

IN THE HIGH COURT OF BOMBAY AT GOA**SECOND APPEAL NO. 32 OF 2008**

1.a) Francisco Xavier Rose Almeida,
son of late Inacio Manuel Paulo
Gregorio Almeida,
aged about 71 years, occupation landlord,
and his wife.

1.b) Smt. Mafaldina Almeida,
daughter of Aleixo Fernandes,
aged about 62 years,
occupation housewife,
both residents of House No.38/1,
Novovado, Senarbatim, Salcete, Goa.

2. a) Vitorinho Joao Almeida,
son of late Inacio Manuel Paulo
Gregorio Almeida, aged about 65 years,
occupation service; and his wife;

2.b) Smt. Maria Felicidade Marcela Almeida,
daughter of Constancio Rodrigues,
aged about 57 years, housewife,
Both residents of 4th Amina Mansion,
M. Pasta Lane, Dadar, Mumbai-14.

..... Appellants.

Versus

Antonio Columban Wilson
das Dores Fernandes alias
Wilson Fernandes, married,
son of Carlos Fernandes,
major in age, landlord,
resident of House No.12,
Nagvado, Betalbatim, Salcete, Goa.

..... Respondent.

Shri S.D. Lotlikar, Senior Advocate with Ms. Aarti Naik, Advocate for the appellants.

Shri C.A. Coutinho, Advocate for the respondent.

CORAM :- F.M. REIS, J.

Date : - 6th February, 2015.

ORAL JUDGMENT :-

Heard Shri S. D. Lotlikar, learned Senior Counsel appearing for the appellants and Shri C. A. Coutinho, learned Counsel appearing for the respondent.

2. The above appeal came to be admitted by an order dated 20th January, 2009, on the following substantial questions of law :

1. Whether it was necessary for the courts below to have framed a issue/point for determination as to which party was in possession of the disputed portion ?
2. Whether the courts below should have considered the evidence on record to find out which party was in possession and that having not been done, whether the judgment and order passed by the courts below should be said to be perverse ?

3. Shri S.D. Lotlikar, learned Senior Counsel appearing for the appellants submits that there is a boundary dispute between the property belonging to the appellants and the respondent as, according to him, the property of the appellants is surveyed under No.58/9 of village Sernabatim and a portion thereof is surveyed under No.59/1A. The learned Senior Counsel submits that the demarcating line of the property of the appellants was a drop of nearly one metre in height, which was accepted to be the boundary line between the two properties. The learned Senior Counsel further submits that on the basis of such boundary line, the appellants got their plans approved for construction of a house, after obtaining all necessary permissions somewhere in the year 1980. The learned Senior Counsel further points out that the appellants always had an impression that the boundary line separating the property of the appellants and the respondent towards the southern side was the said drop and consequently, according to him, such boundary line was shown to the authorities while obtaining the sanctions. The learned Senior Counsel has, thereafter, taken me through the plan and pointed out that the setback from such demarcating line to the outer southern wall of the

house of the appellants is 4.25 metres. The learned Senior Counsel further points out that considering the said distance, the claim of the respondent that the whole property surveyed under No.59/1A belongs to the respondent is totally erroneous. The learned Senior Counsel further points out that the property was resurveyed somewhere in the year 1981 on the basis of the statement recorded of the mother of the appellants fixing the demarcating line, separating the property of the appellants and the respondent on the southern side. The learned Senior Counsel, however, points out that the said statement, in any event, cannot defeat the claim of the appellants to the disputed portion as the mother did not know the legal position about the title of the property at the relevant time. The learned Senior Counsel further submits that the appellants, as well as their ancestors, were always enjoying the property as per the demarcating vestige, which was a drop separating the property of the appellants and the respondent and, as such, the Courts below were not justified to grant the injunction, without examining as to who is in possession of the disputed portion. The learned Senior Counsel further points out that the appellants also filed a counter claim to fix the demarcating line between the property of the appellant and the property of the respondent towards the

southern side. The learned Counsel further points out that the respondent had encroached into the property of the appellants sometime before the filing of the suit and taking advantage of such mischief, the respondent claimed that they were in possession of the disputed portion. The learned Senior Counsel has, thereafter, taken me through the judgment of the lower appellate Court to point out that there is no scrutiny of the materials produced by the appellants and the respondent to come to the conclusion that the respondent was entitled for an injunction. The learned Senior Counsel further points out that merely on the basis of the survey record, the Courts below have non-suited the appellants with regard to their claim over the disputed portion of the property. The learned Senior Counsel further submits that there can be no dispute against their title and as such, considering that the property of the appellant is registered in the land registration office, the property of the appellant is an independent property, corroborated with the demarcating line as shown in the plan. As such, the learned Senior Counsel submits that the substantial questions of law be answered in favour of the appellants.

4. On the other hand, Shri C.A. Ferreira, learned Counsel

appearing for the respondent, has pointed out that the lower appellate Court has rightly assessed the material on record to come to the conclusion that the title of the properties surveyed under Nos. 58/9 and 59/1 of village Sernabatim are referable to the title of the appellants and the respondent. The learned Counsel further points out that there was a Deed of Gift executed by the mother in the year 1980 in favour of the appellants which clearly shows that the property of the appellants is restricted to the property surveyed under No.58/9. The learned Counsel further points out that in the documents produced by the appellants, there is nothing to suggest that any portion of the property surveyed under No.59/1 was part and parcel of the property belonging to the appellants. The learned Counsel further points out that the Courts below have rightly appreciated the evidence on record to come to the conclusion that the respondents were entitled for the injunction as prayed for. The learned Counsel further points out that the question of demarcation would not arise considering that the Courts below have construed the title documents of the parties to come to the conclusion that the respondent was entitled for the relief as sought for. The learned Counsel, as such, submits that the appeal be rejected and the substantial questions of law be answered in favour of the

respondent.

5. I have carefully considered the submissions of the learned Counsel and also gone through the plaint filed by the respondent for injunction simplicitor. It is now well settled that in a suit for injunction simplicitor, one paramount consideration to be examined by the Court is as to whether the plaintiff (respondent herein) has been in possession of the disputed portion. Even assuming that the respondent has title and if he failed to establish that he was in possession of the portion thereof, the suit for injunction simplicitor would fail. As a matter of fact, as rightly pointed out by Shri S.D. Lotlikar, learned Senior Counsel appearing for the appellants, there was a sanctioned plan produced on record, which was approved way back in the year 1980 in respect of the house constructed by the appellants in the property survey No.59/1 which shows that there is a set back of 4.20 metres from southern boundary to the outer wall of the proposed construction. This material piece of evidence which would assist the Court to examine as to who is in possession of the disputed portion, as well as to decide the demarcating line separating the property of the appellant and the respondents towards the southern boundary, has not

at all been examined by the Courts below while examining the evidence of the respondent. It is also to be noted that the demarcation claimed by the appellants would have to be examined in a manner as provided with the law in force. Even to grant such a relief, the question of possession would be relevant to fix the demarcating line. Shri C. A. Coutinho, learned Counsel appearing for the respondent has fairly conceded that the Courts below have not given any definite finding on possession of the disputed portion. In such circumstances, the impugned judgment passed by the lower appellate Court cannot be sustained and deserves to be set aside.

6. It is now well settled that a first appeal is a valuable right of a party and it is expected of the first appellate Court to examine each and every piece of evidence produced by both the parties to determine the correctness of the findings of the trial Court.

7. The Apex Court, in its recent judgment reported in 2015 SCC OnLine SC 26, in the case of ***Shasidhar & others vs. Smt. Ashwini Uma Mathad and another***, has observed at paragraph 16 thus :

“In *Santosh Hazari v. Purushottam Tiwari (Deceased)* by L.Rs. (2001) 3 SCC 179, this Court held (at pages 188-189) as under :

“.... the appellate court has jurisdiction to reverse or affirm the findings of the trial court. First appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on questions of fact and law. The judgment of the appellate court must, therefore, reflect its conscious application of mind and record findings supported by reasons, on all the issues arising along with the contentions put forth, and pressed by the parties for decision of the appellate court..... while reversing a finding of fact the appellate court must come into close quarters with the reasoning assigned by the trial court and then assign its own reasons for arriving at a different finding. This would satisfy the court hearing a further appeal that the first appellate court had discharged the duty expected of it.....”

8. Considering the said judgment of the Apex Court and taking note of the judgment passed by the lower appellate Court, I find that the lower appellate Court has not at all scrutinized every piece of

evidence produced by both the parties to come to a definite conclusion that the appellants were entitled for the relief as claimed in the suit. Apart from that, the lower appellate Court has also not examined the title documents, including the land registration document to ascertain the demarcating line between the property of the appellants and the respondent. Having failed to exercise the jurisdiction as expected of the first appellate Court, I find, in the interest of justice, that the impugned judgment passed by the first appellate Court needs to be quashed and set aside and the matter be remanded to the lower appellate Court to decide the appeal preferred by the appellants afresh, after hearing the parties in accordance with law. The substantial questions of law are answered accordingly.

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

(I) The appeal is partly allowed.

(II) The impugned Judgment and Order dated 16/10/2007, passed by the Adhoc District Judge – 2, FTC-II, South Goa, Margao in Regular Civil Appeal No.48/2007 is quashed and set aside.

(III) Regular Civil Appeal No.48/2007, is restored to the file of the learned Judge.

(IV) The learned Judge is directed to decide the above appeal afresh, in the light of the observations made herein above, in accordance with law.

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

(VI) The appeal stands disposed of accordingly, with no order as to costs.

(VII) The parties are directed to appear before the Court of learned Principal District Judge on 16/4/2015, at 10 a.m..

F.M. REIS, J.

ssm.