Mr. Laximon Gopal Dessai (since deceased) represented by his legal heirs: Mr. Gurudas Laxman Dessai and Others Vs Mr. Uttam Vithoba Naique Dessai

Court: Bombay High Court (Goa Bench)

Date of Decision: April 12, 2010

Hon'ble Judges: N.A. Britto, J

Bench: Single Bench

Advocate: Shivan Dessai, for the Appellant;

Final Decision: Dismissed

Judgement

@JUDGMENTTAG-ORDER

N.A. Britto, J.
This is defendants''(contesting defendant nos. 1 to 6) Second Appeal arising from Special Civil Suit No. 139/91(old). At

the request of the learned Counsel appearing on behalf of the appellants/defendants and by virtue of Order dated 31-3-2010 this appeal has been

heard at the stage of admission. Earlier, notices were ordered to be issued on 3-5-2005 but till date all respondents do not appear to have been

served.

2. There was no serious dispute that the plaintiff and the defendants are the descendants of Vithoba Morto Naik and Rukmini Naik alias Rukmini

Vithoba Naik. The plaintiff Uttam is the son of the said Vithoba and Rukmini, and the defendants(contesting defendant nos. 1 to 6) are the

descendants of his brother Purshottam. The defendant nos. 7 to 56 are the descendants of their three sisters, namely Gangu, Bhagirathi and Saku.

They did not contest the suit.

3. The plaintiff filed the suit essentially to claim 3/10th of the compensation due and payable on account of the acquisition of survey no. 72/2 in the

sum of Rs. 2,07,704/-which was collected by defendant nos. 1, 3 and 5, defendant nos. 2, 4 and 6 being their respective spouses.

4. The suit was filed by the plaintiff claiming that the suit property known as ""Cuno Cungo Xetta"" having land registration no. 4561 was surveyed

under nos. 72/1, 72/2 and 72/3 of Chapoli village of Canacona taluka. The case of the plaintiffs was that for over 50 years the plaintiff was

enjoying the suit property along with defendant nos. 1, 3 and 5 as a common property to the exclusion of his sisters(whose descendants are

defendant nos. 7 to 56) who for all intents and purposes, had relinquished or abandoned their rights in the suit property. Plaintiff therefore claimed

half of the right to 3/5th in the entire suit property.

5. The said contesting defendants stated that the property Cuno Cungo Xetta comprised of only survey no. 72/3 of Chapoli village and that the

plaintiff was entitled to 1/4th of 3/5th parts of the said property. The defendants also stated that there was a family partition amongst the ancestors

of the plaintiff and that of the defendants for more than 80 years during which each of the parties were given separate properties or separate

portions of the property and accordingly they were in possession and enjoyment of the respective portions exclusively and the said partition was

acted upon by the parties for the last 80 or more years. The defendants did not state the name of the property, which according to them,

comprised only survey nos. 72/1 and 72/2.

6. The learned trial Court framed seven issues. The plaintiff had examined three witnesses in support of his case. The defendants had examined two

witnesses in support of their defence, and, ultimately the learned trial Court dismissed the suit of the plaintiffs. The plaintiffs having preferred First

Appeal, the learned Additional District Judge, by his Judgment dated 12-4-2004, inter alia, observed as follows:

The learned trial Court failed to appreciate the documents produced by the plaintiff to prove joint enjoyment of the suit property and did not take

into consideration the vital documents produced by the plaintiff at exhibit 40, 41 and 42 and the oral evidence by virtue of which defendants

admitted that suit property is in joint possession and enjoyment of plaintiff, defendant nos. 1 to 6 and one Kalu Naik Gaonkar. That being the

position point nos. 1 and 2 are answered in the affirmative and point no. 3 is answered in the negative.

7. The learned first appellate Court also held that the claim of the defendants that the suit property was divided by metes and bounds more than 80

years back was devoid of merit and could not be accepted.

8. In coming to the above conclusion, and that the property was common, the learned first appellate Court took note of admissions contained in

the joint application which was filed by the parties to include the names of the plaintiff in the survey records of survey nos. 72/1 and 72/2 and not

only that but also of the statements subsequently given by the defendants in support of the said application in D.C. No. 209/1986. The first

appellate Court also found that both the parties had cut trees with the permission of Forest Department and had appropriated the proceeds as per

the shares claimed by the plaintiffs, and although it was contended on behalf of the defendants that the said trees were cut from survey no. 72/3, on

assessment of evidence produced by both the parties, the learned first appellate Court came to the conclusion that they were cut from survey no.

72/2, and not from survey nos. 72/1 and 72/3 which were paddy fields. In other words, the learned first appellate Court on assessment of

evidence produced by both the parties has come to the conclusion that survey no. 72/2 for the acquisition of which the compensation was due and

payable, was jointly enjoyed by the plaintiff, defendant nos. 1 to 6 and the said Kalu. If the proceeds of the trees cut from survey no. 72/2 were

enjoyed by the parties in the shares claimed by the plaintiff, I fail to understand as to why the plaintiff and the contesting defendants should not also

get the compensation payable in accordance with the said shares. The learned first appellate Court has therefore directed the plaintiff to be paid

3/10th of the entire compensation due and payable with interest at the rate of 8% per year from 1-11-1990. Shri Shivan Dessai, the learned

Counsel appearing on behalf of the said defendants submits, that in absence of inventory proceedings the suit filed by the plaintiffs was not

maintainable. This submission has been made in the light of a decision of this Court in the case of Cruz Fernandes and another v. Gregorina

Fernandes(1991 (2) Goa L.T. 42) wherein this Court held that no suit for physical partition of a common and undivided property lies unless

previously the rights of the parties have been established and determined by a competent public deed of partition or by judicial decree in the

competent inventory proceedings. In my view, the said decision was not at all applicable. The suit filed by the plaintiff was not for partition but only

for a declaration that the plaintiff''s share in compensation was 3/5 of 1/2 (i.e. 3/10) and for recovery of the same. On evidence led by both the

parties, the learned first appellate Court has come to the conclusion that the plaintiff is entitled to 3/10 share on the basis of enjoyment of the

property by the parties. That is a conclusion of fact arrived at on the basis of evidence produced. There is no substantial question of law to be

decided in this second appeal. Consequently, the same is dismissed.