

IN THE HIGH COURT OF BOMBAY AT GOA**SECOND APPEAL NO. 3 OF 1999**

1. Shri Pedro Francisco Pereira (deceased)
Represented through Legal heirs
 - a) Ana Maria e A. I. Pires
daughter of Shri Pedro Francisco Pereira
r/o. Manxe Bhatt, Azossim,
P.O. Neura, Ilhas, Goa.
 - b) Mariano F. Pires
husband of Ana Maria Pires
r/o. Manxe Bhatt, Azossim,
P.O. Neura, Ilhas, Goa.
 - c) Margarida Fernandes
daughter of Shri Pedro Francisco Pereira
(since deceased through L/Rs.)
 - 1(c)(i) Mr. Foestar Cajetan Fernandes
Age – 20 yrs., Occupation – Service
 - 1(c)(ii) Mr. Fraser Jose Fernandes
Age – 18 yrs., Student.
Both resident of House No. 144,
Vaddy, Mercês.
 - d) Francisco Fernandes,

husband of Margarida Fernandes,
r/o. H. No. 144, Vaddy, Mercês,
Ilhas, Goa.

e) Miss. Iria F. Pereira
daughter of Shri. Pedro Francisco Pereira
r/o. H. No. 395, Gabriel Cruz Wado,
Behind Lourdes Church,
Utorda, P.O. Majorda, Salcete.

.... Appellants /
Ori. Plaintiffs

Versus

1. Antonio Joao Moraes (since deceased) by L.Rs.
2. Smt. Joaquina Moraes (expired)
represented by her legal heirs :-
 - a) Shri. Victor Moraes,
son of Antonio Joao Moraes
of major age, and his wife;
 - b) Smt. Pedrinha Moraes,
of major age, housewife
 - c) Shri. Ciril Moraes,
son of Antonio Joao Moraes,
of major age, and his brother
 - (cc)i. Smt. Blazy Moraes
wife of Shri. Ciril Moracs
residing near Utorda Church,

P.O. Majorda, Utorda, Salcette, Goa.

(cc)ii. Smt. Sushila Moraes
 wife of Shri. Francisco Moraes
 residing near Utorda Church,
 P.O. Majorda, Utorda, Salcette, Goa.

d) Shri. Francisco Moraes,
 son of Antonio Joao Moraes,
 of major age,

e) Smt. Celestina Moraes,
 of major age, daughter of Antonio Moraes
 and her husband,

f) Shri. Alberto Pereira,
 of major age,

g) Shri. Rosario Moraes, (deceased) by L.Rs.

2(g)(i) Joyce Rosario Moraes,
 daughter of late Rosario Moraes,
 major of age, unmarried

2(g)(ii) Elton Rosario Moraes,
 son of late late Rosario Moraes,
 major of age, unmarried

2(g)(iii) Alice Rosario Moraes
 daughter of late late Rosario Moraes,

major of age, unmarried

All residing at Dias Vaddo, Cotta,
Chandor, Salcete, Goa.

h) Smt. Umbelina Moraes,
of major age, housewife.

i) Shri Benedito Moraes
son of Antonio Joao Moraes
of major age, and his wife,

j) Smt. Tereza Moraes,
of major age, housewife,

All residing at Utorda, Salcete, ... Respondents/
Ori. Defendants.

Mr. Sudesh Usgaonkar, Advocate for the Petitioners.

Mr. D. Pangam,, Advocate for the Respondents.

CORAM: N. M. JAMDAR, J.

DATE: 24 FEBRUARY, 2015.

JUDGMENT:

The appellants challenge the Judgment and Order passed by the Additional District Judge (II), South Goa, Margao and the Judgment and Order passed by the Civil

Judge, Senior Division, Vasco dismissing the appeal and the suit filed by the appellants.

2. The suit was filed by the appellants claiming to be the owners in possession of a property known as “Pedachem Orda”, which bears a land registration no.13985. According to the appellants, the said property was bounded on the East by the property of Mariano Rosario Pereira, on the West by property of Serafino Rodrigues, on the North by the property of Gustinho Pereira and on the South by the property of Triphonio Godinho. According to the appellants, the property was gifted to Jose Vicente Pereira father of the appellant to Maria Pacheco ,Grand mother of the appellants by the Deed of Gift dated 16 June 1905. The Appellants described part of the property, that is survey no.178/3, is bounded on the East by Kacha road, on the West by a ditch beyond which lies the property of the Defendant. On the North by kacha road and the south by a ditch beyond which lies the property of Trifonio Godinho. The plaint was amended and the appellants introduced description of survey no.178/2 and in the plaint the reference to part of survey no.178/3 was to be read along with survey no.178/2. According to the appellants, the respondent no.1 inserted his name as the owner in respect of survey no.178/3 and taking advantage of that position, he was attempting to interfere with the property. In respect of survey no. 178/2, it was stated that it has been illegally shown in the name of one Tamaturgo Fernandes. Accordingly, the appellants prayed for a declaration that they are owners of the property “Peddachem Orda” surveyed under no.178/3 at

village Utorda, Salcette, Goa. In the suit, the appellants relied upon the Gift Deed of the year 1905, Extract from Book of Description, Matriz certificate and other documents. The appellants also examined witnesses on their behalf.

3. The respondents filed their written statement and contested the suit. The respondents denied the boundaries mentioned in respect of the said property "Peddachem Orda". It was the contention of the respondents that the suit property nowhere forms part and parcel of the property shown in paragraph 1 of the plaint. They asserted that the property exclusively and independently belonged to the respondents and it was distinct and separate property. They submitted that the property does not have any house, but only coconut trees and fruit bearing trees. It was contended that the name of the respondents appeared in the survey record since 1973 and the appellants had moved an application to the Mamlatdar for getting the record of rights corrected but they failed in those proceedings. It was submitted that the fruit bearing trees were plucked and enjoyed exclusively by the respondents and his family members. It was contended that the suit was nothing but an illegal attempt to grab the property of the respondents.

4. The learned Civil Judge considered the matter in great detail. The learned Civil Judge assessed both the documentary and oral evidence on record. He came to the conclusion that the cause of action stated in the plaint itself is false, no steps were taken by the appellants to get the survey

records corrected. The learned Civil Judge held that it is not possible to identify the property description in the land registration certificate, without there being any plan. It was held that the appellants have changed their case from time to time. The learned Civil Judge, after considering the documentary evidence, held that it was not possible to reconcile the boundaries given in the Gift Deed with the boundaries at location. A site inspection was also carried out by the learned Civil Judge and inspection notes were placed on record. The learned Civil Judge came to the conclusion that no documents were produced by which the appellants could claim the suit property. As regards oral evidence produced by the appellants, the learned Civil Judge found that this was contradictory and the oral evidence produced by the respondents was cogent and consistent. The learned Civil Judge accordingly held that no case was made out by the appellants and dismissed the suit.

5. In the appeal, the learned District Judge considered the evidence produced on record in detail. The learned District Judge after appreciation of evidence came to the conclusion that the Judgment and order passed by the learned Civil Judge was correct. The learned District Judge held that neither the Gift Deed nor the pleadings in the plaint demonstrate that the plaintiff has any title to the suit property. Accordingly, the learned District Judge dismissed the appeal.

6. I have heard Mr. Sudesh Usgaonkar, learned counsel for the Appellants and Mr. D. Pangam, learned counsel

for the respondents.

7. The learned counsel for the appellants took me through the Gift Deed and other relevant documents on record and the pleadings and oral evidence in great detail. He submitted that the boundaries in the Gift Deed of 1905 were clear and they tallied with the plaint and therefore, there was no warrant for the appellant to prove the same all over again. It was submitted that the larger property was gifted to the father of the appellants which has been bifurcated by public road and a small portion on the southern side of the road remained, out of which survey no.178/3 was the suit property. He submitted that in the written statement the respondents have admitted the boundaries as per the description. Learned counsel further submitted that the Gift Deed clearly recites the boundaries as per the original description and the findings that the property of T. Godinho lies beyond the ditch, is not substantiated by the entries, is incorrect. He submitted that this fact need not be proved as it was admitted by the respondents. The learned counsel also submitted that the finding that the probability that the suit property being of respondents is incorrect, as this property admittedly does not adjoin the larger property. It was contended that misconstruction of entry in the title documents would be a substantial question of law.

8. The second appeal was admitted on a question of law as regarding interpretation of the Gift Deed dated 16 June, 1905 and identification of the properties based on boundaries

as compared to other description.

9. Before the contentions raised by the learned counsel for the appellants are considered, the scope of Section 100 of Civil Procedure Code, 1908 must be kept in mind. It is settled by catena of judgments that under section 100 of the Code, the Court does not have powers to interfere with the pure findings of fact, and unless there is a substantial question of law. Appreciation of the oral and documentary evidence lies within the domain of the trial Court and the Appellate Court. Unless the appreciation is perverse, the factual finding are not to be disturbed. If the decision of both the Courts are perused, they would show that both the learned Civil Judge and the learned District Judge have considered each piece of evidence and have evaluated the evidential value and have recorded a finding. In the case of “**Dr. Ranbir Singh Vs. Asharfi Lal**” reported in (1995) 6 SCC 580, the Apex Court observed as under:

“14. Sub-section (1) of Section 100 of the Code of Civil Procedure contemplates that an appeal shall lie to the High Court from every decree passed in appeal by any court subordinate to the High Court, if the High is satisfied that the case involves a substantial question of law. Sub-section (4) of Section 100 further provides that when the High Court is satisfied that a substantial question of law is involved in any case, it shall formulate that question. But it may be pointed out that the

High Court formulated no such question of law on basis of which it proposed to interfere with the findings of facts. It has been the consistent view of this Court that there is no jurisdiction to entertain a second appeal on the ground of erroneous finding of fact, based upon an appreciation of the relevant evidence. There is a plethora of case-law in support of this view. To quote a few, references may be made to the decision in V. Ramchandra Ayyar v. Ramalingam Chettiar wherein this Court took the view that even if the appreciation of evidence made by the lower appellate court is patently erroneous and the finding of fact recorded in consequence is grossly erroneous, that cannot be said to introduce a substantial error or defect in the procedure and the High Court cannot interfere with the conclusions of fact recorded by the lower appellate court. This view has been reiterated by this Court in Bhagwan Dass v. Jiley Kaur. This being the position, the High Court was not justified in reappreciating the evidence and substituting its own conclusions for the well-reasoned findings recorded by the courts of fact.”

10. In the case of “**Mahaboob Vs. Maktumsab**” reported in (2008) 11 SCC 586, the Apex Court has observed

as under:

“15) DW 1 is none else than son of the defendant. As rightly observed by the trial Court, he was aged about 26 years as on February 1994, whereas partition had taken place in the year 1973. This shows that he was aged just about 7 years in 1973. In such circumstances, it is difficult to believe that he was aware of the transaction that took place in 1973. Even if we accept his statement is correct, he admitted that as per Ext.P-1 the plaintiff's father got 7 acres 10 guntas. The trial court has also raised a doubt that there is nothing on record to show that Exts. D-11 and D-13 were given to village accountant with the consent of the plaintiff. Like that of the trial Court, the first appellate court raised a doubt about the factum of 1985 partition. The appellate court also concluded that as per Ext. P-1 the extent of RS No. 98/3 is 7 acres and 10 guntas. In the light of the factual conclusion arrived at by the trial court as well as the first appellate court analysing the oral and documentary evidence, we are of the view that the High Court has committed an error in interfering on a question of fact which was not permissible under Section 100 CPC vide P. Chandrasekharan v. S. Kanakarajan and Basayya I. Mathad v.

Rudrayya S. Mathad.

16) It is settled law by this Court, that, it is impermissible for the High Court to interfere on a question of fact particularly when both the courts below rejected Ext. D-11 as not admissible since the same was not properly proved by the defendant. The conclusion arrived at by the High Court is not acceptable and the decision arrived at by the trial Court and the first appellate court declaring the plaintiff as the owner in possession of 7.10 acres is acceptable.”

11. The central issue in the case is whether the boundaries given in the Gift Deed would tally with the suit property. This would entail an exercise of ascertaining boundaries on the location. Before a declaration of ownership is given in favour of a person claiming it, it must be seen whether he has sufficiently shown that he is entitled to the property which is described in the plaint. If the Gift Deed of 1905 is perused, it would show that there are two sets of boundaries mentioned. Both the Trial Court and the Appellate Court have held that often boundaries at location described by names of adjoining owners do not tally and go on changing on account of subsequent transfers and hence all these changes need to be proved. The property described in the Land Registration certificate is difficult to be identified by present survey numbers unless by proving subsequent transfers. The

appellants did not mention the present adjoining boundaries and tallied these boundaries to correlate the old boundaries in the registration certificate. This was necessary to assert that the suit property was part and parcel of the property “Pedachem Orda” to prove that the boundaries of the said survey corresponded with the boundaries mentioned the Gift Deed. The appellant withheld from disclosing the survey number of remaining northern portion of the property. Both the Courts undertook the exercise of tallying the boundaries with the southern portion. The witness of the appellants PW.1 Pedro Silva did not specify any survey number to ascertain the location of property of Mariano Pereira. Nothing was produced to prove that the property which is towards the eastern side is owned by Mariano Pereira.

12. It is the contention of the learned counsel for the appellants that there was as clear admission on the part of the respondents and therefore, it was not necessary for the appellants to prove these facts. There is no such unequivocal admission as claimed. The entire written statement will have to be considered as whole and mere silence vis-a-vis a paragraph of the plaintiff cannot destroy the entire case of the respondents. Furthermore, the burden was on the appellants to prove their case. Whether the boundaries in the Gift Deed tally with the boundaries on location along with the boundaries given in the plaint was an exercise to be undertaken after appreciating the evidence on record. The title deed relied upon by the appellants itself gives two set of boundaries. The boundaries specified therein are detailed by the respondents.

They are with reference to the names of adjoining owners. Current position is not placed on record. No particulars are given regarding the northern side of the property.

13. The witnesses examined by the appellants have given contradictory versions regarding the number of trees and presence of structures in the property. The witnesses have contradicted the appellants themselves. It is not possible to believe that the plaintiffs will not be sure of what is in their ownership. There is complete variance in evidence as regards the coconut trees as to whether they are fruit bearing or not. Also whether there exists a structure or not. On the other hand the respondents evidence has been found to be cogent and convincing. It tallies with the site inspection report prepared after visit of the learned Judge. Further more, the appellants have not taken any steps, in respect of one Tamaturgo Fernandes whose name appears in the record of survey no.178/2. There is no explanation why this is not been done. The name of the respondents appear in the survey no.178/3 since the year 1973. Both the Courts below have taken note of these facts and the complete failure of the appellants to connect the suit properties with the boundaries in the Gift Deed and boundaries at location.

14. The learned counsel for the appellants relied upon the decision of the Apex Court in the case of “**Sebastiao Luis Fernadnes & ors. Vs. K.V.P. Shastri (Deed) Through Lrs.**” in Civil Appeal No.6183 of 2011, to contend that it is not a proposition of law that a finding of fact cannot be interfered

with if it proceeds on a misconception of a document or a wrong interpretation of law. It was also contended that the findings are perverse and therefore they can be corrected under section 100 of the C.P.C. There cannot be any dispute as regards this proposition. However, it has to be considered in the facts of the present case whether there has been any misconstruction of the documents or perversity in the approach. Both the Courts have evaluated the case of the appellants and the respondents. The Courts below found that the boundaries given in the Gift Deed of 1905, do not tally with the suit property on location as on today. The oral evidence has been found to be inconsistent. Even if these documents are to be looked at again, it can be seen that there is no clarity as regards the aspect of location of the suit property is concerned. There is no fundamental error or misconstruction of the Gift Deed. Even if the Gift Deed is taken as it is, the issue is whether the boundaries specified therein as of today tally with the boundaries of the suit property on location. On assessment of evidence this has not been found to be so. It is not possible in a second appeal to hold that the boundaries tally with the suit property on location. As it would amount not only construction of documents, but complete re-appreciation of the factual position. What the appellant is calling upon this Court to do, is to carry out a factual inquiry as to the location of the property with reference to the boundaries. As stated earlier, both the Courts have found that as there is no unquestionable document which can trace the ownership of the appellant to the property. It is further compounded by the fact that the appellants have not been

able to describe their own property. They have not taken any steps at all to get the names of other occupants corrected from the revenue record. In the circumstances, it appears to be only an attempt on the part of the appellant to some how try to grab the property.

15. In the circumstances, there is no merit in this Second Appeal. No substantial question of law arises. The appeal is dismissed. No costs.

N. M. JAMDAR, J.

AP/-