

IN THE HIGH COURT OF BOMBAY AT GOA**SECOND APPEAL NO.47 OF 2007
WITH
CROSS OBJECTION NO.20 OF 2007**

Shri Pratapsingh Raoji Rane,
major, married, landlord,
resident of Vithalapur,
Sanquelim, Goa.
Through his constituted
power-of-attorney,
Gangaram Vithoba Patil,
son of Vithoba Patil, major, married,
resident of Sanquelim, Goa.

.... Appellant

V/s

1. Shri Jitendra Zoiba Rane,
of major age, r/o. Vithalapur,
Sanquelim, Goa.
2. Smt. Jitendra Z. Rane,
w/o. Jitendra Zoiba Rane,
of major age, r/o. Vithalapur,
Sanquelim, Goa.
3. Shri Sanjay Zoiba Rane,
of major age, r/o. Vithalapur,
Sanquelim, Goa.
4. Smt. Vimalabai Zoiba Rane
alias Sanyogita Zoiba Rane,
of major age, r/o. Vithalapur,
Sanquelim, Goa.

.... Respondents

Mr. C.A. Ferreira, Advocate for the Appellant.

Mr. G. Agni, Advocate for the Respondents.

Surveyor present in person.

CORAM : F.M. REIS, J.

DATE : 18th DECEMBER, 2015

ORAL JUDGMENT :

Surveyor present in person and submits a report as per the directions of this Court by order dated 9/10/2015. The said report is taken on record and marked 'X' for identification. Copies of the report furnished to the respective Counsel appearing for both the parties. Mr. C.A. Ferreira, the learned Counsel appearing for the appellant in terms of the said order has agreed to bear the costs of the commission. The bill has already been handed over to the learned Counsel appearing for the appellant who has undertaken to pay to the Surveyor/Commissioner within one week from today.

2. As the report has already been submitted the Surveyor is accordingly discharged.

3. Heard Mr. C.A. Ferreira, the learned Counsel appearing for the appellant and Mr. G. Agni, the learned Counsel appearing for the respondents.

4. The above appeal came to be admitted by on order dated 6/08/2008

on the following substantial question of law:

1. Whether non-compliance of Order 7, Rule 3, C.P.C. Is fatal?
2. Whether finding rendered by Appellate Court the Plaintiff's evidence cannot be taken into account in the absence of plan/sketch to plaint, is perverse?

5. Upon hearing the learned Counsel, though there was no dispute with regard to the ownership of the plots belonging to the appellant namely plots no.5 & 8 in the plan at Exhibit PW1/A and plots designated by nos.7,9 & 9 in the same Exhibit PW1/A, to the respondents there were serious disputes with regard to the demarcation line separating the plots between the plots belonging to the appellant and the respondents. Though the Courts below whilst disposing of the suit filed by the appellant have come to the conclusion that the ownership of the appellant on the plots has been established, the only ground on which the appellant was non-suited for the relief of mandatory injunction is on the ground that the appellant had not identified the alleged encroachment in terms of Order 7 Rule 3 of the Civil Procedure Code.

6. During the course of the hearing of the appeal, on the last occasion, Mr. C.A. Ferreira, the learned Counsel appearing for the appellant has pointed out that such findings were arrived at by the

Appellate Court without considering the plan prepared by the Court Commissioner along with the report dated 15/10/1998 which is at Exhibit CW1/A colly.

7. Though Mr. G. Agni, the learned Counsel appearing for the respondent pointed out that plans were produced on record, nevertheless, the respondents disputed the correctness of the plans produced by the appellants as well as the location shown by the Commissioner.

8. In order that the demarcating line between the plots claimed by the appellant and the respondent could be conclusively established, by an order dated 9/10/2015, by consent of both the Counsel, a Surveyor was directed to demarcate and locate the dividing line between the plots of the appellant and the respondents, in terms directed therein. Accordingly, the Surveyor remained present and has submitted the plan along with the report and other notings.

9. Though the parties had agreed that they would abide by the demarcation carried out by such Surveyor, nevertheless, Mr. G. Agni, the learned Counsel appearing for the respondents has pointed out that he has strong objection to the manner in which the demarcation has been

carried out by the Surveyor. In the present Second Appeal, there is no question of examining the correctness of the contention of Mr. Agni. But the fact remains that on the basis of the plans produced by the appellant which are on record namely Exhibit PW1/A, PW1/C and Exhibit CW1/A collly there was substantial compliance with the provisions of Order 7 Rule 3 of the Civil Procedure Code. Consequently, the Lower Appellate Court was not justified to come to the conclusion that the provisions of Order 7 Rule 3 of the Civil Procedure Code have not been complied with. In any event, as rightly pointed out by Mr. C.A. Ferreira, the learned Counsel appearing for the appellant, the Apex Court in the judgment reported in **2003 (2) SCC 330** in the case of ***Pratibha Singh & anr. V/s. Shanti Devi Prasad and Anr.*** has taken a view that the appellant cannot be non-suited on such ground and in case of any dispute between the parties with regard to the location of the properties it is always open to the Court to appoint a Commissioner to carry out such exercise. The Apex Court has observed at paras 15 and 17 thus:

15. Order 7 Rule 3 of the CPC requires where the subject-matter of the suit is immovable property, the plaint shall contain a description of the property sufficient to identify it. Such description enables the Court to draw a proper decree as required by Order 20 Rule 3 of the CPC. In case such property can be identified by boundaries or numbers in a record for settlement of survey, the plaint shall specify such boundaries or numbers. Having perused the revenue survey map of the entire area of R.S. plot no. 595

and having seen the maps annexed with the registered sale deeds of the defendant judgment-debtors we are clearly of the opinion that the sub-plots 595/1 and 595/11 were not capable of being identified merely by boundaries nor by numbers as sub-plot numbers do not appear in records of settlement or survey. The plaintiffs ought to have filed map of the suit property annexed with the plaint. If the plaintiffs committed an error the defendants should have objected to promptly. The default or carelessness of the parties does not absolve the Trial Court of its obligation which should have, while scrutinizing the plaint, pointed out the omission on the part of the plaintiffs and should have insisted on a map of the immovable property forming subject-matter of the suit being filed. This is the first error.

17. When the suit as to immovable property has been decreed and the property is not definitely identified, the defect in the court record caused by overlooking of provisions contained in Order 7 Rule 3 and Order 20 Rule 3 of the CPC is capable of being cured. After all a successful plaintiff should not be deprived of the fruits of decree. Resort can be had to Section 152 or Section 47 of the CPC depending on the facts and circumstances of each case-which of the two provisions would be more appropriate, just and convenient to invoke. Being an inadvertent error, not affecting the merits of the case, it may be corrected under Section 152 of the CPC by the Court which passed the decree by supplying the omission. Alternatively, the exact description of decretal property may be ascertained by the Executing Court as a question relating to execution, discharge or satisfaction of decree within the meaning of Section 47 CPC. A decree of a competent Court should not, as far as practicable, be allowed to be defeated on account of an accidental slip or omission. In the facts and circumstances of the present case we think it would be more

appropriate to invoke Section 47 of the CPC.

10. Taking note of the said observations and considering that there is a dispute raised by the respondents to the report submitted by the Commissioner appointed pursuant to orders dated 9/10/2015, I find that the question of examining the correctness of the report based on such contention would not be justified by this Court in the present Second Appeal. As such, it would be appropriate to quash and set aside the judgment passed by the learned Lower Appellate Court and direct the Lower Appellate Court to decide the Regular Civil Appeal afresh after hearing the parties in accordance with law.

11. In view of the above, I pass the following order:

O R D E R

- (i) The appeal is partly allowed.
- (ii) The impugned judgment and decree dated 22/02/2007 is quashed and set aside.
- (iii) Regular Civil Appeal No.22/2005 is restored to the file of the learned Lower Appellate Court.
- (iv) The learned Lower Appellate Court is accordingly directed to decide the said appeal afresh in the light of the observations made herein above and in accordance with law.
- (v) All contentions of both the parties on

merits are kept open.

(vi) The parties are directed to appear before the Lower Appellate Court on 1/02/2016 at 10.00 a.m.

(vii) The appeal and Cross-objection accordingly stand disposed of with no order as to costs.

F.M. REIS, J.

NH/-