

IN THE HIGH COURT OF BOMBAY AT GOA

SECOND APPEAL NO. 124 OF 2006

Shri Anant Shantaram Netalkar,
Resident of Tip top Mansion,
No. 1, above Syndicate Bank,
Dhavli, Ponda, Goa.

..... Appellant
Original Defendant

V e r s u s

Comunidade of Betora,
Through its attorney
with Office at Government
Building Opp. Dy. Collectors
Office, Ponda, Goa.

..... Respondent
Original Plaintiff

Mr. M. B. D'Costa, Senior Advocate with Ms. Sonia Chodankar, Advocate for the Appellant.

Mr. R. G. Ramani, Advocate for the Respondent.

Coram :- **F. M. REIS, J**

Date : **30th January, 2015.**

ORAL JUDGMENT

Heard Shri M. B. D' Costa, learned Senior Counsel appearing for the Appellant and Shri Ramani, learned Counsel appearing for the Respondent.

2. The above Appeal came to be admitted by an Order dated 08.03.2007 on the following substantial question of law :

A. Whether the powers of a Special Attorney appointed under the Code of Comunidade get

exhausted when the term of the regular Attorney expires and the Special Attorney cannot institute a suit on a cause of action that has arisen subsequent to the expiry of the term of the regular Attorney ?

B. Whether registration of title in the Land Registration Office prevails over the entries in the records of the Comunidade, particularly when the said registration is prior to the preparation of the records of the Comunidade ?

C. Whether the Courts below have ignored relevant and material evidence, namely (i) documents relating to description and inscription of title in the Land Registration Office; (ii) document showing that Batxeta was originally a property of the Comunidade and it had been granted on *aforamento* (iii) Certified copy of the statement on oath given by the Attorney of the Comunidade on 03.04.84 admitting that the property Batxeta was surveyed under nos. 138/2, 132/1, 2, 3 and 14, 137/0, 146/0, 147/0, 145/0, 149/0 and 150/0 and it belonged to the Vaidya family ?

D. Whether the Code of Comunidade provides for maintenance of records of lands already granted on *aforamento/emphyteusis* and the production of such records would have been able to locate the property Batxeta granted on

aforamento by the Comunidade ?

3. Shri M. B. D'Costa, learned Senior Counsel has strenuously argued that the property claimed by the Appellant is on the basis of a grant by the Respondents way back in the year 1896 and, as such, the Respondents are not justified to contend that such grant cannot be located at loco. Learned Counsel further pointed out that the Respondents are relying upon a Cadastral Plan which was prepared much after the grant in favour of the Appellants without producing the concerned plan to examine the location of the property granted to the Appellant. The learned Counsel has thereafter pointed out that the learned Judge has rejected the claim of the Appellants essentially on the grounds that the boundaries as shown in the original grant in favour of the Predecessor in title of the Appellants have not been established. Learned Counsel further pointed out that due to the passage of time, the properties of the boundary owner changed hardly and, as the new boundaries do not match, it was not open to the Courts below to hold that the Appellant has no grant in their favour. Learned Senior Counsel further pointed out that there was specific no objection given by the Attorney of the Respondents to change the survey records and, as such, the presumption in favour of the Appellant under Section 105 of the Land Revenue Code, would establish that the Appellants are in possession of the disputed portion. Learned Senior Counsel further pointed out that as the original Tombo Cadastral plan maintained by the Respondents has not been produced, adverse inference has to be drawn against the Respondents to the effect that such plan would support the case of the Appellants. Learned Senior Counsel further pointed out that pursuant to the Sale Deed in favour of the Appellant, the Appellant has been in possession of the disputed portion and, as

such, the reliefs granted in favour of the Respondents are not at all justifiable in the facts and circumstances of the case. The learned Senior Counsel has thereafter taken me through the evidence of Pw.1 to point out that there is an admission by Pw. 1 to the effect that he had not even seen the plan nor the original grant in favour of the Predecessor in Title of the Appellant. Learned Senior Counsel has thereafter taken me through the Judgment of the Appellate Court to contend that there is no adjudication as far as the possession is concerned by the learned Lower Appellate Court to justify the relief granted in favour of he Respondent. Learned Senior Counsel as such pointed out that the substantial questions of law be answered in his favour.

4. On the other hand, Shri R. G. Ramani, learned Counsel appearing for the Respondents, has supported the impugned Judgment. The learned Counsel has pointed out that the property claimed by the Appellant is described in Tombo Book no. 1 which itself suggests that such properties belonged to the Respondent-Communidade. Learned Counsel further pointed out that there is no material on record to show that the property claimed by the Appellant corresponds to the suit property as pleaded in the plaint. Learned Counsel further submits that the Appellant managed to induced the President of the Respondent to give the No Objection Certificate to change the Survey Records and that he was not authorised to do so in view of the provisions of the Code of Comunidade. Learned Counsel further submits that but for the fraudulent entry in the Survey Records, the property was always standing in the name of the Respondents and, as such, the contention of the Appellant that the property belongs to the Appellants is totally farfetched.

Learned Counsel further submits that the Respondents have produced the cadastral plan in respect of the suit property which clearly discloses that the property as surveyed in the Record of Rights under Land Revenue Code corresponds to the property as shown in the cadastral plan maintained by the Comunidade. Learned Counsel further submits that once it is established that the property is registered in the Tombo Book in favour of the Appellant, would itself suggests that the Respondents are the owners in possession of the disputed property. Learned Counsel has thereafter taken me through the Judgment of the Trial Court and pointed out that the learned Judge has rightly appreciated the evidence on record to come to the conclusion that the Respondents are entitled for the reliefs as sought in the plaint. Learned Counsel has thereafter taken me through the Judgment of the Lower Appellate Court to point out that the Lower Appellate Court has re-appreciated the evidence on record to come to the conclusion that the Respondents are entitled for the declaration and the injunction as prayed for in the suit. Learned Counsel further submits that only when the Appellants attempted to interfere with the disputed property, the suit was filed by the Respondents for a permanent injunction which has been rightly decreed by the Courts below on the basis of the evidence on record. Learned Counsel further pointed out that there is no perversity in the findings arrived at by the Courts below and, as such, the above Appeal deserves to be rejected.

5. I have duly examined the contentions of the learned counsel and with their assistance I have also gone through the records. On perusal thereof, I find that the suit filed by the Respondents is essentially that lote No.34 of the property

known as "Oddamolla" lying towards the northern side is bounded on the east by the property of Ramchandra Pandurang Vaidya; on the west by the Government forest; towards north by the village Queula and towards south by lote no.35 of the said property Oddamolla. It is further their case that lote no.35 of the said property Oddamolla lying towards the southern is bounded on the east by the property partly by the Government forest, partly by the property of Antonio Basilio Francisco de Santana Aguiar, partly by the property of Gopal Sridora Sinai Borkar and partly by the property of Ramchandra Pandurang Vaidya; towards the west by the Government forest; towards the north by lote no.34 of the property "Oddamolla" and towards the south by the Government forest. It is also the case of the Respondents that they are the owners in possession of the property known as "Oddamolla" situated at Bondbaga, Betora presently surveyed under nos. 132(part), 134, 135/1, 135/2, 135/3, 137, 138(part), 144 (part), 145, 146, 147, 148(part) 149, 150 and 151 (part). It is further their case that they learnt recently that the Appellant was negotiating with a third party for the sale of the said suit property and as such the suit was filed inter-alia to restrain the Appellant by a decree of permanent injunction from interfering in any manner with the possession of the respondents in respect of the suit property or any part thereof and also from selling, alienating etc., The Appellant has filed his written statement disputing the claim of the Respondents inter-alia contending that the property is also known as 'Batxeta Morod' and that it belongs to the Appellant only and not to the Respondents.

6. The learned Trial Judge framed issues and recorded evidence and by

judgment and decree dated 16.10.2004 has noted that the Appellant has admitted that the property 'Oddamolla' described as lote nos.34 and 35 of book Tombo 1 is surveyed under old cadastral survey no.2 and presently surveyed under the new survey numbers and as such the contention of the Appellant that the two properties were not the same could not be accepted. The learned Judge further noted that the shape of the property is such that it is tapering towards the south and the southern boundary is partly Government forest and partly the property of Aguiar and, therefore, it cannot be said that the evidence on record is inconsistent with the case of the Respondents. The learned Judge has appreciated the evidence of PW4, Joel Aguiar and noted that his evidence would establish the case of the Respondents that the property lying on the boundary of the suit property belongs to the family of the said witness. The learned Judge has also appreciated the evidence of DW3 Engineer Kiran Naik and found that the plan produced by him is prepared by one Joshi at Exhibit DW3/A which shows the boundary as pleaded by the Respondents. The learned Judge also noted that his evidence does not inspire confidence and does not identify the property as pleaded by the Appellant. The learned Judge also noted that in support of the case of the Appellant, he has produced the document at Exhibit DW1/A which is a certificate issued by the office of the Respondents showing the property 'Batxeta Morod' bears No. 67 inscribed in the name of lease holder Shri Mahadev Narain Vaidya Panvelkar vide order no.167 dated 13.08.1897. The learned Judge also noted that in terms of Article 222 of the Code of Communitade registration in Book no.2 implies that the properties belonging to the Communitade which have been in possession of the private parties. The learned Judge also noted that the said certificate does not disclose the

property 'Batxeta Morod' is also known as 'Odamol' as claimed by the Appellant. The learned Judge also noted that as per book Tombo 1, in terms of the provisions of the Code of Comunidade, such properties are owned and possessed by the Comunidade or otherwise the same could not be registered in book Tombo 1. The learned Judge also noted that the index of the land is in the name of the Respondents and the same was transferred by the Appellant based on the deed of sale dated 09.01.1984 and the statement given by the attorney of the Respondents Krishna Vithal Gaunkar before the Awal Karkoon, of the records of right to the effect that the suit property does not belong to the Respondents and that he has no objection to change the name of the Respondents from the index of land, the name of said Vaidya which was illegal. The learned Judge also noted the provisions of Article 11 of the Code of Comunidade and different provisions therein as well as the judgment of this Court reported in **2000(2) GLT 427** in the case of **Babu Dessai V/s Comunidade of Serula**, wherein it has been held that the attorney of the Comunidade could not have admitted the claim of the defendant in the said proceedings without permission of the Administrator of the Comunidade and as such held that the admission of the said Gaunkar could not defeat the ownership and possession of the Respondents. The learned Judge after examining minutely the evidence on record and documents produced by the parties, held issue nos. 1, 2 and 3 in the affirmative and issue nos. 4, 5, and 6 in the negative. The learned Judge as such decreed the suit filed by the Respondents and granted injunction against the Appellant.

7. On perusal of the judgment of the learned Lower Appellate Court in

Regular Civil Appeal No. 186/ 2004 dated 05.09.2006, the learned Judge has framed two points for determination. The learned Judge on the basis of the pleadings of the parties has come to the conclusion that it was admitted by the Appellant that in Tombo 1, the property 'Oddamolla Morod' is described under lote nos.34 and 35. The learned Judge also took note of Article 208 of the Code of Comunidade which provides that the Register no.1 is a list of all the properties of the Comunidade which are shown in table no.1 and the description of the sources to other income not connected with the private properties to hold that as the property is registered in book 1, it proves that the said property belongs to the Comunidade/Respondents herein. The learned Judge on the basis of the documentary evidence on record has come to the conclusion that the property 'Oddamolla Morod' under lote nos.34 and 35 is the property owned by the Comunidade of Betora and as such entered into book no.1. The learned Judge also found that lote nos. 34 and 35 was shown in the old cadastral survey plan under survey no.2 and on the basis of the pleadings found that this aspect was not denied by the Appellant. The learned Lower Appellate Court has also taken note of the oral evidence and documentary evidence produced by the parties. The learned Judge further noted that the deposition of PW3 further strengthens the case of the Respondents that the property 'Oddamolla Morod' is the property of the Comunidade of Betora and surveyed under nos. 34 and 35 in the Tombasso record which were prepared in the year 1947 which had become final. The learned Judge also examined the evidence of the Appellant and his witnesses and after appreciating such material has come to the conclusion that the learned Trial Judge has rightly held that the Respondents/ Comunidade are the owners and in

possession of the suit property being the portion of the entire property "Oddamolla". While examining the second point for determination and examining all the documents produced by the Appellant in respect of the property 'Bataxeta Morod' leased to Mahadeva Narayan Vaidya Panvelkar in 1897, the boundaries were nowhere described. The learned Judge also noted that the properties claimed by the Appellant were admeasuring 2,08,015 square metres and the documents or sale deed has in fact not disclosed such area and that nowhere in the written statement it has been the case of the Appellant that such area of 2,08,015 square metres was the subject matter of the purchase by their predecessor in title on 07.02.1896. The learned Judge after appreciating the evidence on record and taking note of the various judgments of this Court and the Apex Court on the relevancy of the revenue records has come to the conclusion that there was no reason to interfere in the judgment passed by the learned Trial Judge and consequently dismissed the appeal filed by the Appellant.

8. On going through the said judgments of the Courts below, I find that the Courts below have minutely examined every piece of evidence on record, especially the boundaries as disclosed in the plaint as well as the boundaries in the book maintained by the Comunidade to come to the conclusion that the suit property corresponds to the property as surveyed in the records of right under numbers 132(part), 137, 138(part), 145, 146, 147, 148 (part) 149, and 150. In fact, the boundaries as referred to in the plaint and the documentary evidence on record, there are fixed boundaries namely that towards the west there is a property of the Government forest and also towards the south. On perusal of the plan

produced under the Land Revenue Code, the boundaries towards the west and the south in respect of the said survey numbers are the Government forest lands. Apart from that, the boundaries of the whole property towards the east is partly by the property of Francis Aguiar and partly by the property of the Gopal Sinai Borkar. One member of the said Aguiar family has been examined by the Respondents as a witness whose evidence has been accepted by the learned Trial Judge and confirmed by the learned Lower Appellate Court. The said witness has clearly stated that the suit property belongs to the Comunidade/ Respondents herein. The evidence of the witness PW1 Ranganath Priolkar has corroborated the case of the Respondents as pleaded and supported by the documentary evidence on record. The property of Ramchandra Vaidya is partly towards the eastern side of the said survey records. In fact, it is the case of the Appellant that the property which has been purchased by them is from the family of Vaidya. On going through the old cadastral plan, the northern boundary of the property claimed by the Respondents is village of Queula. On perusal of the plan produced on record prepared under the Land Revenue Code also shows that the northern boundary is the Village of Queula. Thus, the boundary shown in the documents produced by the Respondents read with cadastral survey plan and the plan produced under the Land Revenue Code conclusively establishes the identity of the suit property and as such the contention of Mr. M. B. Da Costa, learned Senior Counsel appearing for the Appellant that the Respondents have not identified or co-related the boundaries with the property as claimed by them under the Land Revenue Code cannot be accepted. The learned Trial Judge has also noted the admission of DW1 to that effect. The Learned Lower Appellate Court has also taken note of the fact

that on the basis of the pleadings itself this aspect was not even disputed by the Appellant. In such circumstances, I find that the Courts below have rightly identified the property as claimed by the Appellant and consequently, have come to the conclusion that the property claimed by the Respondents corresponds to the said survey numbers on the basis of oral as well as documentary evidence on record. Such concurrent findings of fact arrived at by the Courts below based on material on record cannot be re-appreciated by this Court. The Appellant has failed to establish any perversity in findings whereby the Courts below have concurrently found that the Respondents are the owners and in possession of the disputed property which findings cannot be disturbed by this Court as the Appellant has failed to show that the findings are on the basis of any misreading of evidence or by not examining any material documents produced by the appellants.

9. It is the contention of Mr. M. B. Da Costa, learned Senior Counsel appearing for Appellant that the property granted to the predecessor in title of the Appellant corresponds to lote no.67 in Tombo book no.2. The Tombo book no.2 as noted by the learned Lower Appellate Court is of the properties which are granted to private parties. In the present case, the Appellant did not make any attempt to produce a plan in respect of lote no.67 to examine as to whether such property claimed by the Respondents would include the grant of property shown as lote no.67. It is the contention of Mr. M.B. Da Costa, learned Senior Counsel appearing for the Appellant that such plan ought to have been produced by the Respondents. In the present case, on the basis of the overwhelming evidence on record, the Courts below have noted that the subject matter of the suit property is lote nos. 34

and 35 and not lote no.67. Even on perusal of the sale deed relied upon by the Appellant dated 09.01.1984 at Exhibit DW1/F, I find that the schedule to the said sale deed does not disclose any lote number of the plot which came to be allotted to the predecessor in title of the vendors therein. Though Mr. M. B. Da Costa, learned Senior Counsel appearing for the Appellant has submitted that the property of the vendors of the Appellant is lote no. 67, nevertheless, no reference thereof can be seen in the said sale deed. On perusal of the schedule of the said sale deed, I find that though the area and the survey numbers are mentioned nevertheless, the Courts below upon appreciating the evidence on record have concurrently come to the conclusion that the property surveyed under the said survey numbers as reflected in the said sale deed corresponds to the property of the Respondent bearing lote nos. 34 and 35. In such circumstances, the question of the Appellant claiming that on the basis of the said sale deed any rights have accrued to the Appellant would not arise at all. It is well settled that no person can grant title better than he himself possesses. Hence, in the instant case, unless it is shown that the property as referred to in the said schedule originally belonged to the vendors, the Appellant herein who is a buyer pursuant to the said sale deed, could not claim any relief whatsoever based on such document. In such circumstances, the said sale deed by itself cannot inher any right in favour of the Appellant herein as the property referred to in the said schedule belongs to the Respondent herein. So also, the entries of survey records which have been changed based on such sale deed cannot in any way defeat the claim of the Respondent in respect of the disputed property. As pointed out by the Courts below, the admission on the part of the Special Attorney before the Revenue

Authorities is invalid and in any event, it cannot defeat the ownership and title of the Respondent in respect of the disputed property. The properties described as lote nos. 34 and 35 are shown in Tombo Book no.1 which records the name of the Comunidade/Respondent herein. The description of the properties in Tombo Book, in fact, is akin to the registration in the Land Registration Record and as such this would also further establish that the property corresponds to lote nos. 34 and 35 held to be surveyed under new survey nos. 132(part), 134, 135/1, 135/2, 135/3, 137, 138(part), 144(part), 145, 146, 147, 148(part), 149, 150 and 151(part) of Betora Village belongs to the Respondent. The claim of the Appellant that the suit property corresponds to lote no. 67 has not been established by any material on record. The Appellant did not even attempt to seek a direction to the Respondent to produce the records in respect of the said lote no.67 to examine the veracity of such claim. In any event, revenue records cannot confer title. In the present case, as already pointed out herein above, the Respondent have established by cogent evidence that they were the owners and in possession of the property in dispute based on material on record. In the judgment reported in **(2014) 11 SCC 438** in the case of **Keshar Bai V/s Chhunulal**, it is observed that it is well settled by long line judgment of the Apex Court that the High Court should not interfere with the concurrent findings of fact unless it is perverse. In the present case, as already pointed out herein above, the findings arrived at by the Courts below cannot be said to be perverse, as such findings have been arrived at based on the oral and documentary evidence on record.

10. Apart from that, the suit filed by the Respondent was for injunction

simpliciter without any declaration and as such the concurrent findings of fact arrived at by the Courts below cannot be interfered with by this Court in the present Second Appeal under Section 100 of the Civil Procedure Code, as there is no perversity in such findings. The Courts below have rightly taken a view that the Appellant has failed to establish that the suit property belongs to the Appellant nor that either the Appellant or his predecessor in title were in possession of the suit property. In view of the above, the first substantial question of law is answered as not pressed by the learned Senior Counsel appearing for the Appellant. The remaining substantial questions of law are answered against the Appellant for the aforesaid reasons.

11. In view of the above, I find no merits in the above appeal which stands accordingly rejected.

F .M. REIS, J.

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