

Andreza

**IN THE HIGH COURT OF BOMBAY AT GOA
SECOND APPEAL NO. 31 OF 2005**

1. Mr. Santosh Savlo Kothawale alias Naik (since deceased)

2. Mrs. Shalini Santosh Kothawale alias Naik, major, housewife, (wife of Appellant no.1)

2a) Pradeep Kothwale, (son of deceased Appellant no.1), major in age

2b) Prashant Kothwale, (son of deceased Appellant no.1.), major in age, r/o H. No. 63-A, Grand Pondse, Madel.

2c) Archana Arun Pednekar, (daughter of deceased Appellant No.1), major in age, r/o. H. NO. 71, Gawas wada Brahmapur.

2d) Arun Pednekar, (son-in-law of deceased Appellant), major in age, r/o. H. N. 71, Gawas wada Brahmapur.

2e) Asha/ Yogita Yeshwant Gadekar, (daughter of deceased Appellant No.1), major in age, R/o. Warkhand, Vethal temple, Pernem-Goa.

2f) Yeshwant Gadekar, (son in law of deceased Appellant no.1), major in age, R/o. Warkhand, Vethal temple, Pernem-Goa.

...Appellants

Versus

1. Shri Harishchandra Savlo Kothawale
(since deceased)

1a) Shri Rupesh Harishchandra Naik,
S/o. Late Harishchandra Naik, Age 31
years, Married, Private Service,

1b) Smt. Dipti Vithoba Dessai alias
Rashmi Rupesh Naik, Major of age,
Married, Housewife, Both residing at
H. No. 63/1, Grand Poxem, Thivim,
Bardez, Goa.

2. Mrs. Taramati Harishchandra
Kothawale alias Raul alias Naik, (since
deceased)

3. Smt. Leelavati Yeshwant Kothawala
alias Raul alias Naik, (Deleted)

4. Mr. Madhukar Yeshwant Kothawale
alias Raul alias Naik, (Since deceased)

a) Mrs. Monali Madhukar Yeshwant
Kothawale alias Raul alias Naik, w/o.
Mr. Madhukar Yeshwant Kothawala
alias Raul alias Naik alias Manohar Y.
Naik, major in age, housewife,

b) Miss Yamuna Madhukar Yeshwant
Kothawale alias Raul alias Naik alias
Manohar Y. Naik, d/o. Mr. Madhukar
Yeshwant Kothawala alias Raul alias
Naik alias Manohar Y. Naik, major in
age, service, and

c) Mr. Yatin Manohar Naik alias
Kothawale alias Raul, s/o. Mr.

Madhukar Yeshwant Kothawala alias Raul alias Naik alias Manohar Y. Naik, minor. Represented through his guardian, Mrs. Monali Madhukar Yeshwant Kothawale alias Raul alias Naik w/o. Mr. Madhukar Yeshwant Kothawala alias Raul alias Naik alias Manohar Y. Naik, major in age, housewife, r/o. H. No. 63/1, Grand Poxem, Tivim, Bardez, Goa. (4a).

All r/o. H. No. 63/1, Grand Poxem, Tivim, Bardez, Goa.

5. Mr. Ravi Yeshwant Kothawale, alias Raul alias Naik, major, agriculturist.

All residents of Poxem-Madel, Tivim, Bardez, Goa.

...Respondents

Mr. S. D. Lotlikar, Senior Advocate as Amicus Curiae for the Appellants.

CORAM: MANISH PITALE, J
DATE : 20th October 2021

ORAL JUDGMENT

1. By this appeal, the Appellants (original Defendants) have challenged Judgment and order dated 13.10.2004, passed by the Court of Adhoc Additional District Judge, Panaji, in Regular Civil Appeal No. 158 of 2002, whereby the Appeal was allowed and the suit filed by the Respondents was decreed, directing the Appellants to vacate the suit structure and restore possession of the same to the Respondents.

2. The Respondents (original Plaintiffs) filed a suit for permanent injunction and recovery of possession against the Appellants, claiming that they had purchased the property at survey no. 399/7 in Village Tivim. According to the Respondents, the Appellants were illegally in possession of a structure in the said suit property and that the Respondents were entitled for a Decree for recovery of possession and an order of injunction restraining the Appellants from undertaking construction of any type in the suit property.

3. The Appellants filed their written statements and denied that the Respondents had purchased the aforesaid suit property as per Sale Deed dated 15.11.1968. According to the Appellants, the Respondents had actually purchased the adjoining property in survey no. 398/4 and that the owner of both the properties was one and the same person. According to the Appellants, the parents of the Appellant no.1 had constructed a mud house in the suit property at survey no. 399/7 and that they had acquired the status of Mundkar in the property in question.

4. The Court of Civil Judge Junior Division i.e. the Trial Court, framed issues for determination. In view of the dispute raised by the Appellants regarding the identity of the suit property and its location, the Trial Court specifically framed issue nos. 1 and 4 as follows:

“1. Whether the plaintiffs prove that they are co-owners in exclusive possession of the property known as 'Ponsxem' surveyed under

*no. 399/7 of Village Tivim, Bicholim, Goa,
Purchased vide sale deed dated 15.11.1968?*

...

4. Whether the defendants proves that the property purchased by the plaintiffs in not the suit property but an adjoining property surveyed under no. 398/4 vide sale deed dated 05.11.1968 belonging to late Monica Severina Lobo ?”

5. After taking into consideration the pleadings and the evidence led by the rival parties, the Trial Court came to the conclusion that the property actually purchased by the Respondents was completely different from the suit property and that, therefore, the Respondents had failed to prove that they were co-owners in exclusive possession of the suit property, thereby answering the above quoted issue no.1 in the negative against the Respondents and issue no.4 in the affirmative in favour of the Appellants.

6. On this basis and findings rendered on the other issues, the Trial Court dismissed the suit.

7. Aggrieved by the same, the Appellants filed Regular Civil Appeal No.158 of 2002, before the District Court. The Appellate Court framed two points for consideration and answered both in favour of the Respondents. While reversing the findings rendered by the Trial Court, particularly on the issue as to whether the

Respondents had indeed purchased the suit property under Sale Deed dated 15.11.1968, the Appellate Court held that since the Appellants, as the Defendants, had failed to prove their specific contention that the Respondents had purchased the property from survey no. 398/4 under Sale Deed dated 15.11.1968, the case of the Respondents was strengthened as regards their claim of having purchased the property bearing survey no. 399/7 i.e. the suit property under the aforesaid Sale Deed. Thereafter, the Appellate Court also rendered findings on other aspects against the Appellants and allowed the Appeal. Consequently, the suit was decreed in terms of the prayers made therein.

8. The Appellants filed the present Second Appeal before this Court. By order dated 01.09.2005, the appeal was admitted on the following substantial questions of law:

“(1) Whether the appeal Court was justified in holding that the Sale Deed dated 15.11.1968 relates to the subject property?”

“(2) Whether the first appellate Court committed illegality in shifting the burden of proof on the appellant overlooking that the appellant (the original defendant) having disputed the identity of the suit property purchased under the Deed of Sale dated 15.11.1968, the burden of proof lay solely on the respondent (original plaintiff) to prove identity of the suit property?”

9. The Respondents were served but they chose not to appear before this Court. Mr. S. D. Lotlikar, the learned Senior Counsel, was appointed as Amicus Curiae for the Appellants. He has advanced submissions in the context of the above quoted substantial questions of law framed by this Court.

10. The learned Senior Counsel submitted that in the present case, there was a serious dispute as regards the very identity of the suit property. On one hand, the Respondents claimed that they had purchased the property at survey no. 399/7 under Sale Deed dated 15.11.1968, while on the other hand, the Defendants i.e. the Appellants herein claimed that the subject matter of the aforesaid Sale Deed was the adjoining property at survey no. 398/4. By referring to the material available on record, the learned Senior Counsel brought to the notice of this Court that there was dispute even with regard to the boundaries of the property in question and, in such circumstances, the Court ought to have appointed a commissioner for ascertaining the actual facts of the matter. As regards the question of burden placed on the Appellants with regard to the identity of the suit property and whether it was subject matter of Sale Deed dated 15.11.1968, the learned Senior Counsel submitted that the Appellate Court had obviously erred in placing the burden on the Appellants who were the original Defendants, because the burden was on the Respondents as the original Plaintiffs to prove their claim that the suit property was subject matter of the aforesaid Sale Deed dated 15.11.1968. The learned Senior Counsel placed reliance on judgment of this Court in the case of *Mr. Bento Antonio Gomes alias vs. Rosario Salvador Carneiro*¹, in order to

¹ Second Appeal No. 24 of 2004 dt 06.12.2012

support the contention that the Courts below ought to have appointed a Court Commissioner for local investigation to ascertain the facts of the matter. Reliance was also placed on the Judgment of the Hon'ble Supreme Court in the case of *Haryana Waqf Board vs. Shanti Sarup & Shanti Satrup & Ors.*².

11. This Court has perused the pleadings of the parties and the material on record, as also the Judgments of the Trial Court and Appellate Court in the light of the submissions made by the learned Senior Counsel. A perusal of the plaint would show that the Respondents claimed that they purchased the suit property located in the property at survey no. 397/7 as per Sale Deed dated 15.11.1968. The whole case of the Respondents while seeking permanent injunction and recovery of possession was based on the aforesaid assertion that they purchased the suit property under the aforesaid Sale Deed, located at survey no. 399/7.

12. In the written statement, the Appellants strongly denied the claim of the Respondents and instead claimed that the subject matter of the aforesaid Sale Deed was adjoining property located under survey no. 398/4. Record also shows that there was serious dispute as regards the description of the boundaries of the suit property. It is for this reason that the Trial Court framed issue nos. 1 and 4, quoted above. The whole dispute appears to be as to whether the suit property which was allegedly purchased under the aforesaid Sale Deed was located in survey no. 399/7 or 398/4 of Village Tivim. The Trial Court reached findings in favour of

² (2008) 8 SCC 671

the Appellants on the basis of the documents available on record, which have been upset by the Appellate Court.

13. A perusal of the Judgment of the Appellate Court would show that the findings specifically rendered in favour of the Appellants have been upset, not on the basis of evidence led by the original plaintiffs i.e. the Respondents herein, but on the alleged failure of the Appellants in failing to prove that the subject matter of the Sale Deed relied upon by the Respondents was the property in survey no. 398/4. The tenor of the judgment of the Appellate Court clearly shows that the burden was completely shifted on to the Appellants i.e. the original Defendants, to prove that the claim of the Respondents was not correct. In fact, the entire burden was on the Respondents, being the original Plaintiffs, to prove their claim with positive evidence that the suit property, which was subject matter of the aforesaid Sale Deed dated 15.11.1968, was indeed the property located in survey no. 399/7. Therefore, to that extent, the approach adopted by the Appellate Court is found to be unsustainable and the second substantial question of law framed by this Court deserves to be answered in favour of the Appellants.

14. Insofar as the first substantial question of law is concerned, the findings rendered by the Appellate Court that the property subject matter of the Sale Deed dated 15.11.1968 was the suit property, revolves around the identity of the property because there is indeed confusion regarding the boundaries of the property in question, particularly in the backdrop of properties at survey nos. 399/7 and 398/4 being adjoining properties.

15. In this context, the learned Senior Counsel is justified in contending that in the face of such apparent confusion, in order to better elucidate the matter in dispute, the Courts below, particularly the Trial Court, ought to have appointed a commissioner so that the facts of the matter could have been clarified.

16. Under Order 26 Rule 9 of the Civil Procedure Code (CPC), in any suit that the Court deems a local investigation to be necessary for the purpose of elucidating any matter in dispute, the Court can appoint a commissioner i.e. a person as it thinks fit, directing him to make such an investigation and to report to the Court. It is not necessary for either party to the dispute to make an application for appointment of Commissioner and the exercise of such powers under Order 26 Rule 9 of CPC is not dependent upon such an application being preferred by either party. The Court can, on its own, exercise its power so that the dispute is put to rest once and for all. In this context, the learned Senior Counsel is justified in relying upon the judgment of the Hon'ble Supreme Court in the case of *Haryana Waqf Board vs. Shanti Sarup & Shanti Satrup & Ors.* (supra), and the judgment rendered by this Court in the case of *Mr. Bento Antonio Gomes alias Antonio Bento Gomes* (supra). In the said cases, it was held by the Court that in such situations, when local investigation is warranted, the Court ought to exercise its power under Order 26 Rule 9 of CPC to elucidate any matter in dispute.

17. In the present case, as noted above, there is a serious dispute as regards the identity of the property and as to which

property was the subject matter of the Sale Deed dated 15.11.1968, apart from the fact that there appears to be confusion as regards the exact boundaries of the suit property. In such a situation, the Trial Court ought to have exercised powers under Order 26 Rule 9 of CPC, to appoint a Commissioner and then to have further proceeded in the matter. The first substantial question of law framed by this Court can be answered by directing the Trial Court to take appropriate steps in the matter to appoint a Commissioner and then to proceed further.

18. In view of the above, the present Appeal is partly allowed. The orders passed by the Appellate Court as well as Trial Court are set aside. The Trial Court is directed to exercise powers under Order 26 Rule 9 of CPC and to appoint a commissioner to carry out the local investigation and to submit report before the Court. The Trial Court shall then proceed to grant opportunity to the rival parties to take further steps in the matter, in accordance with law so that the dispute regarding the identity of the property and consequent questions that arise between the parties can be answered on the basis of appropriate material that will come on record.

19. The parties shall appear before the Trial Court on 15.11.2021 at 10.00 a.m.

20. The Registry is directed to send the original records back to the Trial Court forthwith.

21. Needless to say, since the orders of the Trial Court as well as the Appellate Court are set aside, the other issues arising

between the parties, including the issue of Mundkarship, are kept open. The Trial Court is directed to expedite the proceedings.

MANISH PITALE, J.

ANDREZA PEREIRA Digitally signed by ANDREZA PEREIRA
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