

IN THE HIGH COURT OF BOMBAY AT GOA**SECOND APPEAL NO. 116 OF 2008**

Lawrie D'Souza,
major, presently residing in UK.,
duly represented by Albert Nazareth,
major, landlord, resident of
Sorvem waddo, Guirem, Bardez, Goa. Appellant.

V/s.

Freddy Fernandes,
major of age, retired,
resident of House No.872, Sector 37,
Faridabad Haryana. Respondent.

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

Mr. A. D. Bhobe, Advocate for the respondent.

CORAM :- F.M. REIS, J.

Date : - 26 NOVEMBER 2015.

ORAL JUDGMENT :-

Heard Mr. S. D. Lotlikar, learned Senior Counsel appearing
for the appellant and Mr. A. D. Bhobe, learned Counsel appearing for
the respondent.

2. The above appeal came to be admitted by an order dated 13th January, 2012 on the following substantial questions of law :

1) Whether the Trial Court has acted without jurisdiction in framing issues relating to the property surveyed under No.143/4, when the said property was not the suit property, particularly in view of the fact that the Respondent/Defendant categorically admitted that there was misdescription of the same by his predecessor-in-title in the said property, and that the property as a whole did not belong to the predecessor-in-title, but he only had a share therein; the other part being of the ownership of the Appellant ?

2) Whether the Courts below have misconstrued the alleged admission at exhibit 15 to refuse the claim of the appellants that they have right to the suit properties ?

3. Mr. S. D. Lotlikar, learned Senior Counsel appearing for the appellant has pointed out that it is the case of the appellant that there is a property surveyed under No.143/4 of Anjuna Village wherein a house is located, which belonged to the ancestors of the appellant and the ancestors of one Willy Bald, whose rights have devolved upon the respondents herein, which has not been partitioned. It is further the

contention of the learned Senior Counsel that besides the said property, there are properties which are surveyed under Nos. 129/49, 123/2, 123/5, 123/7 and 128/3 of village Anjuna, which stand in the name of the appellant and the said Willy Bald to which, according to the appellant, the respondents have not derived any title therein. The learned Senior Counsel further points out that the suit was filed as the respondents initiated proceedings to partition the estate of the said Willy Bald wherein, according to the appellant, the whole property was enlisted to be partitioned. The learned Senior Counsel further submits that as, according to the appellant the respondents have no right to the suit property, the question of describing such property in the inventory proceedings would not arise at all. The learned Senior Counsel, as such, points out that the suit was filed to declare the Order passed in the said inventory proceedings as null and void and consequential reliefs.

4. On the other hand, Mr. A.D. Bhobe, learned Counsel appearing for the respondents, has pointed out that the case of the appellant is totally without any foundation as, according to him, the property surveyed under No.143/4 belongs to the appellant and said

Willy Bald and that the respondents have a right to the remaining suit properties, as they also belonged to the said Willy Bald. The learned Counsel further points out that on reading of the plaint itself and the reliefs sought in the suit, it is apparent that both the Courts below have concurrently come to the conclusion that the appellant has failed to establish his title of exclusive ownership as claimed in the said suit. The learned Counsel has pointed out that the appellant has not produced the Order passed in the inventory proceedings, nor the records therein in support of his alleged contention that the respondents had erroneously described the entire property in such proceedings. The learned Counsel has, thereafter, taken me through the Judgments of the Courts below to point out there is no case made out for interference of this Court.

5. I have considered the submissions of the learned Counsel and I have also gone through the records. The findings of the Courts below, based on the pleadings of the appellant, are that the appellant has failed to establish his exclusive ownership and possession over the suit properties, as claimed by him. In fact, on perusal of the written statement filed by the respondent/defendant at para 6, I find that the

respondent is enjoying his portion of the property and the house as an independent property demarcated by a wall. It is further the case of the respondent/defendant at para 8 of the written statement that the said Willy Bald has right to the suit property and, hence, his name is rightly recorded in the occupant's column of the survey records. The learned Lower Appellate Court whilst examining the appeal preferred by the appellant has noted that the survey records in respect of Survey Nos. 129/49, 123/2, 123/5, 123/7 and 128/3 were in the names of the appellant, as well as the said Willy Bald. It is further noted by the learned Judge that the fact that the name of said Willy Bald is found in the survey records, has not been disputed by the appellant. The learned Judge further found that the appellant has failed to establish that he is exclusive owner of the disputed property. In such circumstances, considering that the appellant has failed to establish that the whole property belongs to the appellant, the concurrent findings of the Courts below to that extent cannot be interfered with by this Court in the present appeal under Section 100 of the Code of Civil Procedure. In fact, there is also an averment in the plaint that the property Survey No.128/3 was sold by the appellant. In the written statement, the respondent/defendant contends that the attorney was not entitled to

dispose of such a property. On the face of the findings of the Courts below, based on the material on record, the findings of the Courts below to the effect that the appellant has failed to establish that he is the exclusive owner of the properties, including the property survey No. 143/4 of Anjuna Village, cannot be faulted.

6. On going through the judgment of the learned Trial Judge dated 29.01.2008, I find that the learned Judge had framed six issues and while deciding the issue no.1 as to whether the appellant proves that the property surveyed under No.143/4 with the house belongs to the ancestors of the appellant and the ancestors of Willy Bald and enjoyed in common, the learned Judge has decided the issue in negative. While taking such view, the learned Judge has noted that the appellant has failed to produce any document of title nor established his contention that late Willy Bald Fernandes was entitled to the 1/8th undivided share in the property surveyed under No.143/4. The learned Judge also took note of the entry in the survey records to come to the conclusion that the appellant has failed to establish his claim that he was owner of the disputed property. On perusal of the judgment of the learned Lower Appellate Court dated 28.07.2008, I find that the learned

Judge has framed two points for determination. While deciding the first point for determination, the learned Judge has noted that no declaration simpliciter can be granted and while deciding second point for determination, the learned Judge has found that the appellant has failed to produce any material to establish that his ancestors were the owners of the five properties. The learned Judge further noted that the appellant has also failed to establish the ownership in respect of the property surveyed under No.143/4 and the house therein. The learned Judge also noted that PW1 has admitted that he has no document to establish that the suit property belongs to the appellant. The learned Judge has also noted that PW.1 has admitted that Willy Bald and Gregorio were living separately and in respect of two rooms, the house tax was paid by Gregorio and in respect of third house, the house tax was paid by Willy Bald. The learned Judge has also noted that PW.1 has also admitted the house tax and the receipts in respect of house which were taken on record and marked as Exhibit 16 Colly. The learned Judge as such noted that the appellant has failed to establish that the property surveyed under No.143/4 was a common property. The learned Judge has also dealt with the aspect of possession to come to the conclusion that the appellant has failed to establish his

possession. Considering the said findings of the Courts below, I find that there is no case made out for interference in the impugned Judgment. The survey records as well as the material on record and admission of PW.1 itself establish that the appellant has failed to establish his claim of joint ownership of the subject property.

7. In view of the above, I find that there is no jurisdictional error committed by the Courts below in examining the claim of the appellant in respect of the property surveyed under No.143/4. There is a specific issue framed on that count based on the pleadings of the parties by the learned Judge which was issue no.1 and as such, the contention that there was no justification to examine the said aspect is not at all justified. Both the Courts below have come to the conclusion that the appellant has failed to establish his claim of exclusive ownership and possession of the subject property and as such, the first substantial question of law framed has to be answered against the appellant.

8. With regard to the second substantial question of law, both the Courts below have rightly come to the conclusion that there was no

admission as claimed by the appellant based on document at Exhibit 15. On perusal of the statement referred to therein, the deponent Freddy Fernandes has stated that the property surveyed under No.143/4 is divided right up to the house by wall. The 3/4th of the entire property belongs to Willy Bald Fernandes and the other portion of the property and the house belongs to late Gregory D'Souza. On perusal of the whole statement at Exhibit 15, there is nothing to suggest that the claim of the appellant that he was exclusive owner of the property surveyed under No.143/4 has been admitted. Both the Courts below have taken note of the said document to come to the conclusion that there is no admission as claimed by the appellant. There is no perversity in such findings and consequently, the second substantial question of law is answered accordingly.

9. For the aforesaid reasons and subject to the above, the appeal stands rejected.

F.M. REIS, J.

ssm.