

IN THE HIGH COURT OF BOMBAY AT GOA

STAMP NUMBER (APPLN.) NO.998 OF 2019

IN

SECOND APPEAL NO.28 OF 2018

Basilio Fernandes (deceased)

Through Legal Representatives And Anr.

... Applicants

V/s.

Pandurang Alias Pritam Yeswant Malgaonkar

And Anr.

...Respondents

Shri Parag Rao, Advocate for the applicants.

Shri A.F. Diniz, Advocate for the respondents.

CORAM : NUTAN D. SARDESSAI,J.

DATE : 10th April,2019.

ORAL ORDER :

1. Heard Shri P. S. Rao, learned Advocate for the applicants who contended that this Court despite the applicants having referred to the compilation had not at all adverted to or commented upon the same which was in support of his submission that no oral hearing was given to the applicants. This Court had not at all recorded nor dealt with the argument that notwithstanding the Roznama entry of 21/01/2017, the First Appellate Court was duty bound to afford a hearing to the applicants before non-suiting them on a completely new point of not seeking a declaration of title. There was an error by this Court in not quashing and setting aside the impugned Decree on the ground of non-consideration of the judgments by the First Appellate Court despite making necessary

record at paragraph 29 of the judgment under review.

2. This Court erred in dwelling into the merits of the application filed under Order XLI Rule 27 CPC, despite the mandate of the Hon'ble Apex Court in **Malayalam Plantation Ltd v/s. State of Kerala and Another** [(2010)13 SCC 487]. There was also an error committed by this Court in not appointing a Commissioner on an erroneous premise that the dispute was not a boundary dispute between the applicants and the respondents, by failing to appreciate that the dispute as regard the boundary of the applicants on the northern side, itself was a dispute concerning the location of the boundaries. This court failed to appreciate that the impugned judgment and decree of the Trial Court was based on admission/estoppel, when the same could not be considered to be admissions in law. The impugned judgment was therefore liable to be reviewed for errors apparent on the face of the record and therefore it was a fit case for allowing the review to remand the file to the Appellate Court for the appointment of a Commissioner.

3. Shri A.F. Diniz, learned Advocate for the respondents submitted that the parameters for a review of the judgment were well spelt out and it could never be treated as an appeal in disguise. The remedy available to the applicants was by way of an appeal. There was no application for the appointment of a

Commissioner either before the Trial Court or before the First Appellate Court. On his part he too adverted to the judgment for review and submitted that this Court had properly addressed itself to all the points raised on behalf of the appellants and therefore there was no justification for a review of the judgment under consideration. Insofar as the complaint to the Chief Justice was concerned, it was his case that there was discrepancy in the Roznama and the records in the CMIS. The Roznama was the record of the Court unlike the CMIS which was a computer generated printout. In any event no action was taken by the Chief Justice and which showed the hollowness in the grievance of the applicants. The grounds urged in the application were on technical grounds which did not give any scope for review. The applicants could pursue their remedy by way of special leave to appeal and therefore the application had to be dismissed.

4. i have considered the contentions of Shri Parag Rao, learned Advocate for the applicants and Shri A.F. Diniz, learned Advocate for the respondents. At the outset and unlike the contentions of Shri Rao, learned Advocate for the applicants, the issue regarding the boundary dispute was duly dealt with in the judgment under review after considering a host of judgments and finding given that there was no necessity for the appointment of a Commissioner by this Court even considering the judgment in **Bento Antonio**

Gomes alias Antonio Bento gomes v/s. Rosario Salvator Carneiro and others [2014(4) Mh.L.J. 366]. Therefore the question of setting aside the judgment and remanding the matter to the Appellate Court for the appointment of a Commissioner would not at all arise. This is after taking into consideration the contentions of Shri Rao, learned Advocate for the applicants that a holistic view was required to be taken in the matter and that it would bring about a finality to the lis between the parties. Insofar as his other contention is concerned that the judgments were not referred by the learned First Appellate Court, a finding was given to that effect at paragraph 29 of the judgment under review though at the same time an observation was made that the learned First Appellate Court had broadly observed that the judgment did not apply to the facts of the case at large. The arguments of Shri Rao, learned Advocate did not find merit and therefore were not addressed to in the judgment under review. These contentions too, need not call for an interference with the judgment as to qualify an error apparent on the face of the record.

5. A copious reference was made by Shri Rao, learned Advocate for the applicants to the judgment of the First Appellate Court wherein the learned First Appellate Court had taken the applicants by surprise by referring to the issue of declaration not being asked and that the relief was restricted to an injunction simplicitor. May

be Shri Rao, learned Advocate has a point in that regard which by itself would not entitle him to a review of the judgment when that aspect of the matter was duly considered in the Second Appeal. Moreover insofar as the records in the Roznama and the CMIS are concerned, due reference was made to the same in the judgment under review at paragraph 29 to the effect that the First Appellate Court had made a record as on 21/01/2017 that arguments and written arguments were taken into consideration as no oral arguments were advanced before the learned Judge and in that view of the matter had pronounced the judgment. The contention of Shri Rao, learned Advocate for the applicants that no opportunity of hearing was given by the learned First Appellate Court and/or that it did not consider any of the judgments also did not find favour with this Court. It is another matter that while referring to these contentions, it escaped the attention of this Court that there was discrepancy in the noting in the Roznama and CMIS but that by itself would not have much bearing on the case when the contentions of the learned Advocates were taken into consideration by the First Appellate Court and the judgment pronounced accordingly.

6. The other contentions of Shri Rao, learned advocate for the applicants on the tenability of the application under Order XLI Rule 27 CPC is concerned was also taken into consideration and a finding

rendered in the judgment in Second Appeal No.28 of 2018. Moreover an indepth reading of the judgment would reveal that a detailed analysis of the evidence recorded before the Trial Court was considered by this Court and also the application under Order XLI Rule 27 CPC and only then findings were rendered on the examination of all the judgments referred to by the learned Advocates for the parties. Shri Rao, learned Advocate for the applicants was unable to show any error apparent on the face of the record as to vitiate the judgment under review and to call for its correction.

7. I therefore do not find any merit in the application which is accordingly dismissed.

NUTAN D. SARDESSAI,J.

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