

IN THE HIGH COURT OF BOMBAY AT GOA

SECOND APPEAL NO. 73 OF 2016

1. Mrs. Alabia Rodrigues,
wife of late Mr. Roque
Rodrigues, aged 76
years, housewife, Indian
National; and his wife
2. Mr. Sunil Rodrigues,
son of late Mr. Roque
Rodrigues, aged 43
years, Indian National,
service, through his
Attorney, the Appellant
no.1,

Both residents of House
no. 38 (old)/929 (new),
Bairro Primeiro, Assolna,
Salcete-Goa.

..... Appellants

V e r s u s

Miss Etelvina Sandra
Rodrigues, daughter of late
Mr. Celidonio Rodrigues
aged 51 years, service,
resident of House no. 35,
Bairro Primeiro,
Assolna, Salcete, Goa. (Deceased)

- (a) Peter Morais,
Husband of late
Mrs. Etelvina Sandra
Rodrigues, 46 years,
Resident of H. No. 95,
Near Armona Church,
Salcete, Goa.

(Amendment carried out as per
Order dated 07.10.2016)

..... Respondent

Mr. D. Pangam, Advocate for the Appellants.

Mr. M. Fernandes, Advocate for the Respondent.

Coram :- F. M. REIS, J

Date : 24th February, 2017

ORAL JUDGMENT

Heard Mr. Pangam, learned Counsel appearing for the Appellants and Mr. Fernandes, learned Counsel appearing for the Respondent.

2. The challenge in the above Appeal is to the Judgments passed by the Courts below whereby the suit filed by the Respondents for permanent injunction and demolition of the structures came to be partly decreed.

3. Mr. Pangam, learned Counsel appearing for the Appellants, has disputed the correctness of the Judgment of the Appellate Court on the ground that though the Courts below have found that both the parties have failed to establish their title, in the operative part of the Judgment, the Lower Appellate Court has directed the demolition of a structure which is occupied by the Appellants and located in the property surveyed under no. 177/24 of Assolna Village. Learned Counsel further pointed out that though the duly promulgated survey record stand in the name of the Appellants, the learned Judge relying upon a Certificate issued by the Land Survey Department to the effect that the old Cadastral Survey no. 841 corresponds to the said property surveyed under no. 177/24, has erroneously directed the demolition of the subject structure and granted the relief in favour of the Respondent. Learned Counsel further submits that as the learned Judge has relied upon inadmissible evidence which has not been duly proved, there are substantial questions of law which arise in the present Appeal for consideration.

Learned Counsel further submits that the Appellants are in occupation and possession of the subject property surveyed under no. 177/24 for many years much before the liberation of Goa and, as such, according to him, the learned judge was not justified to pass the impugned Judgment. Learned Counsel has thereafter taken me through the sketch attached to the plaint to point out that there is no correlation between the subject property surveyed under no. 177/24 with the property shown in the Cadastral Survey under no. 841. Learned Counsel further pointed out that unless the learned Judge renders a conclusive finding with regard to the title of the subject property, the question of granting any relief of mandatory injunction is not at all justified.

4. On the other hand, Mr. M.A. Fernandes, learned Counsel appearing for the Respondent, has pointed out that in the Inventory Proceedings initiated upon the death of the common ancestors wherein the Appellants as well as the Respondent are parties, there is no dispute raised therein that the property surveyed under Cadastral Survey no. 841, belongs to the common ancestor. Learned Counsel further pointed out that the only objection raised by the Appellant is to the identity of the property vis a vis the Cadastral Survey. Learned Counsel further pointed out that the Respondents are in possession of the property shown in the Cadastral Survey under no.845 which, according to him, is exclusive property which has been gifted by the ancestors to the father of the Respondent. Learned Counsel further pointed out that an inquiry is also pending before the Inventory Court to consider whether the subject property forms part of the inheritance of the common ancestors of the Appellants and the Respondent. Learned Counsel

further pointed out that there is no infirmity in the impugned Judgment and, as such, the Appeal be rejected.

5. I have given my thoughtful consideration to the rival contentions and I have also gone through the records. The relief granted by the Lower Appellate Court whilst disposing of the First Appeal filed by the Appellants reads thus :

The Appeal is hereby partly allowed, with costs. The direction to the defendants to demolish the compound wall is hereby quashed and set aside. The suit of the plaintiff is partly decreed. The defendants, their agents or any one acting on their behalf are permanently restrained from doing any construction work in the suit property and from making any use of the illegally constructed in the suit property and are directed to remove the blockade caused on the access by dumping waste. The defendants are further directed to demolish the illegal structure, at point 'X' as shown in the sketch, at exhibit 44, constructed by them in the suit property. A copy of the said sketch shall form a part of the decree. Decree to be drawn accordingly. Proceedings closed."

6. As far as the first part of the relief granted by the Lower Appellate Court, the learned Judge based on the material on record and evidence adduced by the parties, has come to the conclusion that the Respondents are entitled for the relief of injunction, inter alia, restraining them from putting up any construction in the subject property. As far as the second injunction granted to remove the blockade caused on the access to the subject property, Mr. Pangam, learned Counsel appearing for the Appellants, upon instructions, submitted that Appellants have no grievance with regard to such relief granted by the Lower Appellate Court.

7. The only substantial question of law that has to be examined is whether the Lower Appellate Court was justified to grant the relief of demolition of the structure marked 'X' for identification in the plaint at exhibit C-44 without a finding on title. Mr. Pangam, learned Counsel appearing for the Appellants, has pointed out that there was no issue of title framed in the suit and, as such, according to him, unless title has been established, the question of granting any relief of mandatory injunction would not arise. The suit filed by the Respondent was for permanent injunction. Whilst appreciating the evidence on record, the learned Judge came to the conclusion that the subject structure marked 'X' for identification has been put up by the Appellants contrary to the no objection Certificate obtained for repairs from the Respondent herein. In such circumstances, as it is not in dispute that the parties are agitating the distribution of the properties upon the death of the common ancestors wherein the subject property is also sought to be enlisted, I find that in the peculiar facts and circumstances of the case and looking into the reasons upon which the learned Judge has granted the relief of mandatory

injunction, it would be appropriate that the subject structure marked 'X' for identification in the plan marked at exhibit C-44, would be subject to the final allotment in the Inventory Proceedings bearing no. 117/2003/III pending before the learned Addl. Civil Judge at Margao. Nevertheless, the Appellants shall not change the nature of the said structure marked 'X' for identification nor create any third party rights over such structure until the disposal of the said Inventory Proceedings. The substantial question of law is answered accordingly.

8. In view of the above, I pass the following :

ORDER

(i) The impugned Judgment passed by the Lower Appellate Court to the extent of granting the permanent injunction in respect of the subject property surveyed under no. 177/24 and demolition of the blockade to the access to subject property, stands confirmed.

(ii) The part of the Decree directing the demolition of the subject structure as well as the restraint Order from occupying such structure marked 'X' for identification in Exhibit C-44, stands modified and the Appellants are permitted to occupy the said structure subject to the condition that not creating any third party rights thereto nor changing the nature of such structure until the final disposal of the said Inventory Proceedings.

(iii) Needless to say, the said structure is subject to the final allotment in the said Inventory Proceedings and the Appellants shall not claim any equities on such count at the time of the allotment in such proceedings.

(iv) Appeal stands disposed of accordingly.

F .M. REIS, J.

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