

IN THE HIGH COURT OF BOMBAY AT GOA**SECOND APPEAL NO.83 OF 2014**

Shri Shabbitt Khan Patel & Anr. Appellants

V/s

Shri Mohammad Ali Gafoor
Khan Patel & Anr. Respondents

Mr. U.R. Timble, Advocate for the Appellants.
Mr. Sahish Mahambrey, Advocate for the Respondent No.1.

CORAM : F.M. REIS, J.

DATE : 1st APRIL, 2016

ORAL ORDER :

Heard Mr. U. R. Timble, the learned Counsel appearing for the appellants and Mr. S. Mahambrey, the learned Counsel appearing for the respondent no.1.

2. The above appeal challenges the judgment passed by the Lower Appellate Court whereby a preliminary decree was drawn in the suit filed by the respondents against the appellants to partition the suit property bearing survey no.110/3 and 110/4 of Taleigao Village.

3. Mr. U.R. Timble, the learned Counsel appearing for the appellants has pointed out that the appellant no.1 and the respondent no.1 along with their respective spouses have jointly purchased the suit property.

The learned Counsel further points out that thereafter there was an agreement executed between the parties to partition the suit property, but however, there was no formal Deed of Partition duly registered before the Registration Authorities. The learned Counsel further pointed out that the respondents have illegally executed a partition between respondent no.1 and his wife in the year 2001 whereby they purported to partition the portion which was intended to be allotted to the respondent no.1 in such agreement to partition executed in the year 1999. The learned Counsel further points out that as the agreement to partition was not duly registered in terms of law, the question of holding in the impugned judgment that the property has to be partitioned in terms thereof is not at all justified. The learned Counsel has thereafter taken me through the judgment of the Lower Appellate Court to point out that though the appeal preferred by the appellants was allowed and a preliminary decree has been directed to be drawn in terms of the alternative relief sought by the respondents, the learned Judge has proceeded to make an observation in the operative part of the impugned judgment that the partition has to be in terms of the plots as designated in the plan for partition executed in the year 1999 which did not have any legal effects. The learned Counsel further pointed out that on plain reading of the alternative relief sought by the respondents, it clearly

shows that the relief was to seek partition of the suit property by metes and bounds in terms of their respective shares and there was no relief sought in the manner directed by the Lower Appellate Court. The learned Counsel, as such, pointed out that grave prejudice would occasion to the appellants in case such directions are implemented as according to him the partition would not be equitable and would cause great injustice to the appellants. The learned Counsel, as such, points out that the said portion of the operative part of the preliminary decree deserves to be quashed and set aside.

4. On the other hand, Mr. Sahish Mahambrey, the learned Counsel appearing for the respondent no.1 has pointed out that the preliminary decree which has been drawn is to direct the authorities to partition the property by metes and bounds as prayed for by the respondents. The learned Counsel further points out that the final decree has already been drawn by the learned Trial Judge based on the judgment of the appellate Court and, as such, the above appeal has become infructuous. The learned Counsel further pointed out that the agreement for partition executed in the year 1999 has been acted upon by the parties and according to him the appellant no.1 as well as respondent no.1 have put up respective constructions in the portions which were intended to be

allotted to each of them. The learned Counsel further submits that in such circumstances the directions issued by the Lower Appellate Court which are sought to be impugned by the learned Counsel appearing for the appellants are to be examined in the context that to the extent possible the occupation of the respective parties are to be protected provided the property is duly partitioned by metes and bounds. The learned Counsel, as such, points out that the appeal be rejected.

5. I have considered the submissions of the learned Counsel and I have also gone through the records. On perusal of the plaint filed by the respondents, the respondents had prayed to partition the property on the basis of the agreement to partition executed on 19/04/1999 and in the alternative to partition the property by metes and bounds. It is not disputed that the prayer of the respondents to partition the property in terms of the said agreement to partition did not find favour with the Lower Appellate Court whilst passing the impugned judgment. In such circumstances, the only aspect which remained to be examined by the Lower Appellate Court was to consider the relief in the context of the alternative relief sought by the respondents. As rightly pointed out by the learned Counsel for the appellants the alternate relief sought by the respondents was to direct the partition of the property by metes and

bounds. There was no qualification to such relief prayed by the respondents in the plaint. In such circumstances, the Lower Appellate Court was not justified on one hand to direct the partition of the property by metes and bounds and, thereafter, to observe that such partition should be effected in terms of the plots as designated in the agreement to partition which was not accepted by the learned Lower Appellate Court.

6. But however, considering that it is not disputed that the appellants and the respondents have already constructed their respective houses in the portions which were intended to be allotted to them in terms of the said agreement for partition, the observation of the learned appellate Court which are sought to be impugned in the present appeal would have to be read in the context that while partitioning the property by metes and bounds, to the extent possible, the concerned authority would consider whether such occupation by the appellants and the respondents can be protected, provided that it fits into their respective shares and the property is partitioned in terms of law. Subject to the said clarification which stands substituted to the said direction issued by the learned Judge, I find that there is no substantial question of law which arise in the present appeal.

7. Subject to the above, the appeal stands rejected.

F.M. REIS, J.

NH/-