

**IN THE HIGH COURT OF BOMBAY AT GOA****SECOND APPEAL NO.109 OF 2014**

MRS. JOAQUINA BORGES  
AND OTHERS

..... APPELLANTS.

V E R S U S

MS. ANTONIA BORGE @ ANTONETA  
BORGES (SINCE DECEASED)  
THROUGH HER LEGAL  
REPRESENTATIVES AND OTHERS.

..... RESPONDENTS.

Mr. Sudesh Usgaonkar, Advocate for the appellants.

Mr. C. A. Coutinho, Advocate for the respondents No.1, 2, 5, 6 and 7

Mr. C. A. Ferreira, Advocate for the respondent No.12(a, b and c).

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

**Date : - 29 April 2016**

**ORAL ORDER :-**

Heard Mr. Sudesh Usgaonkar, learned Counsel appearing for the appellants, Mr. C. A. Coutinho, learned Counsel appearing for the respondents No.1, 2, 5, 6 and 7 and Mr. C. A. Ferreira, learned

Counsel appearing for the respondent No.12(a, c, and d).

2. The above appeal challenges the Judgments passed by the Courts below, whereby the suit filed by the respondents No.1 to 7 was partly decreed and, inter alia, besides a declaration and other reliefs, the appellants were directed to vacate the suit property.

3. Mr. Sudesh Usgaonkar, learned Counsel appearing for the appellants has assailed the impugned Judgments on the ground that it is the case of the respondents No.1 to 7 that they are owners in possession of the property surveyed under No.100/9 of Davorlim Village, Salcete Taluka, which corresponds to the property registered in the Land Registration Office under No. 45117 of Book B 117, new series and enrolled in the Taluka Revenue Office under No. 123. The learned Counsel further points out that the registration of the property is based on a Deed of Gift executed way back in the year 1944 by the mother of the original plaintiff No.1. The learned Counsel further submits that the respondents have failed to establish how the mother of the respondent No.1 became the owner of the property and consequently, the registration relied upon by the respondents to claim

their title has no legal effects. The learned Counsel has, thereafter, taken me through the said Gift Deed to point out that the flow of title in favour of the Donor has not been shown, nor the respondents brought any evidence on record to establish that any title was conferred in favour of the mother of the respondent No.1 and, as such, according to him, as this aspect has not been established, the learned Courts below were not justified to grant the relief of declaration of title. The learned Counsel further submits that the appellants are in possession of the suit property as, according to him, the house existing therein is being occupied by the appellants for the last over 100 years. The learned Counsel further points out that as the co-relations between the land registration document and the survey records have not been established, the Courts below were not justified to come to the conclusion that the suit property surveyed under No.100/9 corresponds to the property registered in the Land Registration Office under No.45117. The learned Counsel further submits that plain reading of the translation of the Gift Deed reveals that what has been gifted in favour of the respondent No.1 was only 2/3rd of the property known as "Indona" and, as such, according to him, unless 2/3rd has been clearly identified, the question of granting any relief in favour of the

respondents would not at all arise. The learned Counsel further points out that the Courts below have failed to consider that the appellants were in possession of the suit house and, as such, having failed to take note of such crucial material, would itself disclose that the finding of the learned Judge that the respondents are owners of the property is perverse which would call for interference of this Court. The learned Counsel has extensively taken me through the material on record and the admission of the witnesses of the respondents to point out that the respondents have failed to establish their claim of title over suit property, nor have they brought any evidence to establish the identity of the suit property. The learned Counsel further points out that there are substantial questions of law for consideration and, as such, the impugned Judgments passed by the Courts below deserve to be quashed and set aside.

5. On the other hand, Mr. C. A. Countinho, learned Counsel appearing for the respondents No.1, 2, 5, 6 and 7/original plaintiffs has pointed out that the Courts below, upon appreciation of evidence on record, have come to the conclusion that the respondents have failed to establish their title over the suit property. The learned Counsel further

submits that once the property has been registered in the Land Registration Office, in terms of Article 953 of the Portuguese Civil Code, this would itself draw a presumption of ownership and possession of the respondents and, as such, as the appellants have failed to establish that they had any right to the suit property, the Courts below were justified to decree the suit filed by the respondents. The learned Counsel further points out that it is well settled that possession follows title and, as such, according to him, the Courts below have rightly decreed the suit filed by the respondents. The learned Counsel further points out that both the Courts below have clearly noted that the appellants have failed to claim any right by adverse possession and even issue No.4 framed by the learned Trial Judge was not pressed by the learned Counsel appearing for the appellants before the Trial Court. The learned Counsel further points out that as the appellants have miserably failed to establish any right to the suit property, the question of interfering in the impugned Judgments passed by the Courts below would not at all arise. The learned Counsel has, thereafter, taken me through the substantial questions of law proposed by the appellants to point out that examination of such proposition would require appreciation of evidence, which exercise

cannot be carried out in a second appeal under Section 100 C.P.C.. The learned Counsel further points out that it is the case of the original plaintiffs/respondents No.1 to 7 herein that the appellants had a house which belonged to them at a distance of 200 metres from the suit property and the appellants attempted to put a claim over the suit property. The learned Counsel further submits that in the year 1993, the appellants started some construction activity in the suit property and trespassed into the suit property, which forced the respondents to file the suit which came to be decreed. The learned Counsel has pointed out that the identity of the property was not even in dispute, as a plain reading of the written statement dealing with para 1 of the plaint, would disclose that there was no dispute raised with regard to the identify of the property and, as such, the contention that the identity has not been established cannot be accepted. The learned Counsel further points that the respondents have also examined an expert who has clearly co-related the boundaries shown in the Land Registration document vis-a-vis the survey records and, as such, the contention of Mr. Usgaonkar, learned Counsel appearing for the appellants that the identity of the property has not been established deserves to be rejected. The learned Counsel has, thereafter, taken me through the

Judgments passed by the Courts below and pointed out that there is no perversity in any of the findings rendered therein and, as such, the question of any interference in the impugned Judgment would not at all arise.

6. Mr. C.A. Fereira, learned Counsel appearing for the respondents No. 12 (a, c and d) has supported the contentions of Mr. C.A. Coutinho, learned Counsel appearing for the respondents No.1, 2, 5, 6 and 7 and has pointed out that there is no perversity in the findings rendered in the impugned Judgment and, as such, there is no substantial question of law for consideration by this Court.

7. I have considered the submissions of the learned Counsel and I have also gone through the records. The basic contention of Mr. Usgaonkar, learned Counsel appearing for the appellants is that what was gifted to the original plaintiff No.1/respondent No1 herein was  $\frac{2}{3}$ <sup>rd</sup> of the property and not the entire property known as “Indona (dois tercos do sul)”, but, however, perusal of the original gift deed of the year 1944, clearly shows that the property which has been gifted is “Indona (dois tercos do sul)”. This denomination has been referred to

in the said Deed of Gift on the basis of a certificate which was issued by the Land Registration Office to the effect that a property having such denomination was not registered in the Land Registration Office. The Deed of Gift further states that the boundaries of such property gifted are the one referred to in the Certificate issued by the Office of Land Registration. In such circumstances, the contention of Mr. Usgaonkar, learned Counsel appearing for the appellants that what was gifted was the 2/3<sup>rd</sup> of the property known as “Indona” cannot be accepted. The property which was gifted was known as “Indonar two thirds of South” which has clearly different connotation and would mean that such property is a specific and independent property. Apart from that, on perusal of the inscription in the Land Registration Office, it is seen that the property described under No.45117 is also shown to be the property “Indona (dois tercos do sul)” which clearly discloses that such property was an independent having a specific name.

8. On perusal of para 1 of the plaint, I find that the respondents/plaintiffs had clearly averred that the property survey No.100/9, corresponds to the property registered in the Land Registration Office under No.45117 which belongs to the respondent.

On going through the written statement filed by the appellants, dealing with such averments at para 1, there is no dispute raised by the appellant with regard to the property being registered in the Land Registration Office under No.45117, but the only dispute raised is that the respondents were not the owners of the suit property. Further the contention of Mr. Usgaonkar dealing with para 1 of the plaint is that such property is in possession of the appellants, openly and peacefully which would clearly mean that the identity of the property was not in dispute and the only allegation was that the original plaintiffs/respondents No.1 to 7 were not the owners of the suit property.

9. Mr. Usgaonkar, learned Counsel appearing for the appellants, however, points out that as an additional issue was framed by the learned Trial Judge it would suggest that despite of such an admission, the Trial Judge thought it fit to frame such an issue about the identity of the property. The issue was framed on the basis of the claim of the appellants that they were occupying the said property which, according to them, belonged to the appellants which is not the property claimed by respondents. As such, the said contention of the learned Counsel cannot be accepted. Regarding the contention of Mr.

Usgaonkar that the respondents have not produced any document to show how the property came to be owned by the mother of of the respondent No.1 and that the Courts below were not justified to grant the declaration in favour of the respondents, I find that the said contention cannot be accepted for the reason stated herein. The claim of the appellants was that the appellants also had a right to the property based on a common ancestry which the appellants have failed to establish, and as such, the question of contending that the respondents had to establish how the property was owned by the mother of the respondent No.1 is not at all justified, as sufficient material is on record to establish the title of the respondents, including the records of the Land Registration Office.

10. As already pointed out herein above, the property was registered in the Land Registration Office in the name of the original plaintiffs and, as such, the consequences in law under Article 953 of the Portuguese Civil Code would flow in favour of the respondents herein. Apart from that, it is not in dispute that the survey records also stand in the name of two of the respondents and it is the case of the respondents that the names of the appellants are wrongly figuring in

the survey records. Based on the documentary evidence produced on record, both the Courts below were justified to come to the conclusion that the appellants have failed to establish any right to occupy the suit property.

11. With regard to the contention of Mr. Usgaonkar, learned Counsel appearing for the appellants that the appellants have to be protected of their possession of the suit house, I find that the appellants for the reasons best known to them have given up their claim in the written statement of adverse possession and, in fact, issue No.4 was not pressed by the learned Counsel appearing for the appellant. It is well settled that possession follows title. In the present case, once the respondents have established their title over the suit property, the claim for possession can be defeated in case the appellants had to plead and prove they were in adverse possession of the suit property. As pointed out herein above, there is no claim to that effect by the appellants and consequently, the Courts below were justified to grant the relief sought by the respondents. The appellants have failed to establish by any evidence on record that they have any right to the suit property, nor that they have superior right to remain in possession of the suit property

vis-a-vis the claim of the respondents based on the Land Registration document, as well as the Deed of Gift which are duly registered before the Registering Authority.

12. As such, I find that there are no substantial questions of law which arise in the present appeal for consideration. On perusal of the substantial questions of law proposed by the learned Counsel appearing for the appellants, I find that such substantial questions of law would entail reappreciation of evidence, which exercise cannot be undertaken in a Second Appeal under Section 100 C.P.C., as I find no perversity in the findings of the Courts below. The findings arrived at by the Courts below are not by misreading of evidence or misconstruing of any documents produced on record. As such, I find that no case is made out for interference in the impugned Judgments in terms of Section 100 C.P.C.. Consequently, there is no merit in the above appeal, which stands accordingly rejected.

**F.M. REIS, J.**

ssm.