

**(2014) 08 BOM CK 0116**  
**In the Bombay High Court**  
**Case No : First Appeal No. 326 of 2006**

Government of Goa

APPELLANT

Vs

Benedito D'Souza

RESPONDENT

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**Date of Decision :** 13-08-2014

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 23, Order 41 Rule 23A

**Citation :** (2014) 08 BOM CK 0116

**Hon'ble Judges :** A.R. Joshi, J

**Bench :** Single Bench

**Advocate :** S. Vahidulla, Government Advocate, Advocate for the Appellant; A.F. Diniz, Advocate for the Respondent

**Final Decision :** Allowed

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## Judgement

A.R. Joshi, J.—Heard rival arguments advanced on the limited aspect as to whether issue No. 1 was properly framed and answered. Present appeal is preferred by the original plaintiff i.e. Government of Goa through Chief Secretary, Panaji-Goa as plaintiff No. 1 and the Deputy Conservator of Forest, South Goa Division, Margao as plaintiff No. 2 challenging the judgment and decree in Civil Suit No. 112/2004 (new) dated 13/04/2006. By the said impugned judgment and decree the suit was dismissed and parties were directed to bear their own costs.

2. The suit was filed for declaration that the Government of Goa is the owner in possession of the suit property and that the defendants have no right whatsoever in the same.

3. At the threshold of the arguments learned Government pleader brought attention of this Court towards the issue No. 1 framed, out of the total three issues. The said three issues are reproduced for the sake of ready reference as under:

ISSUES

1. Whether the plaintiffs prove that the plaintiff No. 1 is the owner in possession of the landed property "GOTLEDONGOR" or "QUEDECHO DONGOR", surveyed under no. 4, of village Quedem, of Quepem Taluka? ..... No

2. Whether the defendant proves that the suit is barred by the law of limitation? ..... No

3. Whether the defendant proves that the Eastern part of survey No. 4, having an area of 2,03,450.00 square metres forms part and parcel of the defendant's property "MOLAVELEM XETA" alias "MOLAVELEM XETA E OITEIRAL"? ....Yes

By pointing out mainly the issue No. 1 as above, it is strongly submitted that this issue would not have been framed by the trial Court considering the written statement of the defendants. For this purpose, attention of this Court is drawn towards the specific paragraphs in the written statement to the effect that the defendants are claiming only 2,03,450 square metres of land from survey No. 4 whereas the case of the plaintiffs is that they want the declaration from the Court that they are owners in possession of the property which the defendants claim to be of their ownership. According to the averments in the plaint and also as per the written statement the property only admeasuring about 20 hectares i.e. about 2,03,450 square metres from survey No. 4 is also forming part of the entire 111 hectares of land under survey No. 4 of village Quedem of Quepem Taluka. As such, the property which is in dispute i.e. the suit property is only the property to the extent of 2,03,450 square metres claimed to be in the ownership of the defendants and for which the declaration is sought by the plaintiffs. As against this factual admitted position so far as disputed property is concerned the issue No. 1 is erroneously framed by the trial Court as detailed above and it refers to the entire property under survey No. 4 of village Quedem, Taluka Quepem. By that issue No. 1, the burden is put on plaintiffs to prove that they are the owners in possession of the said entire property of survey No. 4 and in fact this issue No. 4 is answered in the negative and this is admitted factual position. As such, here it is a case in which the issue No. 1 is erroneously framed putting burden on the plaintiffs to show that they are entitled for declaration of the ownership for the entire survey No. 4 though the defendants have not objected for the entire property, but only claimed that property to the extent of 10 hectares out of survey No. 4 and admeasuring 2,03,450 square metres to be of their ownership.

4. By pointing out the above it is submitted on behalf of the plaintiffs that even if the present appeal is allowed the effect created by issue No. 1 still remains that the plaintiffs are not the owners of the entire property bearing survey No. 4. In fact, what was emphasized on behalf of appellants/State that the trial Court had misdirected itself so far as identity of the suit property and this aspect is required to be cured by the trial Court itself for want of framing of the proper issue. In support of these submissions following authorities are cited before the Court on behalf of the State:

(i) AIR 2001 Himachal Pradesh 18 in the case of Om Prakash & Ors. V/s. State of

Himachal Pradesh & Ors.

By pointing out the above authority it is submitted that the judgment not containing the reasons nor grounds for determination of the issue is not a judgment at all. By taking shelter of the ratio of this authority it is submitted that the issue No. 1 is prima facie wrongly framed and burden was put on the plaintiffs to establish that they are the owners of the entire survey No. 4 and which is not warranted as this is not also the case of the defendants as they claim the ownership over the limited part of survey No. 4 and only to the extent of 20 hectares.

(ii) Union of India Vs. E.I.D. Parry (India) Ltd., .

This authority is taken shelter of on behalf of the appellants mentioning that the Court cannot travel beyond the pleadings and in the present case, definitely the trial court had fallen in an error in framing the issue No. 1 as above and on this count alone the matter is required to be remanded to the trial Court for further arguments.

(iii) 2009(17) SCC 349 in the case of Bal Govind Lohia V/s. Narayan Prasad Lohia & Ors.

By pointing out this authority it is argued that under Order 41 Rule 23-A, the matter can be remanded back to the trial Court though the judgment and decree is not only on the preliminary issue, but when all the issues are framed and decided and when the decree is to be reversed in appeal, the matter can be remanded for reconsidering the issue.

5. Counter to the above arguments, learned Counsel for the respondents/ defendants placed reliance on the following authorities and submitted that there is no scope in the present matter as available under Order 41 Rule 23 or Rule 23-A for remand and this Court can deal with the appeal on the merits. The said authorities are as follows:

(i) P. Purushottam Reddy and Another Vs. Pratap Steels Ltd.,

(ii) Smt. Uttara Praveen Thool Vs. Praveen,

(iii) 2006(9) SCC 166 in the case of Kattukandi Edathil Krishnan V/s. Kattudandi Edathil Valsan.

By pointing out the above authorities, it is submitted that none of the provisions of remand are available in the present matter as parties are well aware of what is the suit property and led evidence on the respective claim over the suit property. It is further argued that though the issue No. 1 refer to the larger property and the suit property is a part of it still no prejudice whatsoever has been caused to the plaintiffs merely because the issue refers to the larger property. In the considered opinion of this Court when the pleadings of the parties are otherwise it was erroneous on the part of the trial Court to frame issue No. 1 in the form it is framed and then it was unwarranted to put the burden on the plaintiffs to

prove their right over the entire survey No. 4 though the defence was not to that effect. As such, the trial Court had misdirected itself and had come to the conclusion that the plaintiffs have failed to establish the proof of issue No. 1. Apart from this, the ratios propounded by the above authorities cited on behalf of the respondents have been distinguished by the learned Government pleader for the appellants/State mentioning that the Hon''ble Apex Court was deciding the matter under different parameters in the case of P. Purushottam Reddy & Anr. (supra) as in that matter the Apex Court was dealing with the framing of additional issues which is not the case in the present matter. So far as the second authority in the case of Uttara Praveen Thool (supra) on behalf of the respondents is concerned, it is distinguished that in that matter at hand before the Division Bench of this Court at Nagpur, the issue was not at all framed and it was under consideration whether failure to frame the issue has resulted in vitiating the impugned judgment. Again this is not the case in the present matter. So far as third decision Kattukandi Edathil Krishnan (supra,) it is submitted on behalf of the appellants/State that in fact the Hon''ble Apex Court had remanded the said matter back to the High Court for the purpose of redetermination of the dispute and as such ratio of that authority cannot be squarely applicable to the present matter.

6. Considering the above factual position and framing of the issue No. 1 without there being any dispute regarding the entire survey No. 4 except the part of it admeasuring 2,03,450 square metres, in the opinion of this Court the matter is required to be remanded back to the trial Court for reappraisal and framing issue No. 1 properly and consequently answer the issue as per the evidence already on record and pass final judgment and decree.

7. Consequently, the present appeal is allowed. The impugned judgment and decree set aside. The matter is remanded back to the concerned trial Court to deal with the suit properly in view of the above directions and to dispose off the same as early as possible. Rival parties to appear before the trial Court on 1/09/2014.