

IN THE HIGH COURT OF BOMBAY AT GOA**SECOND APPEAL NO. 69 OF 2017**

1. Shri Mohna Kashinath Naik,
son of late Kashinath Naik,
age 54 years, married, service
and his wife

2. Smt. Mohan Naik/Malini Mohan Naik
age 48 years, housewife,
both Indian National and
r/o H. No.456, Palsere,
Keri, Ponda- Goa.

.... Appellants

V e r s u s

1. Shri Prakash Gajanan Sukthankar (amendment is carried
age 60 years, married, landlord, out as per order dated
(since deceased) represented by his legal heirs 15/9/2017)

1 (a) Smt. Sharad Prakash Sukthankar,
wife of late Prakash Gajanan Sukthankar,
major of age;

1 (b) Shri Amey Prakash Sukthankar,
son of late Prakash G. Sukthankar,
married, major in age, service.

1 (c) Smt. Poonam Amey Sukthankar,
daughter-in-law of late Prakash G.
Sukthankar, major of age,

1 (d) Shri Abhir Prakash Sukthankar,
son of late Prakash G. Sukthankar,
married, major of age, service,

1 (e) Smt. Priyanka Abhir Sukthankar,
daughter-in-law of late Prakash G.

Sukthankar, major in age.
(All r/o H. No.309, Gajanan Niwas Modai,
Margao, Goa)

- 1 (f) Smt. Anagha Vishal Juwarkar,
daughter of late Prakash G. Sukthankar
married, major of age,
- 1 (g) Shri Vishal Audhut Juwarkar,
son-in-law of late Prakash G. Sukthankar,
married, major of age,
(both r/o Shubham Appts, F-4,
behind Savor Hotel, Dhavli, Ponda-Goa-403340.
2. Shri Durgadas Gajanan Sukthankar,
age 58 years, married, landlord,
Both Indian National and
r/o H. No. 309, "Gajanan Niwas",
Modsai, Margao-Goa.
3. Shri Harischchandra Shivlo Naik
(Since deceased) (through his legal heirs)
- 3(a) Shri Tukaram Harishchandra Naik
aged 40 years, Indian National,
- (b) Shri Mortu Harichandra Naik,
age 38 years,
(both r/o H. No.2, Palserem, Keri,
Ponda-Goa).
4. Shri Purshottam Babu Naik,
(Since deceased) No legal heirs
r/o H. No.4, Palserem, Keri, Ponda-Goa.
5. Shri Anand Pandurang Naik
(since deceased) (through his legal heirs)
- 5 (a) Shri Sudha Pandurang Naik,
age 52 years.
- 5 (b) Kum. Ashwita Anand Naik,

age 18 years,
(both r/o H. No.3, Palserem,
Keri, Ponda-Goa).

.... Respondents.

(Above addresses are the registered addresses of the parties as taken from the cause tittle of the Appellate Court Proceedings)

Shri G. Shirodkar, Advocate for the Appellants.

Shri Rui Gomes Pereira, Advocate for the Respondents.

CORAM: C. V. BHADANG, J.

DATE: 25th January, 2018.

ORAL ORDER :

The challenge in this appeal is to the judgment and order dated 7/3/2017 passed by the learned District Judge, Ponda, in Regular Civil Appeal no.129/2015.

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

That the respondent no.1 (since deceased) and respondent no.2 filed a suit against the appellants for injunction restraining the appellants or anybody on their behalf from interfering with the possession and enjoyment of the suit property as described in paras 1 and 2 of the plaint and for a mandatory injunction directing them to demolish the structure illegally

constructed by them in the suit property bearing survey no.36/1 of village Kerim, Ponda, Goa. The case made out in the plaint was that the said structure which was sought to be demolished was away from the existing mundkarial house of the appellants.

3. The appellants resisted the suit contending that they are residing in the house of Shri Baba Satarkar as mundkars. The appellants also sought to raise a plea that they are tenants of the agricultural land in which the structure is situated and they have become owners of the same by virtue of the 5th Amendment to the Goa, Daman and Diu, Agricultural Tenancy Act 1964.

4. The learned trial court raised in all four issues. The parties led oral and documentary evidence. The learned trial court by a judgment and decree dated 20/8/2015 partly decreed the suit restraining the appellants from doing any further construction in the suit house and also restrained them from interfering in any portion of the suit property including trees, except the access to the road. In other words the learned trial court refused to grant mandatory injunction in respect of the structure which is allegedly situated in the north-west corner of survey no.36/1.

5. The appellants challenged the said decree in appeal bearing Regular Civil Appeal No.129/2015 in which the original plaintiffs raised a counter claim to the extent of refusal of relief of mandatory injunction. The learned District Judge apart from dealing with the four issues framed by the trial court framed an additional issue as to whether the appellants prove that they have inherited the tenancy rights in the suit property under survey no.36/1 and 33/1 through their father/father-in-law. The first appellate court by a judgment and decree dated 7/3/2017 dismissed the appeal filed by the appellants while allowing the cross objection. The net result is that the suit stood decreed in its entirety. Feeling aggrieved the appellants are before this Court.

6. I have heard Shri Shirodkar, the learned counsel for the appellants and Shri Pereira, the learned counsel for the respondents. With the assistance of the learned counsel for the parties, I have gone through the record and the judgments of the Courts below.

7. Shri Shirodkar, the learned counsel for the appellants has raised two contentions. Firstly, it is contended that there is a breach of the provisions of Order 7 Rule 3 of Code of Civil Procedure 1908 (Code for short), (as amended by the Bombay High Court amendment). It is submitted

that under the amended Rule 3 of Order 7 of the Code, where the subject matter of the suit is an immovable property, the plaint apart from containing a description of the property sufficient to identify it by boundaries or numbers, in case of an encroachment the plaint has to be accompanied by a sketch showing as approximately as possible, the location and extent of encroachment. It is submitted that no such description or sketch was annexed to the plaint and as such, the learned trial court was justified in refusing an order of mandatory injunction for want of the establishment of the identity of the alleged illegal construction. It is submitted that the first appellate court was not justified in reversing the said finding placing reliance on the evidence of P.W.3, Bhaktraj Tari. Secondly, it is submitted that the learned District Judge could not have recorded a finding on the additional issue no.5 pertaining to the tenancy which was beyond the jurisdiction of the civil court. Except these, there are no other contentions raised. It was submitted that P.W.3 was not an official surveyor and as such, no reliance could have been placed on his evidence.

8. On the contrary, it is submitted by the learned counsel for the respondents that the first appellate court after having meticulously considered the evidence on record including that of P.W.3 has rightly come to the conclusion that the identity of the structure in respect of which a demolition

order was sought has been properly established. The learned counsel has taken me through the evidence of P.W.3 along with the sketch and the two survey records produced collectively at Exhibit 75/C, in order to submit that this being a finding of fact properly recorded is not open for interference in a second appeal. The learned counsel has placed reliance on the decision of the Supreme Court in the case of **Prathiba Singh and anr. Vs. Shanti Devi Prasad and anr., AIR 2003 SC 643**, and in particular, paras 15 and 17 thereof, in order to submit that substantial compliance with the provisions of Order 7 Rule 3 of C.P.C would be sufficient and if the identity of the property can be said to be established on the basis of the evidence available on record, mere non compliance with the Order 7 Rule 3 of C.P.C may not come in the way of the Court, while granting a decree. In so far as the argument based on the additional issue no.5 is concerned, the learned counsel has pointed out that all that the the learned District Judge has said is that on account of the pleadings of the appellant being vague, no issue of tenancy can be raised or framed. It is submitted that the learned District Judge has not decided the said issue and as such, there is no infirmity. It is submitted that in para 35 of the judgment the learned District Judge has affirmed the finding of the trial court that no such issue arises in the matter.

9. In reply, it is submitted by Shri Shirodkar that the ratio as laid

down in the decision of **Pratibha Singh and anr. (supra)** would not apply in view of the Bombay High Court amendment. In other words, it is submitted that in the case before the Hon'ble Supreme Court the provisions of Order 7 Rule 3 of C.P.C as amended by the Bombay High Court were not in issue. It is thus submitted that the said decision would be distinguishable in view of the specific amendment to Order 7 Rule 3 of C.P.C. The learned counsel has also pointed out that the suit was instituted in the year 2002 and P.W.3 had inspected the site in the year 2014 and as such, no reliance could have been placed on his evidence.

10. I have carefully considered the rival circumstances and the submission made and I do not find that the second appeal raises any substantial questions of law.

11. I would first propose to deal with the submissions based on Order 7 Rule 3 of C.P.C. The said rule reads as under :

3. Where the subject matter of the suit is immovable property.- Where the subject matter of the suit is immovable property, the plaint shall contain a description of the property sufficient to identity it, and, in case such property can be identified by boundaries or numbers in a record of settlement or survey, the plaint shall specify such boundaries or numbers.

There is a Bombay High Court amendment to the said rule which

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“3. Where the subject-matter of the suit is immovable property.— Where the subject-matter of the suit is immovable property, the plaintiff shall contain a description of the property sufficient to identify it, and, in case such property can be identified by boundaries or numbers in a record of settlement of survey, the plaintiff shall specify such boundaries or numbers. In case of encroachment a sketch showing as approximately as possible the location and extent of encroachment shall also be filed along with the plaintiff.” (1.10.1983).

12. A comparison of the Bombay High Court amendment with the original rule would clearly show that it is substantially on similar lines except that the High Court amendment provides that in case of an encroachment a sketch showing 'as approximately as possible' the location and extent of encroachment shall also to be filed along with the plaint. In the present case the respondents/plaintiffs had filed a suit for mandatory and prohibitory injunction. The mandatory injunction is in respect of the structure which is to the north west corner of survey no.36/1. The learned trial court refused to

grant the mandatory injunction on the ground that the identity of the said structure is not established, which finding has been reversed by the first appellate court. The question is whether the said finding can be said to be perverse or infirm in the absence of compliance of Order 7 Rule 3 of C.P.C. The Supreme Court in the case of **Prathibha Singh and Ors. (supra)** had an occasion to consider the provisions of Order 7 Rule 3 of C.P.C. It has been inter alia held that in a suit of the present nature the plaintiff ought to have filed a map of the suit property annexed to the plaint. However, if the plaintiff commits an error, it is for the defendants to object to it promptly. It has further been held that the default and the carelessness of the parties does not absolve the trial court of its obligation which should have been done while scrutinizing the plaint pointing out the omission on the part of the plaintiffs and should have insisted on a map of the property forming subject matter of the suit. In para 17 the Hon'ble Supreme Court has held thus:

“When the suit as to immovable property has been decreed and the property is not definitely identified, the defect in the court record caused by overlooking of provisions contained in Order 7 Rule 3 and Order 20 Rule 3 of the CPC is capable of being cured. After all a successful plaintiff should not be deprived of the fruits of decree. Resort can be had to Section 152 or Section 47 of the CPC pending on the facts and circumstances of each case-which of the two provisions would be more appropriate, just and convenient to invoke. Being an inadvertent error, not affecting the merits of the case, it may be corrected under Section 152 of the CPC by the

Court which passed the decree by supplying the omission. Alternatively, the exact description of decretal property may be ascertained by the Executing Court as a question relating to execution, discharge or satisfaction of decree within the meaning of Section 47 CPC. A decree of a competent Court should not, as far as practicable, be allowed to be defeated on account of an accidental slip or omission. In the facts and circumstances of the present case we think it would be more appropriate to invoke Section 47 of the CPC. "

13. It can thus be seen that as held by the Supreme Court that the irregularity with regard to non compliance of Order 7 Rule 3 of C.P.C. is held to be curable. It has specifically been held that a successful plaintiff should not be deprived of the fruits of decree.

14. In my considered view merely on account of the fact that the said decision was not rendered in the context of Order 7 Rule 3 of C.P.C., as amended by the Bombay High Court, would not make any difference because the basic principles as laid down by the Supreme Court would still apply. Thus the contention that the decision in the case of **Prathibha Singh** is distinguishable to my mind cannot be accepted.

15. Coming to the facts, the plaintiffs had examined the surveyor as P.W.3, namely, Bhaktraj Tari, who had drawn the plan of the suit property which was produced at Exhibit 75/C. The trial court on comparison of the

plan prepared by the surveyor with the survey plan of 2003 (Exhibit 77/C) had come to the conclusion that there were more structures than what were existing in the plan of the year 1972 (Exhibit 76/C) P.W.3 has categorically deposed that there was a residential house at the north west corner of the survey no.36/1 and this structure was shown only in the plan of 2003 and was not in existence in the plan of 1972. The learned trial court has further held that therefore it was for the appellants to show that the suit structure was in existence in the survey plan of the year 1972. The trial court in para 31 of the judgment has also recorded that the appellants did not dispute that the structure shown in the north west corner is the suit structure. Thus for all practical purposes the appellants were aware as to which was the structure in respect of which the plaintiffs were seeking an order of demolition. This aspect has also considered by the first appellate court in para 51 onwards, holding that there is sufficient identity of the subject matter of dispute, as the illegal structure is shown in red by P.W.3 in the plan. As noticed earlier, and at the cost of repetition it needs to be stated that the trial court has recorded that it was not disputed by the appellants that the structure in the north west corner of the land survey no.36/1 was the structure which was sought to be demolished. This being a finding of fact recorded on the basis of the evidence of the surveyor is not amenable to challenge in second appeal. The evidence of P.W.3 was sought to be criticized on the ground that he is not a

Government surveyor and that he had inspected the site in the year 2014. I do not find that for any such reason the evidence of P.W.3 can be discarded.

16. Coming to the second ground, Shri Shirodkar, the learned counsel for the appellant has pointed out the observations and the findings of the first appellate Court in para 45 of the judgment in which the first appellate court has held that the appellants (the defendants) have failed to prove their claim to be tenants of the suit property. Shri Shirodkar, the learned counsel submits that this finding may come in the way of the appellants, in application for declaration which they have filed and which is pending before the learned Mamlatdar. To this extent the learned counsel appears to be right. It is trite that the Civil Court has no jurisdiction to deal with the issue of tenancy and thus the finding recorded by the appellate court in para 45 of the judgment cannot come in the way of the appellants in any proceeding filed by the appellant for declaration as a tenant before the learned mamlatdar. Subject to this, I do not find that the appeal raises any substantial question of law. The second appeal is accordingly dismissed with no order as to costs.

C. V. BHADANG, J.

Ap/