

IN THE HIGH COURT OF BOMBAY AT GOA

SECOND APPEAL NO. 31 OF 2017

MRS. IDALINA FERNANDES AND 8 ORS., ... Appellants

Versus

**SHRI. CONCEICAO FERNANDES AND 5
ORS.,** ... Respondents

Mr. Ryan Da Piedade Menezes and Ms. C. Rebeiro, Advocates
for the Appellants.

Coram:- F. M. REIS, J.

Date:- 10th March 2017

ORAL ORDER

Heard Shri Ryan Menezes, learned Counsel appearing for the Appellants.

2. This is a Second Appeal filed by the Appellant, inter alia, challenging the Judgments passed by the Courts below whereby the Suit filed by the Respondents for injunction and to demolish an encroachment by putting up a rubble stone wall, came to be Decreed.

3. Mr. Ryan Menezes, learned Counsel appearing for the Appellants, submits that the Respondents are only co-owners of the property which is surveyed under no. 280/1 of Village Velim which admeasures an area of more than two lakhs square metres

wherein according to the Appellants, a house is existing which was built up by the ancestor of the Appellants pursuant to a permission granted by Joefrey Sales on payment of consideration. Learned Counsel further pointed out that the Respondents filed the Suit on the assumption that the Respondents are Mundkars of the subject house and that the husband of the Appellant no. 1 had advanced a sum of Rs.3,000/- whereby he had agreed to purchase an area of 200 metres. Learned Counsel further pointed out that the said contention of the Respondents has no basis and is erroneous as, according to him, the occupation of the Appellants was based on the permission granted by the other Co-owners who in fact had a Suit filed against the Respondents with regard to the claim of co-ownership in respect of the same property. It is further pointed out that in such Special Civil Suit no. 49/80/A, it was held that the Respondents are only co-owners of the property whereas the remaining shares belonged to the Sales family. Learned Counsel further pointed out that the learned Trial Judge whilst passing the impugned Judgment has erroneously found that the contention of the Appellants that they were occupying the house pursuant to the permission of the said Sales family was irrelevant though, according to him, this was a core issue which emerges from the rival stands. Learned Counsel has thereafter taken me through the Judgment passed by the learned Trial Judge to point out that the learned Judge has failed to consider the

defence raised by the Appellants and, as such, has erroneously come to the conclusion that the Respondents are entitled for the relief of injunction as well as for the demolition of the wall put up by the Appellants. The learned Counsel further submits that having failed to frame the crucial issue whilst disposing of the Suit filed by the Respondents, would itself be a substantial question of law which arises for consideration in the present Appeal under Section 100 of the Civil Procedure Code. Learned Counsel has thereafter taken me through the Judgment of the Lower Appellate Court to point out that this aspect was not even considered by the learned Judge whilst coming to the conclusion that the Respondents were entitled for a permanent and mandatory injunction as granted by the learned Trial Judge. Learned Counsel has thereafter taken me through the Judgment passed in the Suit between the Respondents and the Sales Family to point out that there is a categorical finding therein that the said Sales family is one of the co-owner of the property. Learned Counsel has further pointed out that the stand of the Appellants that an area of 1000 square metres was agreed to be sold to the husband of the Appellant no. 1 by the said Sales family, has not been considered by the Courts below and, as such, there is a substantial question of law which arises in the present Appeal for consideration. Learned Counsel in support of his submission has relied upon the Judgment reported in 1943 Bombay Law Reporter 533. Learned Counsel has thereafter taken me through

the pleadings of the parties to point out that as the core issue has not been considered or examined by the Courts below, there is a substantial question of law which arises in the present Appeal for consideration.

4. I have duly considered the submissions of the learned Counsel and with the assistance of the learned Counsel, I have also gone through the records. Both the Courts below upon appreciating the evidence on record, have found favour with the contention of the Respondents that the occupation of the Appellants of the subject house was pursuant to a permission granted to the Appellants to occupy a portion of the property admeasuring an area of 200 square metres. This finding of fact has been arrived at on the basis of the oral evidence produced on record as well as the documentary evidence including the Survey Records and the Survey Plans. In fact, on perusal of the Record of Rights, the subject house is shown in the Other Rights Column. On perusal of the plan produced on record, the house occupied by the Appellants has been clearly identified. The injunction granted by the Courts below is excluding the area of the house admeasuring 200 square metres. Apart from that, the rubble stone wall which has been constructed by the Appellants is at a place beyond the said area of 200 square metres. In such circumstances, the Courts below upon appreciating the evidence on record have concurrently come to the conclusion that the

Respondents have established their case and that the Appellants have no right beyond the said area of 200 square metres. In such circumstances, the Courts below decreed the Suit filed by the Respondents in the manner as reflected in the impugned Judgment.

5. The contention of Mr. Ryan Menezes, learned Counsel appearing for the Appellants is that the defence of the Appellants in the written statement has not been considered. But, however, on perusal of the issues framed by the learned Trial Court, no issue on that count was framed by the learned Judge. The Appellants also did not raise any objection to the issues framed nor requested the Court to frame an additional issue during the pendency of the trial. On examining the Appeal Memo filed before the Lower Appellate Court, there is no ground taken on this count before the Lower Appellate Court. Even on perusal of the Judgment passed by the Lower Appellate Court, no submission on this aspect was found either recorded or raised by the Appellants before the Lower Appellate Court. In such circumstances, the contention of Mr Ryan Menezes, learned Counsel appearing for the Appellants, that the Judgment of the Courts below stands vitiated for not considering such aspect, cannot be accepted. Apart from that, the fact finding Courts below upon appreciating the evidence on record have concurrently accepted the case put forward by the Respondents

that the occupation of the Appellant is based on the transaction claimed by the Respondents whereby the husband of the Appellant no. 1 was permitted to occupy the subject structure upon receipt of a sum of Rs.3,000/-. On the basis of such concurrent finding of fact, the contention of the Respondents that their occupation was on the basis of a permission granted by the co-owner cannot co-exist. Besides, on perusal of the written statement filed by the Appellants, there are no particulars with regard to the alleged claim of the Appellants that an area of 1000 square metres was given by the Sales family to the husband of the Appellant no. 1 to put up a construction therein. The amount has not been specified. There is no documentary or other evidence produced to substantiate such claim. On the basis of such vague pleadings, the question of raising any issue in the Suit, would not at all be justified. In such circumstances, I find that there is no infirmity committed by the Courts below whilst disposing of the Suit filed by the Respondents. The Appellants have been protected as far as their occupation of the house is concerned. There is no evidence produced by the Appellants to show that the Appellants have any right beyond the occupation of the house located in the subject property. In such circumstances, the Judgment of this Court relied upon by Mr. Ryan Menezes, learned Counsel appearing for the Appellants, would not at all be applicable to the facts and circumstances of the present case.

6. Hence, based on the finding of fact arrived at by the Courts below where no perversity has been shown to have been committed by the Courts below whilst arriving at such finding, I find that there are no substantial question of law which arises in the present Appeal for consideration. The substantial question of law proposed by the Appellants would entail re-appreciation of evidence on record which is not permissible in terms of Section 100 of the Civil Procedure Code in the facts of the present case.

7. In view of the above, I find no merit in the present Appeal which stands rejected accordingly.

F. M. REIS, J.

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