

Tanvi K. Ghanekar

Advocate

Dated: 02/07/2021

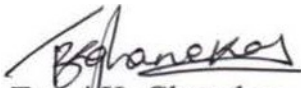
To,
M/s Sattva Villas LLP

Dear Sir,

Kindly find enclosed the Title Opinion on the of Senior Advocate Sudin M S. Usgaonkar in the matter of title of an immovable property known as 'Terceiro Tolopo' situated at Anjuna- Caisua, Bardez Goa. The property is surveyed under no. 206 sub division 3, admeasuring 2000 sq. mtrs.

Thanking you,

Yours Truly,


Tanvi/K. Ghanekar

Date: 02/07/2021

To,
Adv, Tanvi K. Ghanekar

TITLE OPINION

This opinion relates to title of Mr. Valen Savio Sydney Alemao (hereinafter referred to as the present owner) to the immovable property known as "TERCEIRO TOLOPO,, situated at village of Anjuna, within the Panchayat limits of the Anjuna-Caisua, Taluka Bardez, (Hereinafter to be referred to as the said property). The said property comprises of two adjacent plots by the same name, being one plot lying to the North and the other plot lying to the south, both the plots are surveyed under no. 206/3 of village Anjuna and totally admeasuring an area of 2000 sq. mtrs.

The said property is bounded as under:

East By a 5.00 metres wide public road, beyond which lies the land bearing Survey No. 238;

West: The land bearing Survey No. 206/3;

North: By a lane, beyond which lies the land bearing Survey No. 240; and

South: By 3.00 metres wide public road, beyond which lies the land bearing Survey No. 20611

The following documents were furnished for the scrutiny:



- I. The copy of the Livro Denontinado Registo i.e. Deed of provisional Possession and its translation
2. Copy of the "Livro Denominado Tombo 2 B"
3. Certificate dated 16/04/2021 issued by the Comunidade of Anjuna certifying grant of Definitive possession.
4. Deeds of sale dated 15/01/1997 and 24/01/1997
5. Deed of Sale dated 30/12/2009
6. A copy of Regular Civil Suit No. 46/2012/F and the Written Statement.
7. The copy of the Compromise Decree dated 30/01/2016 passed by the Hon'ble Civil Judge Junior Division at Mapusa.
8. Survey Form I and XIV(Manual)
9. Survey Forms I and XIV dated 01/12/2010, 07/11/2016 and 06/02/2021
10. Survey Plan
- II. Nil., Certificate of Encumbrance dated 02/03/2021 issued by the Civil Cum- Sub-registrar, Bardez, Goa
12. Land Zoning Certificate bearing ref. No. TPBZ/ZON/8412/ANJTCP-202111066 dated 08/03/2021 issued by the Dy. Town Planner.

I have perused the documents furnished for scrutiny and opine as under:



Relating to Comunidade Grant

1. The recitals in the last Deed of sale dated 30/12/2009, state that said property originally belonged to Comunidade of Anjuna, who had granted the said property to one Maria Santana Mascarenhas (hereinafter referred to as said Santana) on *aforamento* (emphyteusis) basis and the

endorsement with respect to the said aforamento has been recorded under no. 6 of Second B volume of the Book of Tombo of the said Comunidade on, 30/04/1919.

Upon going through the extract of book "LIVRO DENOMINADO REGSITO" relating to the said property, the same is found recorded at pages 84,84v, 85, 85v, 86v, 87, 87v, 88, 89, 89v, 90,90v. From the records of inspection registered under the item no. 36 and 37 of the series of the 1922 relating to "Terceiro Tolopo" or "3rdTolopo", it is noticed that the name of the property corresponds to that of the said property.

2. Further it is seen that application for the Grant of the said property on Aforamento basis was registered under item no. 36 and 37 and vide orders dated 15/03/1925 and 08/05/1925 respectively, the provisional possession of the said property was given to said Santana. It was observed that at the time of delivery of possession of the said property, it was verified that land measures 20 mtrs towards its east and west and 50 mtrs towards its north and south and the boundaries of the said property were verified. The same were found to be corresponding to the one recorded in the records of inspection. The area of both the plots was found to be 1,000 sq. mtrs. each which corresponded to the one recorded in the records of inspection.

3. It is informed by the present owner that among the documents delivered to him by the predecessors in title, only the document of provisional possession is found and there is no document of definitive



possession (final possession). It is further found from the recitals in the said Deeds of sale dated 15/01/1997 and 24/01/1997 that said Santana died leaving behind her sole successor Carmelina Fernandes, also known as Carmelina Fernandes e Britto (hereinafter to referred to as said Carmelina) married to Joseph Britto.

4. Upon going through the book "Livro Denominado Tombo 2 B" of the Comunidade at pages 115, 117 and 118, it was noticed that an entry in the name of Said Santana was made pertaining to remission *offoro* and the same is found recorded under Item No. 83 at page 7 overleaf on 03/02/1984 of cash book of the year 1984, as Said Carmelina had paid 20 years *foro* (lease rent) at one instance.

5. The relevant provision of Code of Comunidade is quoted as under:

"Art. 222: the Regsiter2 (tombo) is the detailed list of the properties in comunidades domain which are in possession and inscribed in the name of the private persons (model No.12),



6. Although in the survey records the name of said Carmelina appears in the column of Occupant, it could be on the basis of provisional possession. The entry in Survey form relates to an 'occupant' and not to an 'owner'.

7. Possession through the document of provisional possession is mere an act of tolerance and it does not confer any title. It is only the document of definitive possession/ final possession that confers a legal title. Also, mere payment of *foro* without definitive possession does not confer title.

8. As per the scheme of 'Aforamento'(grant),the provisional possession of the land, applied for aforamentos, is given under Article 335 para 3. Land is granted either for the purpose of construction of house or raising garden. As per Article 341 the plot granted shall revert to the Comunidade if it is not utilized for the purpose for which it is granted, in this case for construction of house within four years from the date of provisional possession.

9. As per Article 342 **if** for some reasons the house cannot be constructed, the allottee, before the expiry of the said period should apply for extension. The Comunidade may grant extension of one year. Once the purpose for which aforamento was granted has been fulfilled, within 3 days from the end of period specified in Article 341 or within the extension granted of one year **if** any under Article 342, the allottee is **bound** to apply to the Administrator for definitive possession.



10. As per sole para to Article 337, the Administrator shall grant the definitive possession on the day fixed in the presence of the allottee, attorney, the clerk of the Comunidade and the secretary of the administrator, who shall write the minutes which will be later recorded by the clerk in the competent register maintained by the respective Comunidade.

11. The above provision thus, shows the procedure in detail and the manner by which the definitive possession is given jointly by the officers of the Comunidade and the Administration

12. Article 338 states that provisional delivery of land is only an optional act of mere tolerance between Comunidade and the allottee and it is only the definitive possession that confers legal title on the grantee recognised by civil law. The provisional possession is only a possessory right which can be used against third party.

13. The relevant provisions of the Code of Comunidade are quoted for ready reference:

"ArL 337-The emphyteuta within three days after the end of the period set in article 341, or extended as per article 342, is bound to apply to the administrator for the definitive possession of the land granted on emphyteusis.

Sole: After applying for the possession, the administrator shall grant the same on the day and hour that shall be fixed, and in the presence of the emphytueta, the attorney, the clerk of the comunidade and the secretary of the



administration, the latter shall write the respective minutes, which later on shall be recorded by the clerk in the competent register.

Art. 338- The provisional delivery of the land granted as emphyteusis, cannot be considered in legal relations between the comunidade and the lease holder, as this is an optional act of mere tolerance, only the definitive possession confers to the emphyteusis the rights that the civil law recognises and assure him. He, meanwhile, can make use of the possessory actions and of the other conservatory means against the third parties."

Art 341- Plot granted by way of emphyteusis shall revert to the Comunidade is not utilized, within four years from the date of provisional possession.

I. The following plots shall deemed as uti/ized:-

1.....

2.....

3.The plots granted for building houses which are completed within the said four years, with at least one fifth of the area fully utilized upto.

4.....

5.....

Art. 342. The emphyteuta who, for any reasons, cannot avail of plots granted as emphyteusis within the period of four years, can, before expiry of the same, apply for its extension mentioning the causes for delay in the fulfilment within the stipulated period, and the Government General, after hearing the managing Committee of the Comunidade and the respective administrator, decide the request as he thinks fit, granting the extension for one year.

14. As there are no records available in the office of Comunidade to show that definitive possession was granted to said Santana, upon the request of the present owner a Certificate dated 16/04/2021 was issued by the Comunidade of Anjuna and signed by all office bearers ,certifying that definitive possession was granted to said Santana and that the said property is no longer the property of Comunidade of Anjuna.

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Relatin& to flow of title

15. Said Joseph Britto died on 07/011986 leaving behind his moiety holder said Carmelina and three sons namely, a) Cyril Paul Britto(hereinafter referred to as said Cyril) married to Esperanca Feliciana Britto(hereinafter referred to as said Esperanca), b) Mr. Albert Britto (hereinafter referred to as Albert) and c) Sebastian Nicolas Britto (hereinafter referred to as said Sebastian) married to Savia Britto (hereinafter referred to as said Savia).

16. It is found that said Cannelina along with her son Sebastian and his wife Savia, sold their undivided share in the said property to one J.M. H. Hazaranbi by deed of sale dated 15/01/1997 wherein, said Carmelina is represented by said Sebastian as her constituted attorney. The said Deed of Sale was duly registered in the office of the sub registrar of Bardez, under No. 805, Book no. I volume 492, dared 12/02/1997.

17. Similarly, said Cyril alongwithb his wife Esperanca and his brother Albert represented by said Carmelina as their lawfully constituted



attorney sold their undivided share in the said property to said J.M. H. Hazaranbi vide Deed of sale dated 24/01/J 997 duly registered in the office of Sub-Registrar of Bardez, under no. 855, in Book No. I, Volume No. 494, dated 18/02/1997

18. By a Deed of Sale dated 30/12/2009, said J.M. H. Hazaranbi sold the said property to the present owner, duly registered in the office of the Sub-Registrar of Bardez, under no. BRZ-BK-1-02372-2009, in Book No. LCD Number BRZD37, dated 31/12/2009.

19. Accordingly, the name of said present owner came to be recorded in the occupant column in the survey form I and XIV pertaining to the said property. There is no entry found in the Tenant's Column as well as in the other rights column.

20. A suit bearing Regular Civil Suit No. 46/2012/F was filed by said Cyril, his wife said Esperanca, Basil Mathew Britto, Georgina Peres, Marie Apoline Irene Harren, Isabella Britto and said Albert against Sebastian Britto and his wife Savia, J.M.H. Hazaranbi, her husband .M. Haroon and the present owner in the court of Civil Judge Junior Division at Mapua to declare the said Deeds of sale dated 15/01/1997 and 30/12/2009 as null and void and for issuance of direction to the Sub-Registrar for cancellation of these instruments. Upon going through the



plaint, it was found out that said Santana (referred to in para 3 above) was survived by a daughter Mary Santan Fernandes also known as Maria Sabina Fernandes (Hereinafter referred to as said Sabina) married to one Alex Fernandes also known as Aleixinho Fernandes (hereinafter referred to as said Alex). Said Cannelina is the only daughter of said Sabina and said Alex.

21. Further it was found that said Carmelina had seven children and not three as represented in the sale deed dated 15/01/1997 and 24/01/1997. Basil Mathew Britto, Georgina Peres, Marie Apoline Irene Harren, IsabeUa Britto (hereinafter referred to as said other heirs) are the children of Carmelina who were not made party to the either of the sale deed.

22. During the course of the proceeding, the parties arrived at a compromise among themselves and consent terms came to be filed before the Hon'ble Civil Judge Junior Division at Mapusa. Based on said Consent Terms, a Compromise Decree dated 30/01/2016 was passed by the Hon'ble Civil Judge Junior Division at Mapusa. By the said compromise decree the said Cyril for himself and as the duly constituted attorney of the Esperanca Britto and Basil Mathew Britto dated 26/09/2011, Georgina Peres, Marie Apoline Irene Harren, Isabella Britto by dated 13/10/2009 and said Albert dated 21/09/2011 in the said suit conveyed all their undivided rights, title and interest in the said property in favour of the present owner herein upon receipt of consideration.



Note: Power of attorneys dated 26/09/2011, 26/09/2011, 13/10/2009 and 21/09/2011 given by Esperanca Britto, Basil Mathew Britto Georgina Peres, Marie Apoline Irene Harren, Isabella Britto said Albert respectively in favour of said Cyril are a matter of record..

23. In the said compromise decree the sale deeds dated 15/01/1997 and 30/12/2009 were declared as valid and legal documents. The said- Cyril, said Esmeralda, said Albert and said other heirs (through their duly constituted Power of attorney holder said Cyril) surrendered/relinquished their right in the said property by transferring it favour of the present owner. And the Hon'ble Judge while passing the Judgment held that since there is transfer of rights, the office of Sub-Registrar, Bardez was directed to register the said compromise decree.

The relevant finding is quoted for ready reference:

"Before moving to the operative part, I must observe that since there is a transfer of rights (rom the plaintiffs to the Defendant No. 5, this eventual decree which will be drawn later today will have to be registered before ttle Sub-Registrar of Bardez. Therefore, it becomes necessary to hereby direct the Sub-Registrar of Bardez to register the decree which will be passed later today by this Court, in this suit. Needless to say, the Sub-Registrar can always require payment of the appropriate stamp duty, if the stamp duty amount of Rs.42,100/- is found insufficient."

Accordingly, said Compromise Decree was registered in the Office Sub-Registrar, Bardez, under no. BRZ-BKI-01414-2016, of Book-1

document, CD number BRZD778 on 18/03/2016. Thus, said Cyril, said Esperance, said Albert and other heirs of said Carmelina transferred their right in favour of the present owner.

24. Vide NIL Certificate of Encumbrance on Property bearing No. 557/2021 dated 02/03/2021 issued by the Civil Cum- Sub-registrar, Bardez, Goa it is certified that upon searches made in Book 1 for three years commencing from 26/01/2018 to 26/02/2021 there are no registered encumbrances found to be affecting the said property.

25. Vide Land Zoning Certificate bearing ref. No. TPBZ/ZON/8412/ANJTCP-202111066 dated 08/03/2021, issued by the Dy. Town Planner as per the regional plan for Goa 2021 the said property falls under the Settlement Zone (VP-2) with FAR 60.

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Relating to possession

26. As there is no evidence found recorded in the books of Comunidade due to the misplacing of such books by Comunidade, to show that said Santana has acquired ownership to the said property by way of *aforamento*, alternatively, it can be said that said Santana has acquired possessory title by adverse possession/prescription in view of open, long, peaceful, settled and continuous possession for more than 30 years.

27. Upon the fourth year of the grant of provisional possession the comunidade failed to take steps to recover property. As already stated at para 8 above, the said property technically reverted to comunidade as



Said Santana did not construct a house (the purpose for which said property was granted/allotted on aforamento basis). Nonetheless, she has continued to be in possession of the said property for more than 60-70 years till it was sold to J.M. Hazaranbi.

28. The comunidade did not file the suit for recovery of possession within the statutory period. Considering section 27 of the Indian Limitation Act, the rights of the actual owner get extinguished at the end of the period to institute a suit and then applying Article 529 of the Portuguese Civil Code, prevailing in Goa upon the expiry of continuous possession of 30 years, prescription will operate.

The Section 27 of the Indian Limitation act is quoted for ready reference:

"27. Extinguishment of right to property- At the determination of the period hereby limited to any person for instituting a suit for possession of any property, his right to such property shall be extinguished."

29. Similar provision is found in the Portuguese civil Code. The same is quoted as under:

Article 505

Things and rights are acquired by virtue of possession, just as obligations are extinguished by the fact of not demanding their fulfilment. The Law lays down conditions and the period of time, that is necessary, for one, as well as for the other. This is called prescription.

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Sole Paragraph: The acquisition of things or rights by possession is known as positive prescription; the discharge of obligations by reason of not demanding their fulfilment is known as negative prescription.

30. After the liberation of Goa, the survey operations in Goa under Goa Land Revenue Code, 1968 commenced for Bardez Taluka, immediately upon enforcement of the Goa Land Revenue Code in September, 1969. The new survey was promulgated in Village of Anjuna on 29/03/1972.

31. It appears that upon the redemption of *foro*, said Carmelina applied to get her name recorded in the survey records and accordingly her name came to be inserted in survey form I and XIV in 1983/1984.

32. The said entry in the survey form which bears presumption of correctness as per Section 105 of the Goa Daman and Diu Land Revenue Code, continued from 1983 till now, initially through said Carmelina and later through her successor in title i.e. the present owner. No Objections/claim was raised by Comunidade to the survey entry of said Carmelina or the present owner. The Said entry of said Carmelina has continued for 37years till 2009 and thereafter the name of present owner appeared for last 12 years in the survey form.

33. This shows that said Property initially was in physical possession of said Santana and upon her death, has been in possession of her



descendant i.e. said Carmelina and then is in possession of the present owner totally for a period of 90 years. Therefore, such a long possession for more than 30 years can give rise to acquisition of title by prescription. As upon the failure of the Comunidade to take steps for recovery of possession from Carmelina after the expiry of 4 years from 1925, the possession thereafter of said Santana can be said to be hostile/adverse to the true owner i.e. Comunidade. Therefore, from 1929 till now the parties have been in possession for more than 90 years, exceeding 30 years period to acquire title by prescription.

34. The relevant provisions are quoted below for ready reference:

ARTICLE 529

When, however the possession of immovable or incorporeal immovables mentioned in the preceding article, has lasted for 30 years, prescription shall operate, regardless of bad faith or lack of title, except what is provided in article 510.

ARTICLE 510

Whoever possesses in the name of another cannot acquire by way of prescription the thing possessed, except where there is an adverse claim of title of possession, either arising from a third party, or arising from an objection raised by the possessor which is adverse to the right of the owner, in whose name the possession was being exercised, and not repelled by the latter; but in such case, prescription will start from the date of claim of adverseness.

Sole paragraph: It is said that there is adverse claim of title when the same is by any other party capable of transferring the possession or dominion.



35. In the case of *Comunidade of CIIOrao vis Leticia D'souza* First Appeal No.136 of 2002/decided by the Hon'ble High Court of Bombay at Goa, the land was granted on aforamento with definitive possession to Domingos D'souza in the year 1908. Much later after his death his daughter Leticia paid the foro by remission in the year 1984. The Comunidade contended to be in possession after the death of Domingos as the new survey showed the name of Comunidade. The High-court repelling the contention of Comunidade upheld the claim of Leticia based on the remission made by her.

In that case the name of Comunidade appeared in the survey record whereas in our case the name Comunidade never appeared in the survey records.


36. A Public Notice dated 22/05/2021 was published in two local daily newspapers 'Navhind Times' and 'Herald, inviting objection within a period of 15 days. However, no objection was received from any person within the period stipulated in the public notice and also till today.



CONCLUSION:

In view of observation made in para 34 and 35 above, the party can be said to have also acquired title by prescription based on open, long, peaceful, continuous and adverse possession for more than 30 years.

Panaji,



SUDIN M.S.USGAOKAR