

(2004) 09 BOM CK 0036
In the Bombay High Court
Case No : Second Appeal No. 7 of 2001

Smt. Josephine D"Costa (since deceased represented by L.R. APPELLANT
Mr. Rovano D"Silva) and Others All represented by their
attorney Smt. Maria Perpetua Sucorro Finela D"Silva

Vs

Shri Khushali Govind Naik Desai, Smt. Khushali Naik Dessai RESPONDENT
and Comunidade of Naqueri through its attorney Shri Babu
Naik Dessai

Date of Decision : 17-09-2004

Acts Referred:

Civil Code, 1860 — Article 953

Citation : (2005) 107 BOMLR 614

Hon'ble Judges : N.A. Britto, J

Bench : Single Bench

Advocate : M.S. Usgaonkar and I. Aga, for the Appellant; S.D. Lotlikar and S.
Naik, for Respondent Nos. 1 and 2 and Parashuram R.M., for the Respondent

Final Decision : Allowed

Judgement

N.A. Britto, J.—This second appeal is filed by the Plaintiffs in Special Civil Suit No. 5/87/A.

2. The parties to this appeal shall be referred to in the names as they appear in the cause title of the said Civil Suit.

3. The dispute between the three sets of parties is regarding the land surveyed under Nos. 145/6 and 145/7.

4 The Plaintiffs' suit for declaration, injunction and/or for recovery of possession came to be dismissed by Judgment/Order dated 31st August, 1998, of the Civil Judge, Senior Division, Quepem, and an appeal filed against the same, being Regular Civil Appeal No. 75/1998 came to be dismissed by Judgment/Order dated 5th October, 2000.

5. The case of the Plaintiffs is that there is a property known as "Ambeachem"

alias "Tansorem" situated in Naqueri village of Quepem taluka having Land Registration No. 1042 and bounded on the East by the paddy field known as "Deulachi Nomoxi" situated at Quitol and village boundary of Dabem(Morpirila Village); on the West by the falling waters(Aguas Vertentes) of the hill; on the North by falling waters of the hill(Aguas Vertentes) and on the South by the hill and water dam of the paddy field Tollem of the Devasthan. The Plaintiffs stated that 3/4ths of the said property were described in three independent divisions(Adicoes) in the Land Revenue Office of Quepem under Matrix Nos. 202, 205 and 216 and that 1/4th of the said property was described under Matrix Nos. 204, 206, 214 and 215. The Plaintiff No. 1 along with Constancio Inacio Dionisio da Costa purchased one half of the said 3/4ths of the property under Matrizes Nos. 202, 205 and 216 by Deed dated 3rd July, 1937 and the remaining half of these 3/4th under Matrizes Nos. 202, 205 and 216 belonging to the heirs of Dhananjay Anant Xet Lotlikar which is independent of the half of the Plaintiffs. The Plaintiffs stated that the said half of the said 3/4ths purchased by the Plaintiffs and being independent unit was possessed and enjoyed by the Plaintiffs and was surveyed under Nos. 144/2, 4; 145/1, 2, 3, 4, 5, 6 and 7; 146/2, 3, 4 and 5; and 147/2, in the Record of Rights of Naqueri village. The Plaintiffs stated that the said property consisted of paddy field, coconut grove, cashew grove and some other fruit bearing trees, such as jackfruit, mango etc. and that the Plaintiffs had one shed (loja) which was being used as a store-room and two huts and a cowshed occupied by the watch and ward(torl). The Plaintiffs stated that the Defendant Nos. 1 and 2 had no right, title or interest in the said property or portion thereof but they found that the name of Defendant No. 1 was entered in the Occupant's column in survey No. 145/6. The Plaintiffs also stated that taking advantage of the said survey records Defendant No. 1 was interfering with the said property and was giving threats to the labourers while collecting cashew fruits. Likewise, the Plaintiff stated that Defendant No. 3 had also no right in the said property but the Plaintiffs found that in the survey records, the name of Defendant No. 3 was wrongly entered in the Occupant's column of survey No. 145/7 but the Plaintiffs are in possession of the said portion which is hilly and has jungle trees. The Plaintiffs, therefore, sought a declaration that the portions under survey No. 145/6 and 145/7 were part and parcel of the property of the Plaintiffs and, therefore, they were entitled to get the survey entries of the said survey numbers corrected by deleting the names of Defendant Nos. 1 and 3. The Plaintiffs also prayed for injunction to restrain the Defendant Nos. 1 and 2 from interfering with the possession of the Plaintiffs and assuming the Defendant Nos. 1 and 2 were in possession of the said portion, the Plaintiffs sought recovery of the same.

6. The case of Defendant Nos. 1 and 2 is that the Plaintiffs nor their predecessors in title enjoyed the said property with the said boundary at any time and that within the said boundary given by the Plaintiffs there were some other properties enjoyed by some others. Defendant Nos. 1 and 2 stated that survey No. 145/6 is not part of the said property of the Plaintiffs nor the Plaintiffs enjoyed the same

at any time. The Defendant Nos. 1 and 2 stated that they were in possession of the property No. 145/6 as their own and, therefore, their names were recorded in the survey records. The Defendant Nos. 1 and 2 stated that prior to them the said portion was in possession of the father of Defendant No. 1 which possession was more than 50 years and, therefore, irrespective of any title the said possession has crystallised into prescriptive title which the said Defendants invoked for all purposes. The Defendant Nos. 1 and 2 stated that Defendant No. 1 has been leasing out the coconut trees for toddy tapping from the property No. 145/6 on the bonafide assumption that it is their property known as Momburla under Matrix No. 4 of Dabem Village. The Defendant Nos. 1 and 2 stated that the Western boundary of survey No. 145/6 is separated from the property of the Plaintiffs by a rubble stone wall erected by the Plaintiffs more than 12 years back.

7. The case of Defendant No. 3 is that the boundary given by the Plaintiffs were of the entire property "Ambeachem". The Defendant No. 3 denied that the property on the East was bounded by Morpirila Village and further stated that the village Morpirila was far away from the property "Ambeachem". The Defendant No. 3 stated that the Matriz boundaries of the three divisions((Adicoes) were not correct and the same were fabricated. The Defendant No. 3 stated that the entire property "Ambeachem" was entered only under Matriz No. 202 with boundaries on the East by top of the hill and Pisonomolla, on the West by rivulet and on the South by Pisonomolla having Matriz No. 201 and Tollem of God Sasosini under Matriz No. 200. The Defendant No. 3 denied about the purchase of the said property by the Plaintiffs by Deed dated 3rd March, 1937 and further stated that the said Deed was false and fraudulent. The Defendant No. 3 denied that the property purchased by them was surveyed under the numbers mentioned by them and further stated that the Plaintiffs did not have any property in survey Nos. 144, 145 and 146 (Part). Portion of survey No. 146/4(Part) and 146/6(Part) and that some part of sub-divisions 4 and 6 belongs to Defendant No. 3.

8. The Defendant No. 3 also stated that Defendant Nos. 1 and 2 had no right, title and interest over the portions surveyed under No. 145/6. The Defendant No. 3 stated that the entry under survey No. 145/6 has been surreptitiously and falsely recorded in the name of Defendant No. 1 as occupant. The Defendant No. 3 stated that there existed property known as "Metade de Mol" bearing Matrix Nos. 1 and 2 both situated at Dabem belonging to the Comunidade of Naqueri and Comunidade of Quitol enrolled in the Land Revenue Office of Quepem forming part and parcel of property surveyed under Nos. 145/2, 3, 4, 5, 6 and 7 and survey No. 150(Part) and 149 (Part) and that the said Comunidade of Naqueri and Quitol are the owners in possession of the same. The Defendant No. 3 stated that part of the property Metade de Mol was wrongly shown in the Record of Rights in Village Morpirila. The Defendant No. 3 stated that besides there was another property known as Pisonomolla situated in Naqueri and enrolled under Matriz No. 201 and the same is part and parcel of the properties surveyed under No. 149 and portion of survey No. 150 and portion of survey No. 145/1 which belongs to Defendant No. 3 and portion of survey No. 146/4(Part)

and 146/6(Part) are part and parcel of the property Pisonomolla belonging to Defendant No. 3. The Defendant No. 3 further stated that the boundaries of villages Naqueri of Quepem and Quitol and Morpirla were not correct boundaries of the village Quitol and Morpirla and they were wrongly shown by present surveyors. The Defendant No. 3 stated that Village Morpirla is far away from survey No. 145 and 150. Regarding survey No. 145/6, Defendant No. 3 stated that Defendant Nos. 1 and 2 were trespassers and that they were unlawfully interfering in the property belonging to the Comunidade of Quitol and that survey Nos. 145/2, 3, 4 and 5 have been wrongly included in the name of the Plaintiffs. The Defendant No. 3 also filed a counterclaim to get the name of Joao Ernest Francisco Da Silva and Defendant No. 1 deleted from survey Nos. 144/2, 4; 145/1, 2 to 5, 146/4, 2 to 6 and 147/2, 8 with a further prayer to include the name of Defendant No. 3 therein.

9. This appeal was admitted on the following substantial questions of law:

1. Whether the Courts below have identified the suit property properly by reading/fixing the boundaries?
2. Whether the Courts below have properly interpreted the Sale Deed dated 3rd July, 1937 while deciding the rights over the suit property in survey Nos. 145/6 and 145/7?

10. Mr. S.D. Lotlikar, learned Senior Counsel of the Defendants, has submitted that the questions formulated are questions of fact and they do not involve any question of interpretation of a title document. Mr. Lotlikar, learned Senior Counsel has placed reliance on the case of Jangbir v. Mahavir AIR 1977 SC 27 wherein the Hon'ble Supreme Court has stated that unless interpretation of a document involves the question of application of a principle of law mere inferences from or the evidentiary value of a document generally raises a question of fact. The Court referred to its earlier decision reported in Nedunuri Kameswaramma Vs. Sampati Subba Rao, and stated that the Supreme Court has never laid down that inferences from contents of documents are always to raise questions of law and that a construction of documents(unless they are documents of title) produced by the parties to prove a question of fact does not involve an issue of law, unless it can be shown that the material evidence contained in them was misunderstood by the Court of fact.

11. On the other hand, Mr. M.S. Usgaonkar, learned Senior Counsel of the Plaintiffs has submitted that the case of Jangbir v. Mahavir (supra) does not lay down any proposition of law and that the case at hand is one of misconstruction of law which is always a substantial question of law which can be dealt in a second appeal. Mr. Usgaonkar, learned Senior Counsel has placed reliance on the case of Bhusawal Borough Municipality Vs. Amalgamated Electricity Co. Ltd. and Another, wherein the Supreme Court has stated that misconstruction of a document which is not merely of evidentiary value but upon which the claim of a party is based would be an error of law and the High Court in second appeal

would be entitled to correct it. Reliance is also placed on the case of *Jadu Gopal Chakravarty (Dead) by his Lrs. Vs. Pannalal Bhowmick and Others*, wherein the Supreme Court has held that construction of these basic documents which go to the root of the matter is a question of law and could be gone into in second appeal. It was a case where a plea of collusion and fraud was set up by the Plaintiff and Appellant and the same was founded on two primary circumstances: (i) that the suit property was absolute debuttar, and (ii) that no notice or opportunity was given to Panchanan, who had an interest. The existence or non-existence of both these primary facts depended upon a construction of two basic documents - Deed of Trust(Exh.1) and Deeds(Exhs.2 and 3). The observations that the construction of these basic documents which go to the root of the matter was a question of law and could be gone into in second appeal came to be made in the said background.

12. The Plaintiffs in this case had produced their title documents. The Plaintiffs had produced the description of the property claimed by them under registration No. 1042. The said description showed that by way of an addendum the eastern boundary which was earlier shown as paddy field denominated Nomoxi of the Duels of the village and hill top was changed to as boundary of Village Dabem and paddy field of the property denominated Deulachi Nomoxi of Village Quitol of the province of Bali. This change of boundary had not taken place in the recent past before the filing of the suit but on or about 5th January, 1870, that is to say much before the Plaintiffs had purchased the property by a Sale Deed dated 3rd July, 1937. The Plaintiffs had purchased one half of the 3/4ths of the said property with boundaries as mentioned in the said certificate of description and the Plaintiffs property stood inscribed in their names, as can be seen from the certificate of inscription from 14th August, 1937. The dispute between the Plaintiffs, the Defendant Nos. 1 and 2 as well as Defendant No. 3 was essentially regarding the eastern boundary of the property purchased by the Plaintiffs by the said Deed dated 3rd July, 1937. In spite of the production of the said title documents of the Plaintiffs, the learned trial Court wrongly observed that the changes of the boundaries was done on the sale executed by Ananta Vitola S. Navelkar and others on 3rd July, 1937 without a Deed of Rectification. The learned trial Court failed to take note of the fact that the boundaries were rectified by way of addendum on or about 5th January, 1870 i.e. more than 50 years prior to the Sale Deed. The learned first appellate Court held that the Plaintiffs were the owners of the property purchased by them but refused to grant any reliefs because the Deed of purchase dated 3rd July, 1937, did not describe the property giving the boundaries as an independent unit. In my view, both the Courts below have failed to construe the document of title of the Plaintiffs also with reference to boundaries which was the very foundation of their claim in the suit and this being so, such a misconstruction of the document of title involves a substantial question of law which can be dealt with by this Court in second appeal.

13. As already stated, the Plaintiffs purchased the property claimed namely half

of 3/4ths of property "Ambeachem" alias "Tansorem" by virtue of the said Deed dated 3rd July, 1937, as per boundaries of the said property as mentioned in the certificate of description namely the eastern boundary having been shown as Village Dabem and paddy field of the property denominated Deulachi Nomoxi of Village Quitol of the province of Bali. The Plaintiffs have stated that the Village Dabem is same as Village Morpirla and to show the said boundary of Village Morpirla the Plaintiffs produced the survey plan at Exh.PW1/C. The Defendants Nos. 1 and 2 have accepted this position by stating that the eastern boundary of the property enjoyed by them is village Dabem. The Plaintiffs had therefore proved particularly by production of survey plan that village Dabem or Morpirla started where their property ended on the eastern side and none had proved that the village boundary was incorrectly shown. The Plaintiffs having produced the Deed of purchase dated, 3rd July, 1937(Exh. PW1/B) it was not at all necessary for the Plaintiffs to have produced the Deed of Division and allotment dated 27th January, 1916. The Deed itself mentioned that what was sold was a divided and allotted share. Therefore, it was also unnecessary for the learned first appellate Court to have observed that in the absence of the said Deed of Division it was not possible for the Court to know whether there was actually division or merely allotment of shares. The Plaintiffs in para 6 of the Plea had categorically stated that the half of 3/4ths purchased by them was an independent unit and was possessed and enjoyed by the Plaintiffs and was, inter alia, surveyed under survey Nos. 145/6 and 145/7. The answer of Defendant No. 3 to the said plea of the Plaintiffs was that they were in possession of survey No. 145/6 on the bonafide assumption that it was their property known as "Metade de Momburla" having matriz No. 4 of Dabem village. In other words, the Defendant Nos. 1 and 2 did not claim any property from Naqueri village. All the documents produced by Defendant Nos. 1 and 2 pertained to Quitol village and not to village Naqueri and, therefore, the documents produced by Defendant Nos. 1 and 2 could not have been said to have related to the property of the Plaintiffs situated in Naqueri village. Since the Plaintiffs had identified the property purchased by them as half of 3/4ths corresponding to survey nos. mentioned in para 6 of the Plea, in my view, the learned first appellate Court fell in error in observing that the Plaintiffs had miserably failed to identify their property by means of survey nos.

14. The Defendant Nos. 1 and 2 might have been in possession of survey No. 1415/6 as stated by P.W.1, Sandra D'Silva, from the year 1980. However, the fact remains that Defendant Nos. 1 and 2 had failed to prove that they had acquired any right by way of prescription. In fact, issue No. 8 relating to prescriptive title claimed by Defendant Nos. 1 and 2 was answered against Defendant Nos. 1 and 2 by the learned trial Court and Defendant Nos. 1 and 2 had not preferred any appeal against the same nor had filed any cross objections. Those findings of fact, therefore, have become final and are binding against Defendant Nos. 1 and 2.

15. It was unnecessary for the Plaintiffs to have identified their half of 3/4ths

with reference to three matrix nos. which were referred to by them. It was more than sufficient for the Plaintiffs to have identified the said half of 3/4ths by reference to the eastern boundary regarding which alone there was a dispute between the parties. It was the contention of Defendant Nos. 1 and 2 that the eastern limit of the property of the Plaintiffs was a loose stone wall which was constructed by the Plaintiffs in the year 1978 or thereabout on the eastern boundary of survey No. 145/1 but P.W.1, Sandra D'Silva, had explained that the said wall was constructed to protect the coconut plantation. The same could not have been held against the Plaintiffs as long as the Plaintiffs had identified their eastern boundary with reference to Dabem/Morpirla village. It is true that the Plaintiffs were unable to clearly point out the location of the paddy field of the property denominated Deulachi Nomoxi but that was unnecessary as long as the Plaintiffs were able to point out the eastern boundary of their property with the help of the survey plan Exh.PW.1/C being Morpirla or Dabem village.

16. On behalf of the Defendant Nos. 1 and 2, it is contended that survey No. 145/6 might not have been the property of Defendant Nos. 1 and 2 but the same would not show that it is the property of the Plaintiffs. Reference has been made to the case of Vidhyadhar Vs. Manikrao and Another, . In this case, it has been stated by the Supreme Court that a person in his capacity as a Defendant can raise any legitimate plea available to him under law to defeat the suit of the Plaintiff. This would also include the plea that the sale deed by which title to the property was intended to be conveyed to Plaintiff was void or fictitious or, for that matter, collusive and not intended to be acted upon. Thus, the whole question would depend upon the pleadings of the parties, the nature of the suit, the nature of the deed, the evidence led by the parties in the suit and other attending circumstances. In my view, the said observations of the Supreme Court are not at all applicable to the case at hand. The Plaintiffs have abundantly proved in this case with the title documents and the survey plan that the eastern boundary of the property purchased by them is village Dabem or Morpirla and, therefore, by necessary implication the Plaintiffs property has got to extend upto the limits of the said village in the absence of any other acceptable evidence having been produced by any of the Defendants.

17. The Plaintiffs property has been inscribed in the names of the Plaintiffs from 14th August, 1937. One of the main objects of the Code of Land Registration was to give publicity to the inherent rights to immovable properties. Article 953 of the Civil Code, 1860 provides that the inscription in the registration of a title of conveyance without condition precedent, involves, irrespective of any other formality, the transfer of possession in favour of a person in whose favour such inscription has been done. In other words, by virtue of the aforesaid article, the Plaintiffs had in their favour evidence of both of title and possession in respect of the property claimed by them against none proved by the Defendants.

18. The Plaintiffs had admittedly purchased half of the said 3/4ths of the said property known as "Ambeachem" alias "Tansolem" having Land Registration No.

1042. Assuming for a moment that the Plaintiffs were unable to show the exact portion they had purchased of the said property, the status of the Plaintiffs would have been reduced to being only as co-owners and being co-owners the Plaintiffs would also be entitled to maintain a suit for recovery of possession against trespassers who had no better title than the Plaintiffs.

19. In the case of Ram Niranjana Das and Another Vs. Loknath Mandal and Others, a Full Bench of that Court has held that a suit by a co-sharer is competent, if he sues for recovery of possession of land which is owned by him jointly with others, even without impleading the other co-sharers and that a co-sharer having an interest in a property jointly with others, is apparently a person with a better title than a trespasser. In this view of the matter also the Plaintiffs would be entitled to recover the possession of the portion surveyed under No. 145/6 from the Defendant Nos. 1 and 2.

20. The Defendant Nos. 1 and 2 or for that matter Defendant No. 3 having failed to prove any title to survey Nos. 145/6 and 145/7 respectively and Defendant Nos. 1 and 2 also having failed to prove prescriptive title as regards survey No. 145/6 the Plaintiffs would certainly be entitled to recover the possession from Defendant Nos. 1 and 2 as well as Defendant No. 3 assuming that the latter was in possession of survey No. 145/7.

21. The Hon'ble Supreme Court in the case of Indira Vs. Arumugam and Another, has held that once the title is established on the basis of relevant documents and other evidence unless the Defendant proves adverse possession for the prescriptive period, the Plaintiff cannot be non-suited. This principle squarely applies in this case.

22. In the light of the above discussion, in my opinion, both the Courts below were certainly not justified in dismissing the suit of the Plaintiffs. On the contrary, both the Courts below ought to have decreed the suit of the Plaintiffs in terms of prayers (a), (b)(recovery of possession) and (c) of the plaint, which I hereby do. The Plaintiffs are entitled to costs throughout.