

IN THE HIGH COURT OF BOMBAY AT GOA

SECOND APPEAL NO. 71 OF 2009

Shri Rajendra Rebello,
aged 65 years,
Landed proprietor,
son of late Baldomero Rebello,
Resident of House No.28,
Falwado, Velsao,
Cansaulim Goa.

....

Appellant

V e r s u s

Housing Board of Goa,
Through its Chairman,
Porvorim, Bardez Goa.

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Respondent

Mr. S. D. Lotlikar, Senior Advocate with Ms. G. Xettigar, Advocate for the appellant.

Mr. H. D. Naik, Advocate for the respondent.

CORAM : F. M. REIS, J

DATE : 4th December, 2015

ORAL JUDGMENT

Heard Mr. S. D. Lotlikar, learned Senior Counsel appearing for the appellant and Mr. H. D. Naik, learned counsel appearing for the respondent.

2. The above appeal came to be admitted by an order dated 06.08.2010 on the following substantial questions of law :

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(a) Whether the Courts below could have dismissed the suit of the appellant in toto after having recording a finding that the appellant was indeed owner in possession of the property surveyed under Nos. 49/3, 48/2 & 3 and 47/4 ?

(b) Whether the Courts below misdirected themselves in casting the burden of proving that the road was not constructed in the acquired area, on the appellant, instead of casting the said burden on the respondent, and in failing to draw an adverse inference against the respondent for non production of the plan of acquisition which would show that the area of survey No.49/3 which was acquired by the Government, particularly in view of the fact that the report of the expert produced by the appellant on record showed that, area far in excess of 250 square metres was covered by the road which was illegal construction on the survey no.49/3 ?

3. Mr. Lotlikar, learned Senior Counsel appearing for the appellant in support of the above appeal has pointed out that the dispute in the present case is with regard to the property belonging to the appellant surveyed under No.49/3. The learned Senior Counsel further points out that the respondent have constructed a road through the property of the appellant surveyed under No.49/3 in Sancoale Village without initiating any acquisition proceedings. The learned Senior Counsel further points out that the appellant has filed a suit on the ground that the respondent had encroached into the property of the appellant by constructing a road leading to the national highway without due process of law. The learned Senior Counsel further submits that in the written statement filed by the respondent, it was contended by the respondent that an area of 600 square metres besides an area of 250 square metres was acquired from the property surveyed under No.49/3. The learned Senior Counsel further points out that the respondent has not produced any acquisition plan to support their contention that the actual road has been constructed in conformity with such acquisition plan. The learned Senior Counsel further submits that the fact finding Courts have erroneously put the burden on the appellant to establish the location of the land acquired with the subject road. The learned Senior Counsel further points out that the appellant has examined an expert Mr. Vikas Dessai who has categorically stated that the road which has been constructed is an alignment and according to the learned Senior Counsel such alignment does not match

with the plan produced by the respondent which is at Exhibit P-48. The learned Senior Counsel has thereafter taken me through the plan relied upon by the respondent to point out that it is the contention of the respondent that an area of 250 square metres has been acquired from the property surveyed under No.49/3 as shown in the red colour in the said plan. The learned Senior Counsel further submits that the area of 600 square metres as shown in the green colour in such plan is shown to be from the property surveyed under No.49/3. The learned Senior Counsel further submits that this alignment as shown in the plan does not match with the alignment shown by the expert and as such the burden was on the respondent to produce the acquisition plan to establish the location as well as the area which was acquired from the property of the appellant. The learned Senior Counsel thereafter has taken me through the judgment of the Lower Appellate Court to point out that the learned Judge has erroneously non suited the appellant on the ground that the appellant has in fact not established the encroachment by producing the acquisition plan. The learned Senior Counsel further points out that these findings of the learned Judge are totally erroneous as it was incumbent upon the respondent to establish their case that the road as well as the alignment shown is in accordance with the acquisition plan. The learned Senior Counsel thereafter has taken me through the pleadings as well as the evidence of the said expert Mr. Vikas Dessai to point out that there was cogent evidence on record to hold that the alignment of the existing road was

not in accordance with the alleged acquisition by the respondent. The learned Senior Counsel as such submits that the substantial questions of law be answered in favour of the appellant.

4. On the other hand, Mr. H. D. Naik, learned counsel appearing for the respondent has supported the impugned judgment. The learned counsel has pointed out that the appellant has approached this Court on the basis that no land belonging to the appellant from the property surveyed under No.49/3 was acquired by the Government. The learned counsel further submits that in fact the acquisition proceedings were completed way back in the year 2001 and the suit was filed in the year 2005 and one cannot comprehend how the appellant was not aware about such acquisition proceedings. The learned counsel further submits that the appellant has come with a false case before this Court and as such, the Courts below have rightly refused the claim of the appellant. The learned counsel further submits that the respondent has produced a plan at Exhibit P-48 which clearly depicts the situation at loco of the road as existing in the property surveyed under No. 49/3. The learned counsel further submits that once the respondent had established by material on record that the portion of the land was acquired from the property surveyed under No.49/3, the burden shifted on the appellant to establish the extent of the alleged encroachment in the property. The learned counsel further submits that both the Courts below have rightly appreciated the

evidence on record to come to the conclusion that the appellant has failed to establish his case. The learned counsel as such submits that the appeal be dismissed.

5. I have considered the submissions of the learned counsel and with the assistance of the learned counsel, I have also gone through the records. In the present case, the appellant has filed a suit on the basis that there was no acquisition of any portion of the property surveyed under No.49/3. In the written statement filed by the respondent, there was a categorical averment to point out that an area of 600 square metres and an additional area of 250 square metres was acquired from the property surveyed under No.49/3. Along with the written statement, a plan was produced by the respondent clearly depicting the said area acquired pursuant to the acquisition proceedings. The said plan was thereafter produced on record at Exhibit P-48. Considering that the case put forward by the appellant in the plaint was on the premise that no land was acquired whereas the material on record suggest otherwise that in fact a portion of the property totally admeasuring an area of 850 square metres was in fact acquired from the property surveyed under No.49/3, the burden shifted on the appellant to establish the extent of the alleged encroachment. The award produced on record by the respondent establishes that in fact an area of 850 square metres was acquired from the property surveyed under No.49/3. In case there was any shifting of

alignment as sought to be contended by Mr. Lotlikar, learned Senior Counsel appearing for the appellant, the burden was on the appellant to establish this aspect. No doubt, the appellant has examined an expert Mr. Vikas Dessai in support of the said contention. But however, the fact finding Courts below did not accept the evidence of the said expert to come to the conclusion that the appellant has established the alleged claim of encroachment. With the assistance of Mr. Lotlikar, learned Senior Counsel appearing for the appellant, I have gone through the evidence of the said expert. On perusal of the vague replies in the cross examination, I find that the findings of the fact finding Courts on that aspect cannot be said to be perverse and consequently, the question of interfering in the impugned judgment on that count would not arise at all. Taking note of the fact that the Courts below have concurrently come to the conclusion that the appellant has failed to establish the alleged claim of encroachment, I find that there is no case made out by the appellant for any interference by this Court in a second appeal under Section 100 of the Civil Procedure Code. The burden of proof as pointed out herein above as cast by the Courts below cannot be said to be erroneous and in order to consider the contention of Mr. Lotlikar, learned Senior Counsel appearing for the appellant, it would entail an appreciation of evidence which this Court cannot indulge in a second appeal under Section 100 of the Civil Procedure Code. In such circumstances, I find that no case is made out by the appellant for any interference in the impugned judgment. The

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substantial questions of law are answered accordingly.

6. For the aforesaid reasons, the appeal stands rejected with no order as to costs.

F. M. REIS, J

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