

IN THE HIGH COURT OF BOMBAY AT GOA**WRIT PETITION NO. 1208 OF 2018**

**XAVIER MASCARENHAS, REP. BY POA BY
PETITIONER NO. 2 AND ANR.,** **... Petitioners**

Versus

**VIVEKANAND SHIVA RAUT DESSAI AND 6
ORS.,** **... Respondents**

Shri J. P. Mulgaonkar with Adv. Rupa Banaulikar for the Petitioners.

Shri A. D. Bhobe with Adv. Annelise Fernandes for the Respondent.

**CORAM: C. V. BHADANG, J.
Date: 20th June, 2019.**

Order:

The challenge in this petition is to the judgment and order dated 25/7/2018 passed by the learned District Judge, South Goa at Margao in Misc. Civil Appeal no.33/2015. By the impugned judgment, the appeal filed by the respondent has been allowed and an order of injunction dated 24/4/2015 passed by the learned trial court in Regular Civil Suit no.43/213/B, in favour of the petitioner has been set aside.

2. Th brief facts necessary for the disposal of the petition may be stated thus:

The petitioners have filed the aforesaid suit against the respondent for declaration, partition and injunction. The suit property is better known as “Mudicazana” or “Mudi Casan” consisting of three additions. The present dispute pertains to the second addition, which is enrolled in the Land Registration Office of Quepem under no.778 and is presently surveyed under no.21/1 of Village Assolda, Taluka Quepem-Goa. The petitioners filed the suit for a declaration that they are the co-owners of the suit property to the extent of 1/30th share admeasuring 2150 sq.mtrs and for consequent partition and separation of the said share by metes and bounds.

3. The petitioners filed an application for temporary injunction, restraining the respondents or anybody on their behalf from interfering or carrying out any construction or disposal by sale or otherwise of the suit property including the part of the suit property sold vide Deed of Sale dated 8/7/2013 and 13/5/2013. The suit and the application for temporary injunction was filed on 20/6/2013.

4. The application was resisted on behalf of the respondents inter alia on the ground that the claim of co-ownership of the petitioners which is based on document of matiz is a manipulated document and the petitioner no.1 had inserted his name in the survey index by fraud. It was contended that the

matriz record is neither a document of title nor can show possession. It was contended that the respondents have sold several plots/portions of the suit property to different persons, by various sale deeds much prior to the filing of the suit and that at no point of time any objection was raised. It was also contended that a portion of the suit property was acquired by the Government and even at that time there was no claim made to the compensation and it was the defendants nos. 1 to 4, who were paid the compensation in respect of the acquisition of the part of the said property. It was denied that the petitioners have any right much less to the extent of 1/30th share as claimed.

5. The learned trial court by an order dated 24/4/2015 partly granted the application restraining the respondents from creating any third party right in the suit property, pending disposal of the suit. The learned trial court relied upon the matriz no.778 which records the share of the petitioner. The learned trial court also took notice of the fact that in the sale deed dated 18/12/1972 the original defendants nos. 1 to 4 have acknowledged 1/30th share of the petitioners while selling an area of 1300 sq.mtrs (from out of the remaining 29th/30th share).

6. Feeling aggrieved, the respondents challenged the same before the learned District Judge. The learned District Judge by the impugned judgment

has allowed the appeal setting aside the order passed in favour of the petitioner.

7. I have heard Shri Mulgaonkar, the learned counsel for the petitioners and Shri Bhobe, the learned counsel for the respondent no.1 to 7. With the assistance of the learned counsel for the parties I have gone through the record.

8. Shri Mulgaonkar, the learned counsel for the petitioner has strenuously urged that matriza no.778 is part of the second addition, which clearly records the share of the petitioner and the defendant nos.1 to 4 have also acknowledged the 1/30th share of the petitioners in the sale deed dated 18/12/1972. It is submitted that the learned trial court had rightly come to the conclusion that the petitioners have shown prima facie case on the basis of this documentary evidence and the appellate court in an appeal under section 104 of the Code of Civil Procedure was not justified in interfering with the said order. The learned counsel was at pains to point out that an appeal under section 104 of C.P.C is only an appeal in principle and unless and until the findings by the trial Court are found to be perverse no interference is called for.

9. Mr. Bhobe, the learned counsel for the respondents has supported the impugned order. The learned counsel has placed reliance on the decision of this Court in the case of **Fabrica da Igreja de N. S. de Milagres, 1995 (1) Bom CR. 588**, in order to submit that a matriz document is neither an instrument of title nor a source of possession. It is thus submitted that the trial court was in error in placing reliance on the matriz certificate and the learned District Judge was justified in interfering with the order. The learned counsel has pointed out that the petitioner did not raise any objection when various portions of the suit property were sold much prior to the filing of the suit and they did not even claim compensation when a portion of the suit property was acquired and the compensation was paid to the defendant nos.1 to 4. The learned counsel has then referred to the two sale deeds i.e dated 18/12/1972 and 21/1/1993, in order to submit that the ownership of the respondent over the suit property has been admitted by the petitioners. He, therefore, submitted that no case for interference is made out.

10. I have considered the circumstances and the submissions made. Prima facie it appears that the claim of the petitioners in the suit is based on matriz no.778, which shows the name of Rama Chandru Desai, who is the grand father of the respondent nos.1 and 3 in respect of 29/30th part and the appellant no.1 in respect of 1/30th part. The matriz document cannot be said

to be a document of title as has been held by this Court in the case of **Fabrica (supra)**. The name of the petitioner does not figure in the Form No.I and XIV of survey no.21/1. The petitioners have not taken any action for correction of the survey record which was promulgated much prior to the filing of the suit. The learned District Judge has found that the petitioners have not produced any title document to show how the appellant no.1 has acquired 1/30th share in the suit property. The learned District Judge has then adverted to the two sale deeds dated 18/12/1972 and 21/1/1993. By the sale deed dated 18/12/1972, the petitioner no.1 has purchased a part of the suit property, while by the sale deed dated 21/1/93, the petitioner no.2 has purchased another portion of the suit property from the respondent no.1 to 4, which contains a recital that the vendors i.e respondent nos.1 to 4 and Shiva Rama Raut Desai, the father of the respondent no.1 and 3 are the owners in possession of the whole property “Mudicazana” or “Mudi Casan” consisting of three additions situated at village Assolda, Taluka Quepem, Goa. Prima facie from the record it appears that the respondent nos. 1 to 4 have sold distinct portions of the suit property under various sale deeds and those sale deeds have never been challenged and even when a portion of the suit property was acquired the compensation was paid to the respondent nos.1 to 4. The learned District Judge in my considered view is right in coming to the conclusion that the petitioners have not shown any prima facie case for grant

of injunction as prayed.

11. I have carefully gone through the impugned judgment and it does not suffer from any infirmity. The finding by the learned trial court about existence of the prima facie case based on the document of matriz was one which could be justifiably interfered with, in an appeal under section 104 the Civil Procedure Code. The petition is without any merit and is accordingly dismissed in limini with no order as to costs.

C. V. BHADANG, J.

Ap/