

IN THE HIGH COURT OF BOMBAY AT GOA

SECOND APPEAL 89 OF 2006

1. Shri Blasio Diniz,
resident Of Aquem Baixo,
Navelim, Salcete Goa (since deceased
represented by the Legal
representatives:-

1a) Smt. Olga Carmina Dias e Diniz
residing at Dongorim, Navelim,
Salcete-go.

1b) Sister Iova Diniz
residing at S. P. Mukherjee Marg,
New Delhi.

1c) Mrs. Ina Diniz E Antao and
her husband

1d) Mr. Rosendo Antao,
Both residing At Shetye
and Salkar Residency, near PWD,
Fatorda, Margao Goa.

1e) Mrs. Tecla Diniz e Rodrigues
and her husband

1f) Dr. Bernard Rodrigues
residing at H. No.14,
Aquem Baixo, Navelim,
Salcete-Goa.

.... Appellants.

V e r s u s

1 Mrs. Maria Sena Connie Dias
resident of Aquem Baixo,
Navelim, Salcete-Goa.

2 Ms. Isabela Diniz e D'costa

and her husband;

- 3 Mr. Leslie D'costa
Both residing At D-3-B,
Government Quarters, St. Inez,
Panaji-Goa.
- 4 Mr. Vasanta V. Molio, representing
the Kalpataru Housing Co-operative
Society Limited, resident of Aquem,
Margao-Goa.
- 5 The Kalpataru Housing Co-operative
Society Ltd., with registered address
at 201, Gandhi Market, Margao-Goa.
Respondents.

Mr. D. Pangam and Mr. Luis Fernandes, Advocates for the Appellants.

Mr. M. Amonkar, Advocate for the Respondent no. 4-absent.

Coram :- F. M. REIS, J

Date : 27th February, 2015.

ORAL JUDGMENT

Heard Shri Pangam, learned Counsel appearing for the Appellants.

2. The matter was adjourned from time to time to examine whether the settlement could be arrived at but, however, Shri Amonkar, learned Counsel appearing for the Respondent no. 4, has reported that he could not obtain instruction and, as such, the Appeal was heard on merits.

3. The above Appeal came to be admitted by an Order dated 12.04.2007 on the following substantial questions of law :

(1) Whether in the absence of pleadings as contemplated by Section 15 of the Easements Act, 1882, the suit could have been decreed ?

(2) Whether in absence of any case of easement of necessity of quasi necessity as contemplated by Section 13 of the Easements Act 1882, ever having been set up by the plaintiff, the suit could have been decreed on the basis that property is allegedly landlocked ?

(3) Whether in the absence of any deposition/evidence on the part of the respondent no. 1 that the respondent no. 1 was enjoying the suit access openly, peacefully, uninterruptedly and as a matter of right, the lower appellate Court could have decreed the suit and is the finding in that record therefore based on no evidence on record ?

(4) Whether the lower appellate Court could have set aside the Decree passed in the counter claim filed by the Appellants without there being any appeal filed by the Respondents challenging the Judgment and Decree dated 31.12.2001 passed in the counter claim of the appellants ?

4. Briefly, the facts of the case are that the Respondent no. 2 filed a suit against the Appellants claiming an easementary access of six metres wide and thirty metres long through the property of the Appellants. The Appellants disputed

the said claim by filing the written statement and also filed a counter claim to restrain the Respondent no. 1 from interfering with the suit property of the Appellants and for a mandatory injunction to restore the land to the original condition. The learned Trial Judge by Judgment and Decree dated 31.12.2001, dismissed the suit and decreed the Counter claim filed by the Appellants. The Respondent no. 1 filed an Appeal against the said Decree before the Lower Appellate Court as well as the Decree filed in a Counter Claim. The Appellate Court by Judgment dated 22.03.2006, decreed the suit filed by the Respondent no. 1 and dismissed the Counter Claim. Being aggrieved by the said Judgment, the Appellants preferred the above Appeal.

5. On perusal of the Judgment of the learned Trial Judge, I find that the learned Judge framed 12 issues and, inter alia, came to the conclusion that the Respondent no. 1 had established that she is the owner in possession of the landed property bearing chalta no. 25 of P. T. sheet no. 289 and bearing land Registration no. 11848 situated at Aquem, Baixo, Navelim, but, however, the learned Judge found that the Respondent no. 1 failed to establish any right to the suit access/road. The learned Judge also found that all the other issues were not proved either by the Respondent no. 1 or the Appellants herein.

6. On going through the findings of the learned Judge, I find that it was held that it was impossible to assume that the Respondent no. 1 was using the access through the nullah over which there is no culvert from the time immemorial. The learned Judge also found that the Respondents have failed to prove the very

essential requirements of Section 15 of the Easements Act which require acquisition of right of access by prescription. The learned Judge as such dismissed the suit filed by the Respondent no. 1 and partly allowed the counter claim thereby restraining the Respondent no. 1 from interfering in any manner with the suit property of the Appellant no. 1. On perusal of the Judgment of the Lower Appellate Court, I find that the learned Judge has framed three points for determination and found that from times immemorial, the only access for the Respondent nos. 1 and 2 to the suit property under chalta no. 25 of P.T. Sheet no. 289 from Rawanfond Navelim main road was through the property of the Appellant no. 1 under chalta no.5 P.T. Sheet no. 303 and the property of the Respondent no. 4 herein under chalta no. 40 of P.T. Sheet no. 289 as an easementary right. The learned Judge also found that the Appellants had failed to establish that the access to the property of the Respondent no. 1 was from the property to the west of her property.

7. On perusal of the Judgment of the Lower Appellate Court, the learned Judge has appreciated the evidence on record as well as the evidence of the Surveyor of the Respondent no. 1 and the report at exhibit Pw.2/A, wherein he has, inter alia, stated that if one takes into consideration the physical conditions at the site, one will see that the residential house of M. S. C. Dias faces to the east and that the house was constructed 60 or 70 years back and that it is natural that at the time of the construction of the house, the facing of the front towards the then existing road, which is the present Navelim-Rawanfond road and that the distance would be the shortest available at site. Learned Judge on the basis of such report came to the conclusion that the facts on record proved that the house of the

Respondent no. 1 in chalta no. 25 of P. T. sheet no. 289 was facing towards the east and, as such, it is probable that the access was from the eastern side of the property and not on the western side of the property. The learned Judge further noted that the house was admittedly existing and used atleast for forty years prior to 1992. This evidence was also examined in the context of the deposition of Dw.1, who had stated that the house in the said property is in existence prior to his birth which the learned Judge assumed would be atleast from the year 1920. These findings have been read along with the pleadings in the plaint wherein it was pleaded that the suit access was used from times immemorial i.e. from the time the house was existing. With regard to the contention of the Appellants, that there were no pleadings or ingredients of Section 15 of the Easements Act, the learned Judge noted that the fact that the Respondent no. 1 had pleaded that the suit access on the eastern side through the property of the Appellants was existing from times immemorial and was enjoyed by them as a matter of right read with the deposition of Pw. 2 and Dw. 1, such contention could not be accepted. The learned Judge as such found that there was no merit in the submission of the Appellants that there was no pleading that the access was used as a matter of right. On the basis of the evidence of the Surveyor, the learned Judge noted that the suit access was identified who had also admitted in the cross examination that from the photographs which he had taken the access appeared to be a footpath. The learned Judge also noted that the Respondent no. 1 did not own a four wheeler and consequently found that the Respondent no. 1 is entitled to an access of 1.5 metres through the suit property and not six metres as the Respondent no. 1 had failed to prove that she was taking any vehicle over the disputed access. The learned

Lower Appellate Court consequently found that the Respondent no. 1 has been enjoying the property of the Appellants in the southern eastern direction to the extent of 1.5 metres width and length of around 40 metres up to Rawanfond-Navelim road and, as such, the Respondent no. 1 was entitled for a declaration to that extent. As such, the Appeal filed by the Respondent no. 1 was allowed. The impugned Judgment passed by the Trial Court was set aside and the suit was partly decreed. The counter Claim filed by the Appellants, came to be dismissed.

8. On perusal of the said findings, the fact arrived at by the Lower Appellate Court, the alleged tenancy as claimed by Shri Pangam, learned Counsel appearing for the Appellants, has been rightly rejected by the Lower Appellate Court. The pleadings of the parties have to be read as a whole and liberally construed. The Appellants were very well aware of the claim of the Respondent no. 1 to the effect that the Respondent no. 1 was claiming an access as easementary right of access to go to the main road at Rawanfond-Navelim. On the basis of appreciating the evidence on record and taking note of the position of the house which was existing in the property of the Respondent no. 1 for more than forty years, the learned Judge has come to the conclusion that the access is to the main road through the portion claimed by the Respondent no. 1. But, however, the claim of the Respondent no. 1 to the effect that such access was of six metres has been rightly rejected by the Lower Appellate court. There is no perversity in the said findings nor Shri Pangam, learned Counsel appearing for the Appellants, was in a position to show that such findings have been arrived at by misreading the evidence on record. The Lower Appellate Court as such has rightly set aside the

Judgment of the learned Trial Court whilst passing the impugned Judgment.

9. Shri Pangam, learned Counsel appearing for the Appellants, has pointed out that the disputed access is through a Nullah which cannot be accepted. Considering the relief granted by the Lower Appellant Court, whereby the only access having a width of 1.5 metres has been reserved for the benefit of Respondent no. 1, the contention of Shri Pangam in the light of the original claim put forward by the Respondent no. 1 that said access was of six metres width does not require to be examined. All these factors have been examined by the Lower Appellate Court to come to the conclusion that the Respondent no. 1 was entitled for an access of only 1.5 metres width and six metres as claimed in the plaint. The findings of fact arrived at by the Appellate Court on the basis of the appreciation of evidence on record, cannot re-appreciated by this Court in the present Second Appeal. The fact that the Respondent no. 1 was enjoying the access openly and peacefully over twenty years has been duly examined by the Lower Appellate Court on the basis of the evidence as referred to herein above. As such, as the findings of fact of the Lower Appellate Court cannot be said to be perverse, I find that the question of interfering in such findings in the present Second Appeal would not at all be justifiable. The Lower Appellate Court has rightly as such dismissed the Counter Claim as the Appellants failed to establish that the Respondent no. 1 did not have a right of access through the property of the Appellants herein. Shri Pangam, learned Counsel appearing for the Appellants, has further pointed out that the disputed access reserved by the Lower Appellate Court would in fact cause grave prejudice to the enjoyment of the property of the Appellants herein,

considering the allegation of such access. As far as this contention is concerned, the Appellants are always at liberty to shift such access in terms of the provisions of the Easement Act by providing any alternate access. But, however, considering the location of the house and the direction of the front portion of the house as referred to by the Lower Appellate court, the learned Judge has rightly rejected the claim of the Appellants that the access of the Respondent no. 1 was towards the back portion of the house. The substantial question of laws are answered accordingly.

10. Subject to the above, I find no merit in the above Appeal which stands accordingly rejected with no Orders as to costs.

F .M. REIS, J.

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