

Amrut

IN THE HIGH COURT OF BOMBAY AT GOA

SECOND APPEAL NO.81 OF 2010

1. Mr. Pedro Costa
son of late Mariano D'Costa
50 years old, commercial
and his wife,
2. Mrs. Maria Costa
45 years old, housewife,
Both residents of H.No.110-E
(near Khuris (cross)
Verna, Salcete Goa.

... Appellants

Versus

1. Mr. Ernest D'costa
(since deceased) represented
By his legal representatives
(i) Miss Elona de Souza
d/o late Ernest D'Souza
spinster, 35 years old, landlady,
(ii)(a) Mrs. Louella D'Costa
34 years old landlady,
and her husband.
(iii)(b) Adv. Tarzan D'Costa
45 years old,
No.(ii)(a) and (ii)(b) residents of
Flat No.303, Gaspar Apartments
Mala, Panaji Goa.
(iv) Mr. Caetano de Souza
s/o late Ernest D'Souza
32 years old, commercial employee,
(v) Adv. Emidio de Souza
s/o late Ernest de Souza
25 years old, Advocate
Nos.(iv) and (v) residents of

Casa Pinho, H.No.128
Corte de Oiteiro Panaji Goa.

2. Mrs. Maria Silva Pinha,
w/o late Ernest D'Souza,
65 years old, landlady,
Nos. (1) and 2 are residents of H.No.559,
Poriebhat, Verna, Salcete Goa.
3. Mrs. Rita Moniz,
d/o late Jose Moniz,
45 years old, housewife
and her husband;
4. Lucas D'sa
50 years old,
Commercial employee
Both residents of H.No.574,
Poriebhat, Verna, Salcete Goa.
5. Isabel Moniz
d/o late Inacio Moniz,
40 years old, Commercial Employee;
6. Conceicao Moniz,
d/o late Inacio Moniz,
41 years old, Commercial employee;
7. Caitul Moniz
d/o late Inacio Moniz
38 years old, Commercial employee;
8. Joseph Moniz
d/o late Inacio Moniz
Commercial Employee
Respondents no.4 to 7 are
Resident of H.No.573
Poriebhat, Verna, Salcete Goa. ...Respondents

Mr. C. A. Coutinho, Advocate for the Appellants.
None for the Respondents.

CORAM: M. S. SONAK, J

DATED: 23rd September 2021

ORAL JUDGMENT

1. Heard Mr. C. A. Coutinho, learned counsel for the Appellants. Respondents though served, have not appeared at the stage of the final hearing.

2. On 04.04.2013, this Court admitted this Second Appeal on the following substantial question of law.

“Whether the first appellate Court was justified in reversing the decree of the trial Court without analysing the evidence led by the parties, contrary to the ratio laid down by the Apex Court in the case of 'Santosh Hazari Vs Purushottam Tiwari; AIR 2001 SC 965'?”

3. The Appellants are the original defendants and the respondents are the original plaintiffs in the suit in which the plaintiffs sought a declaration about ownership of 2/3rd larger property which was described as the suit property. In this, the plaintiffs included a triangular portion admeasuring about 870 square meters. The defendants had no serious dispute about the plaintiffs' claim of ownership and possession of 2/3rd of the entire property but it is the defendants' case that the triangular portion of 870 square meters forms a part of 1/3rd which had been allotted in their favor and therefore, forms a part of the property owned and

possessed by them. Based on this, the defendants raised a counterclaim seeking a declaration that they are co-owners in respect of this portion of 870 square meters and for a consequential decree for correction of survey records concerning this portion of 870 square meters.

4. The trial Court, vide judgment and decree dated 27.04.2009 dismissed the plaintiffs' suit but decreed the counterclaim. The operative portion of the Trial Court's judgment and decree reads as follows:-

“ **ORDER**

The suit stands dismissed with costs.

The counter claim filed by the defendants No.1,2, 3(a) and (b) and defendant Nos. 4 to 7 stands decreed with costs. Consequently, it is declared that the defendants are the co-owners of the said property including the area of 870 square metres wrongly included in survey No.59/10 of Verna village, Salcete Taluka as indicated in the inspection report and the plan of the engineer K. P. Prabhu Dessai at exhibit 97-C and 98-C colly. The Sub Divisional Officer and Deputy Collector, South Goa is directed to correct the survey records and include the area of 870 square metres as indicated in the plan of the engineer of the said property bearing survey No.59/9 of Verna village, Salcete Taluka.

Decree to be drawn up accordingly.”

5. The plaintiffs appealed and the First Appellate Court, by its judgment and decree dated 06.11.2009 has reversed the trial Court.

The First Appellate Court has decreed the suit of the plaintiffs but dismissed the counterclaim raised by the defendants. Hence, this Second Appeal by the defendants, on the aforesaid substantial question of law.

6. Mr. C. A. Coutinho at the outset made it clear that the Appellants have no dispute to the decreeing of the suit to the extent such decree holds that the plaintiffs are owners in possession of $2/3^{\text{rd}}$ portion of the larger property which has been described as the suit property in the plaint. He, however, submits that this Second Appeal is restricted to the dismissal of the counterclaim by the First Appellate Court thereby holding that the defendants have no right or interest in respect of the portion of 870 square meters, which according to the defendants, forms part of $1/3^{\text{rd}}$ of the larger property allotted in their favor.

7. This is a case of reversal of the decree of the Trial Court by the First Appellate Court. Precisely in this context, the Hon'ble Supreme Court in *Santosh Hazari Vs Purushottam Tiwari*¹ has held that *while writing a judgment of reversal the appellate Court must remain conscious of two principles. Firstly, the findings of fact based on conflicting evidence arrived at by the trial Court must weigh with the appellate Court, more so when the findings are based on oral evidence recorded by the same presiding Judge who authors the judgment. Secondly, while reversing a finding of fact the appellate Court must come*

¹ AIR 2001 SC 965

into close quarters with the reasoning assigned by the trial Court and then assign its own reasons for arriving at a different finding. This would satisfy the Court hearing a further appeal that the first appellate Court had discharged the duty expected of it.

8. Therefore, the question is whether the First Appellate Court, in the present case whilst reversing the trial Court on the issue of counterclaim has followed the principles laid down by the Hon'ble Apex Court in *Santosh Hazari* (supra).

9. The trial court, in this case, has considered the evidence led by the two relevant witnesses examined on behalf of the defendants. The first is the inspection report and the plans prepared by Krishna P. Prabhu Desai who was examined as DW2 in the matter. This inspection report is at Exhibit 98/C. This inspection report refers to the inspection report and plan dated 08/03/97 prepared by Raghuvir N. Pai. The plan prepared by Raghuvir N. Pai is also a part of the record though Raghuvir N. Pai could not be examined because he expired. The trial court relying upon the two plans and the inspection report had recorded a categorical finding of the existence of a rubble stone wall that demarcated the boundaries between the 2/3rd portion allotted to the plaintiffs and 1/3rd portion allotted to the defendants. The trial court based on this material recorded a finding that the portion of 870 square meters fell within the area allotted to the defendants.

10. The trial Court also considered the pleadings of both parties and concluded that the boundaries as pleaded by the defendants were proved by the witnesses as well as documentary evidence on record. This was particularly in the context of pleadings concerning the rubble stone wall. The trial Court also considered the pleadings of the plaintiffs and found that the evidence on record did not support such pleadings. Based on analysis of all this material, the trial Court decreed the counterclaim. The trial Court was obviously wrong in dismissing the plaintiffs' suit in its entirety because there was no serious dispute about the 2/3rd portion of the larger property which had been allotted to the plaintiffs. To that extent, therefore, the suit was required to be decreed. This error was quite rightly corrected by the First Appellate Court. However, the First Appellate Court has proceeded to dismiss the counterclaim of the defendants as well.

11. The First Appellate Court has reasoned that the trial court in dismissing the counterclaim has merely relied upon a presumption. The First Appellate Court then reasoned that the survey records themselves raised a presumption and this presumption cannot be rebutted by raising another presumption. In theory, the First Appellate Court may be right. However, in the state of evidence on record, it is difficult to agree with the First Appellate Court that the trial Court had relied only on some presumption to decree the counterclaim. From the perusal of the judgment and decree made by the trial Court, it appears that the trial Court has considered the oral

as well as documentary evidence on record and based on the same recorded finding of fact that the portion of 870 square meters indeed fell within 1/3rd area allotted to the defendants. The trial Court has also recorded a finding of fact, again based on the appreciation of evidence on record that this portion was separated from the portion allotted to the plaintiffs by a rubble stone wall as was deposed to by the witnesses on behalf of the defendants. Therefore, these findings of fact could not have been reversed by the First Appellate Court simply by observing that the trial Court had raised a presumption in the matter.

12. In *Santosh Hazari* (supra), the Hon'ble Supreme Court has held that the judgment of the Appellate Court must reflect its conscious application of mind and record findings supported by reasons, on all the issues arising along with the contentions put forth and pressed by the parties for decision of the Appellate Court. Further while writing a judgment of reversal as in the present case, the Appellate Court must remain conscious of two principles. Firstly, the findings of fact based on conflicting evidence arrived at by the trial Court must weigh with the Appellate Court, more so when the findings are based on oral evidence recorded by the same presiding Judge who authors the judgment. Secondly, while reversing a finding of fact the Appellate Court must come into close quarters with the reasoning assigned by the trial Court and then assign its own reasons for arriving at a different finding.

13. In the present case, except for observing that the trial Court has relied on presumption, the First Appellate Court has not bothered to come into close quarters with the reasoning of the Trial Judge and thereafter assign its own reasons for arriving at a different finding. The First Appellate Court has not bothered to explain why it feels that the trial Court has only relied upon a presumption. From the perusal of the judgment and decree made by the trial Court, the finding recorded by the trial Court appears to be based on evaluation of oral as well as documentary evidence on record. Such a finding cannot be said to be based only on a presumption. It was open for the First Appellate Court to hold that there has been some serious error in evaluation and appreciation of evidence by the trial Court or that some inadmissible evidence has been looked into or some admissible evidence has been ignored. But the finding of fact recorded by the trial court could not have been reversed by simply observing that the same was based on presumption and that one presumption is not sufficient to rebut another. Mr. Coutinho, in the circumstances of the present case, is quite right in submitting that the principles laid down in *Santosh Hazari* (supra) were not followed by the First Appellate Court.

14. For the aforesaid reasons, the impugned judgment and decree made by the First Appellate Court, to the extent it dismisses the defendants' counterclaim, is required to be reversed. This means that the plaintiffs are declared the owner in possession of the 2/3rd portion of the larger property claimed and the defendants are

declared owner in possession of the balance $1/3^{\text{rd}}$. But further, the triangular portion of 870 square meters is held to form a part of the $1/3^{\text{rd}}$ portion owned and possessed by the defendants. It is ordered accordingly.

15. The trial court in this case, while perhaps correctly declaring the defendants to be the owners of the portion of 870 square meters as described in their counterclaim has proceeded further to issue a direction for correction of survey records. Having regard to the provisions of the Land Revenue Code and the precedents of the subject even Mr. Coutinho agrees that this portion of the decree is not proper. Accordingly, the portion of the trial court's decree which directs the survey authorities to correct the survey records is set aside. This shall not prevent the defendants from seeking the correction of the survey records based on the declaration now granted.

16. The Second Appeal is partly allowed in the aforesaid terms. There shall be no order as to costs.

M. S. SONAK, J.

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