

IN THE HIGH COURT OF BOMBAY AT GOA

SECOND APPEAL NO. 44 OF 2009

1. Mr. Mulla Abdul Karim Muzawar,
(expired) resident of Kot,
Ponda, Goa through his legal representatives
 - (a) Mrs. Banu Karim Muzawar,
(since deceased)
represented by her legal representatives,
the appellants no. 1(b) and 1(c)
 - (b) Ms. Ashiya Karim Muzawar
 - (c) Ms. Kulsum Karim Muzawar
All residents of Kotwada
Curti, Ponda, Goa.
2. Mr. Mulla Mohammad Saliem Muzawar,
residing at Kot, Ponda, Goa.

..... Appellants/
Original Plaintiffs nos.2(d) & (e)

V e r s u s

1. Mr. Sayed Abdul Razak,
residing at Aquem, Margao,
at present abroad and
represented by his Power of Attorney holder,
Mr. Shaikh Gaffar,
Residing at Khadpaband,
Ponda, Goa.
2. Mr. C. S. Prabhu,
of M/s. Prabhu Associates,
residing near Masjid,
Margao, Goa.
3. Mr. Mulla Kasim Muzawar (expired)
residing at Kot, Ponda, Goa
through his legal representatives:-
 - (a) Mrs. Clusum Bi – (Expired (deleted)
 - (b) Mr. Mulla Ahmed Muzawar,
son of Mulla Kasim Muzawar,
 - (c) Mrs. Zeneth Bi,
wife of Mulla Ahmed Muzawar

- (d) Mr. Mulla Rashid Muzawar
son of Mulla Kasim Muzawar
- (e) Mrs. Aisha Bi
wife of Mulla Rashid Muzawar
(since deceased)
Through legal representatives
- 3(e)(i)Ms. Zafira Mulla Muzawar (daughter)
(ii)Ms. Humeira Mulla Muzawar (daughter)
(iii)Ms. Ameera Mulla Muzawar

All three daughters of
Mr. Mulla Rashid Muzawar
all three major in age,
and all three residing at
Flat no. C-4-199, Second Floor,
Bank of Goa Building,
St. Augustine Waddo, St. Cruz,
Ilhas, Goa.

- (f) Mr. Mullam Abu Talib,
son of Mulla Kasim Muzawar
- (g) Mrs. Massura Bi,
wife of Mulla Abu Talib
- (h) Mr. Mulla Abdul Razak Muzawar
son of Mulla Kasim Muzawar
- (l) Mrs. Fatima Bi,
wife of Mulla Abdul Razak,
- (j) Mrs. Mumtaj Bi,
daughter of Mulla Kasim Muzawar
- (k) Mr. Abdul Karim Khan,
Husband of Mrs. Mumtaj Bi,
All resident of Cot,
Ponda, Goa. ... Original Plaintiffs no. 1(1 to 11)

- 4. (a) Mr. Mulla Rafiq Muzawar
son of deceased Mr. Mulla Abdul
Karim Muzawar
- (b) Mrs. Gulzar Bi,
Wife of Mr. Mulla Rafiq Muzawar

Both residents of Kotwada,
Curti, Ponda, Goa.

..... Respondents/
Original Plaintiffs 2(b) and 2(c)

Mr. I. Agha, Advocate for the Appellants.

Mr. R. G. Ramani, Advocate for the Respondent no. 2.

Coram :- F. M. REIS, J

Judgment Reserved on : 12th August, 2016
Judgment Pronounced on: 21st October, 2016

JUDGMENT

Heard Mr. I. Agha, learned Counsel appearing for the Appellants and
Mr. R. G. Ramani, learned Counsel appearing for the Respondent no. 2.

2. The above Appeal came to be admitted by an Order dated
18.07.2011 on the following substantial questions of law :

(i) Whether the Court below erred in holding that the appellants have not produced any document to establish the link between the plaintiffs with the person in whose name there was entry in the registration records, overlooking the fact that in the evidence given by plaintiff no.3(PW1) that plaintiff no.3 gave the entire genealogy and that PW1 being not subjected to cross-examination and the entire trial having proceeded ex-parte against the defendants, the genealogy stands established by oral evidence ?

(ii) Whether the Courts below erred in relying on the records of survey, in as much as, having the

defendants admitted that the property is the same as claimed by the plaintiffs, the burden was upon the defendants to satisfy as to how they had acquired title to the property and therefore no reliance could be placed on the survey records ?

(iii) Whether the Courts below omitted to take into consideration that in the documents of the gift and purchase, the registration number 6396 establishes the identity of the property which is the same as mentioned by the plaintiffs in the plaint and therefore burden was lying on the defendants to disprove the effect of Article 953 of the Civil Code, according to which the title and possession vest in the person in whose name entry is found recorded ?

(iv) Whether there is misreading of prayer clause (a) of the plaint by the appellate Court in as much as the purport is that plaintiff is suing as co-owner and not as exclusive owner ?

(v) Whether the appellate Court committed error in law on the ground of issue of necessary parties since no such issue arose before the Trial Court ?

3. The parties shall be referred in the manner they so appear in the cause title of the Judgment of the Trial Court.

4. Briefly, the facts of the case as stated by the Plaintiffs are that there exists a property known as "*Hori Dolo Salecodil Siguildada Passun Tican*"

described in the Land Registration Office under no. 6396 of Book B-17 which is bounded towards the East with the property *Udagally* of Ramchandra Colvenkar; west with the property of Sadashiva Naba Naique Pratap Rau Sar Dessai and property *Faquirbaga* of Cagy Mamod Mohidino; South with the ditch of rain water and towards north with the boundary of the Village of Curti, public road and property of Narayan Sinai and others. It is further their case that by inscription no. 1629 at folio 197 of Book F-5, dated 20.03.1895, half of the property stands in the name of Mulla Hussein Muzawar, widow, landlord, $\frac{4}{5}$ th part of the half in favour of Mulla Mamod Sharif Muzawar and $\frac{1}{5}$ th part of half in favour of Mulla Amroddin Muzawar. It is further their case that the Plaintiff no. 2 is the natural son of Mulla Amroddin Muzawar who had $\frac{1}{5}$ th part of half of the suit property described under no. 6396. It is further their case that Mulla Abdul Razaq Muzawar thereafter adopted the Plaintiff no. 2 who is none other than the real brother of Amroddin Muzawar and, consequently, the Plaintiff no. 2 became the co-owner of the said property. In the background of the inscription, the whole property is inscribed half in the name of Mulla Hussein Muzawar, $\frac{4}{5}$ th of half in the name of Mulla Mohamad Sharif Muzawar and $\frac{1}{5}$ th of half in the name of Mulla Amroddin Muzawar. It is further their case that the Plaintiffs are the descendants of the parties whose names are inscribed in the Land Registration Office and that the Respondents are not the successors of any such person. It is further contended that the property is surveyed under no. 121 under different sub-divisions, but however, the subject matter of the suit is the property surveyed under sub-division no. 14 and 15 of the property surveyed under no.121. It is further contended that on 05.04.1988, the Plaintiffs found a construction being carried out in the suit property surveyed under

no. 121/14 by the Defendant no. 1 and that no development is done in the property surveyed under no. 121/15 as stated in the written statement at Para 29 which is a strip reserved for access. It is further their case that the Appellants learnt that the Predecessor in title of the Defendant no. 1 Mrs Zulekha Bi and her husband Mr. Soid Mahamad had executed a Gift Deed dated 12.05.1978 in favour of the defendant no. 1 and Mrs. Fatima Bi and her husband Mr. Shaikh Kassim Issac executed a Sale Deed dated 12.05.1978 in favour of the Defendant no. 1 and Mulla Mohamad Sherif Muzawar executed a Sale Deed dated 25.01.1979 in favour of the Defendant no. 1 and that the Defendant no.1/Respondent no. 1 herein, had entered into an Agreement on 03.05.1982 with the Respondent no. 2 and his wife for development. It is further contended that in all the said Sale Deeds, the property is shown to be described in the Land Registration Office under no. 6396. It is further the case of the Plaintiffs that as co-owners of the property, they filed a Special Civil Suit no. 13/1978 based on the title documents, for declaration, permanent injunction and recovery of possession.

5. The Defendants filed their written statements, inter alia, contending that the property belongs to the Predecessor in title of the Defendant no. 1 namely Shaikh Shabu and his wife Vazer Bi and were in exclusive, peaceful continuous and uninterrupted possession and enjoyment of the said property and that the name of Zulekha Bi and Fatima Bi who are daughter of Shaikh Shabu are recorded in the Survey Records. It is further contended that based on the Gift Deed dated 12.05.1978 and the Sale Deeds dated 12.05.1978 and 25.01.1979, the property belonged to the Defendant no. 1. Consequently, it is their case that the Agreement

for development was executed between the Defendant no. 2 with the Defendant no. 1 on 31.05.1982 and construction stated in October 1982.

6. On the basis of the evidence on record, the learned Trial Judge framed seven issues and the Defendants failed to remain present and, consequently, on 19.01.02, the proceedings went *ex parte* as against the Defendants. The Plaintiffs entered the witness box and produced all the documents and examined the witnesses. But, however, by Judgment dated 03.08.2002, the suit came to be dismissed. Being aggrieved by the said Judgment, The Appellants preferred an Appeal being Regular Civil Appeal no. 112/2002 and by Judgment dated 12.01.2006, the learned Appellate Court dismissed the Appeal preferred by the Appellants.

7. Being aggrieved by the Judgments passed by the Courts below, the Appellants filed an Appeal being Second Appeal no. 65 of 2006. By Judgment dated 12.09.2008, this Court set aside the Judgment of the Lower Appellate Court dated 12.01.2006 and remanded the matter back to the learned Appellate Court to decide the Appeal afresh. By Judgment and Decree dated 03.02.2009, the Lower Appellate Court dismissed the Appeal preferred by the Appellants. Being aggrieved by the said Judgment, the Appellants have preferred the above Second Appeal which came to be admitted on the aforesaid substantial questions of law.

8. Mr. I. Agha, learned Counsel appearing for the appellants, has pointed out that both the Courts below have erroneously come to the conclusion that the

appellants have failed to establish their title over the suit property. Learned Counsel further pointed out that it is well settled that possession follows title and, as such, the very fact that the Defendants did not lead any evidence the averments in the affidavits of the Appellants have been duly proved. The learned Counsel further pointed out that in terms of Article 953 of the Portuguese Civil Code, there is a presumption that title and possession stands in the name of the persons in whose name the property is inscribed. Learned Counsel further pointed out that the identity of the property was not in dispute as even in the alleged documents relied upon by the Defendants, the property is claimed to be registered in the Land Registration Office under no. 6396. Learned Counsel further pointed out that the Courts below have also erroneously found that the Plaintiffs have failed to establish how the property had devolved upon them without there was a categorical statement by the Plaintiffs in their deposition that the person in whose name the property stands is their ancestor. Learned Counsel as such pointed out that the substantial questions of law framed are to be answered in favour of the Appellants.

9. On the other hand, Shri R. G. Ramani, learned Counsel appearing for the Respondent no. 2, pointed out that the Survey Records stood in the name of the Predecessor in title of the Respondent and consequently the claim of the Appellants that the property belonged to the Appellants is misconceived. Learned Counsel further pointed out that the Respondents on the basis of the Agreement executed by the Defendant no. 1, has put up a construction in the subject property and, consequently, the question of granting any relief to the Appellants would be unjustified. Learned Counsel further pointed out that both the Courts below have

concurrently found that the Appellants have failed to establish the devolution of right in their favour in respect of the subject property and consequently there is no case made out for any interference in the impugned Order. Learned Counsel further pointed out that the Appeal be rejected.

10. It would be pertinent to note that before the matter was taken up for final hearing, opportunities were given to the learned Counsel to ascertain whether the dispute would be amicably settled between them, as it was pointed out that during the pendency of the suit some third party rights were created by the Respondent no. 2 herein. But, however, despite of opportunities given, it was reported that no settlement could be arrived at and, consequently, the matter was taken up for final disposal.

11. I have duly considered the rival submissions of the learned Counsel. I have also gone through the record. As rightly pointed out by Mr. I. Agha, learned Counsel appearing for the Petitioners, the identity of the property is not in dispute. Both the Plaintiffs as well as the Defendants are claiming their rights on the basis that the property is registered in the Land Registration Office under no. 6396. It is contended by the Plaintiffs that the persons in whose name the Land Registration document is recorded are the ancestors of the Plaintiffs. Though the Respondents do not claim that any rights have devolved upon the Defendant no. 1 from the persons in whose name the property stands inscribed, nevertheless, the Defendants claimed their right based on the fact that the property was surveyed in the Records of Rights in favour of the Defendant no. 1 who entered into an

Agreement for development with the Defendant no. 2.

12. It is now well settled that entries in the Revenue Records do not create or defeat title. The entries in such records are only for fiscal purpose and, as such, mere figuring the names in the Survey Records would not divert the true owner of the property. With this background, I shall proceed to examine the findings of the Courts below. While disposing of the suit filed by the Plaintiffs, the learned Trial Judge by Judgment dated 03.08.2002 whilst deciding the issues framed in the suit has noted that Pw.1 has stated that the property surveyed under no. 121/14 is recorded in the occupant's column in Form I and XIV in the names of Fatima Bi Shaikh and Zulekha Bi Shaikh and surveyed under no. 121/15 in the name of Yeshwant Govind Shet Vernekar partly and partly with Mohammad Sharif Muzafar. The learned Judge also noted that the brother of Pw.5 had filed objections to the entry in the Survey Records. The learned Judge also noted that the Defendants have claimed that they have no concern with the construction put up in the property surveyed under no. 121/15 but, only with regard to property surveyed under no., 121/14. The learned Judge further noted that the said Fatima Bi and Zulekha Bi are daughters of Shaikh Shabu and his wife Vazer Bi. The learned Judge further noted that the Plaintiffs have not rebutted the presumption in favour of the Defendants as can be drawn under the Land Revenue Code. The learned Judge also noted that half of the property was sold by said Fatima Bi in favour of the Defendant no. 1 and the remaining half was gifted by Zulekha Bi in favour of the Defendant no.1 including the residential house. The learned Judge further noted that the suit is filed in 1998 when the compound wall was constructed

in the year 1979 as pleaded in the written statement and there was delay in filing the suit. The learned Judge also noted that there is no clear and satisfactory evidence to establish the claim of the Plaintiffs and dismissed the suit filed by the Plaintiffs.

13. The Lower Appellate Court by the impugned Judgment dated 03.02.2009 has framed three points for determination. Whilst discussing the first point for determination, the learned Judge noted that the suit was proceeding exparte against the Defendants nor did they cross examine the Plaintiff no. 3. The learned Judge further noted that without satisfying the Court of their ownerships rights, the Plaintiff cannot obtain a declaration of ownership. The learned Judge noted in the Judgment the genealogy how the Plaintiffs claimed their rights to inheritance from the persons who figure in the Land Registration Document but however noted that except for the bare pleadings and a statement in the affidavit in evidence, no document has been produced to show the connection and the relationship between the Plaintiffs and the said Mulla Mohamad Shariff Muzawar and Mulla Amroddin Muzawar in whose names the property stands inscribed. The learned Judge further noted that merely because the Defendants did not enter the witness box, would not absolve the Plaintiff from establishing his case. The learned Judge also found that the document exhibit Pw.1/G cannot be said to be proved in the eyes of law. The learned Judge further noted that the name of Mulla Mohamad Shariff Muzawar in Form I and XIV in the property surveyed under no. 121/5 had 4/5th share of half in the subject property. The learned Judge further noted that there is no evidence on record to show that there is connection with the said Mulla

Mohamad Shariff Muzawar. The learned Judge accordingly found that the Plaintiffs are not entitled for declaration that they are the co-owners in respect of the subject property. Whilst discussing the other point for determination, the learned Judge found that the suit is within the period of limitation. The learned Judge consequently dismissed the Appeal preferred by the Appellants.

14. The aforesaid findings of the Courts below essentially dwell upon whether the Plaintiffs were able to establish their connection between the persons whose names stands inscribed in the Land Registration document. On perusal of the plaint, the Plaintiffs have pleaded at para 3 thus :

“3. The Plaintiffs state that Mulla Hussain Muzawar had one son, namely, Mulla Ali Reza Muzawar, who had two sons and one daughter. The sons are Mulla Noruddin Muzawar and Mulla Z. Muzawar. The Plaintiffs state that Mulla Noruddin Muzawat had one son by name Mulla M. Muzawar, whose son is Plaintiff no. 3.

The Plaintiffs state that Mulla M. Shariff Muzawar had five sons, namely, Mulla Ali Muzawat; Mulla Amrodin Muzawar; Mulla A. Rezak Muzawar; Mulla Ahmad Muzawar and Mulla A. Karim Muzawar. The Plaintiffs state that the Plaintiff no. 1 is the son of Mulla Ahmad Muzawar. The Plaintiff no. 2 is the adopted son of Mulla Abdul Karim Muzawar.”

15. On going through the written statements dealing with the said paragraph, the Respondents have merely denied the said contents and put the Plaintiffs to strict proof thereof. The fact that one sub-division of the subject matters

of the suit bearing survey no. 121/15 stood in the name of Mohamad Shariff Muzawar has not been disputed. The inscription and the Land Registration document also provides that 4/5th of the half of the property stands in the name of Mohamad Shariff Muzawar. The learned Trial Judge whilst coming to the conclusion that the Defendants were in possession of the subject property in view of the construction of the compound wall has failed to note that this defence of the Defendants is not proved as, admittedly, they have not entered the witness box nor cross examined the Plaintiffs with that regard. The learned Trial Judge, as such, was not justified to hold that the wall was constructed in the year 1978. On going through the averments in the affidavit at Paras 1 and 2, the genealogy of the Plaintiffs has been clearly mentioned. These facts have not been disputed by the Defendants as the Defendants chose not to cross examine the witness. The Plaintiffs have also produced the Land Registration document, the inscription document, the disputed Sale Deed as well as the Gift Deeds on record. All these documents clearly show that the subject matter of the property and the identity thereof has not been disputed. In such circumstances, the Courts below were not justified to come to the conclusion that the Plaintiffs have failed to establish their connection with the persons in whose name the property stands inscribed in the Land Registration Office. Article 953 of the Portuguese Civil Code reads thus :

“ Article 953 - *Juridical or Civil Possession*

The inscription in registration records of a title of transfer of property without any suspensive clause, involves, independently of any other formality, the transfer of possession to the person in whose favour such inscription was made.”

16. The said provision clearly provides that the registration in the name of the persons would indicate that he has title and possession of such property. The presumption drawn by Article 953 of the Portuguese Civil Code is no doubt a rebuttal presumption and, as the Defendants failed to lead any evidence in rebuttal, the presumption that the Plaintiffs have established their ownership and possession over the subject property cannot be disputed. It is also to be noted that the property as registered in the Land Registration Office also includes the property surveyed under no. 121/15 wherein one of the ancestors of the Plaintiffs have been shown as co-occupant thereof. In such circumstances, the findings of the Courts below that the Plaintiffs have failed to establish their title and ownership over the subject property, cannot be accepted and deserves to be quashed and set aside. Once the Plaintiffs have established their title, it is well settled that possession follows title. The Defendants have failed to adduce any evidence or establish how title of the subject property has devolved in their favour though the Defendants admit that the Land Registration number of the subject property but have failed to establish how the rights have devolved in their favour from the persons in whose names the property stands registered in the Land Registration Office. In such circumstances, I find that the findings of the learned Judge that the Plaintiffs have failed to establish their right over the subject property deserves to be quashed and set aside. As the Defendants have failed to establish any better title over the subject property, the Plaintiffs are entitled for the reliefs as prayed for in the suit essentially for restoration of possession.

17. The records however show that the suit was filed when the

construction was at an initial stage. As no temporary injunction was granted in the suit, the Respondent No. 2 proceeded to put up a construction in the subject property. Shri R. G. Ramani, learned Counsel appearing for the Respondent no. 2 has in fact admitted that third party rights have been created over the subject property. No doubt such third party interest created would be hit by the provisions of Section 52 of the Transfer of Property Act and would not affect the rights of the Plaintiffs, if any, to get the reliefs in the present suit.

18. Considering the said circumstances and in overall facts and circumstances of the case and in the interest of justice, I find that though the Plaintiffs would otherwise be entitled for a direction to restore the possession of the subject property in favour of the Plaintiffs nevertheless, I find that the Court can mould the reliefs in the peculiar facts and circumstances of the case. Looking into the fact that the suit was filed in the year 1988 and substantial third party interest has been created thereafter, I find that in lieu of restoration of possession the Defendants be directed to pay compensation to the Plaintiffs. In the present case, the property surveyed under no. 121/14 admeasures an area of 850 square metres whereas the property surveyed under no. 121/15 admeasures an area of 425 square metres. The Sale Deed of the year 1979 discloses that from the property surveyed under no. 121/15, an area of 69 square metres was sold by the said Sale Deed dated 25.01.1979. As far as the property surveyed under no. 121/14 is concerned, the area admeasures 850 square metres. By a Sale Deed executed in the year 1978, half of the said property was purported to be sold by one of the occupants shown in the Survey Records to the Defendant no. 1 for a consideration

of Rs.5,000/-. The Court can take judicial notice of the increase in prices whilst determining the market value of the land. The land is stated to be located in the Town which is developing. As there is no material on record to ascertain the exact market value of the land and considering that the litigation is going on from the year 1988, I find that as on the date when the construction was sought to be put up, the market value of the land can be fixed at Rs.100 per square metre, considering that the property was given for development to the Defendant no. 2. Whereas for an area of 69 square metres, one year after the execution of Sale Deeds, the amount of consideration paid is Rs.1,000/- which works out to Rs.15/- per square metre which would show the appreciation of the value of land within one year in the locality in the subject property in question. The total area utilised by the construction put up by the Defendant no. 2 would be 850 plus 69 square metres which would approximately be 919 square metres which is rounded up to 900 square metres. Hence, in lieu of restoration of possession the Defendants be directed to pay compensation jointly and severally in a sum of Rs.90,000/- to the Plaintiffs together with interest thereon at the rate of 8% per annum from the date of filing of the suit until actual payment. Apart from that, the Defendants are restrained from interfering in any manner in the remaining portion of the property surveyed under no. 121/15 where the Defendants claim that they have no interest therein.

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

ORDER

- (i) The impugned Judgment dated 03.08.2002 passed by the learned Trial Judge and the Judgment

dated 03.02.2009 passed by the Lower Appellate court are quashed and set aside.

(ii) The suit filed by the Plaintiffs is decreed whereby the Defendants, their servants, agents, are restrained by permanent injunction from interfering in any manner in the property bearing survey no. 121/15.

(iii) The Defendants are directed to pay jointly and severally in view of restoration of the property surveyed under no. 121/14 and 121/15 part in the sum of Rs.90,000/- together with interest at the rate of 8% per annum from the date of filing of the suit up to actual payment.

F .M. REIS, J.

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