

IN THE HIGH COURT OF BOMBAY AT GOA

Second Appeal No.114/2011
with
Cross-Objections No.11/2012
in
Second Appeal No.114/2011

1) Rohidas Simepuruskar (since deceased)
represented by his heirs and legal
representatives:

- a) Smt. Rekshita Rayu Simepuruskar,
- b) Smt. Amina Gajanand Simepuruskar,

2) Rayu Simepuruskar,

3) Gajanand Simepuruskar,

4) Vinod Simepuruskar,
All of full age, All r/a Cobravado,
Calangute, Bardez-Goa.

... Appellants

Versus

Mario Francisco de Conceicao Lobo alias
Mario Francisco Lobo (since deceased)

1(a) Smt. Asha Lobo,
104/112, Mimosa Road, Carnegie 3163,
Victoria, Australia, through her
Power of Attorney,
Shri Jose Carlos Lobo,
House No.5/23, Feira Alta,
Mapusa, Goa.

... Respondent

Mr. T. Sequeira, Advocate for the Appellants.

Mr. V. P. Thali along with Mr. Rajdeep Prabhugaonkar, Advocates for
the Respondent.

Coram :- M.S. SONAK, J.

Date :- 1st April 2021

JUDGMENT:

Heard T. Sequeira for the Appellants and Mr. V. P. Thali who appears along with Mr. Rajdeep Prabhugaonkar for the Respondent.

2. The appellants are the original defendants and the respondent is the original plaintiff in Regular Civil Suit No.189/1996/C instituted in the Court of the Civil Judge, Senior Division at Mapusa (Trial Court). Accordingly, for this Second Appeal, the parties will be referred to by their original positions before the Trial Court.

3. The plaintiff, by instituting the aforesaid Suit prayed for the following reliefs:

a) That the defendants their agents representatives or any other person acting on their behalf be restrained by way of permanent injunction from doing any construction within a distance of 1.5 meters from the boundary of the suit property in any manner whatsoever.

b) That the defendants their agents, representatives, servants, family members or any other person acting for an on their behalf be restrained by way of permanent injunction from occupying any structure illegally constructed and thereby interfere with the privacy of the plaintiff to enjoy and possess the suit property.

c) Any other relief the court deems fit and proper.

Add prayer (d): That the defendants be directed to demolish the whole construction done or in the alternation so much of the

construction that violates the set-backs stipulated in the law on the boundary line to the east, west and northern sides of the property of the defendants and restore the land to its original condition.

4. The defendants denied the case pleaded by the plaintiff. They claimed that they have not put up any construction at all and that the construction at the site was existing since the year 1974. The defendants, therefore, pleaded that since there was no new construction, there was no question of any violation of the setback rule. The defendants also raised a counterclaim and sought for the demolition of certain constructions put up by the plaintiff, which, according to the defendants, violated the set-back rule requiring a setback of 3 meters.

5. The Trial Court, framed the following issues in the Suit:

“1. Whether the plaintiff proves that he is co-owner in possession of the Suit property?”

2. Whether the plaintiff proves that he is entitled for permanent injunction restraining the defendants from doing construction within distance of 1.5 meters from the boundary of the suit property?”

3. Whether the plaintiff proves that he is entitled for permanent injunction from occupying any structure illegally and interfering with privacy of the plaintiff to enjoy and possess the suit property?”

4. Whether the defendants prove that, this Hon'ble Court has no jurisdiction to try the issue?”

5. *Whether the defendants prove that the plaintiff has no locus standi to File the suit and is suffering from delay and latches?*

6. *What order? what Relief?*

ADDITIONAL ISSUES

1. *Whether the plaintiff proves that the defendants in April 1997 illegally completed the suit construction without leaving proper set back?"*

2. *What Relief? What order?"*

6. The learned Trial Court vide Judgment and Decree dated 30.11.2009 dismissed both the suit as well as the counterclaim with costs.

7. The plaintiff appealed to the District Court, North Goa at Panaji (First Appellate Court) vide Regular Civil Appeal No.12/2010. The defendants did not prefer any cross-appeal or cross-objections against the dismissal of their counterclaim.

8. Vide Judgment and Decree dated 28.12.2010, the First Appellate Court partly decreed the plaintiff's Suit by making the following Order:

“

ORDER

Appeal is allowed with costs.

Suit is decreed in terms of prayers (a) and (d).

The defendants are hereby directed to demolish the construction done within 1.5 metres from the southern boundary of the suit property.

The defendants are further restrained by way of permanent injunction from doing any construction within a distance of 1.5 metres from the boundary of the plaintiff's property.”

9. Aggrieved by the impugned Judgment and Decree dated 28.12.2010 made by the First Appellate Court, the defendants have instituted this Second Appeal. The plaintiff has also filed cross-objections seeking effective relief in terms of prayer clause (d) of the Plaint.

10. This Second Appeal was admitted on 01.03.2012 on the following substantial questions of law:

“(1) Whether the provisions of Article 2325 of the Portuguese Civil Code invoked by the Lower Appellate Court in allowing the Appeal filed by the Respondent is still in force in view of the Planning Regulations in the State of Goa?

(2) Whether, even assuming the provisions of Article 2325 of the Portuguese Civil Code are still in force, whether the Lower Appellate Court was justified to pass the impugned Judgment without giving an opportunity to the Respondent to close all the windows and openings towards the northern side of the impugned construction?”

11. On 25.07.2012 interim relief was granted in the following terms:

“

ORDER

(i) The impugned Judgment and Decree dated 28.12.2010 passed by the Lower Appellate Court is stayed subject to the Applicants closing the openings on the northern wall of the suit structure without prejudice to the rights and contentions of the parties until further Orders.

(ii) Application stands disposed of.”

12. When this appeal was taken up for the final hearing, Mr. Thali pointed out that the condition about the closure of opening on the northern wall of the suit structure was not complied with by the plaintiff. Accordingly, some orders were made to ensure compliance. From the reports now filed on record, it can be held that there is substantial compliance.

13. Mr. Sequeira, the learned counsel for the appellants submits that the expert appointed on behalf of the plaintiff who was examined before the Trial Court was not at all clear in his deposition that some new construction has been put up by the defendants or that the new construction is within the setback of 1.5 meters. He submits that the plaintiff has to stand or fall based on his/her case. In the absence of any proper evidence about the construction being within the set-back area, the First Appellate Court, should not have decreed the Suit.

14. Mr. Sequeira submitted that in any case, the First Appellate Court, after invoking the provisions of Article 2325 of the Portuguese Civil Code, failed to interpret the provisions therein correctly. He

submits that in terms of Article 2325, even if the construction is within 1.5 meters, the same, can be sustained as long as the openings on the side which overlook neighbor's property are now closed and the defendants have no intentions to re-open the same and therefore, the benefit of Article 2325 of the Portuguese Civil Code ought to have been extended to the defendants. He relies on the decision of this Court in *Ms. Eulalia Colaco e Rodrigues and others v. Mr. Gurudas Raikar and others – Civil Revision Application No.180 of 1998* decided on *09.07.1999* to submit that the provisions of Article 2325 of the Portuguese Civil Code are still in force in Goa. Based on all this, Mr. Sequeira submits that both the substantial questions of law may be decided in favor of the appellants and decree made by the First Appellate Court, be reversed.

15. Mr. Thali, the learned counsel for the respondents submits that both the substantial questions of law as framed are not even involved in this Second Appeal. He submits that there were no pleadings requisite for making out a case under Article 2325 of the Portuguese Civil Code. In any case, he submits that even if it is assumed that Articles 2324 and 2325 of the Portuguese Civil Code are still in force, then, the correct interpretation of the two articles makes it clear that no construction can be put up contrary to the municipal or panchayat regulations. He, therefore, submits that no benefit of these articles can accrue to the defendants in the facts and circumstances of the present case.

16. Mr. Thali points out that in respect of this very structure there are demolition orders issued by the revenue authorities, which have attained finality. He points out that the construction is in breach of the CRZ regulations. He submits that all these aspects have been taken into consideration by the First Appellate Court, and therefore, there is no question of reversing the decree made by the First Appellate Court.

17. Mr. Thali submits that the entire construction put up by the defendants is illegal and unauthorized and is required to be demolished. He submits that though the First Appellate Court has decreed the suit in terms of prayer clause (d), the operational order is not in terms of prayer clause (d) but rather, the same is in terms of prayer clause (a). He, therefore, submits that the cross-objections are liable to be allowed.

18. Mr. Thali relies on *Hero Vinoth v. Seshammal – (2006) 5 SCC 545* and *Panchugopal Barua and others v. Umesh Chandra Goswami and others – (1997) 4 SCC 713* in support of his contentions.

19. The rival contentions now fall for my determination.

20. In the present Second Appeal, no substantial question of law was either urged or framed on the issue of perversity in the record of any findings of fact by the First Appellate Court. Normally, the First

Appellate Court is the final court when it comes to findings of fact unless it is demonstrated that such findings of fact are perverse. Mere re-appreciation or re-assessment of evidence on record is normally, beyond the scope of a court deciding a Second Appeal.

21. Therefore, the contention of Mr. Sequeira about the appreciation of the evidence of the expert/surveyor examined on behalf of the plaintiff, cannot be entertained. Besides, it is not as if the First Appellate Court has based its findings almost entirely on the deposition of the expert. The First Appellate Court has taken into consideration the entire evidence lead on behalf of the plaintiff including, the documentary evidence. The First Appellate Court has also taken cognizance of the demolition orders issued by the revenue authorities concerning this very construction.

22. Besides, if the Written Statement of the defendants is perused, then, there are no specific pleadings to deny that any portion of their construction is within 1.5 meters, not to mention 3 meters. The only case set up by the defendants was that they have not done any construction at all as alleged in the plaint and their house was already in existence since 1974, by which point of time, the same was either in terms of the permissible regulations or in any case, any grievance against the same was *ex facie* barred by the law of limitation. Now this specific case pleaded by the defendants was disbelieved by the First Appellate Court by assessment of both the oral as well as the

documentary evidence on record. In the absence of any perversity, it is not possible to disturb the findings of fact in this Second Appeal.

23. In terms of Section 100(5) of the Code of Civil Procedure (CPC), a Second Appeal is to be heard on the substantial question of law formulated at the time of admission of the Second Appeal. The Proviso makes it clear that nothing in this subsection shall take away or abridge the power of the court to hear, for reasons to be recorded, the appeal on any other substantial question of law, not formulated by it if it is satisfied that the case involves such question. Further, in terms of Section 100(5) of CPC itself, the respondent is entitled to argue that the case does not involve a substantial question of law, which may have been formulated at the stage of admission of the appeal.

24. In *Hero Vinoth (supra)* the Hon'ble Supreme Court has held that where the facts required for a point of law have not been pleaded, a litigant should not be allowed to raise that question as a substantial question of law in the second appeal. The mere appreciation of facts, the documentary evidence, or the meaning of entries and the contents of the documents cannot be held to be raising a substantial question of law. Further, to be a question of law '*involving in the case*' there must be first a foundation for it laid in the pleadings and the question should emerge from the sustainable findings of fact arrived at by court of facts and it must be necessary to decide that question of law for a just and proper decision of the case. An entirely new point raised for

the first time before the High Court is not a question involved in the case unless it goes to the root of the matter.

25. To a similar effect, are the observations made by the Hon'ble Supreme Court in *Panchugopal Barua and others (supra)*. There, a specific case set out by the plaintiff was that the defendant was permitted to use a plot of land and to erect a temporary structure thereon. The High court, in the second appeal, dismissed the suit by holding that the defendant was entitled to the benefit of Section 60(b) of the Easements Act because this was a case of a license to erect a permanent structure. The Hon'ble Supreme Court held that there was no plea based on Section 60(b) of the Easements Act ever raised by the defendant in the Written Statement or for that matter before the First Appellate Court. Therefore, such a plea, ought not to have been permitted to be raised in the second appeal. The question based on Section 60(b) of the Easements Act was therefore not involved in the second appeal or did not arise in the second appeal.

26. If the pleadings in the present case are perused, then, it is apparent that the defendants, at no stage, had raised any plea based on Article 2325 of the Portuguese Civil Code. Therefore, Mr. Thali is right in contending that no substantial question of law based on Article 2325 of the Portuguese Civil Code can be said to be involved in this appeal.

27. Even, if the substantial question of law based on Article 2325 of the Portuguese Civil Code is to be considered, now that the same has been formulated, the findings of the First Appellate Court are that the construction is well within the set-back of 1.5 meters. Mr. Sequeira submits that this finding is incorrect. If, this finding is indeed incorrect, then, the defendants, will have nothing to worry about because the impugned decree, as it now stands, only requires demolition of construction done within 1.5 meters from the southern boundary of the suit property. Further, the permanent injunction is from doing any construction within a distance of 1.5 meters from the boundary of the plaintiff's property. If the defendants are indeed serious that there is no construction within 1.5 meters from the southern boundary of the suit property, then, they are always at liberty to point out this fact at the stage of execution of the decree. However, no case is made out to interfere with the decree itself on such ground.

28. Besides, at least *prima facie*, there is substance in the contention of Mr. Thali that Articles 2324 and 2325 of the Portuguese Civil Code have to be construed conjointly. Such a conjoint construction of the two articles is sufficient not to interfere with the impugned decree in this second appeal. This is a case where even the revenue authorities have ordered the demolition of the construction for violation of the Building Regulations of the Land Revenue Code. This is a case where even the defendants did not come with any categorical stand that there was no construction within 1.5 meters setback. It is possible, as

contended by Mr. Thali that the set-back in terms of Panchayat Regulations is 3 meters and not 1.5 meters. For that, the plaintiff will have to pursue the execution or implementation of the orders made by the revenue authorities. In this case, the First Appellate Court has only required the defendants to demolish the construction done within 1.5 meters from the southern boundary of the suit property and also issued an injunction on the same basis. There is no infirmity in the decree made by the First Appellate Court which warrants interference in this second appeal.

29. Insofar as the cross-objections are concerned, it is true that there is a reference to the decreeing of the suit in terms of prayer clause (d). This is however followed by the relief which is relatable mainly to prayer clause (a). If the Judgment of the First Appellate Court is perused, then, it is apparent that the First Appellate Court intended to grant relief in terms of prayer clause (a) and not in terms of prayer clause (d). This is also further evident from the actual operative portion of the order. Therefore, the plaintiff cannot take advantage of the reference to prayer clause (d) in the operative portion of the order. Since this is a second appeal instituted by the defendants, it is only appropriate that the operative portion of the decree is corrected so that the suit is decreed in terms of prayer clause (a) and not in terms of prayer clause (d). However, it is further made clear that this correction will not affect the execution and implementation of the orders that have been made by the revenue authorities. If such orders direct

demolition of structures within 3 meters, then such demolitions can proceed and will not in any manner be affected by this decree.

30. Therefore, this appeal is only partly allowed to the aforesaid extent and it is clarified that the suit shall stand decreed in terms of prayer clause (a) and the operative portion that follows and not in terms of prayer clause (d). The cross-objections in the second appeal are hereby dismissed.

31. In the facts and circumstances of the present case, there shall be no order as to costs.

M. S. SONAK, J.