

IN THE HIGH COURT OF BOMBAY AT GOA**SECOND APPEAL NO. 33 OF 2003**

(1) Mrs. Ganga Krishna Kamat,
through her legal representatives :

(a) Yesso Survya Fondekar,
(b) Yeshodhi Y. Fondekar;
(c) Mukund Jagannath Gaonkar,
(d) Smt.Zaulem Mukund Gaonkar,
All residents of Usgao-Goa
**(Transposed as Respondent
No.11.)**

(2) Atmaram Krishna Kamat,
through his legal representatives :

(a) Krishna Atmaram Kamat, and
his wife ;
(b) Smt. Shital Krishna Kamat;
(c) Kum. Sunil Atmaram Kamat;
(d) Kum. Sarita Atmaram
Kamat;
All residing at Viridi,
Gaonkarwada, Sanquelim-Goa

(e) Smt. Suman Atmaram Kamat
alias Smt. Suman Dnyaneshwar
Sawant, and her husband;
(f) Dnyaneshwar Bhikaji Sawant,
both residing at Talekhol,
Doddamarg, Maharashtra;
(g) Smt. Kumud Atmaram Kamat
alias Smt. Kumud Lavu Parab,
and her husband;
(h)Lavu Rama Parab
Both residing at Gaonkarwarda,
Mayem, Bicholim, Goa.
(3) Mrs. Laxmi A. Kamat,
housewife;

**(Respondent No.2(a) to (h) and
Respondent No.3 transposed as
respondents No.19 and 20.)**

(4) Shantaram Krishna Kamat,
through his legal representatives;

(a) Smt. Mangal Ramakant
Gaonkar, and her husband;

(b) Ramakant Harishchandra
Gaonkar;

Residing at Jamboli, Molem in
Sanquelim Taluka.

(c) Ashok Shantaram Kamat,

(d) Kum. Kunda Shantaram
Kamat,

(e) Narayan Shantaram Kamat,
and his wife;

(f) Smt. Kalpana Narayan Kamat,

(g) Dilip Shantaram Kamat,

(h) Kum. Deepa Shantaram
Kamat;

All residents of Virdi,
Sanquelim, Goa.

(5) Mrs. Shantabai Shantaram
Kamat, housewife;

(6) Surya Krishna Kamat;

(7) Mrs. Sulochana Surya Kamat;

(8) Mrs. Ratnabai Narayan Kamat;

(9) Mrs. Amrutem Gajanan

Kamat; **(Transposed as
Respondent No.21).**

Appellant Nos. 2 to 9 residing at
Gaonkarwada,
Viridi, Sanquelim, Goa.

..... **Appellants.**

Versus

(1) Vassu Jairam Kamat, through
his legal representatives:

- (a) Gokuldas Vassu Kamat;
- (b) Jairam Vassu Kamat;
- (c) Maya Vassu Kamat;
- (d) Mithun Vassu Kamat;
- (e) Sachin Vassu Kamat;

- (2) Mrs. Deuki Vassu Kamat;
- (3) Jagannath R. Kamat;
- (4) Mrs. Kesar J. Kamat;
- [(5) Mrs. Gokule Y. Kamat;]
- (deceased) LRs. Already on record.

- (6) Mrs. Tulshi Vaikunt Kamat;
- (7) Shri Sazi Yeshwant Kamat;
- [(8) Mrs. Yamuna Pandhari Kamat;]
- (deceased) LRs. Already on record.

- (9) Mr. Prakash Pandhari Kamat;
- (10) Madhukar Ramnath Kamat;

All of major age, Indian
Nationals, residing at Viridi,
Sanquelim, Goa.

[(11) Yesso Surya Fondekar,
resident of Usgao-Goa).

- (12) Krishna Atmaram Kamat; and
his wife;
- (13) Smt. Shital Krishna Kamat;
- (14) Kum. Sunil Atmaram Kamat;
- (15) Kum. Sarita Atmaram Kamat;
- All residing at Viridi,
Gaonkarwada, Sanquelim, Goa
- (16) Smt. Suman Atmaram Kamat
alias Smt. Suman Dnyaneshwar
Sawant; and her husband;
- (17) Dnyaneshwar Bhikaji Sawant;
Both residing at Talekhol.
Doddamar, Maharashtra,

(18) Smt. Kumud Atmaram Kamat
alias Smt. Kumud Lavu Parab; and
her husband;

(19) Lavu Rama Parab;

Both residing at Gaonkarwada,
Mayem, Bichlolim, Goa.

(20) Mrs. Laxmi A. Kamat,
residing at Jamboli, Molem,
Sanguem, Taluka.

(21) Mrs. Amrutem Gajanan Kamat,
residing at Gaonkarwada,
Virdi, Sanquelim, Goa.

..... **Respondents.**

Mr. D. Pangam, Advocate for the Appellant.

Mr. S. D. Lotlikar, Senior Advocate with Ms. M. Furtado, Advocate for
the respondents.

CORAM :- F.M. REIS, J.

Date : - 26th February, 2016.

ORAL JUDGMENT :-

Heard Mr. D. Pangam, learned Counsel appearing for the
appellants, and Mr. S.D. Lotlikar, learned Senior Counsel appearing
for the respondents.

2. The above appeal came to be admitted by an order dated 11th
July, 2003, on the following substantial questions of law :

(I) Whether, in view of the provisions of Order VI, the respondents herein led evidence in variance with the pleadings, inasmuch as the respondents claim exclusive ownership of the suit property, whereas in the evidence of DW/1 which has been accepted by the lower Appellate Court have claimed co-ownership as held by the Appellate Authority ?

(II) Whether the entries in the Survey Record can confer title on the respondents and the presumption under Section 105 of the Land Revenue Code, can prove title ?

(III) Whether the learned Appellate Court could have accepted the case of co-ownership of the respondents after holding that the respondents have not been able to produce any documentary evidence in support of the claim of co-ownership ?

3. Shri Pangam, learned Counsel appearing for the appellants, in support of the above substantial questions of law, has pointed out that it is the case of the appellants that they are owners in possession of a property which is surveyed in the records of right under Survey Nos. 3/12, 13, 14, 15, 16, 17 and 18 of Village of Viridi, which corresponds to the property known as “Mal”, “Ghobatta” and “Mossundy” situated

at Virdi, Bicholim Taluka and described in the Land Registration Office under No.1452 and in the Cadastral Survey Plan under Nos.10, 13, 7 and 33. It is further contended by the learned Counsel that the suit property corresponds to 1/4th of the property described in the Land Registration Office under No.1452 and that the respondents have no right at all to such property. The learned Counsel further submits that the respondent No.10 is occupying one house with the consent of ancestors of the appellants and that the respondent No.3 started putting up a new construction in the suit property which forced the appellants to file the above suit. The learned Counsel further points out that in the inventory proceedings which were initiated on the death of the father of the original plaintiff No.1, namely Atmaram, the property came to be described in such proceedings and allotted to the appellant No.1. The learned Counsel further submits that the learned Trial Judge, upon appreciating the evidence on record, has come to the conclusion that the appellants have title to the disputed property. But, however, the declaration sought by the appellants came to be rejected on the ground that all the co-owners were not parties to such proceedings. The learned Counsel further submits that the learned Trial Judge has also taken a view that presumption under Section 105

of the Land Revenue Code was rebutted on the basis of the document of land registration office, as well as the Cadastral Survey Plan. The learned Counsel further submits that it was the case of the respondents that they have acquired title to the disputed property by prescription, but, however, in the deposition of DW.1 it is contended by the respondents that they are co-owners of the disputed property. The learned Counsel further submits that this shifting of stand on the part of the respondents would, itself, suggest that the appellants are the owners of the disputed property. The learned Counsel further submits that the learned Lower Appellate Court has erroneously come to the conclusion that the property, as claimed by the appellants i.e. suit property, does not correspond to the share allotted to the appellants in the inventory proceedings. The learned Counsel further submits that in the deposition of DW.1, the extent of the suit property and its identification was not in dispute and, as such, the learned Lower Appellate Court was not justified to come to the conclusion that the appellants have failed to establish their claim over the suit property. The learned Counsel has extensively taken me through the evidence of DW.1 and DW.2 to point out that the respondents have accepted that the appellants and the respondents are co-owners of the suit property

and, as such, according to him, the injunction sought by the appellants against the respondents not to put up any construction in the disputed property and direction to demolish the disputed structures had to be granted. The learned Counsel further submits that on the basis of the case of the respondents themselves, it is now well established that one co-owner cannot change the nature of the property, without the consent of the other co-owners and, on this ground alone, the relief sought by the appellants ought to have been granted and the suit filed by the appellants ought to have been disposed of accordingly. The learned Counsel has, thereafter, taken me through the records of the Inventory Proceedings of the year 1929 which were initiated upon the death of Atmaram to point out that the property claimed by the appellants, is described at item No.2, as well as item Nos. 7 and 8 therein. The learned Counsel further submits that the learned Lower Appellate Court has misconstrued the evidence on record to come to the conclusion that the appellants have failed to establish their case. The learned Counsel further points out that the survey records cannot create any title in favour of the respondents and as such, the learned Lower Appellate Court was not justified to rely upon the survey records to non-suit the case of the appellants to the effect that the appellants were exclusive

owners of the 1/4th part of the property. The learned Counsel has, thereafter, taken me through the Judgments of both the Courts below and submitted that the learned Lower Appellate Court has erroneously interfered in the Judgment of the learned Trial Judge as the evidence adduced by the respondents is contrary to the pleadings in the written statement and as such deserves to be rejected in terms of Order 6 of CPC. The learned Counsel, as such, points out that the impugned Judgment passed by the learned Lower Appellate Court be quashed and set aside.

4. On the other hand, Mr. S.D. Lotlikar, learned Senior Counsel appearing for the respondents, has submitted that the learned Lower Appellate Court, upon appreciating the evidence on record, has come to the conclusion that the property, as claimed by the appellants bearing Survey Nos. 3/12, 13, 14, 15, 16, 17 and 18 of Village of Virdi has not been correlated with the allotment in favour of the appellants in the inventory proceedings of the year 1929. The learned Senior Counsel further points out that as the appellants have failed to establish their claim of title over the disputed property, and as such the question of granting the permanent injunction or mandatory injunction would

not arise at all. The learned Senior Counsel further submits that the relief of declaration of title came to be refused by the learned Trial Judge and no appeal was preferred against the said refusal of relief to the appellants and, as such, the said findings have attained finality. The learned Senior Counsel further submits that the learned Lower Appellate Court has rightly come to the conclusion that the appellants have failed to establish the exclusive title over the disputed property and, as such, the question of granting the injunction in favour of the appellants would not arise at all. The learned Senior Counsel has also taken me through the defence of the respondents in the written statement to point out that it was a specific case of the respondents that they were co-owners of the property. The learned Senior Counsel further submits that the survey records itself suggest that only two survey numbers claimed by the appellants, stand in the name of the appellants as co-occupants and that the remaining survey numbers stand in the name of the respondents herein. The learned Senior Counsel further points out that the presumption under Section 105 of the Land Revenue Code cannot be rebutted on the basis of the title documents produced by the appellants which were of the year 1929. The learned Senior Counsel further submits that the appeal has no

merit and, as such, deserves to be rejected.

5. I have considered the submissions of the learned Counsel and I have also gone through the record. It is now well settled that it is for the appellants herein to prove their case. It is a specific case of the appellants that they are exclusive owners of 1/4th part of the property which is known as “Mal”, “Ghobatta” and “Mossundy” situated at Viridi, Bicholim Taluka and described in the Land Registrant Office under No.1452, which corresponds to Survey Nos. 3/12, 13, 14, 15, 16, 17 and 18 of Village of Viridi and in the Cadastral Survey Plan under Nos. 10, 13, 7 and 33. With the assistance of the learned counsels I have perused the Cadastral Survey Plan, as well as the Survey Plan, as also the survey records under the Land Revenue Code. On perusal of the Cadastral Survey Plan, it is seen that in the survey plan produced before the trial Court at Exhibit PW.1/D and the survey Plan which is at Exhibit PW.1/E there appears to be a vast difference in the area as recorded therein. In such circumstances, the contention of the learned Counsel appearing for the appellants that the suit property as identified at para 1 of the plaint to be the property shown in the Cadastral Survey Plan under those specific numbers cannot be

accepted. Apart from that, with the assistance of the learned Counsel, I have also perused the boundaries as shown in the inventory proceedings of the year 1929, as well as the boundaries in the Land Registration documents at Exhibit AW.1/A. On perusal of the said boundaries and the boundaries as pleaded in the plaint, I find that there is a vast difference in the boundaries as disclosed therein. The appellants, who are the plaintiffs in the suit, have to explain the circumstances in which the boundaries vary. As such, both the Courts below have justified to refuse the relief of declaration as sought by the appellants. No doubt, the right which the appellants can derive on the basis of the allotment in the inventory proceedings and the inscription in the Land Registration document, cannot be defeated, but, however, as the co-relation between the allotment in the inventory proceedings and the Land Registration document vis-a-vis the survey records prepared under the Land Revenue Code has not been established by the appellants, I find that there is no reason to interfere with the Judgment of the learned Lower Appellate Court refusing the relief of declaration of title as claimed in the suit. Apart from that, as has been pointed out by Mr. Lotlikar, learned Senior Counsel appearing for the respondents, the appellants had not challenged the refusal of the relief by the learned

Trial Court and, as such, the appellants cannot claim such relief in this Court. As such, I find that as the findings of the learned Trial Judge, on that count, has attained finality and as they were not challenged by the appellants, and as such the question of now claiming that the appellants are entitled for a declaration as prayed for in the suit, would not arise at all.

6. Once the appellants have not been able to establish their claim of declaration, the question of granting any consequential relief of mandatory injunction and permanent injunction would not arise at all, especially when, on the basis of material on record, there is a cloud in the claim of title over the specific portion of the suit property. In the present case, as pointed out herein above, there is a gross discrepancy between the official record produced on record and the claim of the appellants and, as such, the suit for permanent injunction, without seeking a declaration would not at all be maintainable.

7. Apart from that, it is not disputed that the appellants have failed to disclose the exact survey number where the disputed structure was existing. As such, the question of granting permanent injunction

as claimed by the appellants, without establishing the exact position of the subject-structure would not arise at all.

8. With regard to the contention of Mr. Pangam, learned Counsel appearing for the appellants that on the basis of the defence and the the evidence of the respondents themselves the relief sought by the appellants could be moulded, I find that the appellants who are the plaintiffs in the suit have to stand on their own legs and cannot rely upon the weakness of the defence to establish their case. In any event, considering the findings, while examining the claim of the appellants for declaration of title, this aspect of granting any relief on the basis of the defence or the evidence of DW.1 or DW.2 would not at all be justified.

9. The above appeal came to be admitted without notice to the respondents. Shri Lotlikar, learned Senior Counsel appearing for the respondents has pointed out that the substantial questions of law framed by this Court would not arise in the present appeal when, according to the learned Senior Counsel, the appellants have failed to establish that they are entitled for declaration of title in the suit. Apart

from that, the question of examining whether the appellants have gone beyond their pleadings or not, would not arise at all when the appellants have failed to establish their claim of title on the basis of the pleadings at para 1 of the plaint.

10. It is well settled that the survey records do not create title, but, however, they create a presumption under Section 105 of the Land Revenue Code, of possession. In that context, the learned Lower Appellate Court has examined the dispute between the parties to come to the conclusion that the appellants were not entitled for any relief in the suit. As has been pointed out herein above, some of the survey numbers are in the names of the appellants, as well as the respondents; and in respect of certain survey numbers, the names of the appellants do not at all figure. As such, the substantial question of law framed by this Court, on that count, would not arise at all. The learned Lower Appellate Court has rejected the claim of ownership of the appellants, not only on the basis of the defence, but also on examining the allotments in the inventory proceedings, as well as description in Land Registration document. No doubt the rights of the appellants in the suit would be restricted to the allotment made in the Inventory

Proceedings in the year 1929 which can be traced to the actual right therein of the estate leaver. As such, the substantial question of law framed by this Court on that count would also not arise in the present case.

11. In such circumstances, I find no merit in the above appeal. The substantial questions of law framed by this Court are answered accordingly. The appeal stands accordingly rejected.

F.M. REIS, J.

ssm.