

IN THE HIGH COURT OF BOMBAY AT GOA**SECOND APPEAL NO. 20 OF 2016**

1. Shri Gajanan Lobhaji Kitturkar,
of major age, residing at Salcebhat,
Revora, Bardez Goa

2. Shri Vinod Lokare,
of major age,
residing at Salcebhat,
Revora, Bardez Goa.

... Appellants

Versus

1. Shri Peter Anthony Gian D'costa,
major of age,
Salchem Bhat,
Revora, Bardez Goa.

2. Shri Luis Antonio Joao Dos
Remedios Cardozo, (deceased)
major of age,
Medical Practitioner,
Residing Opposite Pinto Cottage,
Escrivao waddo, Candolim,
Bardez Goa.

3. Smt. Zeila Cardoz Fernandes,
major of age,
r/o Gurawaddo, Calangute,
Bardez Goa.

4. Shri Francis Malick Fernandes,
major of age,
r/o Gurawado,
Calangute, Bardez Goa.

5. Smt. Prem alias Frimiout Cardoz Metha,
major of age, at Sauntawaddo,

Behind Miranda Cottages,
Calangute, Bardez Goa.

6. Shri Narendra Mehta,
major of age,
C/o Shri Luis Antonio Joao
Dos Remedios Cardozo,
Opposite Pinto Cottage,
Escrivao wado, Candolim,
Bardez Goa.

7. Shri Ramesh Ankush Talankar,
major of age,
r/o Salchem Bhat,
Revora, Bardez Goa.

... Respondents

Ms. A. Razak, Advocate for the appellants.

Mr. J. P. Mulgaonkar, Advocate for the respondent nos. 1, 3 & 5.

Coram:- F. M. REIS, J.

Date:- 22nd April, 2016

ORAL ORDER :

Heard Ms. A. Razak, learned counsel appearing for the appellants and Mr. J. P. Mulgaonkar, learned counsel appearing for the respondent nos. 1, 3 and 5.

2. The above appeal challenges the judgment passed by the learned Lower Appellate Court whereby the appeal preferred by the

respondent no.1 came to be allowed and the suit filed by the respondents was decreed inter-alia granting relief of permanent injunction and mandatory injunction.

3. It is the case of the respondents that the property bearing survey No.47/2 situated in the Village of Revora is a large property wherein the original plaintiffs were the owners in possession of such property in view of the allotment in a Deed of Partition executed way back in the year 1972 whereby a plot of land was allotted to the original plaintiffs. It is further their case that during the pendency of the suit, the respondents purchased an area of 2775 square metres from such property from the original plaintiffs. It is further their contention that the appellants who were the defendants in the suit without any right had encroached into the property belonging to the respondents and put up a structure therein way back in the year 1991. As the appellants had no right to put up such construction, the respondents filed a suit for permanent injunction as well as for mandatory injunction to demolish such structure. The learned Trial Judge by judgment and decree dated 08.05.2009 dismissed the suit filed by the respondents inter alia holding that the respondents had failed to identify the subject property and as

such the respondents were not entitled for any relief. The learned Judge also held that the respondents have also not established their flow of title or exact location of the subject structure to ascertain whether the subject matter of the sale deed in favour of the respondent no.1 was inclusive of the disputed structure. The learned Judge further found that there was no material on record to link the original plaintiffs with co-occupants shown in the survey records by name Mr. Alvito Pinto. Being aggrieved by the said judgment and decree, the respondents preferred an appeal before the learned Lower Appellate Court which came to be allowed by the impugned judgment and decree dated 30.06.2015. Being aggrieved by the said judgment, the appellants have preferred the present Second Appeal.

4. Ms. A. Razak, learned counsel appearing for the appellants has vehemently argued that the learned Trial Judge had rightly come to the conclusion that the respondents have failed to identify the suit property and as such the learned Lower Appellate Court was not justified to set aside the judgment of the learned Trial Judge. The learned counsel has extensively taken me through the judgment of the Trial Judge to point out that the learned Judge after minutely examining

the boundaries as claimed by the respondents and the documents as well as the survey records has come to the conclusion that the respondents have failed to identify the subject property nor established their title based on the partition deed. The learned counsel further submits that there is no material on record to co-relate the property allotted on the basis of the alleged partition to the subject matter of the suit. The learned counsel further pointed out that a well reasoned judgment passed by the learned Trial Judge has been set aside by the learned Lower Appellate Court by misconstruing the evidence on record. The learned counsel thereafter has taken me through the judgment of the learned Lower Appellate Court to point out that the learned Judge has failed to consider that there is no material on record to show that the name of the co-occupant in the survey records is referable to the ancestor of the respondents. The learned counsel further pointed out that the learned Lower Appellate Court has not at all considered the evidence produced on record nor the contention raised by the appellants to come to the conclusion that the respondents have failed to establish their title over the suit property. The learned counsel further pointed out that the suit property itself has not been identified and the evidence of PW1/respondent no.1 clearly suggest that the respondent no.1/PW1 is

not aware either about the subject matter of the deed of partition nor is conversant with the facts in respect of the suit plot. The learned counsel further pointed out that though PW1/respondent no.1 claims that he has purchased an area of 2775 square metres, nevertheless, there is no material on record to show that the subject construction is located in the property purchased by PW1/respondent no.1. The learned counsel further submits that the learned Lower Appellate Court was swayed with irrelevant material on record to come to the conclusion that the respondents have established their case. The learned counsel further pointed out that the learned Judge has also misconstrued the sale deed in favour of the respondents in respect of the property surveyed under No.46/21 which according to the learned counsel is not at all connected with the subject property. The learned counsel has extensively taken me through the findings of the learned Lower Appellate Court to point out that there is no material on record to show that the respondents have established the title over the suit property. The learned counsel further pointed out that the suit itself was bad as there is no declaration of title and as such on this ground alone the suit filed by the respondents deserves to be dismissed. The learned counsel has thereafter pointed out that the learned Lower Appellate Court has misconstrued the evidence

on record as well as the documents produced by the respondents to come to the conclusion that the respondents are entitled for the relief in the suit. The learned counsel thereafter has taken me through the proposed substantial questions of law to point out that such questions arise in the present appeal which require consideration by this Court.

5. On the other hand, Mr. Mulgaonkar, learned counsel appearing for the respondent nos. 1, 3 and 5 has supported the impugned judgment. The learned counsel has pointed out that the learned Lower Appellate Court upon appreciating the evidence on record both documentary and oral has come to the conclusion that the subject property is referable to the deed of partition executed in the year 1972. The learned counsel further pointed out that the deed of partition of the year 1972 has been duly registered before the Sub Registrar and consequently, the presumption of legality to such document would arise in the present case. The learned counsel further pointed out that the appellants are rank trespassers and as such on the basis of such status the question of examining the title of the respondents over the suit property is totally erroneous. The learned counsel further submits that the appellants themselves claim that they have no title over the property

nor in the defence alleged that the construction of the structure is referable to any lawful right to occupy such portion of the property. The learned counsel further pointed out that it is well settled that the possession of a trespasser is not good against the rightful owner as according to him the respondents have produced title document as well as the survey records coupled with the oral evidence to establish that the respondents are entitled to occupy the disputed property as they have lawful right therein. The learned counsel has thereafter taken me through the sale deed produced on record in respect of sale of the part of the property in favour of the original respondent no.1/PW1 to point out that even the disputed structure is shown in the plan which is attached to such sale deed. The learned counsel further pointed out that this sale deed has been exhibited during the evidence of PW1/respondent no.1 and there was no challenge to the location of the property as disclosed therein in the cross examination of PW1. The learned counsel as such points out that the contention of the appellants that the property has not been identified nor that they have not established their flow of title is without any substance and as such there is no case made out for consideration of the present appeal. The learned counsel has gone through the substantial questions of law proposed by the appellants to

point out that all such questions would entail re-appreciation of evidence which is not permissible in Second Appeal under Section 100 of the Civil Procedure Code. The learned counsel as such points out that the appeal be rejected.

6. I have considered the submissions of the learned counsel and I have also gone through the records. On perusal of the judgment of the learned Trial Judge, I find that the learned Trial Judge has rejected the claim put forward by the respondents essentially on the ground that the property claimed by the respondents has not been duly identified. This aspect has been considered by the learned Lower Appellate Court and on the basis of the pleadings read with the allegations in the plaint, the learned Judge has come to the conclusion that the issue of identity of the property was not at all in dispute. The learned Lower Appellate Court has also considered the fact that DW1 himself in cross examination has admitted that the subject structure was located in the suit property. In such circumstances, the contention of the learned counsel appearing for the appellants that the suit property has not been identified cannot be accepted and the learned Lower Appellate Court was justified on the basis of the pleadings of the parties to come to the

conclusion that the respondents have duly identified the subject property.

7. Apart from that, the flow of title of the respondents is on the basis of the deed of partition which has been duly registered before the Sub Registrar way back in the year 1972. PW1 as well as the other witnesses have stated that the suit property is one which has been allotted to the original plaintiffs by such deed of partition. There is no material contrary on record to disapprove the allegations made in the pleadings. The learned Lower Appellate Court as such was justified to come to the conclusion on the basis of the pleadings as well as cross examination of DW1 that the findings of the learned Trial Judge that the property has not been identified or that the subject structure has not been correctly located on the plan was erroneous. It is also to be noted that the learned Lower Appellate Court has taken note that DW1 in cross examination has clearly admitted that he has obtained licence from the Local Panchayat to put up a construction in the property surveyed under No. 46/21 whereas the subject structure was put up by the appellants in the suit property surveyed under No.47/2. It is also admitted by the appellants that though such permission was obtained

way back in the year 1991 no construction has been put up in the property surveyed under No.46/21. This itself suggest that the inference drawn by the learned Lower Appellate Court to come to the conclusion that the appellants have no right to put up the subject structure based on such licence is well founded. Apparently, the appellants have obtained a licence to put up a construction in the property belonging to him surveyed under No.46/21 and on the basis thereof illegally put up a structure in the property surveyed under No.47/2 belonging to the respondents. These findings of fact arrived at by the fact finding Court cannot be re-appreciated by this Court in the present Second Appeal. Besides that, the learned counsel appearing for the appellants has failed to show any perversity in the said findings or that any findings arrived at by the fact finding Court is on the basis of misreading or misconstruing the evidence on record. In such circumstances, the question of interfering in the impugned judgment passed by the learned Lower Appellate Court would not at all be justified.

8. With regard to the contention of the learned counsel appearing for the appellants that there is no material on record to point out that the suit structure is located in the property purchased by PW1, I find that on bare perusal of the plan attached to the sale deed which is

exhibited on record would clearly show that even the subject construction is shown in the property purchased by PW1/respondent no.1. As such, there is no perversity in the findings arrived at by the learned Lower Appellate Court on that count.

9. Apart from that, both the Courts below have concurrently come to the conclusion that the appellants have failed to establish their defence in the suit nor establish any claim of right to occupy the suit property. The learned counsel appearing for the appellants fairly pointed out that there is no specific defence in the written statement claiming any right to the subject property nor the appellants have produced any evidence to substantiate that they have a right to occupy such property. There is no defence raised of adverse possession and as such the findings of the learned Lower Appellate Court that the occupation of the appellants in putting up such structure is an act of trespasser cannot be faulted.

10. The substantial questions of law proposed by the appellants would essentially entail re-appreciation of evidence which is not permissible in a Second Appeal under Section 100 of the Civil

Procedure Code. The contention of the learned counsel appearing for the appellants that the appellants have raised a cloud over the title of the respondents cannot be accepted. As already pointed out herein above, the appellants are not claiming any right to the suit property nor any right to occupy such property. In such circumstances, the contention of the learned counsel appearing for the appellants that the respondents have created a cloud over the title of the respondents does not deserve any consideration.

11. In view of the above, I find that there is no substantial question of law which arises in the present appeal for consideration under Section 100 of the Civil Procedure Code. The fact finding Court has come to the conclusion that the respondents are in possession of the subject property based on the survey records as well as the other material on record, and that the act of putting up a structure in the suit property is an unjustifiable intrusion in the property of the respondents and as such the learned Lower Appellate Court was justified to allow the appeal preferred by the respondents and decree the suit filed by the respondents.

12. In view of the above, I find no merit in the above appeal which stands accordingly rejected.

F. M. REIS, J.

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