

IN THE HIGH COURT OF BOMBAY AT GOA

SECOND APPEAL NO. 64 OF 2016

Mr. Lawrence Pereira,
Aged about 65 years,
agriculturist, residing at Mercurim,
House No.439, Agacaim,
Tiswadi Goa, since deceased,
Through his legal representatives:
(a) Mr. Antonio Santana Pereira (son)
Major in age, rep. by POA.
his wife.
(b) Mrs. Piedade Pereira
(daughter in law)
major in age,
Both residing at House No.439,
Agacaim, Tiswadi Taluka Goa. ... Appellants

Versus

1. Mr. Mateus Avelino Pereira,
aged about 40 years,
married, businessman,
residing at House No.440,
Mercurim, Agacaim,
Tiswadi Goa.
2. Mrs. Immaculate Pereira,
Aged about 35 years, housewife,
Residing at House No.440, Mercurim,
Agacaim, Tiswadi Goa.
Both represented by Attorney,
Mrs. Concessao Pereira e Vaz,
Resident of House No.447/1,
Mercurim, Agacaim,
Tiswadi Goa.

3. Mr. Victorio Pereira,
Aged about 50 years,
businessman,
Resident of House No.440, Mercurim,
Agacaim, Tiswadi Goa.
Since deceased,
Represented by legal representatives,
3(a) Smt. Conceissao Pereira,
major, married, sister of deceased,
3(b) Pascoal Nazareth Vaz,
major, married,
husband of respondent no.3(a),
Both residents of Mercurim,
Agacaim, Tiswadi Goa.
4. Mr. Rosario Pereira,
major in age, son of late
Appellant and his wife,
5. Mrs. Bertina Pereira,
major in age,
daughter in law,
of late Appellant
Both r/o H.No.439, Mercurim,
Agacaim, Tiswadi Goa.
As presently not available for
signing the appeal memo and
wakalatnama,
they are impleaded as respondents ... Respondents

Mr. S. G. Desai, Senior Advocate with Mr. Anoop Atchut Gaoker, Advocate for the appellant.

Mr. M. B. Da Costa, Senior Advocate with Ms. Karishma Custa Betquecar, Advocate for the respondent nos.1 & 3(a).

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Coram:- F. M. REIS, J.

Date:- 7th March, 2017

ORAL JUDGMENT

Heard Mr. S. G. Desai, learned Senior Counsel appearing for the appellants and Mr. M. B. Da Costa, learned Senior Counsel appearing for the respondent nos. 1 & 3(a).

2. Admit on the following substantial question of law :

Whether the judgments passed by the Courts below stand vitiated for refusal to examine a witness to prove the document marked 'X' for identification during the course of the evidence of PW1 ?

3. Ms. K. Betquecar, learned counsel waives service on behalf of the respondent nos. 1 & 3(a).

4. Mr. Desai, learned Senior Counsel appearing for the appellants has pointed out that the property belonging to the appellants is surveyed under No.41/6 whereas the property

belonging to the respondents is surveyed under no.41/7 situated at Mercurim of Village Agacaim. The learned Senior Counsel further pointed out that the property of the respondents is located towards the eastern side of the property of the appellants as according to him there is a wall constructed by the respondents on the boundary line separating the property of the appellant and the respondents. The learned Senior Counsel further pointed out that somewhere in 1998, the western wall of the house of the respondents was reconstructed by masonry stones and according to him buttresses were placed in the property belonging to the appellants on the western side of the property of the respondents to support the mud wall which was likely to be collapsed. The learned Senior Counsel further pointed out that such buttresses placed by the respondents at the time of the said reconstruction of the western wall of the house were not removed despite of request made by the appellants. It is further pointed out that placing such buttresses is an encroachment into the property of the appellants which the appellants are entitled to get withdrawn. The learned Senior Counsel further pointed out that at the time of

the reconstruction of the said western wall, the respondents have also extended the eaves drops of the house thereby further encroaching into the property of the appellants. The learned Senior Counsel further submits that in support of their claim that the buttresses are located in the property of the appellants, the appellants filed an application under Order XVI Rule 1 of the Civil Procedure Code to examine the surveyor Mr. Prazares Gonsalves who had prepared the plan which was marked 'X' for identification during the course of the evidence of PW1. The learned Senior Counsel further pointed out that this application was rejected by the learned Judge on erroneous consideration which was challenged before the learned Lower Appellate Court. It is further submitted that the challenge was not examined by the learned Lower Appellate Court and on the contrary it is recorded by the learned Appellate Court that such order has become final. It is further submitted that the evidence of the said witness is very material to establish the encroachment in the property of the appellants and due to such failure, it led to failure of justice to the appellants. The learned Senior Counsel

thereafter has taken me through the judgments passed by the Courts below to point out that though the Courts below have found that the survey line is not in accordance with the survey plan, nevertheless, as the said plan was not proved the appellants were precluded from establishing their claim. The learned Senior Counsel as such points out that the judgments passed by the Courts below are vitiated and deserve to be quashed and set aside and the matter be remanded to the learned Trial Judge to decide the suit afresh.

5. On the other hand, Mr. M. B. Da Costa, learned Senior Counsel appearing for the respondents has pointed out that there is a boundary dispute over the boundary as shown in the survey plan and the respective titles of the appellants and the respondents. The learned Senior Counsel further submits that as the dividing line between the properties of the appellants and the respondents is not correctly depicted in the survey records, the appellants are not entitled for any relief as the appellants have failed to establish the extent of their boundary line as per their

title documents. The learned Senior Counsel further submits that the buttresses which are alleged to have been put up by the respondents were in existence for more than 50 years. The learned Senior Counsel further submits that such buttresses were in existence for such a long period and in any event, irrespective of the other contentions the respondents have acquired a right by prescription over the subject property on that count. The learned Senior Counsel further pointed out that though the respondents have not raised a specific plea to that effect, nevertheless, the evidence on record would establish this aspect and in any event, the respondents be given liberty to file an appropriate application for leave to raise this plea in the written statement. The learned Senior Counsel further pointed out that at the time of the reconstruction of the western wall of the house of the respondents, such wall has been put up at the same place and the eave drops are at the same position and as such, the contention of the appellants that the buttresses were put up at the time of the reconstruction is an erroneous plea taken by the appellants. The learned Senior Counsel has thereafter taken me through the

judgments passed by the Courts below and pointed out that both the Courts below have rightly come to the conclusion that the appellants have failed to establish the extent of their property separating the property of the appellants and the respondents and consequently, the appeal deserves to be rejected.

6. I have considered the submissions of the learned Senior Counsel and I have also gone through the records. The dispute in the present case is with regard to the legal effect of the buttresses existing adjoining the western wall of the house of the respondents. Though it is contended by the appellants that such buttresses are located in the property belonging to the appellants, nevertheless, the Courts below while examining such aspect have come to the conclusion that there is a boundary dispute as shown in the survey records separating the property of the appellants and the respondents. In such situation, the evidence of the surveyor sought to be examined by the appellants would be material to consider the extent of the property of the appellants vis-a-vis the property of the respondents. Apart from that, the

contention of Mr. Da Costa, learned Senior Counsel appearing for the respondents that in any event the subject buttresses were in existence for more than 50 years and has acquired a prescriptive right in favour of the respondents is a matter which would have to be considered only after the appropriate defence/pleadings are raised by the respondents in the written statement. As such, the question of granting leave to the appellants at this stage without giving an opportunity to the parties to lead further evidence with regard to their respective claims would not at all be justified. Apart from that, the extent of the property of the appellants would determine whether there is any encroachment as claimed by the appellants on account of the eave drops from the roof put up by the respondents while reconstructing the western wall. In such circumstances, without going into the merits of the rival contentions, I find that in the interest of justice the impugned judgments passed by the Courts below dated 31.07.2014 and 28.09.2015 deserve to be quashed and set aside. The appellants are given an opportunity to examine the said witness Mr. Prazares Gonsalves. The respondents are

also given leave to file an application for amendment of the written statement and if so advised even to raise a counter claim on the pleas sought to be raised by the appellants. Needless to say, the respondents are entitled to file an additional written statement, if any, and both the parties are at liberty to lead further evidence in support of their respective stands after the Court frames the additional issue, if any. The learned Senior Counsel appearing for the appellants upon instructions points out that the appellants shall maintain the status quo with regard to the subject dispute in the suit.

7. In view of the above, I pass the following :

ORDER

(i) The judgment passed by the learned Trial Court dated 31.07.2014 and the judgment passed by the learned Lower Appellate Court dated 28.09.2015 are quashed and set aside.

(ii) Regular Civil Suit No.40/1998/C is restored to the file of the learned Civil Judge Junior Division, at Panaji.

(iii) The learned Judge is directed to decide the said suit afresh in the light of the observations made herein above in accordance with law.

(iv) All contentions of both the parties on merits are left open.

(v) Needless to say, considering that the matter is of 1998 the learned Judge shall try and dispose of the suit as expeditiously as possible.

(vi) The appeal stands disposed of with no order as to costs.

F. M. REIS, J.

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