of original plaintiffs learnt that the survey records reflected that an area of 3600 square metres was standing in the name of the respondent, the plaintiffs/appellants filed the suit, inter alia, claiming that the area of 3600 square metres has to be restricted to an area of 3025 square metres as according to them the area of the whole property admeasures 9075 square metres. The learned Counsel further pointed out that the learned Trial Judge on the basis of the evidence on record and after hearing the parties has come to the conclusion that the property was not separated by myths and bounds and, consequently, the appellants were entitled for a declaration to the effect that the respondents were entitled to only an area of 3025 square metres. The learned Counsel further submitted that though the whole property is surveyed under no.206/7, 206/8, 206/9 and 206/1, the property was belonging in co-ownership and, as such, according to him the respondents were not entitled to claim an specific area of 3600 square

metres of the suit property. The learned Counsel further pointed out that the respondents preferred an appeal before the Lower Appellate Court challenging the judgment passed by the Trial Court. The learned Counsel further submits that the learned Lower Appellate Court allowed the appeal preferred by the respondents and dismissed the suit filed by the appellants on the ground that the property was being enjoyed separately since the year 1972 in specific portions and the respondents were entitled to purchase the area of 3600 square metres from Bombo Velip. The learned Counsel further pointed out that the learned Judge has not at all examined the evidence on record and misconstrued the Sale Deed in favour of the respective purchaser to erroneously come to the conclusion that the respondents could claim a specific area of the disputed property. The learned Counsel, as such, submits that the appeal be allowed and the substantial question of law be answered in favour of the appellants.

7. On the other hand, Mr. M.P. Almeida, learned Counsel appearing for the respondents supported the judgment of the learned Lower Appellate Court. The learned Counsel pointed out that immediately after the purchase by the respective purchasers, way back in the year 1971-72, specific areas were in ownership and possession of the individual purchasers which were duly fragmented in the survey records and

consequently the property surveyed under no.206/7 was standing in the name of the ancestor of the plaintiff no.1, 206/8 in the name of the ancestor of the plaintiff no.2 and 206/9 in the name of Bombo Velip which came to be thereafter mutated in favour of respondents herein. The learned Counsel further pointed out that since the year 1972 the parties agreed in the enjoyment by each of the purchasers and was separately enjoying the portion of the properties as owners thereof. The learned Counsel further pointed out that the Lower Appellate Court has rightly come to the conclusion that the appellants were not entitled for the relief and, as such, no interference is called for in the impugned judgment. The learned Counsel further pointed out that even as per the case of the appellants itself it is their contention that besides the three survey numbers a portion of the whole property is surveyed under no.206/1, which is not the subject matter of the suit. The learned Counsel further points out that it is the case of the appellants that the property has not been divided or partition and, as such, unless and until a relief of partition is sought by the appellants, if they were so entitled, the question of seeking a declaration under Section 34 of the Specific Relief Act is not at all justified. The learned Counsel, as such, submits that the suit itself filed by the appellants is not maintainable in law and consequently the appeal deserves to be rejected.

8. I have given my thoughtful consideration to the rival contentions and with the assistance of the learned Counsel, I have also gone through the records. Before I proceed to decide the first substantial question of law, I shall deal with additional substantial question of law framed herein above. Section 34 of the Specific Relief Act reads thus:

34. Discretion of court as to declaration of status or right—Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to such character or right, and the court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in such suit ask for any further relief: Provided that no court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so.

Explanation.—A trustee of property is a “person interested to deny” a title adverse to the title of some one who is not in existence, and whom, if in existence, he would be a trustee.

On plain reading of the said provision, a person can seek relief of declaration only in case their rights to the property are duly established in accordance with law.

9. It is the case of the appellants that the property has not been divided by metes and bounds. In such circumstances without seeking any further relief of partition on the basis of the allegations by the appellants themselves the question of seeking a declaration in terms of Section 34 of the Specific Relief Act would not arise at all. Apart from

that, Sale Deed dated 15/03/1982 itself was executed way back in the year 1982, whereby a specific portion of the property admeasuring an area of 3600 square metres was sold to the respondents. The said Sale Deed has not been challenged by the appellants in the suit. In such circumstances, in the absence of a challenge to the said Sale Deed it is not open to the appellants to contend that the Sale Deed has to be restricted to an area of 3025 square metres. As such, on this ground alone without going into the rival contentions, the suit filed by the appellants is not maintainable and deserves to be dismissed.

10. With regard to the first substantial question of law, it is not disputed that the ancestor of the original plaintiff no.1, ancestor of the original plaintiff no.2 and the said Bombo Velip had purchased specific shares of the property by three different Sale Deeds. On perusal of the recitals in the said Sale Deed, it clearly stipulates that the domain and possession of the property was conveyed in favour of the purchasers of the portion conveyed. Considering the recitals therein and Sale Deed coupled with the fact that the property was separated and enjoyed in the manner as reflected in the survey records from the date of the Sale Deeds, the only conclusion which can be drawn from the material on record is that each of the purchasers enjoyed specific portion of the property from the inception. The property purchased by the respondents

was surveyed under no.206/9 and was admeasuring 3600 square metres. As already pointed out herein above, the Sale Deed has not been challenged by the appellants. In such circumstances, the appellants were not entitled to seek a declaration and claim that the area of the Sale Deed has to be reduced to an area of 3025 square metres. A partition of the property does not necessarily have to be that the areas have to be equal, it also depends on the nature, location and development potential of the portions of the property. The Lower Appellate Court, as such, was justified to pass the impugned judgment. Apart from that, the fact that the properties were enjoyed separately by each of the purchasers of the Sale Deed has not been disputed by the appellants. There was no grievance raised since the time specific separate area was sold in the year 1982 until the suit came to be filed in the year 2002 with regard to the ownership and possession of the respondents herein.

11. In such circumstances, I find that the Lower Appellate Court has rightly allowed the appeal preferred by the respondents and dismissed the suit filed by the appellants. The substantial question of law is answered accordingly. The appeal stands accordingly dismissed with no order as to costs.

F.M. REIS, J.

NH/-