

IN THE HIGH COURT OF BOMBAY AT GOA
SECOND APPEAL NO.99 OF 2004

1. Mrs. Audrey Viegas,
daughter of Carlos Germano Viegas,
major in age, service,
residing at Chapel View Apartments,
Borda, Margao, Goa, and

2. Ms. Piola Viegas,
daughter of Carlos Germano Viegas,
major in age, residing at
Chapel View Apartments,
Borda, Margao, Goa, and

..... Appellants.

Versus

(1. Smt. Magna Teresinha Menino
Jesus Pereira, wife of Joat Joao Viegas)

2. Joat Joao Viegas, (since deceased)

(a) Mrs. Palmira D'Souza and her

(b) Alex D'Souza,

Both resident of Posrom Bhat Opp.
Timoteo Garage Taleigao, Goa.

3. Mrs. Mangla Krishna Raikar,
daughter of late Budho S. Gaonkar,
major in age, resident of
House No.MHN/95, Dactolem, Mangor,
Vasco da Gama, Goa.

..... Respondents.

Mr. R.G. Ramani, Advocate for the Appellants.

Mr. Guru Shirodkar, Advocate for the Respondents.

Coram : N.M. Jamdar, J.

Date : 9 November 2017.

ORAL JUDGMENT:

This Appeal is filed by the original Defendants No.1 and 2, challenging the concurrent Judgments and Orders passed by the learned Civil Judge, Senior Division at Vasco-da-Gama, Goa and by the learned District Judge, South Goa, Margao. The learned Civil Judge had decreed the Suit holding that the Respondents Plaintiffs were owners of the suit property as specified and the Appellants were restrained from interfering with the possession of the Respondents Plaintiffs. A Counter-claim filed by the Appellants was dismissed. The learned District Judge dismissed the Appeal filed by the Appellants, confirming the Judgment and Decree of the learned Civil Judge.

2. The property in question is known as “Dactolem” admeasuring 9313 sq. metres, situated at Mangor, Vasco-da-Goa, registered in the Land Registration Office of Salcete, Margao under No. 10471 on page 63 of Book B reverse no.29, new series and enrolled in the Taluka Revenue Office under matriz no.511, bounded on the east with sloppy waters (Aguas Vertentes), on the west by the lake (Alagoa) belonging to the Comunidade of Mormugao, on the

north by the property belonging to the defendants No.1 and 2 and on the south by the property of the heirs of Jose Sanches, and has been surveyed under Chalta No.85 of P.T. Sheet No.158 and Chalta No.12 of P.T. Sheet No.159 in the City Survey.

3. The Respondents-Plaintiffs filed Regular Civil Suit No.143/2000, contending that the property was initially belonging to one Maria Natividade Rodrigues, which was subsequently inherited by Carlos Germano Viegas and Lidia Palmira Augusta de Souza Viegas who were brother and sister. According to the Respondents, they had succeeded to the suit property through their parents and they were in peaceful and continuous possession since 1 July 1991. According to the Respondents, the property which was subject matter of the Inventory Proceedings, was resurveyed and the Survey Officer finalised the location of each parcel within the said larger piece of land and since the Defendants Appellants started disputing the title of the Respondents and causing obstructions, the suit had to be filed.

4. The Appellants-Defendants filed their Written Statement and contended that in the Inventory Proceedings No.348/1956 part of the property described in Clause 24 fell to the share of Lidia, properties in Clause 22 were in possession and ownership of the Appellants, which they had received from Carlos. Since, according to

the Appellants, the Respondents were trying to grab the property by misdescribing it, the Appellants were also entitled to seek a declaration and consequential relief. The Appellants by filing the Written Statement, contested the Suit and also claimed a relief by filing a Counter-claim. The Respondents filed their written statement to the Counter-claim.

5. The learned Civil Judge framed an issue as to whether the Respondents proved that they are owners and in possession of the suit property having an area of 9313 sq. metres under Chalta No.85 of P.T. Sheet No.158 and Chalta No.12 of P.T. Sheet No.159. An issue was also framed as to whether the Respondents proved that the suit property was resurveyed under Chalta No.85 of P.T. Sheet No.158 and Chalta No.12 of P.T. Sheet No.159, having an area of 8500 sq. metres and 813 sq. metres respectively. The learned Civil Judge held both these issues in favour of the Respondents. The learned Civil Judge also framed an issue as to whether the area of 4219 sq. meters acquired by Government was from part of the suit property and answered it in the affirmative.

6. Before the learned Civil Judge, the main issue arose was regarding the identity of the property as to whether the Old Cadastral Survey No.541 comprises of item at Clause 24 and the item at Clause 22 which was claimed respectively by the Appellants

and the Respondents. The learned Civil Judge, on the question of location and identity of the property, accepted the evidence produced by the Respondents of the Survey Officer on the new survey conducted which clarified the position pursuant to the Inventory Proceedings. The learned Civil Judge also relied upon admissions of the Appellants and discarded the evidence of the Court Commissioner. The learned Civil Judge accordingly decreed the Suit by Judgment and Decree dated 30 July 2003, declaring that the Respondents are owners in possession of the suit property surveyed under Chalta No.85 of P.T. Sheet No.158 and Chalta No.12 of P.T. Sheet No.159 and that the Appellants have no right, title or interest in the suit property. The Counter-claim filed by the Appellants Defendants was dismissed.

7. The Appellants thereafter filed Regular Civil Appeal No.143/2000 in the the District Court, South Goa, Margao. The learned District Judge confirmed the findings of the learned Civil Judge that the decision of the Inspector of Surveys of the survey carried out by the Government Authority, relied upon by the Respondents Plaintiffs, was a cogent piece of evidence in their favour and held that the Report of the Court Commissioner was rightly discarded by the learned Civil Judge. The learned District Judge held that the learned Civil Judge had appreciated the evidence correctly and had reached at a proper conclusion. The learned District Judge,

accordingly, dismissed the Appeal by Judgment and Order dated 14 May 2004. Being aggrieved by these concurrent Judgments, the original Defendants No.1 and 2 have filed this Second Appeal.

8. The Second Appeal was admitted on the following substantial questions of law :

(1) Whether the Judgments passed by the learned Trial Judge and the Appellate Judge are vitiated for non consideration of a report of the Court Commissioner appointed at the instance of the parties, which forms a material substantial evidence in the suit ?

(2) Whether the learned Trial Judge and the Appellate Judge have misconstrued the provisions of Order XXVI, Rule 10, of the Civil Procedure Code, while discarding the report and the Plan submitted by the Court Commissioner ?

(3) Whether the Judgements passed in favour of a deceased person could be upheld by the learned Appellate Court when such a Judgement is null and void and non-est in Law, as admittedly, the Plaintiff No.2 had expired during the pendency of the suit and his Legal Representatives were not brought on record ?

9. I have heard Mr. R.G. Ramani, learned Counsel for the

Appellants and Mr. Guru Shirodkar, learned Counsel for the respondents on the aforesaid questions of law.

10. The aforesaid questions of law, as framed, would show that essentially Question (1) and Question (2) are connected and relate to the report of the Court Commissioner. The Question (3) is regarding effect of death of the Plaintiff No.2 during the pendency the Suit. Though Mr. Ramani, learned Counsel for the Appellants did not address the Court on question of law (3), since it is framed, it will have to be considered. Mr. Shirodkar, the learned Counsel for the Respondents pointed out that factually this question would not arise as the Respondents were husband and wife. Even though the Respondent-Plaintiff No.2 the husband passed away during the pendency of the Suit, the Plaintiff No.1, his wife, was already on record and since there were no legal heirs, there was no question of the Judgments being null and void. This submission is correct and is not controverted. Therefore, this question, so framed, has to be answered against the Appellants.

11. The main contention advanced by Mr. Ramani, is non-consideration by both the Courts of the report of the Court Commissioner. It is contended that the Court Commissioner was appointed at the behest of the Respondents, the Commissioner had submitted his report, the Commissioner was subjected to cross

examination, the report was accepted by the Appellants, yet, both the Courts, without any reason had discarded it, which was a vital piece of evidence. Mr. Ramani contended that in the plan annexed to the report, the Court Commissioner had clearly demarcated the area and, therefore, the report was most germane for decision of the controversy. Mr. Shirodkar, on the other hand, submitted that the report of the Court Commissioner did not consider various aspects, such as acquisition of major part of the property, the effect of the same and the Appellants had themselves given various admissions which were considered by both the Courts.

12. From the arguments advanced, the questions involved in this Second Appeal, both, factual and legal, lie in a narrow ambit. The fact that the Old Cadastral Survey No.541 existed is beyond doubt. That it was subject matter of the Inventory Proceedings is also not in dispute. The Inventory Proceedings were initiated upon the death of the parents of Lidia and Carlos through whom both, the Appellants and the Respondents claim their properties. It is also not in dispute that Lidia was allotted the property at Clause 24 in the Inventory Proceedings and Carlos was allotted the property described in Clause 22. The dispute between the parties, germane for consideration of the Second Appeal, is where the land parcel Clause 24 and the land parcel Clause 22 are located within the Old Cadastral Survey No.541. Though, both the Courts indicated various

other facets, such details, numbers of the land parcel, the learned Counsel for the parties agree that essentially the dispute is as to what is indicated above.

13. Turning now to the aspect of location of the land parcels Clause 24 and Clause 22. The location and identity of the property is generally a question of fact. However, a question of law would arise if, while considering the location of the property, a piece of evidence germane for such identification is not considered or irrelevant piece of evidence taken in consideration or incorrect legal inferences are drawn from the pieces of evidence. If such foundation is established, a question of law would arise for consideration. Stress is laid by the Appellants on non-consideration of evidence and report of the Court Commissioner.

14. As far as evidence for the purpose of location of the land, the Respondents had relied upon the order passed by the Inspector of Land Surveys and Land Records, City Survey, Vasco da Gama. This order confirmed that the Respondents were in possession of the suit property. The order indicated where the land parcels Clause No.22 and Clause 24 were located within the Old Cadastral Survey No.541. This decision taken by the Competent Authority for land survey was placed on record and relied upon by the Respondents. The learned Civil Judge had observed that the Appellants had not challenged this

order by taking out further proceedings. Though Mr. Ramani may be right in contending that after the Civil Suit is filed and the parties were agitating the issue, it was not necessary to challenge the order of Survey Authority, the question still remains to the sufficiency of evidence produced by the Appellants to discard the order passed by the Inspector of Surveys and Land Records. The order passed by the Inspector of Surveys and Land Records identified these two pieces of land and their location within the Old Cadastral Survey No.541 and this was a relevant piece of evidence.

15. According to Mr. Ramani, the report of the Court Commissioner which would supercede the order passed by the Inspector of Surveys and Land Records and it should have been considered in the evidence and given due weightage. Mr. Ramani has placed on record a copy of the Report of the Commissioner and the Plan and examination of the Commissioner. In the Report of the Commissioner, it is stated that he carried out the inspection on site as per Inventory and the plans produced. He saw that the property Clause 22 and Clause 24 were coinciding with the boundaries of the Old Cadastral Survey No.541. This one page report is not of much assistance.

16. In the plan annexed to the report, the Commissioner has shown the property Clause 24 with letter 'A', and the property

Clause 22 with the letter 'B'. While drawing the boundaries and the divisions the properties have been divided as 'A' and 'B' alone. The Respondents filed objections to the report of the Commissioner and the Plan and pointed out that the area of almost 4219 sq. meters acquired by the Government found no mention in the report. The Respondents also took up various other objections to the report.

17. The learned Civil Judge, while keeping the report of the Court Commissioner out of consideration, observed that the Commissioner was appointed at the instance of the Respondents who disagreed with the report and the parties never agreed to go by the report of the Commissioner and, therefore, it was not necessary to go into the aspect of the report. Thereafter, in Appeal, the learned District Judge considered the report of the Court Commissioner. The learned District Judge observed that the report did not consider the acquisition of 4219 sq. metres by the State Government out of the said property and, therefore, the plan which was drawn without showing location of the acquired property, could not be considered as a conclusive piece of evidence.

18. Mr. Ramani sought to contend that it was not the term of reference of the Commissioner to identify the area under acquisition and the documents were not supplied by the Respondents to the Commissioner. This argument cannot be accepted. If the

Appellants wanted to rely on the report of the Commissioner, nothing stopped them from furnishing of the documents regarding acquisition and secondly, if the evidence in the form of official survey produced by the Respondents was to be discarded on the basis of the report, the Plan should have reflected correct boundaries and the existence of the acquired area. If a substantial portion of land which vested in the Government and did not belong to either of the parties, was not demarcated and the properties were demarcated as if the acquisition did not take place at all, the approach of the learned District Judge in not relying on this piece of evidence cannot be termed as perverse.

19. Mr. Ramani submitted that from the price paid in the Inventory Proceedings, it is clear that the Appellants had paid proportionately less amount. This may be so, but this will not aid the Appellants for establishing physical location and identification of the area of the property. On the other hand, Mr. Shirodkar has pointed out that the admissions of the Appellants where the Appellants have admitted the Survey Report.

20. Considering this position, there was no error committed by both the Courts in appreciating the evidence on record. The evidence produced by the Respondents, based on the report of the Inspector of Land Records, so also the admissions of the Appellants

were correctly appreciated by both the Courts. As against this, solitary piece of evidence relied by the Appellants in the form of report of the Court Commissioner was not found to be a reliable piece of evidence for the purpose of identification of the two properties. Both the Courts, therefore, appreciated each piece of evidence and drew correct and legal inference therefrom. There is no perversity in the assessment of evidence. Ascertainment of physical location of a property is a question of fact. Both the Courts have concurrently answered this question of fact in favour of the Respondents. Question of law, as framed, will have to be answered against the Appellants.

21. In the circumstances, no interference is called for in the decisions of both the Courts. The Second Appeal is dismissed. No costs.

N.M. Jamdar, J.