

IN THE HIGH COURT OF BOMBAY AT GOA**WRIT PETITION NO. 780 OF 2015**

1. Selva Raju Nadar, Major in age,
Indian National, s/o Madaswamy
Nadar;
2. Pushpa Nadar, Major in age,
Indian National, w/o Selva Raju
Nadar;
3. Mahesh Vinayak Nadar, Major in
age, Indian National, s/o Selva
Raju Nadar;
4. Dinesh Nadar, Major in age,
Indian National, s/o S. Nadar;

All residents of Manguirish
Prasad Co-operative Housing
Society, A-S3, 2nd Floor, Above
HDFC Bank, Aquem, Margao, Goa.

5. Mohammad Shaikh, Major in age,
Indian National, s/o Shaikh
Abdul Rehman, r/o 82/3, Indona
Davorlim, Salcete, Goa. Petitioners

Versus

1. Mr. Mariano Mesquita, Major in
age, Indian National, s/o
Marcal alias Joao Paulo
Mesquita, r/o H. No. 105,
Naquelim, Chicalim, Goa.

2. Mrs. Aurora Fernandes E Mesquita, major in age, Indian National, w/o Mariano Mesquita, r/o House No. 105, Naquelim, Chicalim, Goa.
3. Mr. Andrew Mesquita, major in age, Indian National, s/o Marcal alias Joao Paulo Mesquita, r/o H. No. 121/1, Naquelim, Chicalim, Goa.
4. Mrs. Angelica Mesquita, Major in age, Indian National, w/o Andrew Mesquita, r/o H. No. 121/1, Naquelim, Chicalim, Goa.
5. Mr. Jose Caetano Mesquita, Major in age, Indian National, s/o Marcal alias Joao Paulo Mesquita, r/o H. No. 105/B, Naquelim, Chicalim, Goa.
6. Mrs. Bela Mesquita, Major in age, Indian National, w/o Jose Caetano Mesquita, r/o H. No. 105/B, Naquelim, Chicalim, Goa.
7. Mr. Manuel Mesquita, Major in age, Indian National, s/o Marcal alias Joao Paulo Mesquita, r/o H. No. 112/B, Naquelim, Chicalim, Goa.
8. Mrs. Idalin Mesquita, Major in age, Indian National, w/o Manuel Mesquita, r/o H. No. 112/B, Naquelim, Chicalim, Goa.

9. Mrs. Joana Mesquita, Major in age, Indian National, d/o Marcal alias Joao Paulo Mesquita, r/o H. No. 164/A, Penta, Chicalim, Goa.
10. Mr. Albert Fernandes, Major in age, Indian National, s/o Domingos Fernandes, r/o H. No. 164/A, Penta, Chicalim, Goa.
11. Mrs. Leonora Mesquita, Major in age, Indian National, d/o Marcal alias Joao Paulo Mesquita, r/o H. No. 118/1, Naquelim, Chicalim, Goa.
12. Mr. Rosario Costa, Major in age, Indian National, s/o Sebastiao Costa, r/o H. No. 118/1, Naquelim, Chicalim, Goa.
13. Mrs. Lourdina Mesquita, Major in age, Indian National, d/o Marcal alias Joao Paulo Mesquita, r/o H. No. 112/A, Naquelim, Chicalim, Goa. Respondents

Shri Nitin Sardessai, Senior Advocate with Shri Gaurang Panandiker and Ms. Neha Shirodkar, Advocates for the Petitioners.

Shri Surendra Desai, Senior Advocate with Shri A.V. Pavithran and Shri Sanman Keny, Advocates for the Respondents.

CORAM:- C. V. BHADANG, J.

RESERVED ON:- 7th OCTOBER, 2016

PRONOUNCED ON:- 13th OCTOBER, 2016

JUDGMENT:

Rule made returnable forthwith. The learned Counsel for the respondents waives service. Heard finally by consent of the parties.

2. The petitioners herein are the original defendant nos. 2 to 6, while the respondent nos. 1 to 13 are the original plaintiffs. For the sake of convenience the parties are referred to in their original capacity. The plaintiffs filed Special Civil Suit No. 16/2013, against petitioners and others for permanent and mandatory injunction. The subject matter of dispute is 16,168 square metres of land out of survey no. 60/2 (old matriz no. 786) of the property known as "Um Terreno Oiteral Aforado" situated at Sancoale.

3. The case made out in the plaint is that the larger area bearing matríz no. 786 situated at Sancoale, Dabolim Village, Mormugao, was belonging to Shri Marcal alias Joao Paulo Mesquita, who died intestate leaving behind his moiety holder, Smt. Joaquina Mesquita (defendant no. 1). Marcal Mesquita sold 3,932 square metres of land to Shri Domingos Dias vide sale deed dated 05.03.1969, while an area admeasuring 2,500 square metres was sold to Smt. Vasanti Lotlikar on 04.09.1969. Marcal Mesquita sold the "remaining land" from out of said property vide sale deed dated 18.02.1970 to Shri Sheikh Shirajuddin and others (defendant nos. 7 to 41). The present petitioners claim to have purchased 16,168 square metres of land from Shri Sheikh Shirajuddin under sale deed dated 21.07.2011.

4. It is the specific case made out in the plaint that the present petitioners could not have purchased 16,168 square metres of land, as the

predecessors of the petitioners (defendant nos. 7 to 41) had purchased only 13,568 square metres of land vide sale deed dated 18.02.1970.

5. It is contended that some time in May, 1981, the original defendant no. 1, Joaquina Mesquita found that the survey record of the suit property did not figure their names, when a D.C. Case No. 119/Dabolim was initiated. However, on the basis of the objection raised by the defendant no. 7, the Awal Karkun, dismissed the application for correction. This was challenged unsuccessfully before the Deputy Collector. However, the learned Additional Collector allowed the appeal and the matter has been remanded back, which is still said to be pending. It is contended that while this proceedings were pending before the Survey Authority, defendant no. 46 moved an application to carve out separate portion to the extent of 1,250 square metres from defendant nos. 44 and 45. It is

contended that notwithstanding the pendency of these cases, the plaintiffs and original defendant no. 1, have been in cultivating possession of the suit property, where they have been cropping wild grass during heavy monsoon period. It is contended that some time in November, 2011, when the plaintiff no. 1 went to the suit property, a person who identified himself as Raju Nadar came there, informing that he is intending to purchase the said property through one broker Ashley Lewis. In the first week of September 2012, said Raju Nadar had again been to the said property alongwith the broker. In January, 2013, during the pendency of the D.C. proceedings, there were attempts to encroach on the suit property, when plaintiff no. 1 observed that a portion of the barbed wire fencing has been partly damaged and removed. At that time, the plaintiffs observed that there was a board erected in the suit property, stating that the land belongs to Dinesh Nadar and family. The plaintiffs addressed letter

on 22.05.2013 to the Chairman, Mormugao Planning and Development Authority, Vasco-da-Gama (MPDA), asking it not to grant any development permission. However, it was realised that such a permission was already granted on 18.06.2013, without hearing the plaintiffs. Lastly, it is contended that some time around 13.08.2013, the plaintiffs have been forcefully and unlawfully dispossessed by putting heavy earth machinery on the suit property. In such circumstances, the plaintiffs filed the suit for the following reliefs:

"a) This Hon'ble Court may be pleased to pass an order evicting the defendant nos. 2 to 6 from the said property.

b) For an order of injunction restraining the defendant nos. 2 to 6 from dispossessing the plaintiffs or otherwise in due process of law.

c) For an order of mandatory injunction against the defendants

directing them to restore the suit property to its original use.

d) For an order restraining the defendant nos. 2 to 6 from creating any third party rights in the suit premises or from renting or leasing out the premises to third parties during the pendency of the hearing and disposal of the suit.

e) For mesne profits against the defendant nos. 2 to 6.

f) For an ad-interim order in terms of prayer clause a, b and d."

6. The plaintiffs also filed an application for temporary injunction.

7. The petitioners resisted the suit and the application. It is contended that the petitioners have purchased the "remaining land" which is admeasuring 16,168 square metres. It is submitted

that the petitioners are in possession of the property from the date of its purchase i.e. 21.07.2011 and they have obtained a development permission.

8. The learned Trial Court by an order dated 09.12.2013 dismissed the application for temporary injunction. The learned Trial Court found that the plaintiffs have not pleaded the area of the property originally purchased by late Marcal Mesquita, their predecessor. The learned Trial Court found that considering the case of the plaintiffs that different portions of the property were sold by three sale deeds, it was for the plaintiffs to prove the area and its location and there is no pleading to that effect. The learned Trial Court found that the plaintiffs have thus failed to make out a *prima facie* case of either ownership or possession. The learned Trial Court also noticed the submission on behalf of the defendant nos. 2 to 6 that wild grass

is not cultivated "but grows wildly" and in that view of the matter, the application was rejected.

9. The plaintiffs challenged the same before the learned District Judge in Miscellaneous Civil Appeal No. 10/2015, which has been allowed vide judgment and order dated 08.09.2015 in the following terms:

"This appeal is allowed. Consequently, the impugned order dismissing the application for temporary injunction is quashed and set aside. As such, the application for temporary injunction is allowed and defendant nos. 2 to 6 are restrained from dispossessing the plaintiffs and carrying out any construction in the suit property.

Defendant nos. 2 to 6 are also restrained from creating any third parties right in the suit property/premises and/or from renting or leasing out the premises to third parties during the pendency

of the hearing and disposal of the suit."

10. Feeling aggrieved the petitioners are before this Court.

11. I have heard Shri Sardessai, the learned Senior Counsel for the petitioners and Shri Dessai, the learned Senior Counsel for the respondents. With the assistance of the learned Senior Counsel for the parties, I have perused the impugned order passed by the learned Trial Court and the judgment rendered by the learned Appellate Court.

12. It is submitted on behalf of the petitioners that the sale deeds dated 18.02.1970 and 21.07.2011, have not been challenged in the suit. It is submitted that during survey, the total area of the survey holding was found to be 21,350 square metres, when a survey was made and that is not the area reflected in any of the title documents. It is

submitted that the discrepancy as to the area does not clothe the plaintiffs with the ownership or possession of the disputed property. It is pointed out that in paragraph-20 of the plaint, the plaintiffs have claimed that they have been dispossessed. It is contended that various prayer clauses in the plaint are contradictory and cannot go together. The learned Senior Counsel submitted that the Appellate Court in paragraph-30 of the impugned judgment has found that the title of defendant nos. 7 and 8 to 43 (the predecessors of the petitioners), would be restricted to 13,568 square metres. It is pointed out that the learned District Judge has held that after deducting the area sold by sale deeds dated 05.03.1969, 04.09.1969, 18.02.1970 and 21.07.2011, the remaining area of the suit property would be the entitlement of the plaintiffs. It is submitted that the learned District Judge has not reversed the finding of the Trial Court about the plaintiffs having failed to

prima facie establish their possession. It is submitted that when the plaintiffs, themselves are coming with the case that they have lost possession, somewhere in August, 2013, injunction restraining the petitioners from dispossessing the plaintiffs, could not have been granted. Alternatively, it is submitted that although, the petitioners have purchased the entire remaining land (after deducting the area, which is sold under the sale deeds dated 05.03.1969 and 04.09.1969), which comes to 16,168 square metres, the petitioners are prepared to set apart the balance land of about 2,600 square metres, pending disposal of the suit, so as to protect the interest of the plaintiffs in the event, they succeed in the suit. The learned Senior Counsel submitted that the land has been converted, wherein 40 plots have been laid, out of which, 12 plots are already sold. He submits that there are laches on the part of the plaintiffs in bringing the suit. It is pointed out that the sale deed in favour of the

predecessors of the petitioners is of the year 1970 and the one in favour of the petitioners is of the year 2011, while the suit is filed in October, 2013. It is submitted that in such circumstances, the plaintiffs are not entitled for grant of temporary injunction.

13. On the contrary, it is submitted on behalf of the respondents that the original sale deeds are not produced by the petitioners. It is submitted that in the absence of the land being partitioned by metes and bounds, the respondents would continue to be joint owners/co-owners of the property. Reliance is placed on Articles 2176 and 2177 of the Portuguese Civil Code (the PCC, for short), which prohibits one of the co-owners dealing with the property, to the exclusion of the others. It is submitted that the petitioners could not have purchased 16,168 square metres of land, when their predecessors had purchased 13,568 square metres of

property. Reliance is also placed on Article-1566 of the PCC, under which there is a right of preemption in favour of the co-owners. Reliance is also placed on Article-2305 of the PCC. It is submitted that the petitioners have filed two applications for amendment, out of which, first application is allowed and the second application raising a challenge to the sale deed, is pending before the Trial Court. It is submitted that there are several disputed questions to be gone into and if, third party rights, are created it would lead to complications. It is submitted that in order to avoid multiplicity of proceedings, the injunction granted needs to be confirmed.

On behalf of the respondents, reliance is placed on the decision of the Supreme Court in the case of **Waryam Singh and Another Vs. Amarnath and Another**, AIR 1954 SC 215 and in the case of **Radhey Shyam and Another Vs. Chhabi Nath and Others**, (2015) 5 SCC 423, in order to submit that the scope of

interference under Article-227 of the Constitution of India, is limited and the impugned judgment of the Appellate Court does not warrant interference.

14. I have carefully considered the rival circumstances and the submissions made. A perusal of paragraph-9 of the sale deed dated 18.02.1970 in favour of defendant nos. 7 to 41 shows that the "remaining area" of approximately 13,568 square metres of land matrized no. 786 was sold for Rs.23,744/- at the rate of 1.75 paise per square metre. The learned District Judge has calculated the total price by taking into consideration the area, which is said to be sold, by multiplying it with the price 1.75 paise per square metre and has concluded and to my mind rightly so, that an area measuring 13,568 square metres was purchased by defendant nos. 7 to 41 (predecessors of the plaintiffs). The sale deed dated 21.07.2011 in favour of the petitioners refers to the description

of the property in Schedule-I appended to the sale deed, which reads as under:

"All that undivided area of 16,168 square metres out of the property known as 'OITEIRAL DO LADO DE SUL or AFRAMENTO' admeasuring an area of 21,350 (Twenty One Thousand Three Hundred Fifty) square metres, situated at Sancoale within Dabolim Village Limits, Taluka and Sub-District of Mormugao, South Goa, described in Land Registration of Salcete under No. 23.707 of Book No. 61, New Series and enrolled in the Taluka Revenue office of Mormugao under Matriz No. 786, surveyed as a whole under Survey No. 60/2, of Dabolim village (hereinafter referred to as 'the said property') and the aforesaid property is bounded as under:

On the East and South: Property of Comunidade of Sancoale.

On the North: Property of Shri Jose Roque Fernandes.

On the West: Property of Shri Antonio Aleixo das Dores Furtado."

15. The sale deed also recites "all that balance area of the said property", is being sold to the petitioners. Thus, it is apparent that the entire dispute has arisen on account of the fact that during the survey of the land matriz no. 786, (when it was allotted survey no. 60/2), the total area of the holding was found to be 21,350 square metres which was in excess of the area sold by the three sale deeds dated 05.03.1969, 04.09.1969 and 18.02.1970. Thus, *prima facie* no exception can be taken to the finding that the predecessors of the petitioners having purchased 13,568 square metres of land, could not have sold 16,168 square metres of land to the petitioners. The difference is of 2,600 square metres.

16. The next question is, what is the effect and whether this can entitle the plaintiffs to obtain an

injunction against the petitioners, in respect of the entire area admeasuring 16,168 square metres.

17. It is significant to note that the sale deed in favour of the defendant nos. 7 to 41 is of the year 1970, while the one in favour of the petitioners is of July, 2011. The suit is filed in October, 2013. That apart, the plaintiffs in paragraph-20 of the plaint have come out with a case that they have already been dispossessed. The case made out by the plaintiffs that they were growing/cultivating wild grass on the land has not been accepted by the Trial Court on noticing the submission on behalf of the petitioners that the grass does not need cultivation "but grows wildly". The Appellate Court has neither reversed this finding nor has recorded a finding that the respondents are in possession of the property. Thus in my view, the petitioners are right in contending that the injunction, restraining the petitioners

from interfering with the possession by the respondents, could not have been granted. At this stage, *prima facie* there is no material to show that the respondents are in possession of the suit land.

18. Insofar as the contention based on Articles 2176 and 2177 of the PCC, that the respondents being the joint owners in possession of the property and about a right of preemption under Article-1566 of the PCC, is concerned the same was not raised before any of the Courts below. It is thus, not possible to consider the same for the first time in this petition. In my considered view, *prima facie* it cannot be accepted that, because in the survey, the land was found to be in excess of what was sold by the three sale deeds, can clothe the respondents being the co-owners of the property alongwith the petitioners. It is true that the property has not been separated by metes and bounds, however, in all probability, it was not necessary, when the sale

deed dated 18.02.1970 was executed in favour of defendant nos. 7 to 41. The parties were under impression that the entire remaining land was 13,568 square metres. It was on account of this, that said sale deed refers to "the entire remaining land" as well as the specific area being 13,568 square metres. Thus, as noticed earlier, the whole dispute arose on account of the fact that in the survey, an area admeasuring 2,600 square metres was found in excess. It is further significant to note that the plaint as it stands, does not challenge the sale deed. The first application filed by the petitioners for amendment of the plaint, which has been allowed, seeks to incorporate the following paragraph (21-A) and prayer clause (C-1), which read thus:

"21-A. The plaintiffs are also entitled to continue in possession of the suit property till such time as the defendant nos. 2 to 6 partition their alleged share or plot of 13,568 square metres of Survey No. 60/2 by

metes and bounds so as to separate the said portion from the balance portion of at least 2,600 square metres belonging to plaintiffs.

C-1. For a judgment and Decree of permanent injunction restraining Defendant nos. 2 to 6 from interfering with the possession of plaintiffs until such time as the respective shares of plaintiffs and defendant nos. 2 to 6 are partitioned by metes and bounds."

19. The second application for amendment, which seeks to incorporate a challenge to the sale deed by incorporation of paragraph 6-A, is said to be pending before the Trial Court. Be that as it may, in the amendment already incorporated, the petitioners are seeking injunction till the balance portion of 2,600/- square metres is separated by metes and bounds.

20. In my considered view, the learned District Judge was not justified in granting injunction, restraining the petitioners from interfering with the possession of the respondents, particularly when the respondents/plaintiffs made out a case that they have been dispossessed in August, 2013 and without reversing the finding of the Trial Court that the respondents have failed to *prima facie* establish possession. The order granting injunction in respect of the entire land, in the absence of a finding that the respondents are in possession, would be perverse and infirm.

21. This takes me to the issue of injunction, insofar as creation of third party rights, is concerned. In this regard, the petitioners not only have a sale deed in their favour, but have obtained the necessary development permission from the MPDA on 18.06.2013. Thus, the petitioners cannot all

together be restrained from dealing with the property. It is evident that the transfer of the property, pending disposal of the suit, would be subject to lis pendence under Section 52 of the Transfer of the Property Act. In a dispute of the present nature, the Court has to balance equities and in appropriate case, can mould the relief, so that the interest of both the parties are safeguarded. As noticed earlier, the petitioners are willing to set apart 2,600 square metres of land, during the pendency of the suit, so that the interest of respondents/plaintiffs are safe guarded, in the event they succeed in the suit. I find that this is a case in which, the ultimate relief can be moulded, so as to balance equities between the parties.

22. Insofar as the scope of challenge under Article-227 of the Constitution of India is concerned, the same is no longer *res integra*, as it

has been the subject matter of several decisions, the earliest being in the case of **Waryam Singh** (supra). In a recent decision in the case of **Radhey Shyam** (supra), the principle question was whether the judicial orders of the civil Court are amenable to challenge under Article-226 of the Constitution of India. In the case of **Shalini Shyam Shetty and Another Vs. Rajendra Shankar Patil, (2010) 8 SCC 329**, the Apex Court has culled out the principles governing exercise of supervisory jurisdiction under Article-227, in paragraph 62 of the judgment. It has been *inter alia* held that the supervisory jurisdiction is to ensure that the Court and Tribunals, operate within the bounds of their authority and to prevent any manifest injustice or miscarriage of justice. In the exercise of such jurisdiction, the High Court cannot correct mere errors of fact or law and the jurisdiction exercised is neither appellate nor revisional in nature.

23. In the present case, as noticed earlier, the Appellate Court without recording the finding about the respondents being in possession and in fact overlooking the fact that on their own saying the respondents have lost the possession, has granted injunction, restraining the petitioners from interfering with the possession of the plaintiffs, which in my considered view would be a patent error requiring interference.

24. In the result, the following order is passed:

O R D E R

(a) The petition is partly allowed.
The impugned order is modified.

(b) The petitioners are restrained from carrying out any construction and/or creating any third party rights in respect of 2,600 square metres of land (which the petitioners

shall set apart), during the pendency of the suit.

(c) It is made clear that, transfers if any, made by the petitioners, after the filing of the suit, in respect of the land excluding the area of 2,600 square metres as above, shall be subject to lis pendence under Section 52 of the Transfer of the Property Act.

(d) Rule is partly made absolute in the aforesaid terms, with no order as to costs.

C. V. BHADANG, J.

EV