

IN THE HIGH COURT OF BOMBAY AT GOA**SECOND APPEAL NO. 79 OF 2006**

1. Miss Catherine Fernandes,
residing at House No.94,
Khalchawaddo, Armabol (Harmal),
Pernem Taluka,Goa.

2. Mrs. Mary Felcia Fernandes,
residing at House No.94,
Khalchawaddo, Armabol (Harmal),
Pernem Taluka,Goa.

3. John Fernandes,
residing at House No.94,
Khalchawaddo, Armabol (Harmal),
Pernem Taluka,Goa.

..... Appellants.

V/s.

1. Nandakumar M. Pai,
Residing at House No.57,
Khalchawaddo, Armabol
Pernem Taluka,Goa.

2. Suresh N. Pai,
residing at Arambol,
Pernem Taluka, Goa.

..... Respondents.

Shri Joseph Vaz, Advocate for the appellants.

Shri Virendra Parsekar, Advocate for respondent No.1.

CORAM :- F.M. REIS, J.

Date : - 9th January, 2015.

ORAL JUDGMENT :-

Heard Shri Joseph Vaz, learned Counsel appearing for appellants and Shri V. Parsekar, learned Counsel appearing for responsible No1. None present for respondent No.2.

2. The above appeal came to be admitted by an order dated 7th March, 2007, on the following substantial questions of law :

(i) Whether the trial Court by ignoring the documentary evidence and giving findings contrary to the documents produced on record has resulted in miscarriage of justice ?

(ii) Whether when documents produced in evidence proved that no construction existed in the plot, the trial Court could not give a finding contrary to the documents produced stating that a construction existed ?

3. Briefly, the facts of the case are that the respondent No.1, original plaintiff filed the civil suit, *inter alia*, for a permanent

injunction, restraining the defendants from encroaching upon and from carrying out any construction in the suit property surveyed under No.72/18 of Village Arambol, Pernem Taluka and for a mandatory injunction to demolish the encroachment in the portion thereof. The claim of the respondent was disputed by the appellants by filing written statement, *inter alia*, contending that there was no encroachment carried out by the appellants. It was further the case of the appellants that a portion of the property belonging to the respondent was already acquired by the Government for the purpose of constructing a road. The learned Trial Court, after framing issues and recording evidence, decreed the suit filed by the respondent by judgment and decree dated 31st August, 2005. Being aggrieved by the said judgment and decree passed by the learned Trial Judge, the appellants preferred an appeal before the District Court, Panaji which also came to be dismissed by Judgment and Decree dated 12th January, 2006. Being aggrieved by the judgments passed by the Courts below, the appellants herein preferred the present second appeal, which came to be admitted on the aforesaid substantial questions of law.

4. Shri Joseph Vaz, learned Counsel appearing for the

appellants has pointed out that the appellants have produced evidence on record, which conclusively establishes that a substantial part of the suit property surveyed under No.72/18 has also been acquired by the Government for construction of a road. The learned Counsel further points out that besides producing the evidence to show that in fact compensation was already received by the respondent, the appellants have also produced the survey record which, *inter alia*, establishes that a part of the disputed land was owned by the Government. The learned Counsel further points out that as such, the learned Trial Judge was not justifiable to come to the conclusion that the respondents were owners in possession of the suit property surveyed under No.72/18. The learned Counsel has, thereafter, taken me through the judgment of the learned Trial Judge and pointed out that the learned Judge has, while deciding the issue No.1, erroneously come to the conclusion that the disputed property was belonging to the respondents, though materials on record suggest otherwise. The learned Counsel has, thereafter, taken me through the judgment of the Lower Appellate Court and pointed out that the said Court has also erroneously come to the conclusion that the respondents were owners in possession of the disputed property, without looking at the documents produced by the

appellants. The learned Counsel further points out that, in fact, the encroachment was carried out on the road by the respondents themselves which was already demolished by the statutory authorities. The learned Counsel has further pointed out that as such, the question of granting any declaration of title in favour of the respondents is not at all justifiable and consequently, the substantial questions of law framed by this Court are to be answered in favour of the appellants.

5. On the other hand, Shri V. Parsekar, learned Counsel appearing for respondent No.1, has pointed out that both the Courts below, upon appreciation of evidence on record, have come to the conclusion that the respondents are owners in possession of the disputed property. The learned Counsel has further pointed out that besides the land which has been acquired, there is a portion of land belonging to the respondents which is existing at the site and, as such, the injunction granted by the Courts below is justifiable. The learned Counsel further points out that the injunction would be effective only to the remaining part of the land, apart from the land which has already been acquired by the Government and further points out that the appellants have not disputed the title and ownership of the

respondents over the disputed property and, as such, the question of any interference in the impugned judgment would not arise.

6. I have considered the submissions of the respective Counsel and I have gone through the record. Undisputed grievance of Shri Vaz, learned Counsel appearing for the appellants that the respondents cannot be the owners in possession of the disputed property surveyed under No.17/18 in its entirety after acquisition, is justifiable. Once Shri Parsekar, learned Counsel appearing for the respondent does not dispute that a part of the property was already acquired by the Government, the consequence is that as far as that area is concerned, the ownership is vested in the State Government. But, however, the learned Lower Appellate Court, while examining the said aspect has come to the conclusion that there is a portion of the land belonging to the respondents which is still available at the site. Taking note of the contention of Shri Parsekar, learned Counsel appearing for the respondent that the relief granted by the Courts below is in operation to the area beyond the land which has been acquired by the Government, I find that the apprehension of Shri Vaz, learned Counsel appearing for the appellants, on that count, would not survive.

Accepting the said statement of Shri Parsekar, learned Counsel appearing for the respondent, the relief granted by the Courts would operate only to the extent of the area beyond the land which has been acquired by the Government for construction of the road. Subject to the above, there is no case made out for interference in the impugned judgments. The ownership and possession examined by the Courts below were in the context that the entire property originally belonged to the respondents. As such, to that extent, the question of interference in the impugned judgments would not arise. Subject to the above, the substantial questions of law stand answered accordingly.

7. Subject to the above, the second appeal stands, accordingly, dismissed, with no order as to costs.

F.M. REIS, J.

ssm.