

IN THE HIGH COURT OF BOMBAY AT GOA

SECOND APPEAL NO. 28 OF 2005

Smt. Pacina D' Cruz,
widow of Constancio D' Cruz,
Aged about 76 years,
Presently residing near Church,
Marcela, Goa.
Through her Constituted Attorney,
Shri Domingo D' Cruz,
Major,
Residing near Church,
Marcela, Goa. (original defendant no. 1.)

..... Appellants

V e r s u s

1. Shri Andre Alexo D' Cruz,
of major age,
Driver, married,
Resident of Deulai, Khandola,
Marcela, Goa. (original plaintiff)

2. Shri Jose D' Cruz,
son of Constancio D' Cruz,
of major age, service,
presently residing near Church,
Marcela, Goa. (original defendant no. 2).

..... Respondents

Mr. S. D. Lotlikar, Senior Advocate with Mr. C . Padgaonkar, Advocate for the Appellants.

Mr. D. D. Zaveri, Advocate under Legal Aid for the Respondent no. 1.

Coram :- F. M. REIS, J

Judgment Reserved on : 15th December, 2014.

Judgment Pronounced on : 20th February, 2015.

JUDGMENT

Heard Shri S. D. Lotlikar, learned Senior Advocate appearing for the Appellants and Shri D. D. Zaveri, learned Counsel appearing for the Respondent no. 1.

2. The above Appeal came to be admitted by an Order dated 02.02.2006 on the following substantial questions of law :

(i) Whether the first appellate Court being final Court of facts, could have proceeded to decide the First Appeal, without formulating the points which arose for its determination, and without appreciating the the evidence on record ?

(ii) Whether the first appellate Court was right in concluding that the suit house was a common house, jointly owned by the respondent No.1 along with the appellant and respondent No.2 when such was not the plea raised by respondent No.1 nor any proof was produced by the respondent No.1 in support of such a plea ?

(iii) Whether the respondent No.1 having approached the Court with the claim that the common wall had been already demolished by the Defendants, could get a relief against the parallel wall constructed by the appellant, on the ground that this would not interfere with his right for repair of the common wall ?

3. During the course of the hearing of the above Appeal, Shri S. D. Lotlikar, learned Senior Advocate appearing for the Appellants, has pointed out that he shall not press for the first substantial question of law but restrict his contentions to the second and third substantial questions of law.

4. Shri S. D. Lotlikar, learned Senior Advocate appearing for the Appellants, has pointed out that the Respondent no. 1 has approached the Court on the basis that there was a common wall between the house occupied by the Respondent no. 1 and the Appellants herein. Learned Senior Advocate further

submits that the Appellants have put up their wall adjacent to the common wall and, as such, the question of the Respondent no. 1 claiming any exclusive rights to such wall would not arise. Learned Senior Advocate further submits that even in terms of the provisions of law, once the Respondent no. 1 has accepted that a common wall was separating the respective portion of the Appellants and the Respondent no. 1 of the house in dispute, it was even open to the Appellants to carry out reconstruction of the wall to the extent of half of the width of the common wall. Learned Senior Advocate further submits that the parallel wall is in the portion occupied by the Appellants and, as such, the Respondent no. 1 was not justified to get the reliefs as granted by the Courts below. Learned Senior Advocate further submits that the Courts below have also erroneously come to the conclusion that the suit house is a common house when, according to him, the Respondent no. 1 himself has approached the Court on the basis that the common wall was separating the respective occupations of the disputed house. Learned Senior Advocate has taken me through the impugned Judgment of the Lower Appellate Court and pointed out that the reliefs granted by the Courts below deserves to be quashed and set aside. Learned Senior Advocate further submits that though originally the house was in the name of late Alex Cruz who is the grandfather of the Respondent no. 1, nevertheless, thereafter, the house was separated and house no. 328/1 came to be allotted to the portion occupied by the Appellants and the portion occupied by Respondent no. 1 was allotted house no. 328/2. Learned Senior Advocate further submits that the Appellants are Mundkars of the said portion of the house and, as such, were entitled to carry out repairs of the disputed common wall as the wall was very old, Learned Senior Advocate further submits

that the wall constructed by the Appellants is at a distance of 20 cms from the common wall and, as such, according to him, the question of directing the demolition of the said wall at the instance of the Respondent no. 1 is not at all justified. Learned Senior Advocate as such submits that the substantial questions of law be answered in favour of the Appellants and the impugned Judgment passed by the Lower Appellate Court be quashed and set aside.

5. On the other hand, Shri Zaveri, learned Counsel appearing for the Respondent no. 1, has supported the impugned Judgments. The learned Counsel pointed out that both the Courts below have concurrently come to the conclusion that the Appellants are not entitled to construct the new masonry wall parallel to the common wall as it would impede/hamper the rights of the Respondent no. 1 in repairing or reconstructing the common wall. Learned Counsel further pointed out that as the wall was a common wall, the Appellants were not entitled to put up a new wall without the consent of the Respondent no. 1 herein. Learned Counsel further submits that grave and irreparable loss would occasion to the Respondent in case the wall constructed by the Appellants is not demolished as it would affect the occupation of the Respondent no. 1 of their portion of the disputed house. Learned Counsel has thereafter taken me through the Judgments passed by the Courts below and has pointed out that both the Courts have concurrently accepted the case of the Respondent no. 1 and decreed the suit filed by the Respondent no. 1 by, inter alia, directing the Appellants to demolish the new wall constructed by the Appellants. Learned Counsel as such submits that the Appeal be rejected.

6. I have considered the submissions of the learned Counsel. I have also gone through the records. Before I proceed to examine the rival contentions, it would be appropriate to note the case put forward by the parties.

7. It is the case of the Respondent no. 1 that in the Village of Candolim, there is a property known as "*Deulache Bhat*" where there exists a house having two portions one in occupation of the Respondent no. 1 and the other in occupation of the Appellants and Respondent no. 2 having a common dead wall in between. According to the Respondent no.1, the Appellants without his consent demolished a portion of the house including the common wall and started constructing a new masonry wall running parallel to the existing common wall and in such a manner that it is impossible for the Respondent no. 1 to repair or reconstruct the existing common mud wall. According to the Respondent no. 1, if the constructions is allowed to continue in the rainy season, the common wall will collapse resulting in irreparable loss to the Respondent no. 1 and, consequently, filed the suit for permanent and mandatory injunction.

8. The Appellants and the Respondent no. 2 filed their written statement, inter alia, claiming that their house is all together separate from the house of the Respondent no. 1, however, admitted that there is a common wall separating the two houses. It is further their contention that they are Mundkars and they have a right to repair and reconstruct the Mundkarial dwelling house. It is further their case that the common mud wall was very old and is on the verge of collapse and, as such, despite of requests to the Respondent no. 1 to repair the said wall with

laterite stones, they failed to pay any attention to such request and, consequently, in April 1998, the Appellants constructed a totally independent laterite stone wall parallel to the said common wall without disturbing or touching or demolishing the said common wall. They also denied that the Respondent no. 1 was prevented from undertaking any repairs to the common wall and prayed that the suit be dismissed.

9. The learned Trial Judge after framing of the issues and recording of evidence, by the Judgment and Decree dated 20.02.2004 decreed the suit filed by the Respondent no. 1. The learned Judge, inter alia, restrained the Appellants and the Respondent no. 2 by a permanent injunction from doing any construction to the common wall of the suit house bearing no. 328/2 located in the property surveyed under no. 2/1. The learned Judge further directed the demolition of the parallel laterite stone masonry wall constructed 20 cms away from the existing common wall having 2.30 metres height as shown in exhibit Pw.4/A. The learned Judge further rejected the prayer of the Respondent no. 1 to demolish the illegal construction.

10. Whilst disposing of the said suit, the learned Judge has come to the conclusion that on the basis of the admission itself, it is proved that the Appellants constructed a new wall close to the existing common wall. Whilst discussing issue no. 2, the learned Judge found that though it was the claim of the Respondent no. 1 that the Appellants had demolished the common wall, he did not produce any material to prove demolition but, however, there is evidence to prove that the

Appellants removed the roof of their portion from the common wall. The learned Judge further found that there is no material to show that before doing the repairs, the Appellants obtained the consent of the Respondent no. 1. The learned Judge further found that the Appellants by erecting a parallel masonry wall within a distance of one foot from the old wall, would interfere with the Respondent no.1's reasonable enjoyment of the common wall and, consequently, directed the demolition of the said wall.

11. Being aggrieved by the said Judgment, the Appellants preferred an Appeal before the Lower Appellate Court being Regular Civil Appeal no. 50 of 2004 which came to be dismissed by Judgment dated 20.10.2004. The Lower Appellate Court whilst examining the said Appeal, has found that the suit house is a common house and this fact is admitted by the Appellants in the written statement. The learned Judge further noted that one co-owner cannot make changes to the house or make any alterations therein without the consent of the other co-owners. The learned Judge as such noted that there is ample evidence on record to prove that both the issues decided in favour of the Respondent no. 1 were justified and the Appellants have failed to make out any case for interfering with such findings. The Lower Appellate Court as such dismissed the said Appeal.

12. On perusal of the Judgment of the First Appellate Court, I find that the learned Judge has otherwise not applied its mind to the real matters in controversy whilst disposing of the Appeal preferred by the Appellants. The Lower Appellate Court is expected to scrutinize the material on record to come to the conclusion as

to whether there is any case made out for interference in the Judgment passed by the Trial Court. The learned Lower Appellate Court has misread the pleadings to come to the conclusion that it was an admitted fact that the house was a common house when it was nobody's case on that count. In fact, it was the case of the Respondent no. 1 that the house occupied by the Respondent no. 1 and the Appellants and the Respondent no. 2 were separated by a common wall. These pleadings cannot infer that the whole house and the property was in co-ownership. The dispute raised by the Respondent no. 1 was restricted to the interference in the common wall separating the portions occupied by the Respondent no. 1 and the Appellants and the Respondent no. 2. In such circumstances, the only aspect to be examined is whether the relief granted by the Courts below to demolish the parallel wall constructed by the Appellants is justified in the facts and circumstances of the case. Considering that the Appellants did not press for the first substantial question of law and both the Counsel conceded that the Appeal may be disposed of by examining the second and third substantial question of law, I will now proceed to examine the rival contentions.

13. On going through the pleadings of the Respondent no. 1 in the plaint and the written statements filed by the Appellants and the Respondent no. 2, the observations of the learned Lower Appellate Court that it was admitted by the parties that the house was a common house is not at all correct. As pointed out herein above, it was the case of the Respondent no. 1 that the houses occupied by the Respondent no. 1 and the Appellants and the Respondent no. 2 on the other hand were separated by a common wall and, as such, the said finding of the Lower

Appellate Court that the house was a common house, is not at all justified. The second substantial question of law is answered accordingly.

14. With regard to the third substantial question of law, the case of the Respondent no. 1 is that there is a common wall separating the two portions and that the Appellants and the Respondent no. 2 are interfering with the common wall. Shri S. D. Lotlikar, learned Senior Advocate, has pointed out that the Appellants are not at all interested to take any support of the said common wall. The learned Senior Advocate further submits that as such the question of the Appellants and the Respondent no. 2 interfering with such common wall would not arise at all. In fact, it is point out by Shri S. D. Lotlikar, learned Senior Advocate, that by re-constructing the new wall, the Respondent no. 1 is benefited as he is always entitled to reconstruct and demolish the common wall if he so desires and the Appellants will not object to such exercise.

15. In this connection, Article 2328 of the Portuguese Civil Code provides that property owners having common walls or boundary walls, can acquire therein communion on the whole or any part thereof by paying half of the value of such wall and half of the value of the land over which such wall or boundary wall is located. Article 2329 of the said Civil Code, inter alia, provides that no openings, windows or alterations can be carried out in a common wall without the consent of the other party. Article 2330 of the said Civil Code, inter alia, provides that an owner of a common wall can construct or introduce cross bars or beams or construct into such common wall provided he does not extend beyond half of the width of the common wall. The said provisions

read together would establish that the owners of common wall can even put beams or cross bars or carry out construction provided they do not extend such exercise beyond half of the width of the common wall. In such circumstances, the findings of the Courts below that the Appellants are not entitled to put up the laterite wall parallel to the existing common wall at a distance of 20 cms cannot be sustained. In the present case, Shri S. D. Lotlikar, learned Senior Advocate appearing for the Appellants, has pointed out that the Appellants have no objection in case the Respondent no. 1 reconstructs such common wall provided it does not cause any damage to the new laterite wall put up by the Appellants parallel to such existing common wall. In such circumstances, considering that the Appellants were even entitled to put up the beams and cross bars and reconstruct the common wall, in terms of the said provisions of law, I find that the Courts below were not justified to direct the demolition of the new laterite wall put up by the Appellants when such wall by itself would not damage the existing common wall. Admittedly, the laterite wall is at a distance of 20 cms from the common wall as such the question of claiming that the Appellants are not entitled to put up such wall in the portion occupied by the Appellant, is not at all justified. In such circumstances, the reliefs granted by the Courts below, cannot be sustained and deserves to be quashed and set aside.

16. In view of the said statement of Shri S. D. Lotlikar, learned Senior Advocate, upon instructions, the Respondent no. 1 is entitled to reconstruct or put up a new wall in the same place of the existing common wall provided it does not cause any damage to the new laterite wall put up by the Appellants herein. The

third substantial question of law is answered accordingly.

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

ORDER

- (I) The Appeal is partly allowed.
- (II) The impugned Judgment passed by the learned Trial Judge dated 20.02.2004 and the Judgment passed by the Lower Appellate Court dated 20.10.2004, are quashed and set aside.
- (III) The Suit filed by the Respondent no. 1 is disposed of by holding that the Respondent no. 1 is entitled to reconstruct the existing common wall at his own cost without damaging the new laterite wall constructed by the Appellants and the Appellants and the Respondent no. 2 shall not object to such exercise by the Respondent no. 1..
- (IV) Appeal stands disposed of accordingly with no orders as to costs.

F .M. REIS, J.

arp/*