

Andreza

IN THE HIGH COURT OF BOMBAY AT GOA
SECOND APPEAL NO. 9 OF 2013

- 1. SHRIKANT KRISHNA PARSEKAR,**
s/o. Late Krishna Parsekar major, Indian
National, r/o. H. No. not known Dabal, Goa
Post Kirlapal Dabal, Taluka Dharbandora
(earlier Sanguem)
- 2. SAVITRI KRISHNA PARSEKAR,**
w/o. Late Krishna Parsekar major, Indian
National, r/o. H. No. not known Dabal, Goa
Post Kirlapal Dabal, Taluka Dharbandora
(earlier Sanguem) ...Appellants

~ VERSUS ~

- 1. RAMA MONO SHETKAR,**
s/o Mono Shetkar married, Indian National
aged about 55 years r/o Norancal, Goa
presently at H. No.68 Dabal, Goa and his
wife since deceased through legal heirs
- 1a. ARATI JEEVANAND SHETKAR,**
d/o. Late Rama Shetkar wife of Jeevanand
Vishnu Shetkar and her husband
- 1b. JEEVANAND VISHNU SHETKAR,**
Both major in age, both resident of
Zambaulim, Quepem, Goa.
- 1c. SHUBANGI RAMA SHETKAR**
- 1d. BHARATI RAMA SHETKAR**
- 1e. MAHENDRA RAMA SHETKAR**
c to e are all major in age,
All children of late Rama Shetkar, all
residing at Dabal, Goa, Taluka Dharbandora
(earlier Sanguem)

2. **SITA RAMA SHETKAR,**
w/o. Rama Shetkar, married, Indian national,
aged about 52 years, r/o. Nirancal, Goa
presently at H. No. 68, Dabal, Post
Kirlapal, Dabal Goa, Taluka Dharbandora
(earlier Sanguem) ... Respondents

APPEARANCES

FOR THE APPELLANT	Mr CA Coutinho, <i>Advocate.</i>
FOR THE RESPONDENTS	Mr SN Joshi and Ms Archana Pai Bir, <i>Advocates</i>

CORAM: G.S. PATEL, J

DATED: 8th August 2017

ORAL JUDGMENT

1. The Second Appeal was admitted on 5th September 2013, on the following substantial question of law:

“Whether the First Appellate Court has misconstrued the order of declaration dated 04.02.2008 at Exhibit D-89 wherein the appellants have been declared as the mundkars of the disputed house situated in the property surveyed under no. 176/7 of Codli Village coupled with the plans at Exhibit 73 and 75 to come to the conclusion that a part of the disputed house is located in the property of the respondents which require demolition?”

2. The appellants in the Second Appeal are the original defendants to the Suit. The Respondents are the original plaintiffs.

The First Appellate Court, by the impugned order dated 26th April 2012, allowed the plaintiffs' appeal, reversed the judgment and decree of the Civil Judge Junior at Sanguem in RCS No. 25 of 2003 dismissing the suit, granted a permanent restraint against the defendants from interfering in any manner with the plot in the suit, and directed the defendants to remove the encroachment to the extent of 32 square metres as depicted on a plan marked Ex C-87 in evidence by the Trial Court.

3. Given the ambit of Section 100 of the Code of Civil Procedure 1908 (“CPC”), I do not believe it is open to a Court in a Second Appeal to embark on a complete re-appreciation of the evidence. A Second Appellate Court must address itself to the substantial question of law framed, although it undoubtedly has its power to address any other substantial question of law that might also arise. The important aspect in this case, one I must note at the forefront, is sub-section (5) of Section 100. This tells us that the appeal is to be heard on the question of law so formulated, but it is always open to the respondent at the hearing of the appeal to urge that no such question arises. This is precisely the frame of Mr. Joshi's response on behalf of the respondents to this Second Appeal. In his submission, at the time of admission, this Court's attention was not drawn to several crucial factors including, importantly, that neither the plaintiffs nor their predecessors-in-title were parties to a declaration dated 4th February 2008. He questions how it can possibly be said that without hearing either the plaintiffs or their predecessors-in-title, any order of a revenue authority could be said to bind them. That is the first aspect of the dispute.

4. The second limb is that, in any case, this order of 4th February 2008 was one that was obtained before the Mamlatdar by the parties to it filing Consent Terms. Mr Joshi says parties to a dispute may file Consent Terms, and, in doing so, may agree on very many things. Order XXIII of the CPC also tells us that such an agreement is not necessarily confined to the immediate disputes; but it is then binding only as between the parties who so agreed. This means, in his formulation, that any such order of the Mamlatdar could have no wider impact beyond the parties to the Consent Terms themselves.

5. Mr Joshi also points out that the First Appellate Court was extremely cautious in its approach while evaluating the evidence of a Court-summoned government officer, one who deposed in the most unequivocal terms that the plans on which the Defendants rely, at Exhibit 73 and 75, were both wrongly issued through inadvertence and that some errors crept into those plans due to oversight. It is therefore his submission that there is no question of law at all, let alone a substantial one, that arises in the Appeal.

6. On the other hand, on behalf of the Appellants before me, Mr Coutinho urges that once there is a government-prepared plan, it cannot be simply ignored by production of some later plan. If there be an inconsistency or contradiction between these various plans, especially ones that purport to show boundary lines of adjacent properties, or construction of boundary walls (*'addo'*) along some of those boundaries, or some combination of the two, there must be a rational and valid explanation. Mr. Coutinho argues that it is not open to any officer of the Government to simply brush aside earlier

officially issued plans by saying that there was inadvertence or oversight. He submits that on a close reading of the First Appellate Court's order and the cross-examination of the Court-summoned government officer, it is clear that there is no explanation at all for this so called "inadvertence" or "oversight". He submits that there is no case made out at any stage of forgery or fabrication, or at least none that was established. Whoever may have been parties to the consent terms, or the previous plans at Exhibits 73 and 75, the fact remains that these were officially issued by authorized officers of the government, and appropriate weightage ought to have been given to them especially when these were properly proved and led in evidence.

7. Having considered carefully the rival submissions and heard both sides at some length, I am not persuaded of the merits of the appellants' case. I find considerable force in the submissions on behalf of the respondents, including that the question of law as framed does not arise at all.

8. I will turn briefly to the facts to the extent necessary. I will refer to the parties as they stood before the Trial Court. The plaintiffs (the present respondents) brought suit for a permanent and mandatory injunction against the present defendants, the present appellants. The controversy is about two adjacent tracts of land. The plaintiffs said they acquired title to a portion of land admeasuring 187 square metres, part of survey no. 1/1 of Village Codli of Sanguem Taluka. They purchased this property from one Kamladevi Swadi under a Sale Deed dated 28 March 1983. This Deed of Sale was Exhibit C-42 in the Trial Court. There was a Deed

of Rectification that followed on 28th March 2003 marked in evidence as Exhibit C-43. The defendants have a residential structure in a property to the west of this plot. The defendants' structure is on a plot owned by one Kamla Dhond. Separating the two — i.e., the plaintiffs' western boundary and the defendants' eastern boundary — is a fencing wall or *addo* of rubble stones. It is said that it had existed for a very long time. The plaintiffs constructed a small structure on the suit plot, and opened a tea stall there. Sometime in the third week of March 2003, the defendants illegally removed the *addo* rubble stones on the western boundary of the plaintiffs' plot. The plot occupied by the defendants is under survey no. 176/7 (part). The plaintiffs' case was that the defendants illegally removed this *addo* boundary wall and moved it into the plaintiffs' property to the extent of three to three-and-a-half metres, thus encroaching on the plaintiffs' property to an extent of about 32 square metres in all. The plaintiffs objected. The defendants paid them no mind. An application to the Panchayat drew no action. The plaintiffs also complained to the Mamlatdar on 15th April 2003, but apparently were told to approach the Civil Court.

9. The answer from Defendant Nos. 1 and 2 was that they were not the owners but the mundkars of Kamlabai Dhond. They were residing and occupying survey no. 176/7 (part) as mundkars. They claimed to be unaware of the plaintiffs' plot or its area. More to the point, they completely denied the existence at any time of this *addo* of rubble stones separating or dividing the two properties. This is really the heart of the dispute. Since there was no *addo* to begin with, the defendants say, there was never any question of them having removed it at all, whether legally or illegally.

10. The Trial Court framed five issues. The first was whether the plaintiffs were the owners in possession of plot 1/1 (part). Issue no. 2 was central to the case:

“(2) Whether Plaintiffs prove that Defendants in 3rd week of March 2003 removed illegally ‘*Addo*’ of rubble stones existing on western side of the suit plot and encroached an area of 32 square metres?”

The other three issues are not germane to this discussion.

11. Embedded in Issue No. 2 was a consideration as to whether this *addo* ever existed. The second aspect required the plaintiffs to prove that there was a removal of that *addo* and its shifting and, resultantly, an encroachment to the extent claimed. This was really the entirety to the suit.

12. The plaintiffs examined plaintiff no. 1 as PW1. They produced documentary evidence. Her evidence was incomplete when she passed away and the plaintiffs then examined the second plaintiff, Sita Rama Shetkar, and produced their documentary evidence through her. They also examined one Jivan Naik as PW2, and a Civil Engineer, one Amarnath Sawant, as PW3. He produced a sketch plan.

13. The defendant nos. 1 and 2 examined the 1st defendant Shrikant Parsekar as DW1. In addition, there is the evidence of one Maya Amonkar. She filed an evidence affidavit that, though not

compiled, is part of the R&P and is dated 22nd June 2011.¹ Ms Amonkar was, at the relevant time, the Inspector of Survey and Land Records, at Quepem, Goa. She filed the affidavit in response to a direction from the Trial Court to furnish an explanation on the discrepancies in the Survey Plans then in evidence, and to produce a true certified copy of the Survey Plans. Ms Amonkar was cross-examined before the Trial Court.² The direction from the Trial Court was at the instance of the plaintiffs who filed an application at Exhibit 99-D pointing out discrepancies in certified copies of Survey Plans. This application was allowed on 8th April 2011. She was issued a summons on 27th June 2011. Her evidence affidavit is marked in evidence.

14. The Trial Court answered three of the five issues in the negative, against the plaintiffs, and the fourth issue on the question of the plaintiffs' *locus standi*, in the affirmative. For some reason, the Trial Court did not address either the statement made on affidavit by Maya Amonkar, although this was in response to a summons, nor her testimony in cross-examination. The First Appellate Court has had occasion to comment on this, and, in my view, quite correctly. The Trial Court dismissed the suit.

15. The First Appellate Court framed two issues for its consideration. These are noted below with the First Appellate Court's finding.

1 R&P, p. 221.

2 Appeal compilation, pp. 195–197.

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| 1. | Whether the plaintiffs have proved that the defendants have illegally removed the <i>addo</i> of rubble stones existing on the western side of the suit plot and have caused encroachment in the suit plot to the extent 32 square metres? | In the affirmative |
| 2. | Whether the impugned Judgment, order and decree calls for interference? | In the affirmative |

16. The question of ownership of the plaintiffs' plot survey no. 1/1 (part) of Codli Village is undisputed. The question is of the extent of the defendants' land, i.e., the land of which they claim to be Mundkars and whether there is by the defendants any encroachment as alleged.

17. Exhibit 89 is an order of the Joint Mamlatdar-I of Sanguem Taluka.³ This was an order following an application on 22nd June 2003 under Section 8-A of the Goa Daman and Diu Mundkars (Protection from Eviction) Act, 1975. It appears that the parties to that dispute filed consent terms. This is noted in the Mamlatdar's order itself. But who were the parties? If the present plaintiffs were before the Mamlatdar, a very different result might follow. The applicant before the Mamlatdar was Savitri Krishna Parsekar, the mother of the present 1st defendant. The respondent was Kamla Sripad Dhond, the owner of survey no. 176/7 (part) of Codli Village. The application was disposed of by declaring Savitri

3 Appeal compilation, *pp.* 187–189.

Parsekar as the Mundkar of dwelling house no. 7 in survey no. 176/7 to the extent of 190 square metres. The order references a plan annexed to the Consent Terms. Now this plan⁴ was obviously one that was filed with the Consent Terms; this is clear from the fact that it bears Savitri Parsekar's left hand thumb impression and the signature of one Devidas Dhond, the legal representative of Kamladevi Dhond. It is said to be a survey map by a retired Head Surveyor of the Land Survey Department. There is no endorsement on it showing that it is issued by the government itself. The western boundary is marked on this and the residential house is shown.

18. It appears that there was then a separate order in a dispute between Savitri Parsekar and Kamla Dhond before the Additional Collector-I, South Goa. There, an application dated 25th June 2004 was filed by Savitri Parsekar under Section 103 of the Land Revenue Code. She claimed to be the Mundkar residing in dwelling house no. 7 in survey no. 176/7. The mundcarial case was pending before the Joint Mamlatdar. She sought a rectification of the entry and a change between serial no. (c) and serial no. (b) in the 'other rights' column. By an order of 14th July 2005, the Additional Collector ordered the necessary rectification. This does not actually advance the present defendants' case much further because, apart from anything else, this was also virtually by consent and this is reflected in the order itself with both parties agreeing that such a rectification was in fact necessary. This is also borne out by the fact that Devidas Dhond filed a statement dated 13th January 2005 accepting the clerical mistake in these entries.

4 Appeal compilation, *p.* 90.

19. The First Appellate Court, therefore, on the basis of these Consent Terms before the Mamlatdar, concluded that this was largely inconsequential because (1) these were consent terms; (2) the plaintiffs were not parties to these proceedings; and (3) the entire dispute was about the neighbouring property and not the plaintiffs' property at all.⁵ This approach cannot be faulted. Further, that the two properties were distinct but adjacent is therefore not in dispute.

20. Amarnath Sawant was an expert whose evidence was led as PW3. He is or was a civil engineer. He inspected the site in the first week of March 2003 and himself carried out a survey on the spot using for reference and as a base, the survey plans, the survey records and the Deed of Sale to which I have earlier referred. He claimed he had located not only the plaintiffs' plot but also the 32 square metre encroachment and he showed this on a plan that he prepared at exhibit C-87. There was some weightage granted by the First Appellate Court to this evidence but this was not the only basis for its decision. The First Appellate Court rejected the argument, in my view correctly, that Sawant's testimony should be disregarded merely because he had not prepared an inspection report. He had been to the site and he had identified the extent of the encroachment with some precision. He went to the extent of describing the encroachment; an extension of the defendant's original house covered with Mangalore tiles and galvanised iron sheets. It is true that the entirety of the defendant's house was not shown on the plan that he prepared, but the First Appellate Court held — again, I think

5 The sketch plan prepared by the surveyor at Exhibit 89 showed the 2nd defendant to be in occupation of an area of about 190 square metres.

quite correctly — that this was not material because he was concerned with an encroachment to one side of the plaintiffs' plot, an extension of the defendant's house to that side and not the dimensions of the entirety of the defendants' house or structure.

21. The testimony of the second witness Jivan Naik was discarded entirely. This is correct. His deposition was largely derivative and is possibly excluded on the basis that it was hearsay. He deposed to what he had been told by the plaintiffs. He could not, obviously, depose to the correctness of what he was told.

22. Sita Rama Shetkar, plaintiff no. 2, entered the frame only because her husband, the 1st plaintiff died pending suit. However, she confirmed the existence at some prior point of time of the *addo* of rubble stones and correctly described the boundaries of the plot. It is true that she could not describe all elements of her own construction, but, as we have seen that is almost entirely irrelevant.

23. The evidence of DW1 is of some significance. I will ignore for the moment the statement in paragraph 11 of his evidence affidavit that he, the 1st defendant had “illegally removed the *addo* of rubble stones”; I believe this to have been a typographical error and the first defendant probably meant to place a denial rather than to convey an admission. It is not on this basis in any case that the suit was decreed by the First Appellate Court.

24. In fact let us put aside for a moment anything that the 1st defendant said and which might or might not constitute an

admission. Instead, let us consider what I believe is sufficiently neutral evidence, the one called for by the Court in response to an application by the plaintiffs.

25. By this stage, there were now in question now four principal survey plans. These are the plans at Exhibit 73 and 75 relied on by the defendants and referred to in the order of admission of this Second Appeal.⁶ These are dated respectively 2003 and 2001. According to the defendants, these do not show the *addo* wall in existence at all, but only show the boundaries of the plot. Therefore, according to the Defendants, there was never any *addo* wall. As against this, there are the maps at Exhibit D-93⁷ and Exhibit C-102.⁸ These are dated respectively 2009 and 2011. Both these plans show the existence of the *addo* boundary wall. The Trial Court had before it two plans produced by the defendants that did not show the *addo* rubble wall and two plans that did. Thus, the application to issue a summons to the Government Officer, Ms Amokar, one that was granted.

26. When she responded to the Court summons, Ms. Amonkar said this:

MAY IT PLEASE YOUR HONOR

6 Appeal compilation, *pp.* 200, 201 respectively.

7 R&P, *pp.* 209–210.

8 Appeal compilation, *p.* 194.

1. Your honorable court has directed the office of the Inspector of Survey and Land Records Margao to **give explanation on discrepancy in survey plan and produce true certified copy of survey plan.** The same was transferred and received by the office of the Inspector of Survey and Land Records, Quepem on 17.06.2011.

2. **It is submitted that the plans issued on 15/10/2003 and 20/02/2011 from the office of Directorate of Settlement of land Records at Panaji are wrongly issued by inadvertence and some error has crept in the said plans due to oversight.**

3. **It is submitted that the plan issued by the office of Inspector of Surveys and Land Records Quepem on 29/07/2009 is correct. The correctness of the record was verified by me with the original plane table sheets maintained by the Directorate of Settlement of Land Records in the Head office.**

4. The certified copy of the correct plan is enclosed herewith for reference.”

(Emphasis added)

27. On this she was cross-examined.⁹ Even in cross she maintained her stand that the earlier plans Exhibits 73 and 75 were wrongly and inadvertently issued and errors had crept in. The error is explained in the additional examination-in-chief and cross-examination. Ms Amonkar also confirmed that when she verified the earlier plans, she had them with her. I am noting this not with a

⁹ Appeal compilation, *pp.* 195–197.

view to re-appreciate the evidence but to test the rival arguments as to whether there exists any scope for interference in a Second Appeal at all. For, this is how the First Appellate Court dealt with this evidence of all four plans and Ms. Amonkar's testimony — something the Trial Court had wholly omitted to do:

“18. Even the various survey plans at exhibit 93, exhibit C-102 and exhibit C-73 clearly shows the existence of rubble stone fencing (*addo*) on the common boundary line of survey no. 1/1 and 176/7. **The Inspector of Survey and Land Records examined in view of order dated 27.6.2011, passed on exhibit D-101, has put at rest the alleged discrepancies in the survey plans at exhibit 73, exhibit 75 and exhibit 95 by means of the correct and authentic plan at exhibit C-102.** Otherwise Dw.1 in his cross has clearly admitted that one of the boundary of survey no. 1/1 and 176/7 is common and that Kamala Dhond does not have any right to survey no. 1/1. It is also an admission of D.w.1 that the suit plot of plaintiffs, admeasuring 187 sq. metres, exists on the eastern side of his house. This witness has further admitted the receipt of notice by the defendants, issued by the Panchayat, on the basis of complaint lodged by the plaintiff no. 1, with an allegation that the defendants have cut his kitchen garden and encroached into his plot. Admittedly, no reply was filed to the said complaint by the defendants. Even Dw.1 has not produced any construction licence and he has also not measured the area of his house as per the survey plan.”

(Emphasis added)

28. It was on this basis, and as a finding of fact based on evidence, that the First Appellate Court concluded in paragraph 19 that the “plaintiffs’ case of illegal and forcible removal of *addo* rubble stone fencing stood proved as did the encroachment.” In paragraph 20, the First Appellate Court noted with admirable brevity the Trial Court’s failure to look at evidence at cardinal importance.

29. In the result, the First Appellate court decreed the suit. Given the material before it and that one entire segment of evidence, i.e. that of Ms. Amonkar had been fully elided from the Trial Court’s judgment, I do not see what other choice the First Appellate Court had. The First Appellate Court’s order contains distinct findings of facts based on evidence: as to the correctness of the plan; as to the evidence of the removal of the *addo* wall; as to the extent of the encroachment; and as to the nature of that encroachment. Indeed, it is difficult to conceive what more the plaintiffs might possibly have done to establish their case.

30. This brings us back to the question I set out at the forefront: is there at all a substantial question of law that arises for consideration in this Second Appeal? The order of admission proceeded without regard to the evidence of Ms Maya Amonkar and without considering all four plans, including in particular the plans at Exhibits 93 and 102. I would address the question in two ways. First, it is in my judgment incorrect to say that there has been any misreading or misconstruing by the First Appellate Court. It has in fact considered exhibit D-89, the Mamlatdar’s Order, in its correct perspective noting that it is a consent order in a proceeding to which

the plaintiffs were not parties and which dealt with a separate property all together. Second, even if the substantial question of law as framed is to be addressed, it would have to be answered in the negative.

31. There is no other question of law, legal or substantial one, that can fairly be said to arise.

32. Consequently, the Appeal is dismissed. However, there will be no order as to costs.

33. The First Appellate Court did not specify a time limit to remove the encroachment. That remains to be done. The defendants will remove the encroachment within a period of three months from today.

(G. S. PATEL, J)

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