

IN THE HIGH COURT OF BOMBAY AT GOA

SECOND APPEAL NO. 103 OF 2008

Smt. Laxmibai Govind Bhat Korde,
Major of age,
Widow of Govind S. Korde,
Resident of
Priol, Ponda-Goa.
(through her power of attorney
Shri Manohar Deuba Bhat Korde)

..... Appellant

V e r s u s

Shri Yeshwant Palni,
(Since deceased)
Represented through his legal heirs

1(a) Smt. Indira Yeshwant Palni
(since deceased)

1(b) Shri Pandurant Yeshwant Palni

1(c) Miss Padmaja Y. Palni
All major of age,
All residents of House no. 745,
Priol, Ponda - Goa.

..... Respondents

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

Mr. Gaurish Agni and Mr. Shaikh Fahad, Advocates for the Respondents.

Coram :- F. M. REIS, J

Date : 23rd October, 2015.

ORAL JUDGMENT

Heard Shri S. D. Lotlikar, learned Senior Advocate appearing for the Appellants and Shri G. Agni, learned Counsel appearing for the Respondents.

2. The above Appeal came to be admitted on 17.09.2009, on the following substantial question of law :

"(1) Whether the impugned judgment and decree is vitiated for failure on the part of the First Appellate Court, to appreciate that a Civil Suit is to be decided on preponderance of probability and the Trial Court after concluding that the plaintiff had established title as well as possession in respect of the suit property, had decreed the suit of the Appellant against the defendant, who was found by the Trial Court to have neither title, nor possession in respect of any part of the property surveyed under No. 118/0, particularly in view of the fact that the First Appellate Court found nothing wrong in the Trial Court's finding that the defendant had failed to establish such title or possession ?

(2) Whether the appreciation of evidence by the First Appellate Court, and the reversal of the judgment of the Trial Court, based on appreciation of oral evidence duly supported by documentary evidence, is arbitrary ?

(3) Whether the First Appellate Court could have dismissed the suit of the appellant in toto, when the ownership and title of the appellant in respect of the property surveyed under No. 126/2 which is a part of the suit property, was not disputed by the defendant, who claimed a right to be in possession of only part of the

property surveyed under No. 118 ?

3. Shri S. D. Lotlikar, learned Senior Advocate appearing for the Appellants, has pointed out that the Appellants have filed a suit for permanent injunction, inter alia, on the ground that the Appellants are owners and in possession of the property surveyed under no. 126/2 and 118(part) and 317/2 of Velling Priol Village. Learned Senior Advocate has pointed out that it is the case of the Respondents that the Respondents are the tenants of the property surveyed under no. 126/3 and 175/3 of the same Village. Learned Senior Advocate further pointed out that the dispute in the present suit is with regard to a portion of the property surveyed under no. 118/0 of the said Priol Village which, according to the Appellants, forms part of the property belonging to the Appellants. Learned Senior Advocate has pointed out that the Respondents have no title or interest in respect of the property surveyed under no. 118/0 as, according to him, the property which is tenanted to the Respondents is surveyed under no. 175/3 which is located on the southern side of the property surveyed under no. 118/0. Learned Senior Advocate further pointed out that the Appellants have clearly averred in the plaint that the portion of the property surveyed under no. 118/0 belonging to the Appellants and is encircled by cactus plantation. Learned Senior Advocate has thereafter taken me through the written statements filed by the Respondents to point out that the existence of such cactus plantation boundary separation has not been disputed by the Respondent but the only claim is that such plantation has been put up by the Respondents. Learned Senior Advocate further pointed out that the learned Trial Judge on the basis of the Sale Deed executed in favour of the Appellants in the year 09.05.1968, held that it forms part of the property surveyed under no. 118/0

which is subject matter of the suit. Learned Senior Advocate has thereafter taken me through the findings of the learned Trial Judge to point out that the learned Trial Judge on the basis of the statement of Dw.1 and Dw.2 held that the boundary line of the property belonging to the Appellants is the red line shown on the plan produced by the Appellants at exhibit Pw.2/A and has found that the Appellants were entitled to the relief sought in the suit. Learned Senior Advocate has minutely taken me through the findings of the learned Trial Judge to point out that on the basis of the admission itself, the identity of the property has not been in dispute and, as such, the learned Trial Judge has rightly decreed the suit. Learned Senior Advocate has taken me through the impugned Judgment passed by the Lower Appellate Court to point out that the learned Judge has erroneously come to the conclusion that the identity of the property has not been established by the Appellants. Learned Senior Advocate further pointed out that the Appellants have identified by survey numbers and, as such, the findings of the Lower Appellate Court to the effect that the identity of the property has not been established, is perverse. Learned Senior Advocate further pointed out that the northern boundary is on the top of the hill and there is no dispute that the property on the northern boundary as per survey records is the top of the hill. Learned Senior Advocate further pointed out that the Respondents claim now to be tenant of the property belonging to the Comunidade but no evidence has been adduced to substantiate its case. Learned Senior Advocate further pointed out that the appellants have also examined the Attorney of the Comunidade who has categorically stated that the Respondents have no right in the disputed property. Learned Senior Advocate further submits that the substantial questions of law be answered in favour of the

Appellants.

4. On the other hand, Shri Gaurish Agni, learned Counsel appearing for the Respondents, has supported the Judgment of the Lower Appellate Court. Learned Counsel further pointed out that it is well settled that the Plaintiff has to prove its case and, according to him, once the Appellants have not established the extent of the property, the Lower Appellate Court was justified to come to the conclusion that the identity of the property has been not established. Learned Advocate further pointed out that the Sale Deed which the Appellants have placed on record, does not disclose the extent of the area of the property and, consequently, the Appellants have failed to establish the extent of their property. Learned Counsel further pointed out that it is the case of the Respondents that as far as the property surveyed under no. 175/3 is concerned, the Respondents have been declared tenants of the heirs of Ramchandra Kellekar. Learned Counsel further pointed out that as per the boundaries shown in the plan, the eastern boundary of the Appellants is the portion of the property encircled by cactus plantation. Learned Counsel further pointed out that this itself shows that the property of the Appellants does not extend to the property surveyed under no. 118/0. Learned Counsel further pointed out that the Respondents are enjoying the property surveyed under no. 118/0 and, consequently, the Lower Appellate Court was justified to refuse the relief sought by the Appellants. Learned Counsel further pointed out that in case this Court finds that the property has not been identified, the matter may be remanded to the Lower Appellate Court to appoint a Commissioner and decide the Appeal filed by the Respondents afresh. Learned

Counsel as such points out that the substantial questions of law be answered in favour of the Respondents and the Appeal filed by the Appellants be accordingly dismissed.

5. I have carefully considered the submissions of the learned Counsel. I have also gone through the records. On perusal of the plaint filed by the Appellants, I find that the Appellants have clearly averred in the plaint that the property claimed by the Appellants which forms part of the property surveyed under no. 118/0 is encircled by a cactus plantation. On perusal of the written statements with regard to the averment of Para 5 of the plaint, I find that the fact of the existence of such cactus plantation has not been disputed by the Respondents. The only allegations made by the Respondents is that the cactus plantation has been put up by the Respondents. But, however, on perusal of the Judgment of the learned Trial Judge, I find that the learned Trial Judge has rightly appreciated the evidence on record and taken note of the admission on the part of Dw.1 and Dw.2 to the effect that the cactus plantation is in fact the separating line of the property of the Appellants from the remaining portion of the property towards the eastern side. The learned Trial Judge has also taken note of the fact that the Respondents are claiming to be tenants of the property belonging to the Comunidade which he learnt was the property of the Comunidade only when he received summons in the suit. This suggests that the claim of the Respondents that they are the tenants of the property of the Comunidade is totally unacceptable. The Lower Appellate Court has come to the conclusion that the Appellants have failed to establish the identity of the property. In the present case, on perusal of the plaint filed by the Appellants, the

property has been identified by the Appellants being the portion of the property surveyed under no. 118/0 of Priol Village forming part of the property of the Appellants separated by cactus plantation. The existence of the cactus plantation has not been disputed by the Appellants. Hence, it cannot be said that the identity disclosed by the Appellants is defective and not specified. Order 7 Rule 3 of the Civil Procedure Code provides that immovable property has to be identified by survey numbers and other identifying marks. On perusal of the averments in the plaint at para 2, there is a specific averment to the effect that the suit property claimed by the Appellants is identified in a plan attached to the plaint. In such circumstances, the finding of the Lower Appellate Court to the effect that the property claimed by the Appellants cannot be identified is not accepted.

6. In the Judgment of the Apex Court reported in **AIR 2015 SC 1236** in the case of **Zarif Ahmad (D) thr. Lrs. & anr. vs. Mohd. Farooq**, it has been observed at Paras 11, 12 and 13 thus :

“11. Order VII Rule [3](#) of the Code of Civil Procedure, 1908 (for short "Code of Civil Procedure"), which pertains to the requirement of description of immovable property, reads as under:

Where the subject matter of the suit is immovable property: Where the subject matter of the suit is immovable property, the plaint shall contain a description of the property, sufficient to identify it, and in case such property can be identified by boundaries in a record of settlement or survey, the plaint shall specify such boundaries or numbers.”

12. The object of the above provision is that the description of the property must be sufficient to identify it. The property can be identifiable by boundaries, or by number in a public record of settlement or survey. Even by plaint map showing the location of the disputed immovable property, it can be described. Since in the present case, the suit property has been described by the Plaintiff in the plaint not only by the boundaries but also by the municipal number, and by giving its description in the plaint map, from no stretch of imagination, it can be said that the suit property was not identifiable in the present case. In our opinion, the High Court has rightly held that the first Appellate Court has erred in law in dismissing the suit by holding that the land is not identifiable. It appears that the first Appellate Court has wrongly framed the additional issue as to whether the property in dispute is identifiable or not particularly when there was no such plea in the written statement. We are in agreement with the High Court that there was no need on the part of the first Appellate Court to remit the matter to the trial court as contended by the Defendants before it (High Court) to allow the parties to adduce evidence on the additional issue, as neither issue on identifiability of land arises from the pleadings nor the evidence was lacking on record.

13. No doubt, Section 107 of Code of Civil Procedure empowers the appellate court to remand a case, but it simultaneously empowers the appellate court to take additional evidence or to require such evidence to be taken. Rule [24](#) of Order XLI Code of

Civil Procedure provides that where evidence on record is sufficient, appellate court may determine the case finally. It is not a healthy practice to remand a case to trial court unless it is necessary to do so as it makes the parties to wait for the final decision of a case for the period which is avoidable. Only in rare situations, a case should be remanded e.g. when the trial court has disposed of a suit on a preliminary issue without recording evidence and giving its decision on the rest of the issues, but it is not so in the present case.”

7. Taking note of the observations of the Apex Court referred to herein above and applying to the facts of the present case, I find that the findings of the Lower Appellate Court to the effect that the identity of the property has not been established cannot be accepted. The property was duly identified on the basis of the boundaries identified on the plan as well as the survey numbers. In such circumstances, I find that the Lower Appellate Court was not justified to interfere in the well reasoned Judgment of the learned Trial Judge. The learned Trial Judge has minutely examined the evidence on record and has come to such conclusions on the basis of the admission on the part of Dw.1 and Dw.2. With the assistance of Mr. Gaurish Agni, learned Counsel appearing for the Respondents, I have also gone through the evidence of Dw.1 and Dw.2 and I find that the learned Trial Judge was justified to come to such conclusion based on such evidence on record. These findings in fact have not been unsettled by the Lower Appellate Court whilst passing the impugned Judgment for any justifiable reasons. There was no occasion for the Lower Appellate Court as such to interfere with the Judgment passed by the

learned Trial Judge. Apart from that the Respondents have also failed to establish their claim of tenancy over the disputed property. The Respondents as such cannot claim a better right to remain in possession of the disputed property. Hence, the substantial questions of law framed by this Court are answered in favour of the Appellants.

8. In view of the above, I pass the following :

ORDER

(i) The Appeal is allowed.

(ii) The impugned Judgment and Decree dated 12.06.2008 passed by the Lower Appellate Court is quashed and set aside.

(iii) Appeal stands disposed of with no orders as to costs.

F .M. REIS, J.

arp/*