

IN THE HIGH COURT OF BOMBAY AT GOA**FIRST APPEAL NO.320 OF 2007.**

1. State of Goa,
through the Chief Secretary of Goa,
at Secretariat, Panaji.
2. Chief Conservator of Forest,
with office at Panaji.
3. Collector, South Goa
with office at Madgaum. Appellants

V/s

Shri Saunsthana Gokarna Partagale,
Jiotoma Moto (hereinafter called as Math)
with office at Partagale represented by its
constituted Attorney Shri Manohar Santu
Kamat, resident of Partagale. Respondents

Mr. M. Sdalkar, Government Advocate for the Appellants.
Mr. Sudesh Usgaonkar, Advocate for the Respondents.

CORAM : F.M. REIS, J.

DATE : 22nd JANUARY, 2016

ORAL JUDGMENT :

Heard Mr. M. Salkar, the learned Government Advocate
appearing for the appellants and Mr. Sudesh Usgaonkar, the learned
Counsel appearing for the respondents.

2. The above appeal challenges the judgment and decree dated
27/04/2007, whereby the suit filed by the respondents came to be

decreed.

3. Briefly, the facts of the case are that the respondents claim that they owned a property known as "Inamachi Galli" situated at Maulinguem of Cotigao Village of Canacona Taluka which was acquired by the respondents by Deed dated 7/11/1875 executed before the Notary Public which document is marked Exhibit 25. It is further their contention that as per the recital of the said document the property originally was a grant from the Government on payment of "foro" which was redeemed. The boundaries mentioned in the said Sale Deed are towards the East, West and South by the slope of the hillock and towards the North by the paddy field of the Government. It is further their case that the area of the said property admeasures 115.12 hectares and consists of a paddy field and comprises also of the slopes of the hills on three sides. The said property according to the respondents is surveyed in the record of rights under Survey No.38 and a major part of Survey No.37. It is further their case that pursuant to a decision passed by the Avalkarkun the area of the property was corrected and shown by the separate survey number bearing no.37/2 which was carved out from the original entire Survey No.37. Subsequently, proceedings under Section 14 of the Land Revenue Code were initiated and there was a

claim by the appellants in which the area attributed to the property of the respondents was about 4 hectares and the remaining was held to be the property of the Government by an order dated 14/08/1984. An appeal was preferred from the said order which was dismissed by an order dated 22/02/1990. Subsequently, a notice under Section 80 of the Civil Procedure Code was served on the appellants which led to the filing of the said suit. It is further the contention of the respondents that the property belonging to the respondents corresponds to the entire Survey No.38 and occupies part of the property under Survey No.37 and part identified as Survey No.37/1. It is further their case that as far as the property under Survey No.38 is concerned there was no dispute raised by the appellants with that regard, but however, what was under dispute was the property surveyed under No.37/1. It is further the contention of the respondents that the appellants in their written statement contend that a part of the property under Survey No.37/1 belongs to the respondents and the other part to the Government. The respondents have also produced the matriz record in respect of the said property under no.1898 which shows boundaries on East, West and North by Inamagalivoril hill of the Government and towards the South by the boundary of the village of Loliem. It is further their case that in the year 1962, the appellants prepared a plan bearing no.18228 of the

property known as "Vorondagalle" situated at Loliem originally belonging to Purshotoma Bendo and subsequently transferred to Modusudan Timblo which was admeasuring 45856 square metres and the northern boundary of the said property is the property of the respondents. It is also their case that on the basis of contemporaneous material produced on record, it clearly discloses that the portion of the property surveyed under No.37/1 forms part and parcel of the property of the respondents. It is further their case that it was the view of the Inquiry Officer in the proceedings under Section 14 of the Land Revenue Code that the area "vertentes" given in the boundary of 1875 means 'slope' and as slope is the boundary, same stands outside the property of the respondents. It is further their case that "vertentes" would mean the top of the hill. On the basis of the material on record the respondents filed the suit on the ground that the appellants have put only "vondes" within the property of the respondents and that is the reason why the respondents filed the suit to protect their property and inter alia sought for a declaration to the effect that the respondents are the owners of the said property having an area of 115 hectares, 12 being the paddy field comprised in Survey No.38 and slopes of the hill to the East, West and South of Survey No.38 comprised in Survey No.37 (part). A further relief sought is to restrain the appellants from

interfering in the possession of the respondents and in the alternative to restore the possession of such portion to the respondents.

4. The respondents filed their written statement admitting that the respondents are the owners of such property, but contending that there is no area mentioned in the said document produced by the respondents and further that the property “Inamachi Galli” is bounded towards the East, West and South by the slope of the three hillocks and towards the North by the paddy field of the Government. The appellants disputed that the area of the property of the respondents admeasures 115.12 hectares and claimed that the property of the respondents is only 4.45 hectares, which is surveyed under no.38, though it is not in the name of the respondents herein. It is further their case that the property surveyed under no.38 shows an area of 4.45 hectares and the North Survey No.39 belongs to the Government and the boundary of the property surveyed under no.38 on all the other three sides is a slope bearing Survey No.37 which belongs to the appellants. The appellants accordingly disputed the claim put forward by the respondents and inter alia alleged that the property under Survey No.37 belongs to the appellants and the respondents have no right at all to any portion thereof. The appellants also disputed the boundaries as disclosed in the matriz record and, as

such, prayed that the suit be dismissed.

5. The learned Trial Judge framed two issues namely:

(i) Whether the respondents prove that part of the property of the respondents is surveyed under no.37/0?; and

(ii) Whether the appellants prove that the entire Survey No.37/0 belongs to the forest department?

6. In support of their case, the respondents examined 4 witnesses and produced documents on record namely the Agreement for Sale dated 17/12/1871 and the Deed of Sale dated 7/11/1875. The orders passed by the Revenue Authorities in proceedings under Section 14 of the Land Revenue Code have also been produced by the respondents. The respondents also examined an expert to disclose the area of the property claimed by the respondents.

7. The appellants in support of their defence have also examined witnesses and produced documents such as the list of national forests in the area of Nandongrem with the boundaries as well as the old gazette and the Form I and XIV.

8. The learned Trial Judge by the impugned judgment and decree

dated 27/04/2007 has decreed the suit filed by the respondents. Being aggrieved by the said judgment the appellants have preferred the present appeal.

9. Mr. M. Salkar, the learned Government Advocate appearing for the appellants has pointed out that the learned Judge has not at all scrutinized the material on record to find out whether any portion of the property under Survey No.37 forms part of the property claimed by the respondents herein. The learned Counsel further pointed out that the boundary of the property is the slope of the hill, which by no stretch of imagination can extend up to the top of the hill. The learned Counsel further pointed out that the respondents are claiming that their boundary would extend up to the top of the hill without any basis nor material on record. The learned Counsel further pointed out that the expert who has been examined by the respondents has not at all visited the property and the inconsistent statement in the cross-examination would itself suggest that such report has no basis. The learned Counsel further pointed out that the property is in the possession of the Forest Department and, as such, the question of granting any relief as sought by the respondents would not arise. The learned Counsel further submitted that the learned Judge has not at all ascertained where the slope begins in order to find

out whether any portion of the property under Survey no.37 forms part of the property belonging to the respondents. The learned Counsel has thereafter taken me through the evidence on record to point out that there is no material on record to substantiate the claim of the respondents that the property claimed by them forms part of the property under Survey No.37 belonging to the respondents. The learned Counsel further pointed out that there is no finding on possession arrived at by the learned Judge nor any material adduced by the respondents to establish their alleged claim of possession. The learned Counsel, as such, pointed out that the impugned judgment passed by the learned Judge cannot be sustained and deserves to be quashed and set aside.

10. On the other hand, Mr. Sudesh Usgaonkar, the learned Counsel appearing for the respondents has supported the impugned judgment. The learned Counsel has pointed out that the learned Judge has noted the admissions of the appellants in collateral proceedings against the boundary owners to hold that the portion of the property under Survey No.37 forms part of the property of the respondents. The learned Counsel further pointed out that the slope of the hill itself would suggest that the property would extend up to the top of the hill. The learned Counsel further submits that the learned Judge has misconstrued the

judgment produced on record to hold that the suit property claimed by the respondents forms part of the property of the respondents. The learned Counsel further submits that the learned Judge also noted boundaries in the matrix record to hold that the claim of the respondents was tenable. The learned Counsel further pointed out that there is material on record to show that the respondents were doing cumery cultivation and, as such, the learned Judge was justified to pass the impugned judgment.

11. Upon hearing the learned Counsel and on perusal of the record, the following point for determination arises in the present appeal:

Whether the learned Judge has scrutinized the material on record whilst coming to the conclusion that part of the property of the respondents is surveyed under no.37(part) of Cotigao Village?

12. On perusal of the evidence on record, I find that PW1, who has deposed on behalf of the respondents, has pointed out that the property purchased by the respondents is bounded on three sides by the slope of the hill while on one side by the paddy field of the appellant. The learned Judge has not rendered any finding as to where the slope of the hill would begin. On the contrary, the claim of the respondents appears to be that their property extends to the top of the hill. The documents

produced by the respondents did not suggest that the property of the respondents extends up to the top of the hill. Apart from that, to examine the extent of the property apart from locating the slope of the hill, the learned Judge has also to render a finding on possession of the parties. It is the contention of the appellants that the disputed portion of the property is in possession of the Forest Department and that there are protection barriers erected by the appellants to protect the property belonging to the Forest Department. On perusal of the impugned judgment, I find that there is no specific finding on possession rendered by the learned Judge whilst passing the impugned judgment. It is also to be noted that the claim of the respondents extends to an area of 115.12 hectares though the document relied upon by the respondents does not disclose the area purchased by the respondents pursuant to the document at Exhibit 25. There is no other document produced disclosing the actual area belonging to the respondents. It is also to be noted that the respondents have also claimed for a relief for restoration of possession. In such circumstances, unless there is a specific finding as to who was in possession of the property for all these years and whether the respondents were owners in possession of the disputed portion it was not open to the learned Judge to grant the relief sought by the respondents. At this stage, I invited the Counsel appearing for the respective parties

to address the Court on the evidence produced by the parties in support of their rival contentions to examine the correctness of the claim of the respondents. But however, both the learned Counsel have fairly accepted that as the evidence adduced by both the parties has not been minutely scrutinized by the learned Trial Judge, it would be appropriate to remand the matter to the learned Trial Judge to decide the suit filed by the respondents afresh. It was further submitted by the learned Counsel that any observations with regard to the merits of the dispute would influence the learned Judge whilst scrutinizing the evidence on record adduced by the parties and, as such, pointed out that no reasons be given on the merits of the claims put forward by the respective parties. It is expected of the learned Judge as such to minutely examine the document and reconstitute the boundaries of the property at loco and, thereafter, ascertain who is in possession of such disputed portion and decide whether the respondents are entitled for the relief as sought in the suit.

13. In such circumstances, I find that as the learned Trial Judge has not at all scrutinized the material on record to examine whether the respondents have successfully established their claim that a part of the property under Survey no.37 forms part of the property belonging to the

respondents, it would be appropriate in the interest of justice to quash and set aside the judgment passed by the learned Trial Judge and remand the matter to the learned Judge to decide the suit filed by the respondents afresh in accordance with law. The point for determination is answered accordingly.

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

O R D E R

- (i) The appeal is partly allowed.
- (ii) The impugned judgment and decree dated 27/04/2007 is quashed and set aside.
- (iii) Civil Suit No.81/2004 is restored to the file of the learned District Judge.
- (iv) The learned District Judge is accordingly directed to decide the suit filed by the respondents afresh in the light of the observations made herein above, after hearing the parties in accordance with law.
- (v) All contentions of both the parties on merits are left open.
- (vi) The parties are directed to appear before the learned District Judge on 31/03/2016 at 10.00 a.m.

F.M. REIS, J.

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