

Amrut

**IN THE HIGH COURT OF BOMBAY AT GOA
FIRST APPEAL NO. 24 OF 2015**

Mrs Molly Purificacao Borges,
Aged 45 years, major, wife of Faustiao
Borges, housewife, resident of
H.No.1350/A, Culwado,
Cuncolim, Salcete Goa.

.....Appellant

Versus

1 State represented by
Chief Secretary,
Government of Goa,
Ground Floor,
Collectorate Building,
Panaji Goa.

2 Directorate of Municipal Administration,
Government of Goa, Ground Floor,
Collectorate Building, Panaji Goa.

3 Cuncolim Municipal Council,
First Floor, Municipal Building,
Cuncolim, Salcete Goa.

4 Primary Health Centre,
Balli, Quepem Goa.

5 Surendra Dessai,
Major, resident of H.No.128,
Nainem, Culwado, Cuncolim,
Salcete Goa.

.... Respondents

Mr Joaquim Godinho, Advocate for the Appellant.

Ms Sulekha Kamat, Additional Government Advocate for Respondent
Nos. 1, 2 and 4.

Mr S. D. Padiyar and Mr P. Shirodkar, Advocates for Respondent No.3.

Mr C. A. Coutinho and Mr I. Santimano, Advocates for Respondent No.5.

CORAM: M. S. SONAK, J.

DATED : 19th OCTOBER 2023

ORAL JUDGMENT

1. Heard Mr J. Godinho, learned counsel for the Appellant, Ms S. Kamat, learned Additional Government Advocate for Respondent Nos. 1, 2 and 4, Mr S. D. Padiyar, learned counsel for Respondent No.3 and Mr C. A. Coutinho, learned counsel for Respondent No.5.
2. The challenge in this appeal is to the judgment and decree dated 05.05.2014 by which the trial Court dismissed the Appellant's Civil Suit No.33/2010 seeking a mandatory injunction to direct defendant Nos.1, 2 and 3 to demolish old cowshed constructed by the fifth defendant and to remove the other unhygienic material lying therein. The mandatory injunction was also sought to clear the public drainage flowing through the suit paddy field. The plaintiff also sought for a permanent and mandatory injunction to restrain the fifth defendant from causing an unhygienic nuisance in the paddy field.
3. By the impugned judgment and decree, the learned trial Court has dismissed the suit *inter alia* by holding that the Appellant failed to prove the aspect of nuisance. The trial Court also held that since the house tax receipts were produced in respect of the cowshed, the same would have to be presumed legal. Based on this finding, the relief for demolition of the cowshed was denied.
4. Mr Godinho submits that the evidence on record, both oral as well as documentary shows that the fifth defendant's cowshed was a source of nuisance

and even a health hazard. He pointed out that the health authorities had taken cognizance of the Appellant's complaint and issued directions to the fifth defendant on the aspect of nuisance. He therefore submits that the suit should have been decreed as prayed for.

5. Mr Godinho submits that merely because there were some tax payment receipts, that would not confer legality on the cowshed. He submits that the tax can be collected by the Municipal Council even from illegal construction, but that does not legalise such construction. He submits that the finding of the trial Court to this effect is, therefore, illegal and warrants interference. Mr Godinho submits that the trial Court has not appreciated the evidence on record in its proper perspective, and therefore, the impugned judgment and decree warrants interference.

6. Ms Kamat learned Additional Government Advocate states that the Appellant raised no grievance against the health authorities or other Government authorities who were impleaded in the suit. She pointed out that the Appellant, during her evidence, specifically stated that there was no grievance against the health authorities. She, therefore, submits that the appeal may be dismissed qua the Government authorities.

7. Mr Padiyar states that the Appellant's complaints were duly attended to. He supported the finding about the lack of any nuisance recorded by the trial Court.

8. Mr Coutinho submitted that there was no nuisance, and the findings recorded by the trial Court in this regard are duly supported by the evidence on record and call for no interference. He submitted that the Appellant's evidence was unclear regards the alleged nuisance being caused by the old cowshed and new

cowshed. He submitted that the cowshed which was being operated was hardly 75 metres away from the fifth defendant's house. He submitted that the same was quite far from the Appellant's house, and the trial Court rightly disbelieved the theory of foul smell. Accordingly, Mr Coutinho submits that this appeal may be dismissed.

9. The rival contentions now fall for determination.

10. The trial Court in the present case framed and answered the following issues:

Sr. No.	ISSUES	Findings
1	Whether the plaintiff proves that the suit cowshed is illegal?	Not proved
2	Whether the plaintiff proves that the suit cowshed is a health hazard to the plaintiff?	Not proved
3	Whether the plaintiff proves that the defendant nos.1 to 4 has failed to act on the matter and enforce the law by carrying out the demolition of cowshed?	Not proved
4	Whether the defendant No.5 proves that the suit is barred by law of limitation?	Not proved
5	Whether the defendant No.5 proves that the suit is filed against the wrong persons?	Not proved
6	Whether the defendants prove that the suit cowshed bears H.No.133 and the same is lawful legal construction?	Proved

11. In support of pleadings in the plaint, the Appellant examined herself as PW1 and produced several documents. Respondent No.5 (original fifth defendant) also examined himself and produced documents on record. Based upon oral and documentary evidence, the trial Court deemed it appropriate to dismiss the suit

because the Appellant failed to discharge the burden which was cast on her in terms of issues cast.

12. Therefore, the points which arise for determination in this appeal are as follows:

- (a) Whether the Appellant has proved that the fifth Respondent's cowshed and the activities therein were a source of nuisance?
- (b) Whether the fifth respondent's cowshed could be regarded as a legal structure based only on the tax receipts produced by the fifth Respondent?
- (c) Whether the impugned decree, even if upheld would bar the Appellant from approaching the health authorities under the Goa Public Health Act, 1985, or other statutory authorities urging the action against the fifth Respondent based on the premise that nuisance from the cowshed continues or in any case, is now affecting the Appellant?

13. On the first point for determination, the trial Court quite correctly cast the burden on the Appellant/plaintiff. From the evidence produced on record by the Appellant, it appears that there was some problem regarding the operation in the cowshed. However, upon complaints filed by the Appellant, the statutory authorities issued directions to the fifth Respondent to abate the nuisance. After that, there was no categorical evidence on the aspect of nuisance. Merely stating that the doctor had certified some ailment which the Appellant suffered due to

foul cow dung smell is not sufficient to conclude nuisance. The trial Court has referred to the Appellant's answer in the cross-examination in which, at one stage, she accepted that the fifth Respondent's original cowshed generated no foul smell. The trial Court has also referred to the Appellant's admission that there are many other cowsheds close to the fifth Respondent's cowshed.

14. There is also some evidence on record which suggests that after the statutory authorities issued the directions, the original cowshed, which may have been somewhat problematic to the Appellant, was removed and a new cowshed was erected close to the fifth Respondent's house and presumably further from the Appellant's house. The trial Court has assessed the oral and documentary evidence on record.

15. This being a first appeal, even upon reassessment of oral and documentary evidence on record, no case is made out to differ from the finding recorded by the trial Court, particularly on the issue of nuisance. The trial Court has also recorded a finding of fact that the original cowshed was demolished, and the new cowshed is away from the Appellant's house. There is evidence of several other cowsheds in the vicinity. Accordingly, the findings that the Appellant has failed to prove the aspect of nuisance or the case that it was only the fifth Respondent's cowshed which was cause for the nuisance warrants no interference.

16. Regarding the second point for determination, the trial Court was not justified in concluding that the shifted cowshed was legal only because the house tax receipts were produced in respect of the same. Mr Godinho was justified in submitting that the tax can even be collected from unauthorised constructions, but collection of tax does not render an unauthorised or illegal construction legal.

At the same time, there is evidence of the directions issued by the statutory authorities to demolish the old cowshed and shift the same to an alternate location. There is evidence of such shifting of cowshed. Based on all these issues, no categorical finding can be given about the legality or otherwise of the new cowshed.

17. Accordingly, the interests of justice will be served if, despite the impugned judgment and decree, the Appellant is granted liberty to file an appropriate complaint with the Municipal Authority regarding the cowshed. If such a complaint is filed, the Municipal Authority must dispose of such complaint in accordance with law and on its own merits by complying with the principles of natural justice and fair play. To that extent, the impugned decree is modified.

18. Regarding the third point for determination, liberty can always be granted to the Appellant to file a complaint before the health authorities under the Goa Public Health Act, 1985, or for that matter, other statutory authorities concerned with the issue of abatement of nuisance. Such liberty can be granted to the Appellant even though this Court does not wish to interfere with the findings on the aspect of nuisance.

19. If, according to the Appellant, the nuisance persists or is increased beyond tolerable limits or has now surfaced, then the disposal of suit or record of an adverse finding by the Civil Court will not prevent the Appellant from filing the complaint to the statutory authorities. If such a complaint is filed, the statutory authorities must look into the same and dispose of the same in accordance with the law, if necessary, by conducting a site inspection. The third point for

determination is decided accordingly. The impugned decree is modified accordingly.

20. The impugned judgment and decree are modified in the above terms.

21. The first appeal is disposed of in the above terms.

22. There shall be no order for costs.

M. S. SONAK, J.

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