

IN THE HIGH COURT OF BOMBAY AT GOA

SECOND APPEAL NO. 72 OF 2010

1. Shri Govind Baboni Gaonkar
and his wife
2. Smt. Soku Govind Gaonkar
both died by their legal heirs
(a) Smt. Mogrem Manohar Gaonkar
55 years of age, and her husband,

(b) Shri Manohar Ganesh Gaonkar
60 years of age,
both residing at H.No.55,
Bandoli, Sanguem Goa. Appellants

V e r s u s

1. Shri Sanvollo Fondu Gaonkar
(since deceased)
(a) Smt. Sukan Narayan Gaonkar,
widow, 58 years of age,
daughter of law of the deceased,

1(b) Shri Hari Sanvlo Gaonkar
40 years of age, agriculturist,
married, son of the deceased,

1(c) Smt. Sheetal Hari Gaonkar,
35 years of age, agriculturist,
married, daughter in law of the deceased,

1(d) Shri Ratnakar Sanvlo Gaonkar
37 years of age, agriculturist,
married, son of the deceased,

1(e) Smt. Dulu Ratnakar Gaonkar
35 years of age, agriculturist,
married, daughter in law of the deceased

1(f) Shri Anil Sanvlo Gaonkar
35 years of age, agriculturist,
married, son of the deceased,

1(g) Smt. Sampada Anil Gaonkar,
30 years of age, agriculturist,
married, daughter in law of the deceased
All residing at Soliem, Cacoda,
Quepem Goa.

1(h) Smt. Kensar Babuso Gaonkar
42 years of age, agriculturist,
married, daughter of the deceased,

1(i) Shri Babuso Gaonkar,
(deleted)

1(i)(a) Shri Gopal Babuso Gaokar,
major, married, agriculturist,
Grandson of the deceased Res. no.1,

1(i)(b) Smt. Maya Gopal Gaokar,
major, married, agriculturist,
grand-daughter in law of deceased Resp. No.1,

1(i)(c) Shri Ganesh Babuso Gaokar,
major, married, agriculturist,
Grandson of deceased Resp. No.1

1(i)(d) Smt. Sukanti Ganesh Gaokar,
major, married, agriculturist,
Grand-daughter in law of deceased Resp. No.1

1(i)(e) Shri Sunil Babuso Gaokar,
major, unmarried, agriculturist,
Grandson of deceased Resp. No.1
All residents of Jariwada,
Gudi Paroda, Quepem Goa.

1(j) Smt. Shevte Raghunath Divkar,
35 years of age, agriculturist,
married, daughter of the deceased,

1(k) Shri Raghunath Divkar
38 years of age, agriculturist,
married, son in law of the deceased
Both residing at Naywada,
Akmal, Quepem Goa.

1(l) Smt. Savita @ Suvidha Sudhakar Gaonkar
33 years of age, agriculturist,
married, daughter of the deceased

1(m) Shri Sudhakar Gaonkar
35 years of age, agriculturist,
married, son in law of the deceased
Both residing at H.No.227/1, Gaonkarwada,
Malkarne, Quepem Goa

2. Smt. Chandar Khampru Gaonkar
major, both residing at Soliem, Cacoda,

3. Shri Mukund Molu Gaonkar,
since deceased by his heirs:
3(a) Smt. Laxmi Mukund Gaokar,
major, residing at Soliem, Cacoda

3(b) Smt. Vithem Ram Ghadi,
widow residing at Ghadiamwada, Cacoda

3(c) Smt. Kamal Vithal Gaonkar

and her husband,

3(d) Shri Vithal Gaonkar,
both residing near School at Guddo,
Avedem, Quepem.

3(e) Smt. Leela Arjuna Ghadi
widow, residing at Soliem,
Cacoda, Quepem

4. Shri Surya Molu Gaonkar,
major, since deceased through legal heirs
 - 4(a) Shri Uttam Surya Gaonkar, and his wife
 - (b) Smt. Urmila Uttam Gaonkar,
 - (c) Shri Santosh Surya Gaonkar and his wife
 - (d) Smt. Shonha Santosh Gaonkar
 - (e) Shri Rashunath Surya Gaonkar and his wife
 - (f) Smt. Bharati Rashunath Gaonkar,
 - (g) Shri Dhaklo Surya Gaonkar
 - (h) Shri Laxman Surya Gaonkar
 All residing at Soliem, Kakoda
 - (i) Smt. Jiddunk Chandru Gaonkar and
her husband
 - (j) Shri Chandru Gaonkar,
both residing at Vaddem Neturkem,
Sanguem.
 - (k) Smt. Anjani Chandrakant Molik
and her husband
 - (l) Shri Chandrakant Molik
both residing at Malkapan, Quepem.
 - (m) Smt. Sulabh Kiran Gaonkar,
and her husband
 - (n) Kiran Gaonkar
both residing at Bethora, Ponda.

5. Shri Molu Ramchandra Gaonkar, major
(since deceased)

5(a) Smt. Mortem Molu Gaonkar,

widow of the respondent no.5,
major of age, housewife,
5(b) Shri Babal Molu Gaonkar
54 years of age, service,
married, son of Shri Molu Gaonkar
5(c) Smt. Bindia Babal Gaonkar,
49 years of age, housewife,
married, daughter in law of
Shri Molu Gaonkar
5(d) Shri Sitaram Molu Gaonkar
48 years of age, service,
married, son of Shri Molu Gaonkar
5(e) Smt. Sangeeta Sitaram Gaonkar
43 years of age, housewife,
married, daughter in law of
Shri Molu Gaonkar
5(f) Shri Datta Molu Gaonkar
50 years of age, service,
married, son of Shri Molu Gaonkar
5(g) Smt. Mangal Datta Gaonkar
46 years of age, housewife,
married, daughter in law of
Shri Molu Gaonkar
5(h) Shri Gokuldas Molu Gaonkar
44 years of age, service,
married, son of Shri Molu Gaonkar
5(i) Smt. Shali Gokuldas Gaonkar
40 years of age,
married, daughter in law of
Shri Molu Gaonkar
All residing at Soliem, Cacoda,
Quepem Goa.
5(j) Smt. Sukanti Ramdas Gaonkar
40 years of age, housewife,
married, daughter of Shri Molu Gaonkar
5(k) Shri Ramdas Gaonkar
major of age, service,
married, son in law of the deceased

Both residing at Kupa, Quepem Goa.

6. Shri Pundalik Bombo Gaonkar,
major, and his wife

7. Smt. Ganga Pundalik Gaonkar, major

8. Shri Datta Bombo Gaonkar,
major and his wife,

9. Smt. Shevtu Datta Gaonkar, major,

10. Shri Tulxidas Bombo Gaonkar,
major, and his wife,

11. Smt. Jayem Tulxidas Gaonkar, major,

12. Shri Zizi Ganaba Gaonkar, major
(since deceased)

12(a) Smt. Krishne Jiju Gaonkar
widow of late Jiju Gaonkar

12(b) Shri Shrikant Jiju Gaonkar
major, married, son of late Jiju Gaonkar,
and his wife,

12(c) Smt. Suvati Shrikant Gaonkar
major, married,

12(d) Shri Devidas Jiju Gaonkar
major, married, son of late Jiju Gaonkar
and his wife,

12(e) Smt. Deepali Devidas Gaonkar
major, married,

12(f) Shri Sudhakar Jiju Gaonkar
major, married, son of late Jiju Gaonkar
and his wife,

12(g) Smt. Sushma Sudhakar Gaonkar
major, married,

12(h) Shri Ganba Jiju Gaonkar
major, unmarried, son of late Jiju Gaonkar

12(i) Shri Vishwanath Jiju Gaonkar
major, unmarried, son of late Jiju Gaonkar
All residents of Soliem, Cacoda,
Quepem Goa.

12(j) Smt. Sushila Putu Gaonkar
major, married,
daughter of late Jiju Gaonkar and
her husband

12(k) Shri Putu Gaonkar
major, married,
Both residents of Shivnewar,
Nirankal, Ponda Goa.

12(l) Smt. Gulabe Narayan Gaonkar
major, married, daughter of
late Jiju Gaonkar and her husband

12(m) Shri Narayan Gaonkar
major, married,
Both residents of Madkai, Sakhwar,
Ponda Goa.

12(n) Smt. Lata Ramchandra Gaonkar
major, married, daughter of
late Jiju Gaonkar and her husband

12(o) Shri Ramchandra Gaonkar
major, married,
Both residents of Kumare,
Sanguem Goa.

13. Shri Bhuto Deu Gaonkar, major
(since deceased)

13(a) Smt. Nilima Nilu Gaonkar,
50 years of age, widow,
daughter in law of the deceased

13(b) Shri Kushali Bhuto Gaonkar
52 years of age,
married, son of the deceased

13(c) Smt. Gokul Kushali Gaonkar
48 years of age,
married, daughter in law of the deceased

All residents of Soliem, Cacoda Goa

13(d) Smt. Durga Tulsidas Gaonkar

45 years of age, married,

daughter of the deceased and her husband

13(e) Shri Tulsidas Gaonkar

major, married, son in law of the deceased

Both residents of Amde, Ugem,

Sanguem goa.

13(f) Smt. Sunita Umesh Naik

42 years of age,

married, daughter of the deceased,

and her husband

13(g) Shri Umesh Naik

major, married,

son in law of the deceased

Both residents of Valkani,

Ward No.3, Sanguem Goa

14. Shri Chondru Khapru Gaonkar,

major

all residing at Soliem, Cacoda, Quepem,

15. Shri Raghu Shambu Gaonkar

since deceased by his heirs:

15(a) Mrs. Roghu Gaokar,

major, widow

15(b) Shri Shambu Raghu Gaokar

since deceased by his legal heirs

15(b)(a) Miss Shevantu Shambu Gaokar

15(b)(b) Miss Sunita Shambu Gaokar

15(c) Smt. Gulabi Shambu Gaokar,

both residing at Mhasgal, Cacoda

15(d) Shri Maruti Raghu Gaokar

major and his wife

15(e) Smt. Champa Maruti Gaokar

both residing at Soliem, Cacoda,

15(f) Shri Ramanath Raghu Gaokar

major and his wife

15(g) Smt. Mangal Ramanath Gaokar,
major,
both residing at Pajimola, Sanguem
15(h) Shri Prabhakar Raghu Gaonkar
major, bachelor,
residing at Soliem, Cacoda,

16. Shri Shankar Vithoba Gaokar
since deceased by his heirs
16(a) Shri Suriagi Shankar Gaokar
major and his wife,
since deceased represented by legal heirs
16(a)(i) Shri Rohidas Suryagi Gaokar
16(a)(ii) Smt. Ujwala Rohidas Gaokar
16(a)(iii) Shri Rama Suriaji Gaokar,
16(a)(iv) Smt. Sita Rama Gaokar
16(b) Smt. Gokul Gaokar, major
16(c) Shri Vithoba Shankar Gaokar, major
bachelor (since deceased)

17. Shri Babusso Sukdo Gaokar
since deceased by his heirs
17(a) Smt. Tulxi Mono Gaokar, major,
and her husband
17(b) Shri Mono Gaokar, major
both residing at Colony No.1
Wadem, Sanguem Goa.
17(c) Smt. Moga Premanand Gaokar
major and her husband
17(d) Shri Premanand Gaokar, major
both residing at Matorgem
Shigao, Sanguem Goa.
17(e) Smt. Shevanti Nagu Gaokar
major and her husband
17(f) Shri Nagu Zizi Gaokar, major
both residing at Colomba, Rivona
Sanguem Goa
17(g) Smt. Jayanti Babusso Gaokar

major, unmarried,

17(h) Shri Krisna Babusso Gaokar, major
bachelor, both residing at
Soliem, Cacoda, Quepem

17(i) Smt. Shanta Babusso Gaokar, major
(since deceased)

widow of Sukdo Babusso Gaokar

17(j) Smt. Nanda Sukdo Babusso Gaokar, major
widow of Sukdo Babusso Gaokar

17(k) Kum. Pramila Sukdo Gaokar, major

17(l) Kum. Babita Sukdo Gaokar, major

17(m) Kum. Sudha Sukdo Gaokar, major

17(n) Kum. Prakash Sukdo Gaokar, major
all residing at Soliem, Cacoda

18. Shri Krisna Pandu Gaokar

since deceased by his heirs

18(a) Shri Raisu Krisna Gaokar
major and his wife

18(b) Smt. Mogrem Raisy Gaokar, major
(since deceased through her Lrs.)

18(b)(i) Shri Kanta Raisu Gaonkar
major, married, son of deceased
respondent no.18(b) and his wife

18(b)(ii) Smt. Kanisha Kanta Gaonkar
major, married,

Both residents of Soliem, Cacoda,
Quepem Goa.

18(b)(iii) Shri Guru Desai
major, married, son in law of deceased
respondent no.18(b) and his wife

18(b)(iv) Smt. Jayshree Guru Desai
major, married, daughter of deceased
respondent no. 18(b)

Both residents of Mogole, Sanguem Goa.

18(c) Shri Gunu Krisna Gaonkar
major and his wife

18(d) Smt. Tulxi Gunu Gaokar, major

- 18(e) Shri Babaya Krisna Gaokar
major and his wife
- 18(f) Smt. Yamuna Babaya Gaokar, major
- 18(g) Shri Gopi Gaokar, major
(since deceased)
and his wife
- 18(h) Smt. Tulxi Gopi Gaokar
since deceased by her heirs
- (a) Shri Santosh Gopi Gaokar, major
- (b) Shri Sudhakar Gopi Gaokar, major
- (c) Shri Ashok Gopi Gaokar, major
All residing at Musgal, Soliem, Cacoda
- 18h(d) Smt. Somoti Santosh Gaokar
Daughter in law of
late Shri Gopi Gaokar
major, married
- 18h(e) Smt. Manda Sudhakar Gaokar
daughter in law of late Shri Gopi Gaokar
major, married,
- 18h(f) Smt. Ankita Ashok Gaokar
daughter in law of late Shri Gopi Gaokar
major, married,
all residing at Musgal, Soliem, Cacoda.
- 18(i) Shri Pundalik Krisna Gaokar
major and his wife
- 18(j) Smt. Jayashree Pundalik Gaokar, major
- 18(k) Shri Pandu Krisna Gaokar,
major and his wife,
- 18(l) Smt. Jayanti Pandu Gaokar, major,
- 18(m) Shri Barkelo Krisna Gaokar
major and his wife
- 18(n) Smt. Lila Barkelo Gaokar, major
19. Shri Visnu Ramchandra Gaokar, major
20. Shri Barkelo Bilut Gaokar
since deceased by his heirs
- 20(a) Smt. Mathura Barkelo Gaokar, major

20(b) Shri Savlo Barkelo Gaokar, major
 20(c) Shri Shailesh Barkelo Gaokar, major
 all residing at Soliem, Cacoda.
 20(d) Smt. Vishranti Kushali Gaokar
 major and her husband
 20(e) Shri Kushali R. Gaokar
 both residing at Amekan, Ponda

21. Smt. Mossanem Barkelo Gaokar, major

22. Shri Kashinath Bibut Gaonkar, major

23. Mrs. Kashinath Gaokar, major

24. Shri Guji Bibut Gaokar, major
 and his wife

25. Mrs. Guji Gaokar, major

26. Shri Chandrakant Bibut Gaokar,
 major and his wife,

27. Smt. Kesar Chandrakant Gaokar,
 major,
 all residing at Soliem, Cacoda

28. Shri Avdhut Kalyan Salelkar
 (since deceased)

28(a) Smt. Suhasini Avdhut Salelkar,
 major, widow of the deceased,

28(b) Smt. Supriya A. Kambli,
 major, married, daughter of deceased,
 and her husband,

28(c) Shri Ashish Kambli,
 major, married,
 son in law of deceased,

28(d) Shri Ameya A. Salelkar,
 major, married, son of deceased,

and his wife,
 28(e) Smt. Samina A. Salelkar,
 major, daughter in law of the deceased
 All residents of Tariponta, Sanguem, Goa.

29. Mrs. Avdhut Salelkar, major
 both residing at Tariponto, Sanguem

30. Dr. Sakho Gudo,
 (since deceased by his only son
 Shri Dr. Krisna Sakharam Gude,
 residing at abroad
 represented by his power of attorney
 Shri Umesh V. Gude,
 residing behind Panchayat Office,
 Shiroda Goa.

.... Respondents

Mr. V. P. Thali, Advocate for the appellants.

Mr. P. A. Kholkar, Advocate for the respondent nos. 5, 15(d), 15(e), 15(h), 16(a)(i), 16(a)(ii), 16(a)(iii), 16(a)(iv), 16(b), 17(h), 18(c), 18(d), 18(i), 18(j), 18(m) and 21.

Coram:- F. M. REIS, J.

Date:- 3rd March, 2017

ORAL JUDGMENT

Heard Mr. V. P. Thali, learned counsel appearing for the appellants and Mr. P. A. Kholkar, learned counsel appearing for the respondent nos.5, 15(d), 15(e), 15(h), 16(a)(i), 16(a)(ii), 16(a)(iii), 16(a)(iv), 16(b), 17(h), 18(c), 18(d), 18(i), 18(j), 18(m) and 21.

2. The above appeal came to be admitted by order dated 29.08.2013 on the following substantial questions of law.

(i) Whether the Lower Appellate Court has failed to comply, substantially or otherwise with the mandatory requirements of Order 41, Rule 31 of the Civil Procedure Code and thereby rendered its judgment, a nullity ?

(ii) Whether in view of the judgment of the Supreme Court in the case of “M. K. Setty v/s M. V. L. Rao”, reported in AIR 1972 SC 2299 and in view of its finding that the evidence produced by the appellants shows enjoyment of distinct portion of the property by them, the lower Appellate Court, ought to have granted the decree of injunction, even if the relief of declaration was not available to the appellants ?

3. During the course of the hearing of the above appeal, Mr. Thali, learned counsel appearing for the appellants did not press for the first substantial question of law. Accordingly, the matter was heard on the second substantial question of law. The learned counsel appearing for the appellants has pointed out that the learned Lower Appellate Court while passing the impugned

judgment has clearly held that the appellants have established that they were occupying a distinct portion of the subject property which according to the learned counsel admeasuring an area of 5650 square metres as identified in the plan at Exhibit PW4/A. The learned counsel further pointed out that this portion of the property was purchased by the appellants pursuant to a registered sale deed from one Mr. Salelkar in 1939. The learned counsel further pointed out that the appellants and their ancestors were enjoying the specific portion of the property since the time of its purchase and as the respondents were interfering with such possession of the appellants, the suit was filed for a relief of injunction. The learned counsel further pointed out that the claim of co-ownership is based on a remote claim of title of a common ancestor, who expired before the sale deed. The learned counsel further submits that there is no material on record to show that any portion of the property was enjoyed in co-ownership though the co-heirs are enjoying separately different portions of the subject property. The learned counsel further submits that the respondents themselves accept that the said Salelkar had executed a larger portion of the property

surveyed under No.34/3 and got a separate survey number for such portion of the property as 34/5 of Cacoda Village. The learned counsel further pointed out that even assuming that the property is in co-ownership and considering that there is separate enjoyment of a distinct portions by the appellants, the respondents cannot interfere with such possession otherwise than due process of law. The learned counsel as such points out that the second substantial question of law be answered accordingly.

4. On the other hand, Mr. P. A. Kholkar, learned counsel appearing for the respondent nos.5, 15(d), 15(e), 15(h), 16(a)(i), 16(a)(ii), 16(a)(iii), 16(a)(iv), 16(b), 17(h), 18(c), 18(d), 18(i), 18(j), 18(m) and 21 has supported the impugned judgment. The learned counsel pointed out that the learned Judge has come to the conclusion that the appellants have failed to establish their exclusive possession over the disputed property. The learned counsel further pointed out that both the Courts below have concurrently found that the property was enjoyed in co-ownership and as such according to him the appellants themselves have

admitted that the respondents have enjoyed a part of the disputed property. The learned counsel thereafter has taken me through the impugned judgments passed by the Courts below to point out that the findings of the learned Lower Appellate Court that the appellants were enjoying a distinct portion is without any reasons and as such granting any relief in favour of the appellants would not arise.

5. I have considered the submissions of the learned counsel and I have also gone through the records. The learned Lower Appellate Court while passing the impugned judgment has clearly come to the conclusion that the appellants have established that they were enjoying a distinct portion of the subject property. Though the Courts below have found that there is no formal partition executed between all the co-owners of the common ancestor, nevertheless, the findings therein clearly suggest that its co-owners are enjoying different segments of the larger property. In this context, the appellants are also enjoying a portion of the property admeasuring 5650 square metres as identified in the plan

at Exhibit PW4/A. These findings of fact arrived at by the Courts below have not been challenged by any of the respondents in the present appeal. Admittedly, the respondents who are represented by Mr. Kholkar, have not entered into the witness box nor produced anything to show that they are in possession of any portion of the property. The remaining respondents have chosen to remain absent though served in the above appeal. In such circumstances, the findings of fact arrived at by the learned Lower Appellate Court to the effect that the appellants are enjoying a distinct portion of the property cannot be faulted.

6. Though the appellants have failed to establish that there was any formal partition executed between all the co-owners of the common ancestor, nevertheless, once it is established that each of the co-owners are enjoying separate portion of the property of the larger property, such enjoyment cannot be disturbed unless a proper suit for partition is initiated by the co-heirs to partition the property. Admittedly, there is no material on record to show that the parties at any point of time enjoyed any fruit bearing trees jointly amongst

themselves. The learned Lower Appellate Court has found that a distinct portion of the property was being enjoyed by the appellants herein. Even the enjoyment of the co-owners of the common property can be protected until a proper suit for partition is filed to partition the property by metes and bounds. Article 2179 of the Portuguese Civil Code as translated *inter alia* provides that use and management of the thing or of the right held in indivision shall be regulated in terms of the provisions of Article 1249 onwards. Article 2180 of the Civil Code provides that no co-owner shall be compelled to hold a thing in indivision and he may at any time demand partition. Article 2181 of the Civil Code further provides that the partition of the property in indivision may be done amicably or by arbitrators appointed by the parties. Article 2185 further provides that the co-owners may not renounce to the right to demand partition but they may agree that the thing may remain undivided for a certain period of time which shall not exceed five years. It is however, lawful to extend this period by a fresh agreement. Reading the said provisions of the Portuguese Civil Code, it can be easily gathered that the co-owners are entitled to

agree in the manner of enjoyment of the property without renouncing their right to partition the said property. Such individual possession on account of such arrangement can be protected until the partition recognized in law is duly executed between the parties. As pointed out in the said provisions, no co-owners shall be compelled to hold the property in indivision and may at any time demand the partition thereof.

7. In such circumstances, apart from that, the Apex Court in the judgment reported in ***AIR 1972 SC 2299*** in the case of ***M. Kallappa Setty, V/s M. V. Lakshminarayana Rao*** has observed at para 5 thus :

“5. So far as the question of possession is concerned, as mentioned earlier, both the trial court and the first appellate court have accepted the plaintiff's case that he was in possession of the suit site ever since he purchased the same in 1947. This is essentially a finding of fact. That finding is based on evidence. The High Court, in our opinion, erred in coming to the conclusion

that the possession of the plaintiff after the sale deed in his favour is not a relevant circumstance. We are of opinion that it is an extremely important circumstance. The plaintiff can on the strength of his possession resist interference from persons who have no better title than himself to the suit property. Once it is accepted, as the trial court and the first appellate court have done, that the plaintiff was in possession of the property ever since 1947 then his possession has to be protected as against interference by some one who is not proved to have a better title than himself to the suit property. On the findings arrived at by the fact finding courts as regards possession, the plaintiff was entitled to the second relief asked for by him even if he had failed to prove his title satisfactorily. Therefore in our opinion, the High Court was not right in interfering with the judgment of the trial court as affirmed by the first appellate court regarding relief No. 2.”

8. Taking note of the said observations, I find that the appellants are entitled for the relief of permanent injunction not to dispossess the appellants in such portion of the property as identified in the plan at Exhibit PW4/A otherwise than due process of law. The appellants would not be entitled to claim any equity in case such portion is allotted to any of the co-owners of the subject property. The appellants also shall not interfere with the occupation of the other co-heirs of the remaining portion of the larger property surveyed under No.34/3 otherwise than due process of law. In view of the above, the second substantial question of law is answered accordingly.

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

ORDER

- (i) The appeal is partly allowed.
- (ii) The impugned judgments dated 30.04.2002 & 27.02.2007 of the Courts below stand modified and the respondents are restrained from interfering with the enjoyment of the portion of the property as identified in

the plan at Exhibit PW4/A otherwise than due process of law in the light of the observations made herein above.

(iii) Needless to say that the appellants shall not alienate or change the nature of the property without obtaining consent of the co-owners of the property.

(iv) The appeal stands disposed of accordingly.

F. M. REIS, J.

at*