

IN THE HIGH COURT OF BOMBAY AT GOA

SECOND APPEAL NO. 50 OF 2016

SMT. KANTIBAI B. BORKAR (DEC) THR.
LRS. AND 2 ORS.,

... Appellants

Versus

MRS. LIDIA VALES E SILVEIRA (DEC)
THR. LRS.,

... Respondent

Mr. Ajit R. Kantak, Advocate for the appellants.
Mr. V. Rodrigues, Advocate for the caveator.

Coram:- F. M. REIS, J.

Date:- 20th August, 2016

P.C.

Heard Mr. A. R. Kantak, learned counsel appearing for the appellants and Mr. V. Rodrigues, learned counsel appearing for the caveator.

2. The above appeal challenges the judgments passed by the Courts below whereby the appellants have been directed to demolish the shed located in the property belonging to the respondents surveyed Chalta Nos. 8 to 35 and 38 to 40 of P.T. Sheet No.95 of Panaji City and Matriz No. 159.

3. It is the case of the appellants that the alleged encroachment was put up by the respondents way back in the year 1992 but however there is no material on record to establish that in fact any

such structure was put up on the said date. The learned counsel further pointed out that the original plaintiff did not enter into the witness box though the power of attorney on behalf of the legal representatives of the deceased entered the witness box. The learned counsel further submits that such power of attorney being PW1 was not personally conversant with the facts of the case and as such, according to him the respondents have failed to establish their alleged cause of action. The learned counsel further submits that though the brother of the legal representatives was examined as a duly constituted attorney, there is material on record to suggest that he was not personally conversant with the facts of the case. The learned counsel further pointed out that though the appellants do not dispute that the original owner was in fact the owner of the property nevertheless, according to him there are no pleadings in the plaint or evidence adduced by the respondents to substantiate that the suit property stands devolved upon the legal representatives of the plaintiff who is the respondent no.1(a). The learned counsel further pointed out that as there are no pleadings to substantiate the claim of the legal representatives, the question of granting any relief in favour of such legal representatives would not arise at all. The learned counsel further pointed out that it is well settled that evidence beyond pleadings cannot be looked into and as such the Courts below were not justified to grant a relief in favour of the appellants on a specious plea that the property belonged to the respondent no.1(a). The learned counsel further submits that as such the impugned judgments passed

by the Courts below deserve to be quashed and set aside. The learned counsel further pointed out that even to substantiate the contention that the alleged encroachment took place in the year 1992, the original plaintiff did not even lodge any complaint to any of the statutory authorities with that regard. The learned counsel as such points out that the Courts below have erroneously come to the conclusion that the respondents are entitled for the relief sought in the suit.

4. Mr. V. Rodrigues, learned counsel appearing for the caveator has pointed out that besides PW1, the respondents have also examined PW2 and PW3 who were the eye witnesses to the subject construction and as such the contention of the learned counsel appearing for the appellants that there is cogent evidence on record to substantiate such contention deserves to be rejected. The learned counsel further pointed out that the legal representative brought on record upon the death of the original plaintiff was a person who has bequeathed the property in his favour by the deceased plaintiff in view of the Will dated 05.04.1990, which is at Exhibit 49. The learned counsel further pointed out that as such the contention of the learned counsel appearing for the appellants has no merit and consequently, the appeal be rejected.

5. I have considered the submissions of the learned counsel and I have also gone through the records. Both the Courts below upon

appreciating the evidence on record have concurrently come to the conclusion that the suit shed was constructed in the year 1992. These findings have been arrived at based on the oral as well as the other material produced by the respondents to come to the conclusion that the respondents have established their cause of action in the suit. Apart from the evidence of PW1, as rightly pointed out by Mr. Rodrigues, learned counsel appearing for the respondents, there is corroborative evidence produced on record of the witnesses to establish that in fact the subject structure was put up in the year 1992. On perusal of the evidence on record, it shows that the appellants admittedly did not enter the witness box nor produce any evidence. In such circumstances, the contention of Mr. Kantak, learned counsel appearing for the appellants that the respondents have failed to establish their cause of action as pleaded in the suit deserves to be rejected. The concurrent findings of fact arrived at by the Courts below based on the evidence on record cannot be reappreciated by this Court as I find no perversity in such findings. There is nothing produced nor pointed out by the learned counsel appearing for the appellants that there was any misreading of evidence or any clinching piece of evidence has been overlooked by the Courts below while coming to such conclusion.

6. With regard to the contention of Mr. Kantak, learned counsel appearing for the appellants that PW1 was not conversant with the facts of the case, I find that it is now well settled that the allegations

in the pleadings can be established by leading evidence and in the present case the fact that there exists the subject structure put up by the respondents has not been disputed. Apart from that, on the basis of the material on record, the Courts below have come to the conclusion that such structure was put up in the year 1992 without the consent or authority of the appellants herein. In such circumstances, merely because the original plaintiff has expired and as the duly authorised representative of the legal representatives has deposed in support of the case in the plaint would not by itself be sufficient to hold that the respondents have not established their case as put up in the plaint. As such, the contention of Mr. Kantak, learned counsel appearing for the appellants on that count deserves to be rejected. The attorney has deposed the facts known to him in respect of the subject matter of the dispute and produced documents in accordance with law.

7. As far as the contention of Mr. Kantak, learned counsel appearing for the appellants that the respondent no.1(a) has not established how he has gained title to the subject property, I find that it is clearly brought on record that the deceased plaintiff has bequeathed the suit property in favour of such legal representatives by a Will which is at Exhibit 49. There is no challenge to such Will nor any objection raised when the legal representatives were brought on record. Apart from that, the fact that the legal representatives were ordered to be brought on record without any objection would

itself suggest that the right to sue survived in favour of such legal representatives. Besides that in terms of the definition of the legal representative even an intermeddler in the estate of the deceased is included. As such, as there is no challenge to the Will and there is nothing to suggest that the legal representatives have no right to the subject property, I find that the contention of Mr. Kantak, learned counsel appearing for the appellants at this stage is misconceived. As such, I find that the contention with that regard has no substance and deserves to be rejected. On perusal of the substantial questions of law as proposed by the appellants, I find that such substantial questions of law do not arise in the present appeal. Examining such questions would entail reappreciation of evidence which cannot be done by this Court in a Second Appeal under Section 100 of the Civil Procedure Code. As such, admittedly, the appellants have failed to lead any evidence and as such the contention that the respondents have failed to establish their case cannot at all be accepted.

8. In view of the above, I find no merits in the above appeal which stands accordingly rejected.

F. M. REIS, J.

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