

IN THE HIGH COURT OF BOMBAY AT GOA

SECOND APPEAL NO. 59 OF 2017

SHRI. PURUSHOTTAM PANDHARI GAWAS. ... Appellant
Versus
SHRI. KESHAV FATKIRO (DEC) REP. BY
HIS LRS AND 2 ORS., ... Respondents

Mr. Sudin Usgaonkar, Senior Advocate with Mr. K. Padgaonkar,
Advocate for the appellant.
Ms. A. Lobo, Advocate for the respondents No. 1(a & B), 2(a, b
and c).

Coram:- F. M. REIS, J.

Date:- 6th July, 2017

P.C.:

Heard Mr. Sudin Usgaonkar, learned Senior Counsel
appearing for the appellant.

2. The challenge in the above appeal is to the Judgment
passed by the Lower Appellate Court, whereby the appeal
preferred by the respondents was allowed and the suit filed by
the appellant came to be dismissed.

3. Mr. Sudin Usgaonkar, learned Senior Counsel appearing
for the appellant has vehemently argued that the subject-matter
of the suit was an extension carried out by the respondents by
extending the structure located in the property surveyed under
No.28/1 of Village Navelim, Bicholim Taluka wherein the

respondents had encroached in an area of 100 sq. metres. The learned Senior Counsel further points out that the appellant was declared as an agricultural tenant in terms of the Goa Agricultural Tenancy Act by the Judgment passed by the learned Administrative Tribunal, whereby the revision preferred by the appellant came to be allowed and the appellant was, inter alia, declared to be an agricultural tenant of the property surveyed under No.28/1. The learned Senior Counsel further submits that as the respondents were extending the structure located in the said property, the appellant filed the suit inter alia, to demolish the extent of such encroachment. The learned Senior Counsel further points out that the suit filed by the appellant came to be decreed by the learned Trial Judge which was set aside by the Lower Appellate Court by the impugned Judgment dated 31/10/2015. The learned Senior Counsel, thereafter, has minutely taken me through the Judgment passed by the Lower Appellate Court to point out that the learned Judge has misconstrued the evidence on record, specially the evidence of PW.3 who is the Surveyor who had clearly identified the encroachment to the extent of 100 sq. metres carried out by the respondent No.1. The learned Senior Counsel further submits that the learned Judge has erroneously taken a view that the appellant has failed to show the extent of encroachment and, as such, on this ground alone the findings of the learned Lower Appellate Court are by misreading the evidence of the Surveyor

who had categorically identified the encroachment of 100 sq. metres in the plan attached to the report placed on record. The learned Senior Counsel further points out that the learned Judge had also misread the pleadings of the appellant to come to the conclusion that the original area of the subject structure had not been identified, though the pleadings clearly suggest that the appellant had pleaded that the original structure had an area of 150 sq. metres. The learned Senior Counsel further points out that the encroachment carried out by the respondents is merely a mathematical calculation which can be culled out from the evidence of the Surveyor, as well as from the pleadings of the appellant. The learned Senior Counsel, as such, points out that the findings of the learned Lower Appellate Court that the encroachment had not been established, are perverse, as such findings were by misreading the evidence of the Surveyor which calls for interference of this Court in the present Second Appeal. The learned Senior Counsel, as such, points out that there are substantial questions of law which arise for consideration in the present appeal.

4. I have considered the submissions of the learned Senior Counsel and with his assistance, I have also gone through the records. While disposing of the appeal preferred by the respondents, the Lower Appellate Court had framed two points for determination. The first point for determination is, whether

the appellant has established the extent of the encroachment carried out in the subject-property. The second point is whether the suit is bad for non-joinder of necessary parties.

5. Whilst examining such points for determination, the Lower Appellate Court came to the conclusion that the evidence of PW.3, the Surveyor, was not reliable. The learned Judge found that on the basis of his admission in the cross examination that such exercise was carried out merely by examining the difference of the colours of the two parts of the structure carried out by the respondents. The Lower Appellate Court further noted that the Surveyor had not identified the original plinth area of the admitted existing structure before examining the extent of such encroachment. The learned Judge further noted that on the basis of the admission in the cross examination the Court below found that the evidence of such Surveyor was not reliable. Such finding of the Lower Appellate Court based on appreciating the evidence on record, cannot be reappreciated by this Court in the present second appeal.

6. With regard to the contention of Mr. Usgaonkar, learned Senior Counsel appearing for the appellant that there was misreading of the averments in the plaint, I find that on perusal of the plaint, it is seen that it is the case of the appellant that the original structure had an area of 150 sq. metres. But, however, on

examining the report and the plan produced on record prepared by the Surveyor, such area of 150 sq. metres has not been identified either in the report or in the site plan attached to such report. The Surveyor has also not stated that before examining the extent of the encroached area, the said original area of 150 sq. metres was identified by such Surveyor. The learned Judge further noted that even along with the plan, there was no croqui produced by the appellant to identify the extent of such encroachment. This finding arrived at by the Lower Appellate Court based on the evidence on record, cannot be said to be perverse, as such finding has been rendered on the basis of documentary, as well as the oral evidence on record. The inference drawn by the learned Judge based on the admissions of the appellant is well founded and does not call for interference of this Court in the present second appeal.

7. Apart from that, the appellant is claiming to be an agricultural tenant of the suit property surveyed under No.28/1. To substantiate such claim, the appellant is relying upon a declaration in his favour issued whilst disposing of the revision by the Administrative Tribunal. It is not in dispute that besides the structure of the respondents, there are 8 to 9 other structures existing in the subject property. Areas where such structures are located, naturally cannot form part of an agricultural land in terms of the Agricultural Tenancy Act. Mr. Usgaonkar, learned

Senior Counsel has placed on record the survey records to point out that the structures are standing in the name of the Comunidade. The property, admittedly, belonged to the Comunidade. In such circumstances, the Lower Appellate Court was justified to come to the conclusion that no relief could be granted in the suit, on such count, without making the Comunidade as a party, being a necessary party. The findings of the Lower Appellate Court on that count, as such, cannot be faulted.

8. In view of the above, I find that there are no substantial questions of law which arise for consideration in the present appeal. The appeal stands, accordingly, dismissed.

F. M. REIS, J.

ssm.