

IN THE HIGH COURT OF BOMBAY AT GOA

SECOND APPEAL NO. 31 OF 2007

1. Shri Ismail Adam Khan (since deceased)
Through his legal heirs,
1(a) Mrs. Jaida Ismail Khan,
1(b) Mr. S. R. Amin,
Sector No.3, H.No.68,
Aroli, Thana Belapur road,
New Bombay, Ghansoli Post,
1(c) Sahida Ismail Khan,
1(d) Mr. Enaitulla Ismail Khan,
1(e) Rahimtulla Ismail Khan,
All residing at Velus,
Valpoi, Sattari Goa.
 2. Smt. Bibhiji Ismail Khan,
resident of Velus,
Valpoi, Sattari Goa.
(Original defendant nos. 1 and 2)
- ... Appellants

Versus

1. Shri Gajanan Bhiku Velingkar
(since deceased)
1(a) Mirabai Gajanan Velingker,
1(b) Rajendra Gajanand Velingker,
Son of Gajanand Velingker,
1(c) Ranjana Rajendra Velingker,
wife of Rajendra Velingker,
1(d) Prasad Gajanand Velingker,
son of Gajanand Velingker,
1(e) Sindhu Prasad Velingker,
wife of Prasad Velingker,
1(f) Reshma Velingker,
Daughter of Gajanand Velingker,

- 1(g) Nandini Sirsat
Daughter of Gajanand Velingkar,
married,
1(h) Surendra Sirsat,
son in law of Gajanand Velingkar,
All residents of H.No.228, Nagargao Road,
Opposite Kadamba Bus Stand,
Valpoi, Sattari Goa.
2. Smt. Meerabai Gajanan Velingkar,
wife of Gajanan Velingkar,
3. Smt. Premabai Kashinath Velingkar,
widow of Kashinath Velingkar,
(since deceased)
represented by her L.Rs. Respondent nos.
4, 5 and 6.
4. Shri Bhiku Kashinath Velingkar,
son of late Kashinath Velingkar,
5. Smt. Rukmini Bhiku Velingkar,
6. Shri Krishna Kashinath Velingkar,
All residing at Velus, Sattari Goa.
(all original plaintiffs)
7. Shri Yeshwant Vithal Vadkar,
8. Smt. Laxmi Yeshwant Vadkar,
9. Smt. Radha Krishna Gawas,
Near Multipurpose hall,
Gokulwadi Sanquelim, Goa.
10. Shri Babli Krishna Gawas (expired)
11. Shri Guru Krishna Gawas,

Massordem, Valpoi,
Sattari Goa. ... Respondents
(original defendants no.3 to 7).

Mr. P. S. Lotlikar, Advocate for the appellants.

Mr. Sudin Usgaonkar, Senior Advocate with Ms. V. Palyekar,
Advocate for the respondent nos. 1(a) to 1(e), 4 and 5.

Coram:- F. M. REIS, J.

Date:- 28th July, 2017

ORAL JUDGMENT

Heard Mr. P. S. Lotlikar, learned counsel appearing for the appellants and Mr. Sudin Usgaonkar, learned Senior Counsel appearing for the respondent nos. 1(a) to 1(e) and 4 and 5.

2. The above appeal came to be admitted by an order dated 14.06.2007 on the following substantial questions of law :

1. Whether the respondents/plaintiffs who had approached the Court with the plea that they were owners in possession of the suit field

would be granted the reliefs of declaration and permanent injunction as has been done by the Courts below, after having found that the respondents/plaintiffs had failed to establish that they were owners of the suit property, particularly, in the absence of any pleadings, either admitting ownership of the Government or showing how the respondents/plaintiffs have acquired possession of the suit paddy field and that their possession was lawful and also in view of the fact that the revenue authorities had confirmed the possession of the appellant in respect of the suit paddy field ?

2. Whether the suit, in so far as the respondents/plaintiffs sought mandatory injunction to direct correction of the record of rights was barred by Section 106 of the Land Revenue Code and whether such a suit could be entertained without joining the persons, whose

orders were being challenged, as parties to the suit ?

3. Whether on the face of the documents of title produced by the respondents/plaintiffs which show that the suit paddy field was of the ownership of the Government and on the face of the conclusion reached by the Courts below that the suit paddy field did not belong to the respondents/plaintiffs, the suit of the respondents/plaintiffs for declaration of permanent and mandatory injunction could have been decreed by the Court, particularly, in view of the fact that the title documents produced by the respondents/plaintiffs showed that the suit property was owned by the Government ?
4. Whether the Courts below could have declared the order of the Deputy Collector dated 10th May, 1988 and the order of the Awal Karkun dated 29th July, 1983 as null and void by going

into the merits of the said order, after the said orders had been confirmed in appeal and the second appeal, particularly, in view of the fact that the Courts below had recorded a clear finding that the respondents/plaintiffs were not owners of the suit paddy field ?

3. Mr. P. S. Lotlikar, learned counsel appearing for the appellants has pointed out that the subject matter of the property is a portion of the property surveyed under No.44/5-A of Velus Village of Valpoi Goa which according to the appellants is in possession of the appellants in view of a lease created by the relative in favour of the appellants. The learned counsel further pointed out that the said property was surveyed in the name of Arjun Gawas who had no connection with such property and as such, the appellant obtained an affidavit of such person to delete his name from the survey records and record the name of the appellant. The learned counsel further pointed out that based on such correction, the property was partitioned under the Land

Revenue Code whereby a separate survey number came to be issued to such property as survey no.44/5-A. The learned counsel further submitted that both the Courts below have come to the conclusion that the respondents have failed to establish their title to the subject property and as such the question of granting any relief of injunction and declaration of possession would not at all arise. The learned counsel further pointed out that except for an area of 3805 square metres of the property, the respondents have no right at all to any other area beyond such area and as such the Courts below have failed to consider that as the respondents have failed to establish that the possession is referable to a legal title, the respondents were not entitled for such relief. The learned counsel further pointed out that the documents produced by the appellants have been discarded on untenable consideration. It is further pointed out that the learned Judge has also granted the relief of rectification of survey records which is not permissible in view of the judgment passed by the learned Single Judge of this Court. It is further submitted that as the respondents have failed to show their title over the subject property, the question of

granting any permanent injunction would not arise and as such the substantial questions of law framed by this Court be answered in favour of the appellants.

4. On the other hand, Mr. Sudin Usgaonkar, learned Senior Counsel appearing for the respondents has submitted that the properties surveyed under Nos.44/3 and 44/5 are in possession of the respondents. It is further submitted that though the Alwara is in favour of the respondents, the substantial portion of the property surveyed under no.44/5 and the remaining portion of such property also continued in possession of the respondents herein. It is further pointed out that without giving a notice to the respondents and by a mischievous exercise, the appellant had culled out a portion of the property surveyed under no.44/5 as being survey no.44/5-A to include the name of the appellant. The learned Senior Counsel further submitted that both the Courts below upon appreciating the evidence on record have concurrently found that the respondents were in possession of the portion of the property surveyed under no.44/5-A and as such the

Courts below were justified to grant the relief in favour of the respondents. The learned Senior Counsel further pointed out that the appellants have failed to establish any right to the subject property nor any better right to remain in possession of such property and as such, the Courts below were justified to grant the relief. The learned Senior Counsel also submitted that there were earlier proceedings initiated under Section 4 of the Mamlatdar's Courts Act against the appellant herein wherein the appellant had accepted that the subject property was in possession of the respondents herein. The learned Senior Counsel as such points out that in view of the law now well settled, the third relief granted by the learned Judge to rectify the survey records may be quashed and set aside.

5. I have considered the submissions of the learned counsel and I have also gone through the records. On perusal of the judgments passed by the Courts below, both the Courts have concurrently found that the respondents are in possession of the subject property. While arriving at such conclusion, the Courts

below have accepted the oral testimony of the witnesses examined by the respondents to hold that the portion of the paddy field which is surveyed under No.44/5-A is in possession of the respondents herein. The Courts below also found that this portion of the property was originally a part of the property surveyed under No.44/5, which admittedly was included in the Alwara granted by the Government in favour of the respondents. The Courts below have also found that the portion of the property is in occupation and possession of the respondents based on the residential house and other works carried out by the respondents therein. The findings of fact arrived at based on the appreciating evidence on record cannot be reappreciated by this Court in the present Second Appeal. The evidence recorded has been appreciated upon examining the oral as well as the documentary evidence produced on record. The Courts below have believed the evidence of the witnesses examined on behalf of the respondents. As such, the findings of fact on possession as arrived at by the Courts below cannot be interfered by this Court in the present Second Appeal.

6. On the background of such findings of fact, the only aspect which remains to be examined is what relief can be granted in such circumstances, especially when both the Courts below have concurrently found that the ownership claimed by the appellants has not been established on the material on record. The fact that the respondents had Alwara in their favour is not in dispute. Considering that the possession is found to be in favour of the respondents, in such case what would be the material to find out whether the appellants who are attempting to interfere with such possession have a better right to remain in possession of the property. In the present case, way back in the year 1978 when the proceedings under Section 4 of the Mamlatdar's Courts Act were initiated, it was found based on the oral evidence and the admission of the testimony of the appellant that the possession was with the respondents herein. Admittedly, the appellants have not initiated any proceedings since the time such orders were passed by the learned Mamlatdar to get their alleged claim of ownership and possession over the subject property adjudicated in a proper forum. In such circumstances,

considering the possession which continued since so many years, it was not open to the appellants to interfere with such possession of the respondents. Once a person is found to be in possession of a specific portion of the property, such possession can be interfered only by a true owner or by a person who has a better right to remain in possession. In the present case, the Courts below have found that the appellants have failed to show their alleged claim of entitlement to remain in possession of the property on the basis of the lease agreement allegedly executed by the relative in their favour. Admittedly, the relative has not been examined nor party to such proceedings. In such circumstances, no fault can be found in the relief granted by the Courts below. The only aspect which could be added while granting the relief is that such possession is protected unless dispossessed by due process of law by a person who has a better right to remain in possession or ownership right over such property.

7. In similar circumstances, the Apex Court in the judgment reported in **(2004) 1 SCC 769** in the case of ***Rame Gowda (Dead) by Lrs. V/s M. Varadappa Naidu (Dead) by Lrs and another,*** has observed at paras 11 and 12 thus :

“11. In the present case the trial Court has found the plaintiff as having failed in proving his title. Nevertheless, he has been found to be in settled possession of the property. Even the defendant failed in proving his title over the disputed land so as to substantiate his entitlement to evict the plaintiff. The Trial Court, therefore, left the question of title open and proceeded to determine the suit on the basis of possession, protecting the established possession and restraining the attempted interference therewith. The Trial Court and the High Court have rightly decided the suit. It is still open to the defendant-appellant to file a suit based on his title against the plaintiff-respondent and evict the latter on the former establishing his better right to possess the property.

12. The learned counsel for the appellant

relied on the Division Bench decision in Dasnam Naga Sanyasi and Anr. Vs. Allahabad Development Authority, Allahabad and Anr. AIR 1995 Allahabad 418 and a Single Judge decision in Kallappa Rama Londa Vs. Shivappa Nagappa Aparaj and Ors. AIR 1995 Karnataka 238 to submit that in the absence of declaration of title having been sought for, the suit filed by the plaintiff-respondent was not maintainable, and should have been dismissed solely on this ground. We cannot agree. Dasnam Naga Sanyasi and Anr.'s case relates to the stage of grant of temporary injunction wherein, in the facts and circumstances of that case, the Division Bench of the High Court upheld the decision of the court below declining the discretionary relief of ad-interim injunction to the plaintiff on the ground that failure to claim declaration of title in the facts of that case spoke against the conduct of the plaintiff and was considered to be 'unusual'. In Kallappa Rama Londa's case, the learned Single Judge has upheld the maintainability

of a suit merely seeking injunction, without declaration of title, and on dealing with several decided cases the learned Judge has agreed with the proposition that where the suit for declaration of title and injunction is filed and the title is not clear, the question of title will have to be kept open without denying the plaintiff's claim for injunction in view of the fact that the plaintiff has been in possession and there is nothing to show that the plaintiff has gained possession by any unfair means just prior to the suit. That is the correct position of law. In *Fakirbhai Bhagwandas and Anr. Vs. Maganlal Haribhai and Anr.* AIR 1951 Bombay 380 a Division Bench spoke through Bhagwati, J. (as his Lordship then was), and held that it is not necessary for the person claiming injunction to prove his title to the suit land. It would suffice if he proves that he was in lawful possession of the same and that his possession was invaded or threatened to be invaded by a person who has no title thereof. We respectfully agree with the view so taken.

The High Court has kept the question of title open. Each of the two contending parties would be at liberty to plead all relevant facts directed towards establishing their titles, as respectively claimed, and proving the same in duly constituted legal proceedings. By way of abundant caution, we clarify that the impugned judgment shall not be taken to have decided the question of title to the suit property for or against any of the contending parties.”

8. Taking note of the observations as referred to herein above, I find that the relief granted by the Courts below cannot be faulted. Needless to say, as observed therein, the appellants if so advised can file a suit based on title to recover the possession of such portion of the property in accordance with law.

9. In view of the concession of Mr. Sudin Usgaonkar, learned Senior Counsel appearing for the respondents that the relief granted by the Courts below to the extent of directing the Talathi and other Survey Authorities to delete the names of

Krishna Arjun Gawas and Ismail Adam Khan and to include the names of the respondents in the occupants column of the record of rights stands quashed and set aside. The party if so advised would have to get the survey records rectified in accordance with law. The substantial questions of law are answered accordingly.

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

ORDER

- (i) The appeal is partly allowed.
- (ii) The relief granted by the Courts below thereby directing the Mamlatdar of Sattari Taluka or Talathi of Valpoi, to delete the names of Krishna Arjun Gawas and Ismail Adam Khan and to include the names of the respondents in the occupant column of the record of rights in respect of the property surveyed under Nos.44/5 and 44/5-A is quashed and set aside.
- (iii) The remaining relief granted by the Courts below stands confirmed in the light of the

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observations made herein above.

(iv) The appeal stands disposed of accordingly.

F. M. REIS, J.

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