

IN THE HIGH COURT OF BOMBAY AT GOA**SECOND APPEAL NO. 96 OF 2018**

1. Mr. Rajan Mahadeo Bhat,
son of lat Mahadeo Bhat,
aged 53 years, Indian National,
self employed, resident of
House no.39, Bhandarwada,
Pernem-Goa.
 2. Mrs. Rupali Rajendra Bhat,
wife of Rajendra Bhat, aged 51
years, housewife, Indian National,
resident of House no.39,
Bhandarwada, Pernem, Goa.
(Registered Addresses)
- Appellants

V e r s u s

1. Mr. Manohar Sitaram Nhanji,
son of late Sitaram Nhanji, aged
66 years, married, agriculturist,
resident of House no.57/A,
Bhandarwada, Paliem,
Pernem-Goa.
2. Mr. Govind Vishwanath Bhat,
son of late Vishwanath Bhat, aged,
66 years, married, agriculturist,
resident of House no.40,
Bhandarwada, Paliem,
Pernem-Goa.
3. Mr. Kisan Namdev Parab,
son of late Namdev Parab,
aged 51 years, self employed,
resident of House no.318,
Mirjal Wada, Paliem,
Pernem-Goa.
4. Mrs. Chandrawati Manohar,

Nhanji, wife of Manohar Nhanji,
aged 60 years, housewife,
resident of House no.57/A,
Bhandarwada, Paliem,
Pernem-Goa.

5. Mrs. Suchita Govind Bhat,
wife of Govind Bhat, aged 52 years,
housewife, resident of House no.40,
Bhandarwada, Paliem,
Pernem-Goa.

6. Mr. Dattaram Mahadev Bhat,
son of late Mahadeo Bhat,
aged 65 years, married, Indian
National, service;

7. Mrs. Ujwala Dattaram Bhat,
wife of Dattaram Mahadev Bhat,
aged 59 years, housewife, Indian
National, housewife,

Both residents of N.M.M, Society
Kawala, Thane, Mumbai.

8. Mr. Janardhan Mahadeo Bhat,
son of late Mahadeo Bhat,
aged 48 year, married, Indian
National, self employed;

9. Mrs. Kshitaja Janardhan Bhat,
wife of Janardhan Mahadeo Bhat,
aged 40 years, housewife,
Indian National,
Both residents of Bhandarwada,
Paliem, Pernem-Goa.

..... Respondents

Shri Prasheen Lotlikar for the Appellants.

Shri J. P. Mulgaonkar, for the Respondents.

CORAM: C. V. BHADANG, J.

Reserved on: 10/04/2019

Pronounced on: 03/06/2019

O R D E R:

By this appeal, the appellants, original plaintiffs are challenging the concurrent finding by the Courts below about dismissal of their suit against the respondent.

2. The brief facts are that, the appellants filed Regular Civil Suit no.96/2011 against the respondents and two others, being defendant nos. 4 and 5, who were subsequently dropped. The suit was filed for declaration and permanent injunction. The appellants had sought a declaration that they are the owners in possession of the suit property bearing survey no.32/2 situated at Paliem, Pernem, Goa, admeasuring 48950 sq.mtrs, more specifically described in the plaint. The appellants sought an injunction restraining the respondents from interfering with the suit property.

3. The suit was resisted by the respondent nos.1 and 2 (the defendant nos.1 and 2) inter alia on the ground of non joinder of necessary parties. It was contended that other co owners of survey no.32/2 are not joined as defendants to the suit. It was contended that land survey no.32/2 is

admeasuring 37967 sq.mtrs and not 48,950 sq.mtrs as claimed by the appellants. It was contended that the appellants are in actual possession of an area of 37,967 sq.mtrs only and are trying to usurp an additional area of 10,983 sq.mtrs. It was contended that the Director of Land Survey had asked the appellants to surrender the plan of the suit property issued on 22/1/2009 and collect the corrected plan, as according to the Director of Land Survey, the plan issued on 22/1/2009 was issued purely due to a technical error, which had occurred at the time of the computerization of the plan. It was thus contended that the appellants cannot place reliance on the plan dated 22/1/2009.

4. On the basis of the rival pleadings the learned trial court framed the following issues:

- 1) Whether the plaintiffs prove that they along with their family members are in possession and enjoyment of the suit property bearing survey no.32/2 admeasuring an area of 48950 sq.mtrs since last more than 50 years?
- 2) Whether the plaintiffs prove that Directorate of Settlement and Land Records has made major changes in the survey plan to the extent, adjoining to the line of property bearing survey no.32/3 to 31?

3) Whether the plaintiffs prove that they are entitled for injunction restraining defendant nos.1 and to 3 and 6 from interfering from the suit property survey no.32/2 admeasuring an area of 48950 sq.mtrs.?

4) Whether the defendant nos. 1 to 3 and 6 prove that the suit is bad in law?

5. The appellant, Mr. Rajan Bhobe examined himself as PW.1 and a Civil Engineer, Mr. Mahadev Naik Tuyekar as PW.2 and produced certain documents. The respondents/defendants did not examine any witness.

6. The learned trial court answered the issues nos. 1 to 3 in the negative and the issue no.4 in the affirmative and dismissed the suit by a judgment and decree dated 6/5/2016.

7. Feeling aggrieved, the appellants challenged the same before the learned District Judge in Regular Civil Appeal no.53/2016. The learned District Judge framed a solitary point for consideration, namely, whether the appellants/plaintiffs have proved, that the total area of the suit property is 48950 sq.mtrs and answered the point in the negative and dismissed the appeal by a judgment and decree dated 27/2/2017. Hence this appeal.

8. I have heard Shri Lotlikar, the learned Counsel for the appellants and Mr. Mulgaonkar, the learned counsel for the respondents. Perused record.

9. The appellants have proposed the following draft substantial question of law, which according to them arise in the Second Appeal and an additional substantial question of law :

1) Whether the findings of the Courts below stand vitiated on account of the fact that both the courts have failed to consider that the expert witness in his evidence had deposed that as per the Gift Deed the area of the property bearing survey no.32/2 was 48,950 sq.mtrs., which conclusively proved that the appellants were in possession of an area of 48,950 sq.mtrs. and hence was entitled to a permanent injunction restraining the respondents from interfering with the property?

2) Whether the findings of the Courts below that the suit filed by the appellants was barred by limitation is contrary to law and pleadings on record, in as much as, no evidence was led by the respondents to disprove the case of the appellants, with respect to the cause of action that had arisen for the filing of the present suit?

Additional substantial question of law:

1) Whether both the courts below failed to appreciate that the suit of the appellant/plaintiff was basically a suit for demarcation and therefore the said suit could not be dismissed without a commissioner being appointed for the purpose of determining the area and the boundaries of the property at loco?

10. It is contended by Shri Lotlikar, the learned counsel for the appellants that the Courts below were in error in holding that the appellants have failed to prove that the area of the suit property was 48950 sq.mtrs, particularly, in the wake of the fact that in the Gift Deed the area of the suit property was mentioned as 48,950 sq.mtrs. It is submitted that the Courts below ought to have appointed a Court Commissioner in order to ascertain the actual area of the suit property. For this purpose, reliance is placed on the decision of this Court in the case of **Mr. Bento Antonio Gomes alias Antonio Bento Gomes Vs. Rosario Salvador (Second Appeal no.24/2004, decided on 6/12/2013)**.

It is submitted that it is a settled proposition that in a dispute of the present nature, it is appropriate and obligatory on the part of the Court to appoint a Commissioner for local investigation and then to decide the matter which is not done. It is submitted that the Courts below were also in error in holding

that the suit was barred by limitation. It is submitted that the suit is basically a suit for demarcation and the same could not have been dismissed without a Commissioner being appointed, for the purpose of determining the area and the boundaries of the suit property at the location. Except these, there are no other contentions raised.

11. Shri Mulgaonkar, the learned counsel for the respondents on the contrary has supported the impugned judgment. It is submitted that the Courts below after threadbare consideration of the oral and documentary evidence led by the appellants have rightly come to the conclusion that the appellants have failed to prove that the area of the land survey no. 32/2 was 48,950 sq.mtrs and in the absence of the said finding being shown to be perverse, no interference, in a second appeal, is called for. It is submitted that the concurrent finding recorded by the Courts below is based on the appreciation of the evidence. It is submitted that the appellants are trying to take disadvantage of the error in issuing the plan dated 22/1/2009 which is not permissible. It is submitted that the suit also cannot be said to be one for demarcation and/or for determination of the boundaries of the suit property . It is submitted that the appellants already having examined a civil engineer, namely Mahadeo Tuyekar, cannot now justifiably claim that the courts ought to have appointed a commissioner for local investigation. It is submitted that

the reliance placed on the decision of this Court in the case of **Mr. Bento (supra)** is misplaced.

12. I have considered the circumstances and the submissions made and I do not find that the appeal raises any substantial questions of law.

13. The case made out by the appellants, is that land survey no.32/2 better known as “Visbhat Bagayat” or “Bagayat vis Boto” is admeasuring 48950 sq.mtrs and not 37,967 sq.mtrs., as shown in the survey record i.e Form no.1 and XIV. According to the appellants, the land known as “Visboto or Bagayat Vis Boto” was allotted to the father of the appellant no.1 i.e late Mahadeo Balkrishna Bhat, in the Inventory Proceedings held in the court of the learned Civil Judge, Senior Division, Mapusa, on the death of his grandfather late Janardan Mahadeo Bhat, from Pallem, which was registered as Inventory Proceedings no.353/1919 and which was decided on 9/7/1938. The father of the appellant no.1, under a Deed of Gift dated 19/10/1976 gifted one third of out of the land, received by him in the inventory proceedings, in favour of his three sons, namely, Dattaram Mahadeo Bhat, Janardhan Mahadev Bhat and the appellant no.1, Rajan Mahadeo Bhat. Significantly the Gift Deed is silent about the area which has been gifted to the three brothers.

14. Be that as it may, it appears that earlier there was a suit filed by the original defendant no.1 against the appellants being RCS no.15/1997 claiming access through the land survey no.32/2. In that suit, the appellant no.1 examined himself as DW.1 and a copy of the Form no.I and XIV of the suit property was produced at Exhibit DW1/C. This was somewhere in the year 2000. The Courts below have found that the present PW.1 (who was examined as DW.1 in RCS No.15/97) had admitted and/or not disputed the correctness of the Form No.I and XIV which showed the area of the land survey no. 32/2 as 37,960 sq.mtrs. This is one of the reasons why the trial court has held that the suit was barred by limitation inasmuch as the trial court has found that the suit has to be brought within three years of the accrual of the cause of action and thus the present suit which was filed in the year 2010 when the appellant was aware about the area of the land being 37,960 sq.mtrs. in the year 2000 itself, was barred by limitation. That apart, both the Courts below have concurrently found that the suit is based on a survey plan at Exhibit 24, which the DSLR vide their letter dated 9/3/2010 (Exhibit 29) had claimed to be incorrectly issued, on account of some technical error and the correct plan was subsequently issued on 26/2/2009. Thus the DSLR had specifically claimed that the plan earlier issued on 22/1/2009 was incorrect. In my considered view the courts below are right in coming to the conclusion that the plaintiffs are trying to take advantage of the

plan dated 22/1/2009, which the plaintiffs were asked to surrender as being an incorrect plan. There is a earlier plan issued on 4/3/1986, which is the correct plan. PW.1 had admitted that in the year 1997 the area of the suit property was shown in the Form No.I and XIV as 37,967 sq.mtrs. and he does not have any other Form No.I and XIV to show that its actual area is 48,950 sq.mtrs. PW.1 further admitted that he did not take any steps to rectify the survey no.32/2 from 1997 till the filing of the suit, i.e till 2010. The first appellate court has also noted that PW.1 had admitted that in RCS no.15/1997, he had not disputed the correctness of the area as shown in Form No.I and XIV to be 37,961 sq.mtrs.

15. In so far as the evidence of PW2 is concerned, he had carried out survey and his report dated 11/10/2008 is based on the survey plan (Exhibit 36) and he admitted that there is a difference in the area of survey no.32/2 in the survey plan (Exhibits 25 and 36). Considering the overall circumstances it is clear that the suit was filed only on account of the fact of issuance of the plan dated 22/1/2009, which immediately thereafter the DSLR came to be issued out of inadvertence and a corrected plan was subsequently issued on 26/2/2009 asking the appellants to surrender the plan dated 22/1/2019 which they did not do. The finding so recorded is on appreciation of the oral and documentary evidence on record and cannot be faulted with.

16. The reliance placed on behalf of the appellants in the case of **Mr. Bento Antonio Gomes (supra)** to my mind is misplaced. There cannot be any manner of dispute with the proposition that normally, in a dispute as to encroachment and/or demarcation, the Courts would do well to appoint an expert commissioner, in order to enable it to arrive at a proper conclusion. In the case of **Mr. Bento (supra)**, the existence of a mud ridge, separating the property of the plaintiffs and the defendants was accepted by both the Courts below. The trial court had decreed the suit. There were three expert reports available on record, two in support of the case of the plaintiffs and one in the support of the defendant's claim. The learned trial court decreed the suit relying on the expert's evidence produced on behalf of the plaintiffs. However, the appellate court disbelieved the expert's evidence on behalf of the plaintiffs as well as the defendants. It was in these circumstances found by this Court that it was necessary on the part of the learned appellate court to remit the matter to the learned trial court for appointing of a Commissioner for effecting local investigation, particularly when, on facts existence of the mud ridge was accepted by both the courts. It was in these circumstances that this Court remitted the matter back to the trial court for appointing a commissioner for local investigation. In my considered view, the case clearly turned on its own facts.

17. In the present case in hand neither the inventory proceedings nor the Gift Deed of the year 1976 refers to any specific area. All along in the Form No.I and XIV the area of the suit property is shown as 37,967 sq.mrs and not 48,950 sq.mtrs. This was also not disputed in the year 2000 by PW.1 in Regular Civil Suit no.15/97. The suit clearly appears to be the outcome of an inadvertent error by the office of DSLR in issuing a plan dated 22/1/2009 which was followed by issuance of a corrected plan on 26/2/2009. In that view of the matter, the contention on behalf of the appellants that the Courts ought to have appointed a Commissioner for local investigation to my mind cannot be accepted. The appeal is without any merit and it is accordingly dismissed with no order as to costs.

C. V. BHADANG, J.

Ap/