

IN THE HIGH COURT OF BOMBAY AT GOA**SECOND APPEAL NO. 153 OF 2005**

Shri Arjun Jairam Parab,
son of late Jairam Arjun Parab,
major of age, retired,
resident of House No.20,
Khalchawada, Virnoa,
Pernem-Goa
(Registered Address)

.... Appellant.

V e r s u s

Shri Sonu alias Sanjay Krishna Parab,
son of late Krishna Parab, son of late
Krishna Parab, major of age,
married, employed, resident of
Khalchawada, Virnoda,
Pernem, Goa.
(Registered address)

..... Respondent

Shri V. Menezes, Advocate with Adv. A. Shirodkar for the Appellant.
Smt. A. Agni, Senior Advocate with Adv. R. Kamatar for the Respondent.

CORAM: C. V. BHADANG, J.

DATE: 13th June, 2017.

JUDGMENT:

The challenge in this appeal is to the judgment and decree dated 14/9/2005 passed by the learned Additional District Judge at Mapusa in Regular Civil Appeal no.70/2004. By the impugned judgment, the appeal filed by the respondent has been allowed thereby dismissing the suit filed by the appellant.

2. The brief facts necessary for the disposal of the appeal may be stated thus:

That the appellant filed a suit against the respondent before the learned Civil Judge Junior Division at Pernem, for injunction restraining the respondent or anybody on his behalf, from doing any extension to the existing house or making any encroachment in the suit property thereby causing any injury to the plaintiff and from committing any breach of the appellant's right of co ownership over the suit property.

3. The suit property consists of land survey no.43/12 known as “Govind Naik Bhatlem” situated at Virnoda Taluka, Pernem. Admittedly the suit property is common undivided and joint ancestral property belonging to the appellant, the respondent and other co owners. The respondent, who is admittedly the co owner of the suit property has his residential house standing therein. The appellant has also his house standing in the suit property which is to the eastern side of the house of the respondent.

4. The appellant was working as Assistant Head Master in Mata Secondary High School Vasco and has since retired in the year 1996-97. After his retirement the appellant has been residing in his house situated in the suit property. The material case made out by the appellant was that the house of

the respondent is standing “very close to the house of the appellant”. There was a small structure/shed consisting of mud parapets with palm leaves roofing on the eastern side of the house of the respondent. Late Vishnu Parab, the grand father of the respondent, used to keep his goats in the said shed. After the death of Vishnu Parab the respondent ceased to have any goats and the said structure was lying idle. It is the material case that about 20 to 25 years prior to the filing of the suit the said structure 'got demolished', and the space on which the said structure was standing was lying open.

5. Sometime in the first week of February 2002, the respondent started clearing the debris and digging in the said open space. The appellant accosted the respondent requesting him not to undertake any construction in the said open space. According to the appellant, the respondent told him that the respondent would be constructing an additional room in the said open space. On 20/5/2002, the respondent started digging trenches in the open space for laying foundation and subsequently on 29/6/2002, the respondent bought about 5 to 6 truck loads of laterite stones, for the purpose of constructing a room. According to the appellant, by digging trenches the respondent has encroached in the suit property to the extent of 40.38 sq.mtrs and as a result of the excavation, the open space on the north- western side of the appellant's house has been reduced to 1.15 metres. In short according to

the appellant the proposed construction would be a constant source of nuisance to him causing health hazards and a likely obstruction and blockade to the natural flow of rain water, risking stability of the house of the appellant. It was contended that the respondent has no right to construct in the said open space, without the consent or permission of the appellant, who is admittedly the co owner and thus the proposed construction constitutes violation of the appellant's proprietary rights.

6. The respondent resisted the suit. It is, however, not disputed that the parties are co owners of the suit property. It was contended that the appellant and his two brothers are staying in their own houses at the place of their employment and they visit the house only during religious festivals. It was, however, not disputed that the distance between the eastern wall of the respondent's house and the western wall of the appellant's house is about 1.60 metres. It was, however denied that there was a small structure/shed existing on the eastern side of the house of the respondent as claimed. It was denied that the grand father of the respondent used to keep goats in the said structure. It was contended that the grand father of the appellant used to tie his goats in one of the outer rooms on the eastern side of his residential house. It was denied that any such structure was demolished about 20 -25 years ago, or that the space on which the said shed was standing was lying

vacant. It was contended that the outer room of the house where the grand father of the respondent used to tie his goats was in existence till recently. It was contended that before filing of the suit the respondent demolished the same in order to reconstruct it with laterite stones as the structure of the said room was old and was infested by white ants. In short according to the respondent the said room was a part and parcel of the residential house of the respondent and was demolished shortly before the appellant filed the suit. It was thus denied that the space was lying vacant for about 20-25 years prior to the filing of the suit as claimed by the appellant. It was contended that the respondent has obtained a NOC from the Village Panchayat of Virnoda and other authorities including the Primary Health Centre, Pernem and the Town and Country Planning Department for the construction. All other adverse allegations were denied.

7. On the basis of the rival pleadings, the learned trial court raised the following two issues :

- (i) Whether the plaintiff proves that the defendant on 28/5/2002 dug the trenches for foundation?
- (ii) Whether the plaintiff proves that the defendant on 29/06/ brought 6 trucks of laterite stones for constructing a room thereby encroaching into the suit property to the extent of 40/38 sq.mtrs

reducing the entire open space on the North-Western side by 1.15 meters?

8. The parties led evidence in which the appellant examined himself along with Mangesh B. Parab, PW2, Gajanan Shankar Deulkar, PW3 and Vishvas Kotkar, PW4. The respondent examined himself in support of his defence and other witness including Engineer Sawal Parab.

9. The learned trial Court by a judgment and decree dated 14/9/2005 decreed the suit. Feeling aggrieved the respondent challenged the same before the learned District Judge. The learned District Judge by the impugned judgment and decree has allowed the appeal thereby dismissing the suit filed by the appellant. Hence this second appeal.

10. I have heard Shri V. Menezes, the learned counsel for the appellant and Mrs. Agni, the learned Senior Counsel for the respondent. With the assistance of the learned counsel for the parties I have gone through the record and the judgment of the trial court as well as the first appellate court. The parties have also filed synopsis of their submissions, on record. I have gone through the same.

11. It is submitted by the learned counsel for the appellant that the first appellate court was in error in deciding the appeal after re framing an issue. It is submitted that once the first appellate court had come to the conclusion that the trial court had failed to frame proper issues, the normal course which should have been adopted, (after reframing the issue) was to remit the matter back, so as to permit the parties to lead evidence. In other words, it is submitted that the appellant could not avail of an opportunity to lead evidence on the issue as re-framed by the appellate court, which has caused prejudice. Secondly, it is submitted that the first appellate court was in error in holding that the respondent although admittedly a co owner, could be permitted to undertake construction in the suit property, without the consent/permission of the appellant. On behalf of the appellant reliance is placed on the decision of the Supreme Court in the case of **Mahindra Vs. Sushila, AIR 1965 SC 364** and on the decision of this Court in the case of **Jose Caetano Vaz vs. Julia L.L. Fernandes, AIR 1969 Goa 90**, and **Datta L. Naik V/s. Damodar L. Naik , 2003 (1) GLT 24**. It is submitted that in view of the provisions of Article 2179 and Article 1270 of the Portuguese Civil Code, a co owner cannot alter the structure of the suit property, without consent of the other co-owners. The learned counsel has taken me to through the evidence in order to demonstrate that the space in between the house of the appellant and the respondent was lying vacant since about 20 to 25 years

prior to the filing of the suit, where there was a shed constructed in mud which was used by the grand father of the respondent for tying his goats.

12. On the contrary, it is submitted by Mrs. Agni , the learned Senior Counsel that the appellant admits that there was a construction in between the house of the appellant and the respondent although according to the appellant it collapsed about 25 years prior to the filing of the suit. The learned Senior Counsel has referred to the survey plan at page102 of the compilation in order to submit that it shows the existence of the outer room. The learned counsel has referred to para 10 of the judgment of the appellate court in which the first appellate court has found that the pleadings in the plaint that the said structure got demolished are vague, lacking in material particulars, as to who had removed the said structure. It is submitted that the first appellate court has rightly found that the house of the respondent is one continuous structure and there is no separation between the alleged shed/structure and the house of the respondent indicated by letter “E” in the survey plan (Exhibit PW1/B). It is submitted that the appellant had not made out a case that the open space was in his exclusive possession. It is submitted that the case of **Datta Naik (supra)** is distinguishable on facts.

13. On behalf of the respondent reliance is placed on the decision of

the Hon'ble Supreme Court in the case of **Nedunuri Kameswaramma Vs. Sampati Subba Rao, AIR 1963 SC 884, Bhairab Chandra Nandan Vs. Ranadhir Chandra Dutta, AIR 1988 SC 396, Kochunju Nair Vs. Koshy Alexander and others, AIR 1999 SC 2272, Santosh Hazari Vs. Purushottam Tiwari (dead) by Lrs., 2001 AIR SCW 723** and the decision of the **Punjab and Haryana High Court in Bachan. Singh Swaran Singh AIR 2001 P & H 112.**

14. It is submitted that it was nobody's case that evidence would be required to be led after reframing of the issue. It is submitted that the parties were all along aware about the nature of the controversy and the issues involved. It is submitted that the principle question was whether there was a space admeasuring about 40 sq.mtrs. lying vacant between the house of the appellant and the respondent since about 20 -25 years prior to the filing of the suit and whether the respondent was trying to construct in the said open space or whether the proposed construction by the respondent was in the place where there was a existing room of the house, which was demolished. It is submitted that the first appellate court after appreciation of the evidence on record has rightly come to the conclusion that there was no open space existing between the two houses as claimed by the appellant and all along the distance between the eastern wall of the house of the respondent and the

western wall of the house of the appellant was about 1.6 metres. It is submitted that this findings of fact cannot be disturbed in second appeal.

15. I have carefully considered the rival circumstances and the submissions made. This appeal was admitted on the following substantial questions of law:

- (i) Whether the first appellate court having come to the conclusion that the issues framed by the trial court were irrelevant, erred in not remanding the issues and the first appellate court ought not to have disposed off the appeal on altogether new issues without notice to the parties?
- (ii) Whether, the reasoning of the first appellate court that a co-owner cannot object if the other co-owner constructs without permission of other co-owner is erroneous and against the law laid down by this Court in the matter of **Datta D. Naik Vs. Damodar Naik**, 2003 (1) Goa Law Times 24?

16. The issues raised by the trial court have been noticed above. The first appellate court found and to my mind rightly so that there was no particular dispute that the parties are co owners of the suit property and the only point which arose for determination was whether the appellant had

established the existence of the open space and or whether that there was any encroachment in the open space, so as to interfere with the proprietary rights of the appellant. The first appellate court further rightly found that the issue framed by the trial court as to whether the defendant had dug trenches for foundation and had brought truck loads of laterite stones for construction were not relevant as there was no particular dispute in this regard. Thus the first appellate court found that the issue which ought to have been framed was whether the appellant proves that the structure for tying goats was an adjoining structure and not part of the house of the respondent as shown in the survey plan and further whether the said structure had collapsed more than 25 years back, leaving an open space of about 40 sq.mtrs.

17. It can thus be seen that the first appellate court on consideration of the rival pleadings had found that the real issue was about the existence of the open space of about 40 sq.mtrs for about 25 years, as claimed by the appellant and whether the said open space was created on account of demolition of an independent shed of mud walls and with a thatched roof, in which according to the appellant the grand father of the respondent was tying his goats. According to the learned counsel for the appellant, on the first appellate court reframing the issue it ought to have afforded an opportunity to the parties to lead evidence and the appellant cannot be taken by surprise, as

he was not put to notice on the said issue as reframed and this causes prejudice. In my considered view the submission cannot be accepted. From the rival pleadings and the evidence led, it is clear that the parties were aware about the nature of the controversy and the particular dispute involved and there was no element of surprise as such, as claimed by the appellant. The evidence of the appellant and his witnesses would make it clear that the parties were aware of the dispute. The appellant in his cross examination has even admitted that the cattle shed was attached to the house of the respondent. He further admitted that as per the survey plan produced at Exhibit PW1/B the distance between his house and the house of the respondent is about 1.5 metres. Further in the cross examination it was suggested to the appellant that the goat shed was a part of the residential house of the respondent which the appellant denied. A specific suggestion was given that the goat shed was a part of the house being the outer room of the residential house of the respondent and that the said goat shed was demolished after the respondent made an application to various authorities. It was specifically suggested to the appellant that there was no open space existing since 25 years prior to the filing of the suit. Thus it is clear that the appellant was well aware of the contours of the dispute and the first appellate court was justified in reframing the issue and deciding the appeal on the basis of the evidence available on record. That apart, a perusal of the issue no.2 as

framed by the trial court would show that the appellant was expected to prove that the respondent had brought laterite stones for construction of a room thereby encroaching into the suit property to the extent of 40.30 sq.mtrs reducing the entire open area on the eastern side by 1.15 metres. Though it was not disputed by the respondent that he had brought laterite stones for construction and that part of the issue no.2 may be redundant, the later part of issue no.2 would make it explicit that the appellant was expected to establish about the existence of the open space and its reduction in the northeast side to 1.15 metres on account of the alleged encroachment by the respondent in the open space.

18. The effect of omission to frame an issue fell for consideration of the Hon'ble Supreme Court in the case of **Nedunuir Kameswramma** (supra). In para 6 it has been inter alia held that when the parties went to trial fully knowing the rival case and led all the evidence not only in support of their contentions, but in refutation of those on the other side, it cannot be said that the absence of an issue was fatal to the case, or that there was a mis-trial which vitiates the proceedings. The question whether the omission to frame a particular issue, has the effect of vitiating a trial, would depend upon facts and circumstances of each case. Suffice it to mention that it is not in all cases of an omission and failure to frame an issue that the trial vitiates. In the

present case as noticed earlier, the parties were aware of the nature of the dispute and the case which they were supposed to prove as well as meet and therefore the contention that the first appellate court ought not to have decided the appeal without affording opportunity to the parties to lead evidence on the issue reframed, to my mind cannot be accepted.

19. This takes me to the second substantial question of law.

18. Admittedly, the suit property is jointly owned and the parties are co-owners along with some others. The question is whether the proposed construction by the respondent is a new construction encroaching in the alleged open space of about 40 sq.mtrs. The appellate court has reached a finding of fact that there was no open space lying between the houses of the appellant and the respondent, as claimed by the appellant, as also there was no independent goat shed as claimed by the appellant. The first appellate court on appreciation of the evidence has found that the goats were being kept in the outer room of the residential house of the respondent and that there was no open space as claimed by the appellant. The first appellate court on consideration of the evidence of the Engineer Mr. Sawal (DW2) and the survey plan, has found that the space between the two houses was hardly 1.5 metres. It can thus be seen that on facts it has been found and to my mind

rightly so that the respondent was attempting to construct on the space after demolishing the existing room and the question is whether in such circumstances the appellant can object to the same. In this regard, the first appellate court has found that the appellant had also constructed an additional room in the joint property without obtaining permission from the respondent. It was contended on behalf of the respondent that this will dis-entitle the appellant to get any equitable relief of injunction. Be that as it may, the question has to be examined in the light of existing legal position about the construction by one of the co owners in the joint property with or without obtaining the consent/permission of the other co-owners. In this regard strong reliance has been placed on behalf of the appellant on the decision in the case of **Datta Naik (supra) and Jose Caetano Vaz (supra)**. The first appellate court has found the said case to be distinguishable. In the case of **Datta Naik**, one of the co owners had undertaken some construction activity in one portion of the suit property to such an extent that if allowed to be completed it would have blocked the appellant's passage to the well, the bathroom and toilet situated towards the other extreme of the property. The first appellate court has found that the decision is of no help to the appellant when it is established that the respondent was doing the construction of the room on the same plinth and after obtaining necessary permission and approval from the statutory authorities. I do not find that any exception can be taken to the

findings so recorded.

20. In the case of **Jose Caetan Vaz (supra)** it has been held that a co owner cannot effect change in user of the joint property without the consent of the other co-owners. The question thus would depend on the facts and circumstances of each case whether indeed there is any change of user. As noticed earlier the first appellate court has found that the proposed construction was on the existing plinth area and it was not a new construction much less which would affect any of the rights of the appellant so far as the enjoyment of his house is concerned. In this regard a useful reference can be made to the decision of the Supreme Court in the case of **Kochunju Nair (supra)** in which it has been inter alia held in para 11 thus:

“ To hold that a co-owner is not an owner and his possession is not the possession envisaged in Section 2 (25) of the Act is in conflict with the correct legal position. If a co-owner wants to erect homestead on the land he is free to do so. When a division of the co-ownership property takes place the co-owner who put up the homestead can claim that the said portion may be allotted to his share. Courts would ordinarily grant such equitable relief when claimed. [vide Nutbehri Das v. Nanilal Das, AIR 1937 PB 611. If the other co-owner objects to the construction of a homestead he can get the co-ownership property divided by partition, and if the other party is not readily willing to that course it

is open to him to get it partitioned through suit. These are various remedies available to the co-owner in respect of his land. Merely because he has to resort to such steps it cannot be said that a co-owner cannot erect a homestead on his land.”

It can thus be seen that once there is a finding that the construction is on the same plinth area after demolishing the existing room and after obtaining the necessary permission/approval from the statutory authorities, I do not find that the contention of the appellant in this regard can be accepted. For the aforesaid reasons, I find that there is no merit in the second appeal. The second appeal is accordingly dismissed, with no order as to costs.

C. V. BHADANG, J.

Ap/