

Vinita

IN THE HIGH COURT OF BOMBAY AT GOA.

SECOND APPEAL NO.28 of 2007

1. Laximan Meng Gaunkar
(Since deceased)
- 1a) Mr. Prakash L. Gaonkar,
Son of late Laxman Meng Gaonkar
46years old, married, serviceman
- 1b) Mrs. Jyoti P. Gaonkar
Wife of Mr. Prakash Gaonkar
37 years old, house wife
- 1c) Mr. Sudhakar L. Gaonkar,
Son of late Laxman Meng Gaonkar
48 years old, married, agriculturist
- 1d) Mrs. Suvidha S. Gaonkar,
Wife of late Laxman Meng
Gaonkar 43 years old, housewife
- 1e) Miss. Rupa L. Gaonkar,
Daughter of late Laxman Meng Gaonkar,
30 years old, unmarried, service.
All the appellants no. 1(a) to 1(e),
residing at house no. 4, Xetodi,
Villian Bhati, Sanguem Goa.
- 1f) Mrs. Manjusha M. Shirodkar,
Daughter of late Laxman Meng Gaonkar,
43 years old, married, service
- ig) Mr. Mahesh S. Shirodkar,
Husband of Munjusha M. Shirodkar,
55 years old, businessman,
Both the appellants no .1(f) and
1(g) residing at house no. 38, Vaddem,
colony no. 2, Sanguem Goa.
- 1h) Mrs. Minakshi D. Gawde,
Daughter of late Laxman Meng
Gaonkar, 37 years old, married,
businesswoman
- 1i) Mr. Devanand B. Gawde, Husband
of Minakshi D. Gawde, 47 years old,

service

Both appellants no.1(h) and 1(i),
residing at house no. 90/A, Nagueshi,
Bandora, Ponda Goa.

2. Pondo Meng Gaunkar (deceased)
through his legal heir
- 2a. Mrs. Abolem Pondo Gaunkar widow
- 2b. Tulshidas Pondo Gaonkar
- 2c. Rama Pondo Gaonkar
- 2d. Miss Mogrem Pondo Gaunkar
- 2d(i) Shri Tulshidas Kamat s/o Karai
Shiroda of Ponda Taluka
- 2e. Gokul Pondo Gaunkar
- 2f. Miss Shali Pondo Gaunkar
all residing at Velipwado, Viliena
Bhati of Sanguem Taluka.

..... Appellants.

V/s

1. Shri Jaganath Sukto Goundolkar,
2. Gopala Sukto Goundolkar
3. Tulso Sukto Goundolkar
all r/o Viliena in Sanguem Taluka
H.No. 2.
4. Sukto Poto Goundolkar (deceased)
through his legal heirs -
- 4a. Smt. Hirubai Sukto Goundolkar,
widow of Putto Goundolkar (deceased)
- 4b. Smt. Chandravati Jaganth Goundolkar
wife of Jaganath Goundolkar (dropped)
- 4c. Smt. Snehana Gopal Goundolka, wife
of Gopal Sukti Goundolkar (dropped)
- 4d. Smt. Ashavati Tulso Goundolkar
- 4e. Miss Prema Sukto Gaundalkar
daughter (dropped) all r/o Viliena
- 4f. Shri. Yeshwant Gopal Kavlekar and
his wife (dropped)
- 4g. Smt. Pondorem Yeshwant Kavlekar
daughter (dropped)
- 4h. Shri Krishna Babu Malkernekhar
both r/o Molkorne (dropped)
- 4i. Smt. Shevtu Krishna Malkernekhar
both r/ o Molkorne (dropped)

- 4j. Smt. Kalyan Sukti Goundolkar
r/o Congornem Bhati (dropped)
H. No. of all the respondents
are not known. Respondents.

Mr. V. P. Thali and Mr. R. Prabhugaonkar, Advocates for the appellants.

Mr. C. A. Coutinho and Mr. I. Santimano, Advocates for the respondent nos. 1 to 4.

WITH
CROSS OBJECTION 28 OF 2007
IN
SECOND APPEAL 28 OF 2007

1. Shri Jaganath Sukto Goundolkar,
2. Gopala Sukto Goundolkar; and
3. Tulso Sukto Goundolkar;
all r/o H. No. 2, Viliena in
Sanguem Taluka Applicants(roiginal
respondent nos.1 to
3)

V/S

1. Laximan Meng Gaunkar
2. Pondo Meng Gaunkar (deceased)
through his legal heirs:-
2a. Mrs. Abolem Pondo Gaunkar, widow
2b. Tulshidas Pondo Gaonkar
2c. Rama Pondo Gaonkar
2d. Miss Mogrem Pondo Gaunkar
2d(i) Shri Tulshidas Kamat s/o Karai
Shiroda of Ponda Taluka
2e. Gokul Pondo Gaunkar
2f. Miss Shali Pondo Gaunkar
all residing at Velipwado, Viliena
Bhati of Sanguem Taluka. ... Respondents.

Mr. C. A. Coutinho and Mr. I. Santimano, Advocates for the appellants.

Mr. V. P. Thali and Mr. R. Prabhugaonkar, Advocates for the respondents.

Coram:- MANISH PITALE, J.

Date:-26th October, 2021.

ORAL JUDGMENT:

1. By this appeal the defendants are before this Court challenging judgment and order dated 19.9.2006 passed by the Court of Ad-hoc District Judge-FTC-I South Goa, Margao, whereby Regular Civil Appeal No. 72 of 1998, filed by the respondents (original plaintiffs) stood allowed and the suit filed by the respondents was partly decreed. A decree of declaration as owners of the suit property was granted in favour of the respondents while prayer for grant of permanent injunction was rejected.

2. The respondents filed Regular Civil Suit No.81/1981 for declaration and permanent injunction against the appellants. The respondents claimed to be owners of the suit property on the basis of registered Gift Deed dated 4.7.1968 executed by the original defendant no.3 i.e. father of the original plaintiff, whereby the suit property was gifted in their favour. The respondents claimed that the appellants herein were seeking to disturb the possession of the

respondents by taking advantage of the fact that the original defendant no.1 was permitted to stay in part of the suit property by the original defendant no. 3, during the time of cultivation in one of the sheds in the paddy field.

3. The appellants filed their written statement and denied the claim of the respondents that they were owners of the suit property on the basis of aforesaid gift deed, for want of knowledge and they stated that respondents ought to be put to strict proof of such claim. In the written statement it was specifically stated that the appellants were in possession and enjoyment of the suit property and further that they were cultivating the same. It was specifically stated that the respondents did not have any right, title or interest in the suit property.

4. There is no dispute about the fact that the controversy in the present case concerns one of the suit properties i.e. property located in Matriz no. 98 at Viliena village of Sanguem Taluka known as "Gorbata Segunda Adicao".

5. On the basis of the pleadings of the rival parties, the trial Court i.e. Court of Civil Judge Junior Division at Sanquem framed as many as 12 issues, which included issues pertaining to the claim of the respondents as regards the title in the suit property at Matriz no. 98

and their claim on the basis of the aforesaid gift deed dated 4.7.1968.

6. After the rival parties led their evidence before the trial Court, by judgment and order dated 31.8.1998, the trial Court gave findings against the respondents. It was found that the respondents had failed to prove that they became owners of the suit property on the basis of the aforesaid gift deed, because there was nothing to show that they had accepted the gift deed and also because there were no recitals in the gift deed to trace the source of title of the suit property. The gift deed was executed by the grandfather of the respondents (original plaintiffs). It was also found that the suit property was not properly identified and that the pleadings on behalf of the respondent no. 3 were absolutely vague. On this basis, the suit was dismissed.

7. Aggrieved by the same, the respondents filed Regular Civil Appeal No. 72/1998, before the Court below i.e. the Appellate Court. The said Court framed two points for determination while deciding the appeal, concerning the validity of the gift deed and as to whether the respondents had succeeded in proving their title in the suit property. By the impugned judgment and order, the appellate Court found that the name of the grandfather of the respondents was

found in the occupant's column in the Matriz record and further that no fault could be found on the part of the respondents even if they failed to show the acceptance of the gift deed made in their favour, because they were minors at the relevant time and that Article 1478 of the Portuguese Civil Code covered the position of law in their favour. The appellate Court then found that the respondents did not deserve grant of permanent injunction in their favour, but the material on record was sufficient to grant them declaration in respect of the aforementioned suit property.

8. Aggrieved by the impugned judgment and order passed by the first appellate Court, whereby the suit was partly decreed, the appellants filed the present Second Appeal, which was admitted by an order dated 21.11.2007, on the following substantial questions of law:-

A) Whether the appellate Court could have granted the prayer of declaration as prayed for by the plaintiffs, without the plaintiffs having produced any document of title?

B) Whether the gift deed in respect of the suit property executed by the defendant No.3 in favour of the plaintiffs is by itself a document of title of the plaintiffs, without there being any recital in the gift deed or any plea in the pleadings of the plaintiffs or any evidence produced by them, as to the source of the title of the defendant no. (Donor) himself?

C) Whether the suit for declaration as prayed for by the plaintiffs could have been decreed, when the plaintiffs were held by both the courts below not to have been in possession of the suit property and had therefore not granted the consequential relief of injunction?

9. Mr. Thali, learned counsel appearing for the appellant submitted that the questions of law deserved to be answered in favour of the appellants and against the respondents. Consequently, the impugned judgment and order deserved to be quashed and set aside and the suit deserved to be dismissed.

10. Learned Counsel invited attention of this Court to the pleadings of the parties. It was submitted that a perusal of the plaint would show that the only basis for claiming ownership and title in the suit property on behalf of the respondents was the aforesaid gift deed and that there was no reference to any document of title or the source of the title of the predecessor of the respondents. It was further submitted that the appellants had denied the claim regarding ownership as claimed by the respondents and a specific statement was made regarding possession and enjoyment, as also cultivation of the suit property by the appellants herein. It was submitted that in the face of such denial, it was necessary for the respondents to have proved their source of title while claiming the

decree for declaration. 11. It was further submitted that the trial Court had appreciated the material on record in the correct perspective while dismissing the suit but the Appellate Court had erred in granting the decree of declaration when no semblance of proof was presented on behalf of the respondents as regards title in the suit property. It was submitted that the appellate Court fell in grave error for the reason that the respondents were found not entitled to a decree of permanent injunction as they themselves had conceded that the appellants were in possession of the suit property and that in the face of such finding, the decree of declaration ought not to have been granted. The learned counsel for the appellants relied upon the judgment of the Hon'ble Supreme Court in the case of ***Union of India Vs Ibrahim Uddin and another, (2012) 8 SCC 148***, to contend that when the respondents were not in possession of the suit property, the suit for declaration of title and ownership ought to have been dismissed.

12. On the other hand, Mr. Coutinho, learned counsel appearing for the contesting respondents submitted that the manner in which the appellants had denied the contents of the plaint demonstrated that there was absence of emphatic denial and that in such a situation, even if there was no recital of source of title in the gift

deed, in view of the *prima facie* long standing possession shown in the suit property on behalf of the respondents, the presumption under Section 110 of the Evidence Act operated. Therefore, the approach adopted by the trial Court was unsustainable and the error was corrected by the Appellate Court in the impugned judgment and order. It was submitted that the first two substantial questions of law framed by this Court could be answered on the basis that even if there was absence of a document of title in favour of the respondents, the Matriz record did indicate long standing possession in the suit property and if the pleadings on record were to be appreciated in the correct perspective, the decree of declaration passed in favour of the respondents deserved to be upheld under Section 110 of the Evidence Act. This aspect was specifically pressed on behalf of the respondents in their cross objection. In support of the aforesaid contentions, the learned Counsel appearing for the respondents relied upon the judgments of the Hon'ble Supreme Court in the case of ***Chief Conservator of Forest, Govt. of A.P. Vs. The Collector and ors. (2003)3 SCC 472, The State of A.P. and ors Vs Star Bone Mill and Fertilizer Co., (2013)9 SCC 319.***

13. In so far as the third question of law is concerned, the learned counsel for the respondents relied upon the judgment of the Hon'ble Supreme Court in the case of ***Rukhmabai Vs Laxminarayan and ors, AIR 1960 SC335***, to contend that if such a plea was to be raised against the respondents on the basis that they were not in possession of the suit property, they ought to have being put to notice. That having not been done, according to the learned counsel for the respondents, the said question of law could not be answered against them and on this basis, it was submitted that the appeal deserved to be dismissed.

14. Heard learned counsel for the rival parties and perused the material on record.

15. Perusal of the pleadings of the parties indicates that while the respondents claimed ownership and title in the suit property on the basis of the registered gift deed dated 4.7.1968, the appellants denied such claim for want of knowledge. But while doing so, the appellant specifically stated in para 9 of the Written Statement that the respondents had no right, title or interest over the suit property. In para 6,7 and 10 of the Written statement, it was specifically stated on behalf of the appellants that they were in possession of the suit property and in enjoyment thereof. It was specifically stated that

when the predecessor of the contesting respondents i.e. original defendant no. 3 sought to interfere with the activity of cultivation undertaken by the appellants in the suit property, proceedings were initiated before the Mamlatdar and an injunction was granted in favour of the appellants, restraining the original respondent no. 3 from interfering with their possession in the suit property.

16. This Court is of the opinion that the tenor of denials and specific pleadings on behalf of the appellants in the written statement demonstrate the fact that the claims made by the contesting respondents regarding ownership, title and possession in the suit property were emphatically denied

17. In the face of such pleadings, the respondents were expected to demonstrate how their claim of ownership and title in the suit property was justified. It is an admitted position that the only document on which the respondents relied was the aforesaid gift deed. It is also the matter of the record that the gift deed does not state any source of title in the grandfather of the contesting respondents, who had executed the gift deed in their favour. In such a situation, to buttress the claim made on behalf of contesting respondents, reliance was placed on Matriz records to contend that the name of the grandfather of the contesting respondents was

recorded as an occupant of the suit property. This, at best was a revenue record only recording the possession of the grandfather of the contesting respondents in the suit property and it obviously would not qualify as a document of title. Therefore, it is clear that the trial Court did not commit any error in returning the finding against the respondents on the question of title in the suit property. It was held that the contesting respondents had failed to prove their title in the suit property and therefore, they were not entitled for declaration as sought in the suit.

18. When the impugned judgment and order passed by the Appellate Court is perused, it is found that the said Court also recorded the fact that the name of the grandfather of the contesting respondents was recorded only in the occupant's column in the Matriz record. There was no other document of title brought to the notice of the appellate Court. Yet, the appellate Court proceeded on the basis that since the name of the grandfather of the contesting respondents was found in the occupant's column and the gift deed was executed in favour of the said respondents, it could be said to be sufficient material to grant the decree of declaration in favour of the said respondents. But, the discussion in the impugned judgment and order, particularly in paragraph 9, shows that while the appellate

Court recorded that the respondents had prayed for declaration, regarding ownership in the suit property, which included their residential house and it extended from the canal of water on the eastern side upto the said residential house with all appurtenances, such a prayer was vague and not properly worded. Surprisingly, the appellate Court still granted the declaration of ownership as claimed by the contesting respondents. It is further interesting that the appellate Court itself found that the contesting respondents were not entitled for a decree of permanent injunction for the reason that the possession of the appellants in the suit property was admitted on the part of the contesting respondents.

19. This Court finds that the reasoning in paragraph 9 of the impugned judgment is self-contradictory and wholly unsustainable.

20. Even otherwise the substantial questions of law at “A” and “B” quoted above deserve to be answered in favour of the appellants and against the respondents, for the reason that there is admittedly no document of title produced on behalf of the contesting respondents and by merely producing the aforesaid registered gift deed in their favour, it would not be sufficient to hold that they had proved their title in the suit property. In this backdrop, the question as to

whether the article 1478 of the Portuguese Civil Code would inure to the benefit of the contesting respondents pales into insignificance.

21. In so far as the presumption under Section 110 of the Evidence Act is concerned, a perusal of the judgment on which the learned counsel appearing for the respondents has relied would show that for the said presumption to apply there ought to be sufficient material to show long standing possession of the contesting respondents in the suit property. In the present case, as noted above, at the outset, in the written statement itself the appellants had stoutly denied the possession of the respondents in the suit property. On the contrary, the appellants have claimed that they were not only in possession but in cultivation of the suit property, in respect of which they had also obtained an injunction in their favour before the Mamlatdar, restraining respondent no.3 from interfering in their activities of cultivation in the suit property. In the face of such pleadings and material on record, there is no ground for the contesting respondents to place reliance on Section 110 of the Evidence Act and the aforesaid judgments, to contend that the declaration granted by the Appellate Court deserves to be sustained. Hence, it is found that there is no substance in the cross objection raised on behalf of the respondents.

22. In so far as substantial question of law at “C” above is concerned, the pleadings of the parties, particularly the categorical statements made in the Written Statement in paragraph 6, 7, 9 and 10 would show that there was sufficient material for the two Courts below to conclude that the contesting respondents were not in possession of the suit property. There is no question of the contesting respondents not having been put to notice of such a stand on behalf of the appellants. It was on the basis of such pleadings that parties led evidence and the two Courts below concurrently held on the question of possession against the respondents.

23. In fact, it was for this very reason that the appellate Court found that the contesting respondents did not deserve any permanent injunction in their favour. In fact, in the face of such finding rendered against the contesting respondents, the appellate Court clearly erred in granting declaration of ownership in the suit property.

24. In view of the above, the substantial questions of law framed by this Court are answered in favour of the appellants and against the respondents.

25. Consequently, the appeal is allowed and the impugned judgment and order passed by the appellate Court is set aside and the judgment and order passed by the trial Court is restored.

26. In view of the findings rendered above, cross objection filed on behalf of the contesting respondent stands dismissed.

MANISH PITALE, J.

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