

IN THE HIGH COURT OF BOMBAY AT GOA**SECOND APPEAL NO. 29 OF 2006**

Ms. Barbara Gomes,
c/o. Rosa Esmenia Moraes,
H.No. 23/31, Pale, Velsao,
Salcete, Goa.

..... Appellant.

V/s.

1. Pratap Mardolkar,
H.No.84, Alto Dabolim, Goa.

2. Comunidade of Sancoale,
through the Procurador of the
Comunidade of Sancoale,
Sancoale, Goa.

..... Respondents.

Shri Y. V. Nadkarni and Ms. D. Shirgan, Advocates for the appellant.

None for the respondents though served.

CORAM :- F.M. REIS, J.

Date : - 6th February, 2015.

ORAL JUDGMENT :-

Heard Shri Y. V. Nadkarni, learned Counsel appearing for
the appellants. None for the respondents.

2. The above appeal came to be admitted by an order dated 16/08/2006, on the following substantial questions of law :

a) Whether the first Appellate Court did not correctly construe the documents produced by the plaintiff, more particularly the certificates of usurpation issued by the Comunidade, and other documents such as Consent Decree ?

(b) Whether the first appellate Court had correctly interpreted the provisions of Code of Comunidades regarding usurpation ?

(c) Whether the first Appellate Court did not correctly interpret the documents produced by the plaintiff more particularly the certificates issued by the Comunidade as also other documents which if correctly interpreted would have led to an opposite conclusion ?

3. Shri Y. V. Nadkarni, learned Counsel appearing for the appellant has strenuously contended that the property belonging to the appellant is corresponding to lote Nos. 77 and 78 which usurpations have been regularised in favour of the father of the appellant herein by

the Comunidade. The learned Counsel further points out that it is the case of the appellant that the said usurpations corresponding to lote Nos. 77 and 78 are surveyed in the record of rights under the Land Revenue Code under Survey Nos.59/0 and 59/1 of Village Dabolim, Mormugao Taluka. The learned Counsel further points out that the area legalised in favour of the appellant admeasures an area of 875 sq. metres and an area of 9,798 sq. metres. The learned Counsel further points out that these usurpations are located in the said survey numbers 59/0 and 59/1, which was originally surveyed under No.59/0 of Village Dabolim. The learned Counsel further points out that the ancestors of the appellant were in possession of the said disputed property since the year 1941 and this itself discloses that the disputed property belongs to the appellant. The learned Counsel further submits that the learned trial Judge has rightly appreciated the evidence on record to come to the conclusion that as the respondent failed to establish that lote Nos. 77 and 78 are not located in the property surveyed under No.59/1 of Village Dabolim, the suit of the appellant deserves to be decreed. The learned Counsel further submits that the first appellate Court erroneously interfered in the said Judgment, without examining the documents on record. The learned Counsel further submits that the

first appellate Court has erroneously misconstrued the documents produced by the appellant to come to the conclusion that the property surveyed under No.59/1 does not correspond to the property legalised in favour of the appellant being lote Nos. 77 and 78. The learned Counsel has, thereafter taken me through the impugned judgment of the first appellate Court to point out that the Court has erred to hold that the appellants have failed to establish the identity of the disputed property surveyed under No.59/1. The learned Counsel has also taken me through the document of usurpation referred to by the learned first appellate Court to point out that the statements therein have been misread by the appellate Court to allow the appeal, setting aside the judgment passed by the learned trial Court. The learned Counsel, as such, points out that the substantial questions of law framed by this Court are to be answered in favour of the appellant herein.

4. The respondents though served have failed to remain present.

5. I have carefully considered the submissions of the learned

Counsel appearing for the appellant and also gone through the record. On perusal of the judgment of the learned trial Judge, I find that the learned Judge has not at all scrutinized the material on record to come to the conclusion that the appellant, who was the plaintiff, has established her claim that the property bearing lote Nos. 77 and 78 is located in the property surveyed under No.59/1. It is expected of the learned trial Judge to examine each and every piece of evidence produced by both the parties to come to a definite conclusion with regard to the claims of the respective parties. As the learned trial Court has failed to correctly exercise its jurisdiction in deciding the suit filed by the appellant, the lower appellate Court in such circumstances was justified to reappreciate and consider the evidence produced by the parties to ascertain as to whether the appellant has established her case as pleaded. On perusal of the judgment of the lower appellate Court, it reveals that the learned Judge has rightly taken note of the pleadings of the appellant. A perusal of the plaint discloses that it is the case of the appellant that the property shown as lote Nos. 77 and 78 is located in the property surveyed under No.59/1 of Village Dabolim. On the contrary, learned Judge has relied upon the consent terms produced in the suit for partition between the appellant and his

family members inter se to hold that such claim of the appellant could not be accepted. The learned Judge has taken note of the fact that in the said suit it was the case of the appellant who was also party therein that the property surveyed under No.59/1 corresponds to usurpation registered under No.16. These aspects of the earlier proceedings were not even pleaded in the present suit filed by the appellant. In such circumstances, the contention of the appellant that the consent terms produced by the appellant herself would establish the claim that lote nos. 77 and 78 are located in the property survey no.59/1 is not at all justifiable.

6. Apart from that, the lower appellate Court also examined the boundaries as shown in the alleged usurpation claimed by the appellant to hold that the boundaries therein were not even pleaded by the appellant in the present suit. This would further establish that the boundaries of the property surveyed under No.59/1 do not correspond to any of the boundaries as shown in the usurpation plan. In fact, perusal of the document of usurpation relied upon by the appellant would show that the alleged usurpation of an area of 9,798 sq. metres is located in the vicinity of the residential house of the

appellant. In the present case, there is nothing on record to suggest that on any side of the property surveyed under No.59/1 there is any portion occupied by the family of the appellant.

7. In such circumstances, the construction by the learned lower appellate Judge of the documents produced by the appellant cannot be faulted on the basis of the evidence on record. The learned lower appellate Court has rightly appreciated the evidence on record to come to the conclusion that the appellant has failed to establish that lote Nos. 77 and 78 are located in the property surveyed under No.59/1. The appellant has not even examined any expert witness to locate the boundaries. Having failed to produce any document in support of her claim, I find that the lower appellate Court was justified to come to the conclusion that the appellant has failed to establish her case and consequently allowed the appeal, and dismissed the suit filed by the appellant.

8. It is now well settled that this Court, in its exercise of its jurisdiction under Section 100 of Code of Civil Procedure, cannot reappreciate the evidence to come to any contrary finding unless there

is perversity in such findings. In the present case, the learned first appellate Court has come to the conclusion on the basis of the oral, as well as the documentary evidence, that the appellant who was respondent No.1 before the lower appellate Court, has failed to establish her claim that the property lote nos. 77 and 78 are located in the property surveyed under No.59/1 of Village Dabolim. This finding of the lower appellate Court cannot be said to be perverse, as there is nothing on record to show that there was misreading of the evidence or that any clinching material was not taken note of by the lower appellate Court while coming to such conclusion. In such circumstances, I find that the substantial questions of law framed by this Court are to be answered against the appellant.

9. Hence, I find no merit in the above appeal which stands dismissed, with no order as to costs.

F.M. REIS, J.

ssm.