

IN THE HIGH COURT OF BOMBAY AT GOA

SECOND APPEAL NO. 28 OF 2016

SHRI FRANCISCO ANTONIO JOAO DE
PHILOMENO FERNANDES AND ANR.,

... Appellants

Versus

SHRI. GANBA SIVA PRABHU DESAI
(SINCE DECEASED) AND 28 ORS.,

... Respondents

Mr. F. E. Noronha, Advocate - Amicus Curiae.

Mr. Menezes Myron D'souza, Advocate for the respondent no.18.

Coram:- F. M. REIS, J.

Date:- 15th October, 2016

ORAL ORDER :

Heard Mr. F. E. Noronha, learned Amicus Curiae and Mr. M. D'Souza, learned counsel appearing for the respondent no.18.

2. The above appeal challenges the judgments passed by the Courts below whereby the suit filed by the appellants for injunction and recovery of compensation came to be dismissed.

3. Mr. F. E. Noronha, learned Amicus Curiae has pointed out that a Commissioner was appointed by the learned Trial Judge to identify the location of the tree in question which the appellants alleged was located in his property which is identified as second adicao of the property known as Bichalem or Vajem situated at Shiroda. It is further pointed out that the appellants were not given opportunity to cross examine the commissioner and as such the suit

came to be dismissed for failure on the part of the appellants to establish their claim that the tree in question was located in the property claimed by the appellants. The learned Amicus Curiae further pointed out that the learned Lower Appellate Court permitted the appellants to cross examine the commissioner but however, in the meanwhile the commissioner has expired. It is further pointed out that the appellants moved an application to appoint a fresh commissioner which was declined by the learned Lower Appellate Court. The learned Amicus Curiae further pointed out that as such both the Courts below have erroneously come to the conclusion that the appellants have failed to establish that the tree in question was located in the property belonging to the appellants. The learned Amicus Curiae further pointed out that as such there are substantial questions of law which arise in the present appeal for consideration.

4. On the other hand, Mr. M. D'Souza, learned counsel appearing for the respondent no.18 has submitted that on the basis of the pleadings in suit the tree in question was located in the property second adicao of the property known as Bichalem or Vajem. The learned counsel thereafter has taken me through the findings of the Courts below to point out that the said second adicao was in fact sold by the parents of the appellants to the respondent no.1. The learned counsel as such points out that there are no substantial questions of law which arise in the present appeal for consideration.

5. I have considered the submissions of the learned counsel and I have also gone through the records. Both the Courts below upon appreciating the evidence on record have come to the conclusion that the appellants have failed to establish that the tree in question was located in the property claimed by the appellants to be second adicao of the property known as Bichalem or Vajem. But however, as rightly pointed out by the learned counsel appearing for the respondent no.18, the appellants themselves have admitted that the said second adicao was sold to the respondent no.1 by their parents. It is also further admitted that thereafter there was an exchange between the parents of the appellants and the respondent no.1 herein whereby the parents of the appellants ceased to have any right to the suit property. In such circumstances, the question of devolving any right to the subject property on the appellants when admittedly the property was already conveyed by the parents of the appellants in favour of the respondent no.1 would not arise at all. In such circumstances, merely because no commissioner has been appointed would not in any way affect the findings of the learned Judge that the foundation of the claim itself does not survive. Hence, I find no substantial question of law which arises in the present appeal for consideration. As such, the appeal stands rejected accordingly.

F. M. REIS, J.

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