

Amrut

IN THE HIGH COURT OF BOMBAY AT GOA

SECOND APPEAL NO.11 OF 2010

1. Shri Srikrishna Jairam Shetye,
son of late Jairam Shetye, major age,
married, presently not employed, Indian
National, resident of Manaswada, Ribandar,
Goa. (The Original Defendant No.2).
Now deceased represented by Lrs Respondent
Nos. 4 and 5.

2. Shri Kashinath Jairam Shetye,
son of late Jairam Shetye, major age,
married, service, Indian National,
resident of Manaswada, Ribandar Goa. (The
Original Defendant No.1.)

...Appellants

Versus

1. Shri Deelip Raghavendra Shetye,
house no.E-58, Patto, Ribandar Goa.
(The Original Plaintiff)

2. Shri A. G. Kalangutkar,
Notary cum Advocate, Gudem, Siolim, Goa.
(The Original Defendant No.3)

3. Shri Haroon Ibrahim,
Proprietor, Magnum Constructions,
Magnum Chambers, St. Inez, Panaji Goa.
(The Original Defendant No.4).

4. Ms. Divya Shrikrishna Shetye,
d/o late Shrikrishna Jairam Shetye,

age not known, Indian,
r/o Opp. Kutikar Stores,
Pavelim, Bainguinim,
Old Goa, Goa.

Through her legal Guardian & mother,
Mrs. Sangeeta Shrikrishna Shetye,
major in age, Indian,
r/o Opp. Kutikar Stores,
Pavelim, Bainguinim,
Old Goa, Goa.

5. Mrs. Sangeeta Shrikrishna Shetye,
Major in age, Indian,
r/o Opp. Kutikar Stores,
Pavelim, Bainguinim,
Old Goa, Goa.

...Respondents

Mr. Ryan Menezes, Advocate for the Appellants.
Mr. Sudin Usgaonkar, Senior Advocate with Ms. Tanvi Kamat
Ghanekar, Advocate for Respondent No.1.

CORAM: M. S. SONAK, J.

Date: 3rd September 2021

ORAL JUDGMENT

1. Heard Mr. Menezes, learned counsel for the Appellants – Defendant Nos. 1 and 2 and Mr. Sudin Usgaonkar, learned Senior Advocate who appears along with Ms. Tanvi Kamat Ghanekar for Respondent No.1 – Plaintiff.

2. The Appellants were the original Defendant Nos. 1 and 2 and Respondent No.1 was the original Plaintiff in Regular Civil Suit No. 152/99/C instituted before the Trial Court seeking *inter alia* for the following reliefs:

(a) a declaration that the agreements dated 12.05.1998 are null and void;

(b) a decree of permanent injunction restraining Defendant Nos. 1 and 2 from interfering with the suit premises as described in the plaint.

3. Mr. Usgaonkar, learned Senior Counsel for the Plaintiff, on instructions, submitted that ultimately the relief for declaration of agreements dated 12.05.1998 was not pressed as it was not found to be necessary. The plaintiff however pursued the suit to seek the relief of permanent injunction restraining Defendant Nos. 1 and 2 from interfering with the suit premises.

4. Plaintiff led oral evidence and also produced documentary evidence on record. Defendant Nos. 1 and 2 did not step into the witness box to lead any evidence.

5. The Trial Court by judgment and decree dated 20.01.2009 decreed the suit and granted a permanent injunction restraining Defendant Nos. 1 and 2 from interfering with the suit premises. The Trial Court clarified that the suit premises in the present case

were the shop bearing No.20, even though, this very shop, earlier has been described as shop No.21.

6. The First Appellate Court, vide judgment and decree dated 06.11.2009 has confirmed the decree made by the Trial Court. Hence, the present Second Appeal.

7. This Second Appeal was admitted on 16.11.2010 on the following substantial questions of law:

i) Whether in view of the fact that the shop no.20 was never the subject matter of the suit before the Trial Court, in as much as there was no pleading whatsoever with regards to shop no.20 in the plaint, which dealt only with shop no.21, to which clear and unequivocal reference was made in the plaint as being the suit premises, the trial Court could not have passed any decree with regards to shop no.20?

ii) Whether the First Appellate Court committed a grave error in failing to appreciate that the Hon'ble trial Court has by recording a finding that shop no.20 and shop no.21 were the same premises, with regards to which there were absolutely no pleadings, and which was not a fact in issue between the parties, has gone beyond the scope of the pleadings and has proceeded on that basis to pass a decree of permanent injunction with regard to a premise that was not the subject matter of the suit, and was indeed wholly extraneous to it?

8. Mr. Menezes learned counsel for the Appellants submits that the Plaintiff had sought for a decree in respect of shop No.21. An attempt was made to amend the plaint and to substitute number 21 with the number 20. However, this amendment was not allowed by the Trial Court. Even the Writ Petition No. 355 of 2007 against this order was dismissed by this Court by order dated 03.08.2007. Mr. Menezes submits that therefore there were no pleadings in the suit that shop Nos.20 and 21 were the same or that the shop actually allotted to Plaintiff was shop No.20. He submitted that no amount of evidence that is not backed by pleadings can even be looked into. Since two Courts failed to apply this principle, the impugned judgments and decrees warrant interference.

9. In the alternate, Mr. Menezes submits that no evidence whatsoever was led by Plaintiff to demonstrate that shop Nos.20 and 21 are the same or that what was allotted to Plaintiff was shop No.20 though it was initially numbered as 21. He, therefore, submits that the findings recorded by the two Courts are vitiated by the evidence on record.

10. Finally, Mr. Menezes submits that the First Appellate Court has not considered the issue of proof not backed by pleadings even though the same was raised both in the appeal memo as well as at the time of the oral arguments before the First Appellate Court.

11. Mr. Usgaonkar learned Senior Advocate defends the impugned judgments and decrees based on the reasoning reflecting therein. He submits that this Court's order dated 03.08.2007 in Writ Petition No.355 of 2007 is quite clear in saying that the Plaintiff was granted an opportunity to lead evidence and clarify the discrepancy arising out of the renumbering of shops. Mr. Usgaonkar submits that in pursuance of such liberty, the evidence was led and such evidence was not even challenged by Defendant Nos. 1 and 2 in cross-examination. Mr. Usgaonkar submits that even otherwise, there is overwhelming evidence on record in support of Plaintiff's case. He submits that there are concurrent findings of fact and no interference is warranted in the Second Appeal.

12. The rival contentions now fall for determination.

13. In the context of substantial questions of law as framed, the main issue to be decided in this Second Appeal is whether the findings concurrently recorded by the two Courts travel beyond the pleadings of the parties. There can be no dispute about the proposition that no amount of proof that is not backed by pleadings can be looked into or appreciated in a matter of this nature. The crucial question is whether this principle is attracted to the facts and circumstances of this case or rather even after applying such a principle whether it can be said that the findings

concurrently recorded by the two Courts travel beyond the pleadings.

14. In the plaint, Plaintiff has no doubt referred to shop No.21 as the shop which was allotted to him by the builder in terms of the agreement dated 30.04.1997. However, at the later stage, it transpires that the builder renumbered the shop premises, and therefore, for proper identification and to avoid any confusion the Plaintiff applied for leave to amend the plaint. No such leave was granted by the Trial Court vide its order dated 09.05.2007.

15. Plaintiff then instituted Writ Petition No.355 of 2007 before this Court to question the order dated 09.05.2007. This petition was not simpliciter dismissed as urged by Mr. Menezes but rather, a detailed order was made on 03.08.2007 in the same.

16. The order dated 03.08.2007 is crucial and therefore, the same is transcribed below for the convenience of reference.

“This writ petition impugns an order dated 9.5.2007 passed by the Civil Judge, J.D. 'C; Court, Panji rejecting the application for amendment of the plaint under O.6, R.17 of the Civil Procedure Code. The present petitioner who is plaintiff in the suit had filed the Special Civil Suit No.152/99/C for declaration that an agreement dated 12.5.98 was null and void. The suit further sought a permanent injunction restraining defendant Nos. 1 & 2, their agents and servants from interfering in any manner in the suit premises. The

suit premises were described as a shop No.21. According to the plaintiff, the suit premises were allotted to him by the builder who is now impleaded as defendant No.4 in the suit, under an agreement dated 13.4.97. The said agreement indicates that the shop to be allotted after reconstruction to the present petitioner was shop No.21. This shop No.21 was in fact specifically marked on the sanctioned construction plan of the ground floor annexed to this agreement. If the agreement for allotment is taken in to account and the map annexed thereto if perused there can be no doubt about the identification of the suit shop. However, in the agreement dated 12.5.98 which has been executed by the builder in favour of respondent No.2, there is no shop number mentioned. The plaintiff filed an application for amendment in which he has contended that the owner had subsequently changed or altered the original plan of the 'Magnum Center.' Suit premises which were shown as shop No.21, were given shop No.20 in the new plan. He therefore, sought another amendment asking that shop No.20 should be referred to as suit premises. This has been rejected by the trial court on the ground that it would change the nature of the suit. **In my view, the rights of the petitioner/ original plaintiff are governed by his own agreement and there is no doubt in respect of identification of the shop which was allotted to the present petitioner/original plaintiff. The description in the agreement in his favour in the plan annexed to the agreement, fully identifies the property in respect of which the plaintiff has right. Any subsequent action on the part of builder, of changing the number of shop, does not in any way affect the right of the plaintiff on the shop allotted to him under agreement dated 13.4.97. In fact plan which is annexed to the agreement is the sanctioned plan**

duly sanctioned by the competent authority and this cannot be altered by the builder. Even if he changes some numbers, that will nowhere affect the plaintiff's right in the suit. Affidavit and reply of respondent No. 1 & 2 are taken on record. It is always open to the plaintiff to explain development in his evidence. I don't feel there exists any need to entertain the petition and same stands dismissed."

17. Now from the perusal of the order dated 03.08.2007, even though the conclusion is that the Court did not feel the necessity to entertain the petition and dismissed the same, reasons for this were spelled out earlier. From the reasons, it is apparent that this Court believed that the amendment was not necessary in the facts and circumstances of the case because it was always open to Plaintiff to lead proper evidence and to explain about the change of numbers. This Court made it clear that merely because there was some change of number that would not affect the substantive rights of the parties and it was always open to the Plaintiff to explain this position by leading evidence. Therefore, this is not a case where this Court endorsed in entirety the order of Trial Court dated 09.05.2007 rejecting leave to amend the plaint but rather this Court, held that there was no necessity to amend the plaint, but issue about the change of number could be suitably explained by leading evidence.

18. This Court's order dated 03.08.2007 was not challenged either by Plaintiff or Defendant Nos. 1 and 2 before the Hon'ble

Apex Court rather, in compliance with liberty granted to Plaintiff in the order dated 03.08.2007, the Plaintiff, examined himself to explain the discrepancy about numbers. Significantly, this deposition of Plaintiff was not even challenged by Defendant Nos. 1 and 2 even though they had the opportunity to cross-examine Plaintiff on this point, which is now being described as the crucial point in the matter. The two Courts, therefore, accepted the case of the Plaintiff and to my mind, there is no perversity whatsoever in the concurrent findings of fact recorded by the two Courts on this point.

19. The reasons why Defendant Nos. 1 and 2 possibly did not even choose to cross-examine the Plaintiff or challenge the Plaintiff's case is because their case in the written statement was based on agreements dated 12.05.1998. In the written statement, these defendants had pleaded that they would file a separate suit against the builder/developer for the interference of these 1998 agreements. There is nothing on record as to whether or not such a suit was indeed filed or not. However, Mr. Usgaonkar, learned Senior Advocate for the Plaintiff, on instructions, submitted that such a suit was filed by Defendant Nos. 1 and 2 but it was not pursued and the same came to be dismissed for non-prosecution. Be that as it may, this could be the possible reason why Defendant Nos. 1 and 2 did not even bother to challenge the agreements or examine the Plaintiff when the Plaintiff armed with liberty

granted by this Court to produce evidence to explain the discrepancy of numbers. At this stage, therefore, it is too late for Defendant Nos. 1 and 2 to contend that there is variance between the pleadings and proof. This is not a case where there is variance between the pleadings and proof. This is also not a case where evidence that is not backed by pleadings has been considered by the two Courts in recording concurrent findings of fact. The substantial questions of law as framed are therefore required to be answered against the Appellants.

20. The First Appellate Court, in this case, has affirmed the decree made by the Trial Court. The First Appellate Court has even observed that the well-reasoned judgment and decree made by the Trial Court deserves to be upheld. The contention that there is no consideration of plea of variance between the pleadings and proof cannot be accepted. In any case, there is nothing on record to suggest that such a plea was in fact raised or pressed before the First Appellate Court. No application was taken out before the First Appellate Court soon after the First Appellate Court dismissed the first appeal by order dated 06.11.2009 pointing out that this point was in fact urged but not considered. Mere raising a point in the memo of appeal is never sufficient in such matters. The First Appellate Court has however recorded detailed findings as to how it was not contested by Defendant Nos. 1 and 2 that Plaintiff was in possession of the suit premises.

Based on all this, the First Appellate Court was justified in upholding the decree of permanent injunction that was granted in favor of the Plaintiff in this case.

21. For all the aforesaid reasons, this appeal is liable to be dismissed and is hereby dismissed. There shall be no order as to costs.

M. S. SONAK, J.

TARI AMRUT NAGESH Digitally signed by TARI AMRUT NAGESH
Date: 2021.09.03 18:42:14 +05'30'