

IN THE HIGH COURT OF BOMBAY AT GOA**SECOND APPEAL NO.81 OF 2006**

1. Mrs. Fatima Gomes Furtado,
major of age, d/o Joao Antonio Gomes,
r/o.H.no.824, Patseabhadd, Thana,
Cortalim Goa.
 2. Shri Caetano Raimundo Gomes,
major of age, s/o Joao Antonio Gomes,
r/o. H. No.824, Patseabhadd, Thana,
Cortalim, Goa.presently in Kuwait,
represented by his Power of Attorney
holder Shri Caetano Furtado,
major of age, residing at Thana,
Cortalim, Goa.
 3. Shri Caetano Furtado
major of age, residing at
H. No.824, Patseabhadd, Thana,
Cortalim, Goa.
 4. Mrs. Votorina Miranda E Gomes
major in age, d/o Thomas Miranda,
residing At H. No.824, Patseabhadd,
Thana, Cortalim, Goa.
-Appellants

Versus

1. Smt. Indirabai Vinayak Lotlikar,
major of age, r/o H.no.836, Thana,
Cortalim Goa.
2. Pramod Vinayak Lotlikar
major in age, r/o. H. No.836,
Thana, Cortalim, Goa. (Since deceased)
3. Master Vinayak Alias Durgesh P.
Lotlikar, aged about 10 years, s/o. Late
Pramod V. Lotlekar, r/o H. No. 836,
Thana, Cortalim, Goa, represented by Mother
and Respondent no. 4.

4. Smt. Laxmi Pramod Lotlikar
major in age, r/o. H. No.836, Thana,
Cortalim, Goa.
5. Shri Raju Vinayak Lotlikar
major in age, r/o. H. No.836, Thana,
Cortalim, Goa.
6. Shri Digamber Vinayak Lotlikar
major in age, r/o. H. No.836,
Thana, Cortalim, Goa.
7. Smt. Shalini Vassudeo Vernekar
major in age, r/o. H. No.836, Thana,
Cortalim, Goa.
8. Shri Vassudeo G. Vernekar
major in age, r/o. H. No.836,
Thana, Cortalim, Goa.
9. Smt. Nayana Raikar
major in age, r/o. Margao, Goa,
and her husband
10. Shri Shivanand Antu Raikar
major in age, r/o. Margao.
- 10.1 Mrs.Nayan Shivanand Raikar,
(Wife);
- 10.2 Shri. Saish Shivanand Raikar,
(son);
- 10.3 Kavita Shivanand Raikar,
(daughter)
All residents Of Margao- Goa.
11. Smt. Roshan Premanand Verlekar
major in age, r/o. Damodar Housing
Society, Building No.9, Flat No.5,
Aquem, Alto, Margao, Goa and her
husband.

12. Shri Premanand A. Verlekar
r/o. Damodar Housing Society,
Building No.9, Flat No.5, Aquem
Alto, Margao, Goa.
13. Shri Shrikant Kashinath Lotlikar
major in age, r/o. H. No.836, Thana,
Cortalim, Goa(deceased) through L.R's
- 13.1 Smt. Suhasini S. Lotlikar,(wife)
resident Of Raghuvir Jewellers, Sanquelim- Goa.
- 13.2 Smt. Kalpana Ramakant Shirodkar,
(daughter) and her husband,
- 13.3 Shri. Ramakant Shirodkar,
Both residing near Ribandar
Hospital, Ribandar- Goa.
- 13.4 Smt. Vidya Raikar,(daughter)
resident Of Goregaum, Mumbai.
- 13.5 Smt. Semma Satish Mashelkar,
daughter); and her husband,
- 13.6 Shri. Satish R. Mashelkar,
Both residents of Raghuvir
Jewellers, Sanquelim- Goa.
- 13.7 Smt. Reshma Khandeparkar,
(daughter) and her husband,
- 13.8 Shri. Lilesh B. Khandeparkar,
Both residents of House No.1498/
1499, Gogol, Margao-Goa.
14. Smt. Suhasini Shrikant Lotlikar
wife of Shri Shrikant Kashinath
Lotlikar, major in age, r/o. H.
No.836, Thana, Cortalim, Goa.

15. Shri Vithola Kashinath Lotlikar
major in age, represented by
his Power of Attorney holding
Shri Digamber Vinayak Lotlikar,
residing at Cortalim, Goa.Respondents

Mr. P. Rao, Advocate for the Appellants.

Mr. J. Godinho, Advocate for Respondents No.1,4 to 12.

CORAM : F.M. REIS, J.

DATE : 4th SEPTEMBER, 2015

ORAL JUDGMENT :

Heard Mr. P. Rao, learned Counsel appearing for the appellants
and Mr. J. Godinho, learned Counsel appearing for respondents no.1,4 to
12.

2. The above appeal came to be admitted by an order dated
13/11/2009 on the following substantial questions of law:

a) Whether the Lower Appellate Court could have reversed the Decree passed by the learned Trial Court after holding that the Appellants' predecessor in title vide Deed of Sale dated 17.01.1916 purchased the suit property in as much as pursuant to such Deed of Sale, the Appellants proved the title to the suit property and it was incumbent upon the Lower Appellate Court to decree the suit in terms of prayer clause (b) for declaration and further direct demarcation of the suit property in terms of prayer clause (aa),

b) Whether in view of the clear Title Deed viz. Deed of Sale dated 17.01.1916 and the plan of the Comunidade showing the purchase made by the Appellants, could the Lower Appellate Court deny

Decree of demarcation of the suit property?

d) Whether the findings of the Lower Appellate Court that the Appellants admit ownership of the Respondents in respect of Survey Nos.39/14 and 39/15 are perverse and contrary to the pleadings and evidence on record?

e) Whether the Lower Appellate Court has committed jurisdictional error by not following the ratio laid down by the Honourable Supreme Court in the case of Santosh Hazare V/s Purshottam Tiwari, reported in (2001) 3 SCC 179, which enjoins the Appellant Court to come in close quarters with the findings given by the Trial Court while reversing the same?

3. On the last date of hearing, when the matter was argued, the parties were also put to notice that an additional substantial question of law would be framed if the matter was heard on merits. Accordingly, the following additional substantial question of law was framed:

“Whether, in terms of the provisions of Order XXVI, Rule 9 of CPC, 1908 and the law laid down by the Hon'ble Apex Court as well as by this Court in respect thereof, the Courts below were duty bound to appoint a Commissioner to conduct inspection at loco, the suit being filed by the appellant on account of encroachment by the respondents in the property of the appellant and having failed to do so, the Judgments and Decrees are liable to be quashed and set aside?

4. When the matter was heard on the last date of hearing, considering that ultimately the alleged claim of the appellants was around 50 square metres, opportunities were given to the parties to explore the possibility

of settlement and consider whether the dispute could be resolved on payment of compensation to the appellants. But however, despite of opportunities given by this Court, the learned Counsel appearing for the respective parties have pointed out that no settlement could be arrived at and, as such, the matter was heard on merits.

5. Mr. P. Rao, learned Counsel appearing for the appellants pointed out that the source of title of the appellants is based on the Sale Deed dated 17/01/1916 whereby the predecessor in title of the appellants had purchased the disputed property from the original owner of the property. The learned Counsel further points out that the appellants is the grandson of the original purchaser and, as such, he is entitled for an area of 100 square metres as disclosed in such Sale Deed. The learned Counsel further points out that it is not disputed that the said Sale Deed is pertaining to the disputed property claimed by the appellants, but however, according to the learned Counsel a portion of the property belonging to the appellants is wrongly surveyed in the record of rights under Survey No.39/14 and 39/15. The learned Counsel further points out that though the appellants have purchased an area of 100 square metres only an area of 50 square metres is recorded in the name of the appellants in survey record in respect of the property surveyed under no.39/19. The learned Counsel further pointed out that once the title of

the appellants has been duly established the burden is shifted on the respondents to show as to how the area purchased by the appellants has been reduced from 100 square metres to 50 square metres. The learned Counsel further points out that even as per the documents produced by the respondents the area purchased by the respondents no.1, 4 to 12 admeasure an area of 522 square metres when the survey record discloses 550 square metres. The learned Counsel, as such, submits that this portion of property is located on the eastern side of the property of the appellants which prima facie discloses that the area of 28 square metres is encroached by the respondents no.1, 4 to 12. The learned Counsel further pointed out that the remaining portion of the property encroached is on the northern side which is recorded in the name of respondent no.14 and surveyed under no.39/14. The learned Counsel further submits that even on perusal of the Comunidade plan at Exhibit 28, if one superimposes the said plan on the actual survey plan under the Land Revenue Code it clearly depicts that in fact there is an encroachment towards the eastern and northern side of the property of the appellants aggregating an area of 50 square metres. The learned Counsel further pointed out that the learned Trial Judge upon appreciating the evidence on record and examining the documents produced by the parties had in fact decreed the suit of the appellants inter alia granting a declaration that the appellants are the owners of the

disputed property and granted the consequential reliefs. The learned Counsel further points out that the Lower Appellate Court has misconstrued the documents produced by the appellants and has erroneously come to the conclusion that there is no foundation in the suit to claim that a specific area of the property belonging to the the appellants was encroached by respondents no. 1, 4 to 12 and respondent no.15. The learned Counsel further pointed out that it is well settled that only facts have to be pleaded and not the evidence and on perusal of the pleading there is a specific averment in the plaint to the effect that there is an encroachment of the property of the appellants towards the eastern and northern side in the property surveyed under no.39/14 and 39/15. The learned Counsel, as such, submits that Lower Appellate Court has erroneously construed the plaint to come to the conclusion that the evidence is contrary to the pleadings in the suit. The learned Counsel further pointed out that it is well settled that in case of the encroachment the Court has to appoint a Commissioner in terms of Order 26 of the Civil Procedure Code and in support of the said submission the learned Counsel relied upon two judgments of the learned Single Judge of this Court one dated 6/12/2013 in Second Appeal No.24/2004 and judgment passed by this Court in Second Appeal No.71/2005 dated 1/07/2014. The learned Counsel, as such, submits that the additional substantial question of law may accordingly be answered in favour of the appellants

and the matter be remanded to the Lower Appellate Court to appoint a Commissioner and proceed to decide the appeal preferred by the respondents after hearing the parties in accordance with law.

6. On the other hand, Mr. J. Godinho, learned Counsel appearing for respondents no. 1, 4 to 12 has supported the judgment passed by the Lower Appellate Court. The learned Counsel has taken me through the finding of the learned Judge at para 37 of the impugned judgment to point out that the learned Judge has clearly come to the conclusion that there is no pleading in the plaint to contend that a specific area of the property belonging to the appellant was encroached by the respondents no.1, 4 to 12. The learned Counsel further pointed out that only in the evidence of PW1 it was sought to be claimed by the appellants that an area of about 28 square metres belonging to the appellants is located in the property surveyed under no.39/15 standing in the name of respondents no.1, 4 to 12. The learned Counsel further pointed out that as this evidence is inconsistent with the pleadings the Lower Appellate Court has rightly rejected the case of the appellants. The learned Counsel further pointed out that in terms of the provisions of the Civil Procedure Code it is now well settled that the party who claims that there is an encroachment into his property has to file a plan clearly identifying the location of such area. The learned Counsel further points out that

such exercise has not been done by the appellants. The learned Counsel as such pointed out that it is not open for this Court to now assist the appellants to appoint a Commissioner and procure evidence in support of the case of the appellants. The learned Counsel, as such, submits that the substantial question of law framed by this Court has to be answered in favour of the respondents.

7. Respondents no.2,3,13 & 14 though served have remained absent.

8. I have duly considered the submissions of the learned Counsel and have also gone through the records. The main contention of respondents no. 1, 4 to 12 is that the Lower Appellate Court has rightly come to the conclusion that the location of the alleged encroachment claimed by the appellants has only been identified during the course of the evidence of PW1 and that there is no foundation to that effect in the plaint. Such finding of the learned Judge cannot be accepted as the Lower Appellate Court itself whilst recording the claim of the appellants has observed that the plaint has clearly stated at para 36 that the appellants' claim that the property belonged to the appellants admeasuring 100 square metres and that the property surveyed in the name of the appellants under no.39/19 admeasures only 50 square metres and that the remaining 50 square metres are wrongly recorded in the survey records under no.39/14 and

39/15. A plain reading of the said averments in the plaint and the contents of the said paragraph would clearly suggest that there was sufficient foundation in the pleadings to contend that there was an encroachment in the property belonging to the appellants which is partly located in survey no.39/14 and partly in the property under survey no.39/15. As such, the contention of Mr. Godinho that there is no foundation in the pleadings to contend that there is an encroachment located in the property surveyed under no.39/15 cannot be accepted. The learned Single Judge of this Court whilst disposing of the said Second Appeal has observed at para 19 and para 21 thus:

21. No doubt that in the present case, application for appointment of Court Commissioner was not made. However, it is to be noted that before the learned Trial Judge three experts' reports were available. Two were in support of the plaintiff's plea and one in support of defendants' claim. The learned Trial Judge had decreed the suit relying on the experts' evidence. However, the Appellate Court disbelieved the experts' evidence on behalf of the plaintiff as well as the defendants. In that view of the matter, there was no expert's evidence available before the Appellate Court. In the circumstances, it was necessary on the part of the learned Appellate Court to remit the matter to the learned Trial Court appointing an expert as a Commissioner for doing the local investigation.

9. This Court has taken a view that when it is a case of encroachment, it is always open to the Court in exercise of powers under Order 26 rule 9 of the Civil Procedure Code to appoint a Commissioner

to examine the alleged claim of the parties based on the document of title of both the parties. In the present case, the appellants are claiming to be the owners of the property based on the Sale Deed of the year 1916. Respondents no. 1, 4 to 12 also claim title based on the same Sale Deed which is also of the year 1916. The properties purchased by the respective parties or their ancestors are also depicted in the Comunidade plan at Exhibit 28. All these documents would have to be reconciled to examine whether there is in fact any encroachment as claimed by the appellants. Prima facie, on perusal of the Comunidade plan at exhibit 28 and the survey plan, I find that the claim of the appellants cannot be lightly discarded. But however, this exercise will have to be examined only after appointing a Commissioner in terms of Order 26 rule 9 of the Civil Procedure Code to visit the disputed property and examine whether in fact there is any encroachment claimed by the appellants. No doubt, after such report is produced the parties can cross examine such Commissioner if they so desire in accordance with law. The Lower Appellate Court will have to take a fresh decision as to whether the appellants are entitled for any relief as prayed for.

10. In view of the above, I find it is appropriate that the impugned judgment passed by the Lower Appellate Court be quashed and set aside and the matter be remanded to the Lower Appellate Court to decide the

appeal afresh in the light of the observations made herein above after appointing the Commissioner in terms of Order 26 Rule 9 of the Civil Procedure Code. The Lower Appellate Court may accordingly direct the Inspector of Survey and Land Records to depute a competent Surveyor to be appointed as a Commissioner to identify the disputed property belonging to the appellants and the respondents and submit the report to the Lower Appellate Court. The costs of such Commissioner shall be borne by the appellants. The substantial questions of law are answered accordingly.

11. In view of the above, I pass the following order:

ORDER

- (i) The appeal is partly allowed.
- (ii) The impugned judgment and decree dated 12/04/2006 passed by the Lower Appellate Court is quashed and set aside.
- (iii) The Regular Civil Appeal No.115/04 is restored to the file of the Lower Appellate Court.
- (iv) The Lower Appellate Court is directed to decide the said appeal afresh in the light of the observations made herein above after appointing the Commissioner as stated herein above.
- (v) The appeal is disposed of with no order as to costs.
- (vi) The parties are directed to appear before the Lower Appellate Court on 12/10/2015 at 10.00 a.m.

(vii) All contentions of both the parties on merits are left open.

F.M. REIS, J.

NH/-