

IN THE HIGH COURT OF BOMBAY AT GOA
SECOND APPEAL NO. 69 OF 2009.

1. Smt. Radhabai Vithal Pagui ,
w/o. Vithal Pagui, major,
housewife, r/o. Sadolxem,
Poinguinim, Canacona, Goa.
- 2 Mr. Mohandas Vithal Pagi (Son),
- 3 Mrs. Shashikala S. Patil,
(daughter) married to
- 4 Mr. Subhash Patil,
- 5 Mrs. Pushpa V. Pagi,
(daughter) spinster
- 6 Mrs. Pratibha V. Pagi,
(daughter)
- 7 Mrs. Shobha D. Pagi,
(daughter)r/o Of Delem,
Canacona-Goa.
- 8 Mr. Damu Naushikar alias Pagi
R/o. Rajbag Canacona, Goa.
(since Deceased Through Lrs.)
- 8a. Mrs. Dipti Raghuvir Pagui,
d/o Damu Naushikar alias Pagi,
married, housewife, and
her husband,
- 8b. Mr. Raghuvir V. Pagui,
s/o Mr. Vithal pagui, Service,
married;
- 8c. Mr. Deepesh Damu Pagui,
S/o Damu Naushikar alias Pagi,
bachelor, service,
- 8.4 Mr. Deevesh Damu Pagui,
s/o Damu Naushikar alias Pagi,
bachelor, service
(All are major of age)

(All r/o.Rajbag Canacona, Goa.) Appellants.

Versus

1. Dr. Mrs. Sulabha P. Keny,
w/o Pramod Keny, d/o Shivaray
Dalal, major in age, married,
Medical Practitioner, r/o Panjim,
Goa, represented by her Attorney
Shri Harshad Pagui, s/o. Anand
Pagui, major in age, occupation
service, r/o. Sadolxem,
Canacona, Goa.
 2. Mr. Jayaprakash Tiwari,
 3. Ganu Pagi,
r/o. Delem, Canacona- Goa.
 4. Jayashree G. Pagi (daughter)
w/o Ganu Pagi, r/o. Delem,
Canacona- Goa.
- Respondents.

Shri S. M. Usgaonkar, Senior Advocate with Ms. Tanvi Kamat
Ghanekar, Advocate for the appellants.

Shr I. Agha, Advocate for the respondent no.1.

CORAM : F.M. REIS, J.

DATE : 29th September, 2015.

ORAL JUDGMENT

Heard Mr. Sudin M. S. Usgaonkar, learned Senior
Advocate appearing for the petitioner and Mr. Iftikhar Agha,
learned Advocate appearing for the respondent no.1.

2. The above appeal came to be admitted by an order
dated 30.7.2010 under the following substantial questions of
law.

- (a) Whether Pw1 having deposed as the attorney of the Respondent, on the cause of action, which was prior to the execution of Power of Attorney dated 20.02.2003 and the said witness deposing only as attorney, his evidence was impermissible in law as per the authority of Janki Vashdeo Bhojwani vs. Indusind Bank Ltd. (AIR 2005 SC 439) ?
- (b) Whether in view of fact that Dw4, one of the coowners having himself deposed that he did give consent himself, non proving of his written consent was not at all detrimental ?

3. With regard to the first substantial question of law it is not disputed that PW1 who has deposed on behalf of the principal is the person whose father's house is located adjoining the subject property. Merely because he is working or residing at Panajim does not mean that he cannot have personal knowledge about the facts which have occurred close to his ancestral house. Apart from that, the deposition of PW1 is also on the basis of the other materials which are produced and, as such, the contention of Shri Usgaonkar, learned Senior Counsel appearing for the appellants that the evidence of PW1 has to be discarded cannot be accepted. PW1 can depose facts to his personal knowledge and those acts which are done based on the power of attorney in his favour as held by the Apex Court in the judgments reported in **(2010) 10 SCC 512 in the case of Man Kaur(Dead) By Lrs Vs. Hartar Singh Sangha, (2005)2**

SCC 217, in the case of Janki Vashdeo Bhojwani Vs. Indusind Bank Ltd., and (2013)12 SCC 64, in the case of S. Kesari Hanuman Goud Vs. Anjum Jehan.

4. Taking note of the said observations, the evidence of PW1 and the documents produced by him can be examined in support of the case put forward by the respondents in the above context. The first substantial question of law is answered accordingly.

5. With regard to the second substantial question of law, Shri Usgaonkar, learned Senior Counsel has pointed out that the respondents have failed to prove their case that the alleged disputed construction was put up in the year 2003. It is the contention of Mr. Usgaonkar, learned Senior Counsel that such disputed construction, was already in existence. Mr. Usgaonkar, learned Senior Counsel further submits that in any event, it was earlier a wooden structure which was thereafter converted into a masonry structure covered with cement sheet. Mr. Usgaonkar, learned Senior Counsel further points out that the original structure was in existence for the last number of years and that the appellants were residing in the dwelling house located in the suit property as mundkars. The learned counsel further points out that as such the structure was admittedly in existence much prior to the alleged cause of

action, as the respondents have failed to prove their case and as such, the lower Appellate Court was not justified to grant the relief in favour of the respondents. The learned Counsel further points out that in any event, one of the co-owner has granted permission to the appellants to put up and/or reconstruct such structure in the year 2003 and, as such, according to him, it cannot be now said that the work carried out by the appellants is without any authorisation. The learned Senior Counsel further points out that even the said co-owners DW4 who has deposed in the Court has categorically admitted that such structure was in existence much prior to the year 2003 and that there were 11 pillars in the disputed structure. The learned Counsel further points out that as one of the co-owner had granted permission to the appellants the contention that the construction put up by the appellants is without authorisation, is without any substance. The learned counsel has thereafter taken me through the judgment of the Lower Appellate Court to point out that the Lower Appellate Court has misconstrued the evidence to come to a perverse conclusion that the respondents were entitled to the reliefs as prayed for.

6. Mr. Agha, learned counsel appearing for the respondents has submitted that the original cow shed was adjoining to the dwelling house of the appellants and that the disputed structure is at about 50 metres from such structure.

The learned counsel further points out that the right to reside in the house is on the basis that the appellants are mundkars having a dwelling house. Considering that the disputed structure is much beyond the dwelling house such activities on the part of the appellants are itself illegal. The learned Counsel further alleged that the consent obtained from one co-owners in any event is not binding on the respondents as such co-owner has negligible interest in the disputed property. The learned counsel further points out that infact, in view of the original understanding between some of the co-owners and the respondent the portion where the disputed structure is located was being enjoyed and occupied by the respondents. The learned counsel further points out that the father of PW1 who is Anand Pagui has also his house in the suit property and he had purchased some portion of the house in the disputed property and, as such, the Lower Appellate court was justified to pass the impugned judgment and no interference of this Court is called for in the impugned judgment.

7. I have carefully considered the submissions of learned counsel and has also gone through the records.

8. The claim of the appellants flow on the basis that they are mundkars occupying the dwelling house in the disputed property. The right of the mundkars are governed in terms of

the Goa, Daman and Diu Mundkars (Protection from Eviction) Act, 1975. Admittedly, the disputed structure is much beyond the area of the dwelling house as defined in the Mundkar Act. Apart from that, admittedly the appellants have not obtained a declaration from the competent Court that they are mundkars. Though no declaration to that effect has been obtained. I shall proceed to examine the contentions of Mr. Usgaonkar, based on the record.

9. As admittedly the disputed structure is beyond the area of the dwelling house, I find that no protection to such structure can be given. In such situation one would have to ascertain whether the alleged consent obtained from one of the co-owners, who is DW4 would entitle the appellant to put up a new structure in the disputed property. It is now well settled that one co-owners cannot make any alteration in the co-ownership property without the consent of all the co-owners. Besides the consent of one co-owners cannot by itself bind the respondents who are admittedly co-owners of the disputed property. Hence, the whole claim of the appellants that one of the co-owners has permitted the appellants to reconstruct the disputed cow shed cannot protect the activities carried out by the appellants. Apart from that the contentions of Mr. Usgaonkar, learned Senior Counsel that the structure was in existence much prior to the year 2003 has been disbelieved by

the Lower Appellant Court based on material on record. Such findings are not perverse and as such, it is not open to this Court under Section 100 of CP.C. to interference with such findings on facts.

10. Another aspect to be noted is that the disputed structure has 11 pillars. The material on record in fact suggest that at the time of filing of the suit such structure was in fact not existing. There is no material to substantiate the contention of Mr. Usgaonkar, that the constriction was in existence for the last number of years and, as such, the respondents are not entitled for such relief, cannot be accepted.

11. It appears that the whole exercised on the part of the appellants is to invade the remaining portion of the disputed property to the detriment of the interests of the other co-owners. Such acts on the part of the appellant cannot be protected. The Lower Appellate Court has rightly examined the material on record to come to the conclusion that the disputed structure is put up by the appellants without the consent of the respondent and has granted appropriate relief accordingly. I find no infirmity in the findings of the Lower Appellate Court which would call for interference of this Court. The substantial question of law is answered accordingly.

12. In view of the above, appeal stands dismissed with no order as to costs.

F.M. REIS, J.

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