

IN THE HIGH COURT OF BOMBAY AT GOA.

SECOND APPEAL NO. 109 OF 2008

Shri Santosh Ratanji Ramnatkar,
Proprietor of Poonam Lodge,
Near Pimpal Katta,
New market,
Margao, Goa.

..... Appellant.

Versus

1. Shri Anil Purxottam Verlekar,
Major, r/o. H. No. 245, New
market, Margao, Goa.
2. Shri Vinod Shantilal Gosolia,
Since deceased and through
his Legal representatives;
 - a) Mr. Manish Vinod Gosalia
(already on record as Respondent
No. 3), Son of Vinod Gosalia,
Major of age,
 - b) Mrs. Toral M. Gosalia,
Daughter in law of Vinod Gosalia,
Major of age,
Both residing at S-4,
Osia Mall, Margao Goa.
 - c) Mrs. Neelam Gandhi,
Daughter in law of Vinod Gosalia,
Major of age,
 - d) Shri Punit Gandhi,
Son in law of Vinod Gosalia,
Major of age,
Both residing at Flat No.6,
Siddivinayak Apartments,
Trabai Park, Kolhapur,
Maharashtra.

3. Shri Manish Vinod Gosalia,
Both r/o. H. No. 1021,
Murida, Fatorda,
Salcete, Goa.

..... Respondents.

Mr. S. D. Padiyar, Advocate for the appellant.

Mr. G. Shirodkar, Advocate for the respondent no.1.

CORAM : F.M. REIS, J.

DATE : 29th January, 2016.

ORAL JUDGMENT

Heard Mr. S. D. Padiyar, learned counsel appearing for the appellant and Mr. G. Shirodkar, learned Counsel appearing for the respondent no.1.

2. The above appeal came to be admitted by order dated 13.7.2009 on the following substantial questions of law:-

- (1) Whether the suit was liable to be dismissed for non compliance of the provisions of Order 7 Rule 3 of Code of Civil Procedure and whether the non compliance of the provision of the Order 7 Rule 3 of Code of Civil Procedure was not fatal for the decision in the case ?
- (2) Whether the findings of the lower Appellant Court on the aspect of plaintiffs co-ownership over the suit drain and defendants illegal and unauthorized construction over the same are vitiated in law for being influenced by an error of record and mis-appreciation and non-appreciation of evidence on record?

3. Mr. Padiyar, learned Counsel appearing for the appellant has pointed out that on bare perusal of the reliefs sought in the suit, it is evident that the suit itself was not maintainable. The learned Counsel further submits that the relief claimed by the respondent no.1/original plaintiff, in the suit is to appoint a commissioner to identify the alleged encroachment in the disputed drain. Mr. Padiyar, learned Counsel further submits that the respondent no.1/plaintiff has not established any locus standi to file the said suit and as such, the Lower Appellate Court was not justified to grant the said relief. The learned Counsel further submits that the drain is surveyed under chalta No. 628 of P. T. Sheet No.239 of Margao Taluka, Salcete Goa also in the name of the appellant and as such itself suggest that the appellant has also right to the drain. The learned Counsel has thereafter taken me through the judgment of the Lower Appellate Court to point out that the Lower Appellate Court has come to the conclusion that the family of the respondent no.1 who are the plaintiff in the suit has got a sewage pipeline over the said drain, which releases water into the drain and, as such, the respondent no.1/plaintiff was not entitled for the relief of permanent injunction. The learned Counsel further points out that the Lower Appellate Court has also come to the conclusion that the appellant and the respondents have right to use the drain jointly and as such, the findings of the learned Judge to the effect to appoint a commissioner is totally misconstrued. The learned Counsel further submits that as far as the relief granted to remove the pipe line is concerned, the appellant has no pipeline over the said drain but

only pipe line releases storm water, rain water of the said building in the said common drain. The learned counsel further points out that the judgment passed by the Lower Appellate Court deserves to be quashed and set aside.

4. Mr. G. Shirodkar, learned Counsel fairly accepts that the appointment of the commissioner after decree is passed is not justifiable. The learned Counsel further points out that in any event once the Courts have come to the conclusion that the appellant as well as the respondent no.1 have right to use the drain, it is not permissible to the appellant to exclusively use the said drain.

5. The learned counsel further submits that the statement on instructions made by the learned Counsel for the appellant be recorded that there is no pipe line of the appellant and appeal be accordingly disposed of.

6. Upon hearing the learned counsel and on perusal of the records, I find that the learned Lower Appellate Court upon appreciation of evidence on record has come to the conclusion that the respondent is a co-owner of the suit drain. The learned Judge also came to the conclusion that the appellant has illegally and unauthorisedly raised the construction over the suit drain and that the appellant is flowing dirty sewage water therein. As pointed out herein above, it is not disputed that the drain separates the property of the

appellant and the respondents and consequently, it belongs jointly to the appellant and the respondents and other co-owners. In such circumstances, any changes to such drain is with the mutual consent of all the co-owners. Mr. Padiyar, learned counsel appearing for the appellant does not seriously dispute the correctness of the findings of the learned Lower Appellate Court on that count and as such the findings of the learned Lower Appellate Court that the appellant is not entitled to make changes to such disputed drain or allow any sewage water therein cannot be faulted. But however, the learned counsel appearing for the appellant upon instructions has stated that the appellant has not installed any pipeline over the said drain and as such to that extent the directions of the learned Judge to remove the pipeline cannot be sustained. But however, the statement of Mr. Padiyar, upon instructions that the pipeline adjoining the said drain only releases the rain water from the building of the appellant and not sewage water is accepted and as such the appellant shall not allow the sewage water to be released in the subject drain. In view of the said statement of Mr. Padiyar, upon instructions which stands accepted, there is no need of any further relief on that count to be granted in favour of the respondents herein.

7. In view of the statement of Mr. G. Shirodkar, learned counsel appearing for the respondent no.1 and by consent, the relief of appointment of Commissioner by the learned Lower Appellate Court is quashed and set aside. The substantial questions of law are answered

accordingly.

8. In view of the above, the impugned judgment dated 07.07.2008 passed by the learned Lower Appellate Court in Regular Civil Appeal No. 2/2008 is quashed and set aside. The suit filed by the respondents stands disposed of based on the said statement of Mr. Padiyar, learned counsel appearing for the appellant upon instructions. The appeal stands disposed of accordingly.

F. M. Reis,J

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