

Meena

IN THE HIGH COURT OF BOMBAY AT GOA
APPEAL FROM ORDER NO.2 OF 2017

- 1 Mr. Wilfredo Xavier Jose Monteiro
- 2 Mrs. Zarina Jacinta Monteiro and
her husband
- 3 Aloysius Albanos Vaz
- 4 Mr. Yvonn Sabha Monteiro
and his wife;
- 5 Mrs. Patricia Mildegard Bernadette
Thomas
All r/o. Calvaddo, Varca
Salcete, Goa.

All represented through their
Attorney the appellant No.1.

.... Appellants

Versus

- 1 Pedro do Rosario Fernandes alias
Pedro Antonio Miguel Fernandes
(expired)
married, landlord,
755, Fatrade,
r/o. Varca, Salcete, Goa
- 1a Mr. Joao Edaiger Fernandes and
his wife
- 1b Mrs. Sarobela Exaltacao Fernandes
Both resident of
H.No.775A, 2nd Ftrade,
Varca, Salcete, Goa.
- 1c Mr. Roy Adelaide Fernandes and
his wife,
- 1d Mrs. Ermelina Fernandes
Both residents of
H.No.775, 2nd Fatrade,
Varca, Salcete, Goa.
(Amendment carried out as per

- order dated 04/11/2019 in MCA
No. 874 of 2019.)
- 2 Philomeno Fernandes
Major of age, and her sons;
- 3 Filipe Fernandes
Aged about 18 years and
- 4 Bloosom Fernandes
Aged about 14 years
Represented by their mother
and natural guardian the
respondent No.2
All residents at Post Box 1692-Respondents
13017, Safae, Kuwait.

Mr. C.A. Coutinho with **Mr. I. Santimano**, *Advocates for the appellants.*

Mr. J.E. Coelho Pereira, Senior Advocate with **Mr. V. Korgaonkar** and **Mr. Vilas Pavithran**, Advocates for the respondents.

CORAM: MANISH PITALE, J.

RESERVED ON : 31st August, 2021.

PRONOUNCED ON: 7th September, 2021.

JUDGMENT:

1. This is an Appeal from Order filed under Order XLIII Rule 1(u) of the Code of Civil Procedure (CPC) in order to challenge the judgment and order dated 02/02/2016 passed by the Court of the District Judge-II, South Goa, Margao (hereinafter referred to as the 'Appellate Court') in Regular Civil Appeal No.51 of 2006. By the impugned judgment and order the Appellate Court has quashed and set aside the judgment and decree of the Trial Court and the matter has been remanded back with specific directions.

2. The appellants are the original Defendants. The respondent No.1 is the original Plaintiff. The said respondent filed a suit for declaration against the appellants herein, as also respondent Nos.2 to 4. The respondent No.1 claimed that the suit property belonged to himself and respondent Nos. 2 to 4 i. e. original Defendant nos.2 to 4 and sought a declaration in that regard. The description of the property was specifically stated in paragraph No.1 of the plaint. The respondent No.1 traced the source of title in the suit property by making specific statements in the plaint.

3. The appellants herein filed their written statement denying the claims of the respondent No.1. Instead, they claimed to be owners and in possession of the suit property. Their claim was based on their predecessor acquiring ownership and possession in the suit property.

4. By judgment and order dated 21/03/2006, the Court of Civil Judge, Junior Division, Margao (hereinafter referred to as the 'Trial Court') partly decreed the suit and granted a declaration that the respondent No.1 (original plaintiff) and respondent Nos.2 to 4 (original defendant nos.2 to 4) were owners of the suit property. The Trial Court found that the respondent No.1 had been able to place sufficient material on record to show ownership in the suit property and that the appellants had failed to support their claim of having inherited the property from their mother. Aggrieved by the said judgment and decree passed by the Trial Court, the appellants filed Regular Civil Appeal No.51 of 2006 before the Appellate Court. By judgment and order dated 05/02/2007, the Appellate Court allowed the Appeal and dismissed the suit. The Appellate Court not only found that the respondent No.1 had failed to prove ownership in the suit property but also rendered finding that the suit was barred by limitation.

5. Aggrieved by the same, the respondent No.1 filed Second Appeal No.82 of 2007 before this Court. By order dated 16/07/2010, this Court admitted the Second Appeal on two substantial questions of law. Thereafter, on 17/01/2014, this Court answered the said questions in favour of the respondent No.1 and partly allowed the Second Appeal. Accordingly, the judgment and order of the Appellate Court dated 05/02/2007 was set aside, the appeal was restored before the Appellate Court and the said Court was directed to decide the Appeal afresh in the light of the observations made by this Court.

6. Thereafter, the Appellate Court took up the appeal for consideration. The respondent No.1 filed an application under Order XLI Rule 27 of the CPC for placing on record additional documents and also moved an application for appointment of Commissioner. The Appellate Court considered the said applications at the stage of hearing of the appeal. The said Court framed two points for consideration, which concerned the aspect of opportunity to be given to the respondent No.1 to produce additional documents and whether the appointment of a Commissioner was warranted in the facts and circumstances of the case.

7. By the impugned judgment and order the Appellate Court answered both the points in favour of the respondent No.1. Thereupon, the Appellate Court allowed the appeal, quashed and set aside the order of the Trial Court and remanded the matter back to the Trial Court with a direction to permit the respondent No.1 to produce additional documents. Further directions were given to the effect that the appellants would be given an opportunity to cross-examine the respondent No.1 in respect of such documents and to lead evidence

in rebuttal. A direction was also given for appointment of a trained Government Surveyor for identifying the property.

8. Aggrieved by the same, the appellants have filed the present Appeal. The present appeal is an Appeal under Order XLIII Rule 1(u) of the CPC, which can be considered, if a substantial question of law arises. On perusal of the material on record, this Court is of the opinion that the following substantial questions of law arise for consideration:

(1) Whether the Appellate Court in the present case was justified in exercising its power under Order XLI Rule 23 A under CPC for remanding the matter back to the Trial Court when this Court while disposing of Second Appeal No.82 of 2007 had specifically directed that the Appeal be decided in the light of observations made by this Court while disposing of the Second Appeal?

(2) Whether the Appellate Court came in close quarters of the judgment of the Trial Court before setting aside the same and directing remand of the matter for a fresh consideration before the Trial Court?

(3) Whether the Appellate Court exercised power in consonance with Order XLI Rule 31 of the CPC while rendering judgment and holding that the matter deserved to be remanded to the Trial Court?

(4) Whether necessary conditions were satisfied by respondent No.1 for seeking production of additional documents under Order XLI Rule 27 of the CPC and consequently whether the Appellate Court was justified in allowing such an application?

(5) Whether in the facts and circumstances of the present case, particularly in the backdrop of the pleadings of the parties, whether direction to appoint a Commissioner was warranted?

9. Heard learned Counsel for the rival parties in the context of the aforesaid substantial questions of law.

10. Mr. Coutinho, learned Counsel appearing for the appellant submitted that perusal of the impugned judgment and order would show that mandatory requirements of Order XLI Rule 31 of the CPC were not satisfied in the present case, inasmuch as the Appellate Court failed to properly frame points for determination, upon considering the judgment of the Trial Court. The emphasis placed by the Appellate Court only on two applications moved by the respondent No.1 for the production of additional documents and appointment of a Commissioner, demonstrated the error in the approach adopted by the Appellate Court. The judgment of the Trial Court was not considered and appreciated by the Appellate Court before setting aside the same and rendering findings to the effect that the case deserved to be remanded for a fresh consideration by the Trial Court. According to the learned Counsel for the appellant, the respondent No.1 had failed to make out a case for remand under Order XLI Rule 23A of the CPC. As per settled law, an order of remand cannot be passed casually and substantial grounds need to exist for exercising such a power.

11. It was further submitted that the requirements of Order XLI Rule 27 for production of additional documents were also not satisfied and that therefore, the Appellate Court erred in remanding the matter to the Trial Court. It was further submitted that when the question of the identity of the property had not

arisen and the dispute was with regard to the question of ownership in the suit property, the Appellate Court ought to have considered the same on the basis of the rival claims of the contesting parties as regards ownership and possession, instead of exercising power for appointment of a Commissioner. The Appellate Court misdirected itself in proceedings on the basis that the real question was about the identity of the property.

12. The learned Counsel placed reliance on judgments of the Hon'ble Supreme Court in the case of **Union of India V/s. Ibrahim Uddin and Another** [(2012) 8 SCC 148] **H. Siddiqui (Dead) by LRS V/s. A. Ramalingam** [(2011) 4 SCC 240], **P. Purshottam Reddy and Ors. V/s. Pratap Steel Ltd.** [(2002) 2 SCC 686] and **Wadi v/s. Amilal and Ors** [(2015) 1 SCC 677] and judgments of this Court in the case of **Balkrishan Dattatraya Butte and ors v/s. Dattatraya Shankar Mohite and Ors** [1998 (2) ALL MR 740] and **Shri Damodar Narsinva Naik and another V/s. Mrs. Liberata Philokena Moraes e Pereira and others** [2016 (2) Goa L.R. 376 (Bom) (PB)].

13. On the other hand, Mr. J. E. Coelho Pereira, learned Senior Counsel appearing for the respondents, submitted that the nature of the dispute in the present case justifies the order remanding the matter to the Trial Court. It was submitted that in view of the additional documents brought on record on behalf of the respondent No.1, it was clear that there was a dispute in respect of the identity of the property and that further evidence was necessary for reaching an appropriate finding in that regard. On this basis, it was submitted that the remand order was justified and the appointment of a Commissioner was in the interest of justice. The learned Senior Counsel took this Court through the contents of the impugned judgment and order to assert that the Appellate Court

had indeed come in close quarters of the judgment of the Trial Court and that upon finding the central controversy to be a dispute regarding the identity of the suit property, the Appellate Court correctly remanded the matter to the Trial Court. It was submitted that the two points framed in the impugned judgment and order were most appropriate in the facts and circumstances of the present case and that in similar circumstances, in the case of **Vasant Tukaram Prabhu v/s. Smt. Xalinibai Borcar and others** (Judgment dated 12/03/2014 passed in Appeal from Order No.71 of 2013), this Court had upheld an order of the Appellate Court where only one point was framed for consideration i.e. as to whether an expert ought to have been appointed to identify the suit property? This Court in the said judgment had upheld the order of remand and appointment of a Commissioner on the ground that the Court was really concerned with what was necessary in the interest of justice. The learned Senior Counsel also relied upon the judgment of this Court in the case of **Ruben Vasco Da Gama and Anr v/s. Cannon Fr. Santana Jacinto Dos Remedios Faleiro and 8 ors.** (Judgment and order dated 04/01/2017 passed in Appeal from Order No.54 of 2015), wherein also, an order of remand was upheld on the ground that the interest of justice was paramount.

14. Having heard the learned Counsel for rival parties, this Court is called upon to answer the above-mentioned substantial questions of law. The first contention raised on behalf of the appellant is that the Appellate Court in the present case failed to consider the findings rendered by the Trial Court on merits and misdirected itself in placing its focus only on the two applications filed on behalf of respondent No.1.

15. Since the Appellate Court in the present case has remanded the matter to the Trial Court, it has obviously exercised power under Order XLVII Rule 23A of the CPC. This is because the Trial Court in the present case had not disposed of the suit on any preliminary point but the suit had been partly decreed upon consideration on merits. The Appellate Court in the present case set aside such a decree and remanded the matter. Order XLI Rule 23A of the CPC provides that when such a remand is considered necessary by the Appellate Court, it shall have the same powers as it has under Rule 23 of Order XLI of the CPC. The Hon'ble Supreme Court in the case of **P. Purshottam Reddy and Ors. V/s. Pratap Steel Ltd.**(supra), while considering the scope of power of the Appellate Court under Order XLI Rule 23A of the CPC, has held that the power of remand has to be exercised in exceptional cases when it is found that the judgment under challenge is not satisfactorily decided. It is advised that Appellate Court should be circumspect in ordering a remand when the case is not covered under Rule 23 A of Order XLI of the CPC.

16. In order to decide a first appeal, the Appellate Court is expected to come in close quarters of the judgment of the Trial Court and to frame points for determination as expected under Rule 31 of Order XLI of the CPC. In the case of **H. Siddiqui (Dead) by LRS V/s. A. Ramalingam** (supra), the Supreme Court has held that the Appellate Court is expected to independently assess the evidence of the parties and consider the relevant points that arise for adjudication, considering the material on record. Being the final Court of fact, the Appellate Court is not expected to make general observations and it is expected to give reasons for its decision on each point independently to that of the Trial Court. The Appellate Court is expected to consider the entire evidence

and to discuss the same in detail before rendering findings on the points framed for consideration.

17. It is in this backdrop that the impugned judgment and order of the Appellate Court needs to be considered. A perusal of the same would show that the Appellate Court has referred to the judgment of the Trial Court, the issues frame therein and after paraphrasing the findings of the Trial Court, the Appellate Court has abruptly referred to applications filed by the respondent No.1 for producing additional documents and the application for appointment of a Commissioner. Thereafter, immediately, the Appellate Court has framed two points for determination. The same read as follows:

- i) whether the plaintiff No. 1 is to be given an opportunity to produce additional evidence?*
- ii) whether a Commissioner is required to be appointed as prayed for by the plaintiff No.1 in this appeal?*

18. There is no other point framed for determination by the Appellate Court, pertaining to the findings rendered by the Trial Court on the merits of the rival contentions. Thereafter, the Appellate Court has proceeded to refer to the evidence of the respondent No.1 and the evidence tendered on behalf of the appellants. It is analyzed in the context of the additional documents sought to be brought on record on behalf of the respondent No. 1. Much emphasis has been placed on a judgment rendered in Regular Civil Suit No. 61/1989/D, instituted by the mother of the appellants, wherein the respondents were admittedly not parties. Although the Appellate Court has itself observed in the impugned judgment that the said additional document i.e. judgment in Regular Civil Suit No. 61/1989/D, is not binding on the respondent No.1 i.e. original plaintiff, contents of the said judgment and the pleadings of the parties in the said

litigation have been gone into, to conclude that there is a dispute regarding the identity of the suit property in the present case.

19. In fact, in paragraph No. 27 of the impugned judgment, the Appellate Court has made an emphatic statement that it is manifest that this is a case where the dispute centers around the identity of the property.

20. Thus, not only has the Appellate Court failed in considering the pleadings of the parties on record, but it has also failed to refer to and examine the findings rendered by the Trial Court, apart from the fact that the Appellate Court has completely misdirected itself in proceeding on the basis that the dispute in the present case centers around identity of the suit property. As regards the documents sought to be brought on record on behalf of the respondent No. 1 under Order XLI Rule 27 of the CPC, having rendered a finding that the judgment in the case of Regular Civil Suit No. 61/1989/D, would not be binding on the respondent No.1, there was no reason to comment upon the same in detail and then to hold that there was a dispute regarding the identity of the property.

21. If the Appellate Court had come in close quarters of the judgment rendered by the Trial Court, such an error would not have crept in. The Appellate Court obviously did not come in close quarters of the Trial Court judgement and failed to follow the mandate of Order XLI Rule 31 of the CPC. The judgment of the Trial Court considered the pleadings of the parties on record. A perusal of the plaint would show that the respondent No.1 had specifically described the property in paragraph No.1 of the plaint and thereafter, the said respondent claimed ownership in the property on the basis of assertions made in the plaint. The appellants in their written statement denied

that the respondent No.1 along with original defendant Nos. 2 to 4 could be said to be owners of the suit property. Instead, they raised competing claims of ownership in the very suit property. The parties led their evidence on the basis of such pleadings and after considering the evidence on record, the Trial Court rendered findings on merits to the effect that the respondent No.1 had been able to prove that the said respondent and original defendant Nos. 2 to 4 were indeed owners of the suit property.

22. When the appellants filed the appeal before the Appellate Court, not only did the Appellate Court in the first instance in its judgment and order 05/02/2007, hold that the suit was barred by limitation, but the Appellate Court also held on merits that the evidence on record was insufficient to prove the claim of the respondent No.1 regarding ownership in the suit property. In the Second Appeal filed by respondent No.1, this Court while partly allowing the Second Appeal held as follows:

“8. I have considered the submissions of the learned Counsel as also gone through the records. On perusal of the impugned Judge, the contention of Shri J. E. Coelho Pereira, learned Senior Counsel that there is an admission by non-traversal in the pleadings has not been examined by the learned Judge whilst passing the impugned Judgment. This would have to be examined by the learned Judge in conjunction with the other evidence adduced by the parties. Having failed to do so, I find that the learned Judge has misconstrued the pleadings of the parties to hold that the Appellant has failed to establish his right to the suit property. It is well settled that a party has to only plead facts and not evidence. In the present case, there is a specific averment by both the parties in the pleadings claiming that they are in possession of the suit property. The evidence adduced by the respective parties on that count cannot be brushed aside on a specious ground that these averments were not found in the pleadings of the parties. This aspect would have to be examined in the context of the evidence and the pleadings of the parties. In such

circumstances, I find that the learned Judge was not justified to discard the evidence of Pw. 2, Pw.3, Dw.2, Dw.3 and Dw. 4 whilst coming to the conclusion that the Appellant has failed to establish his right to the suit property. Having regard to the facts and circumstances of the case and considering that the learned Judge has not examined the matter in accordance with law, I find it appropriate, in the interest of justice, to quash and set aside the impugned judgment passed by the Lower Appellate Court and direct the learned Judge to decide the Appeal afresh after hearing the parties in accordance with law.

10. Considering the view taken by me hereinabove, I find that these aspects can be examined by the Lower Appellate Court upon hearing the parties on its own merits. No doubt, the learned Trial Judge ought to have scrutinised all the material on record whilst coming to the conclusion that the Appellant has established their case. But, however, these aspects can also be gone into by the Lower Appellate Court as it is now well settled that the whole dispute is open before the Lower Appellate Court in a first appeal as it can also re-appreciate the evidence on record. In such circumstances, I find it appropriate to remand the matter to the Lower Appellate Court to decide the Appeal preferred by the Respondents on its own merits in accordance with law."

23. Therefore, it is evident that upon remand, the Appellate Court was expected to consider the material on record to come to a conclusion as to whether the rival parties had been able to prove their respective claims of ownership in the suit property. In fact, when the respondent No.1 as the original plaintiff claimed ownership in the suit property described in paragraph No.1 of the plaint, the Appellate Court was expected to examine as to whether the findings rendered in favour of respondent No.1 in that regard were justified on the basis of the evidence on record. No such finding has been rendered by the Appellate Court in the impugned judgment and order. Instead, the entire focus has shifted to the applications filed by the respondent No.1 for placing additional documents on record and for the appointment of Commissioner.

This Court is of the opinion that the approach of the Appellate Court demonstrated that the observations made by this Court while disposing of Second Appeal No.82 of 2007, were completely ignored.

24. In this context, the judgment rendered by this Court in the case of **Vasant Tukaram Prabhu v/s. Smt. Xalinibai Borcar and others** (supra), needs to be considered as the learned Senior Counsel appearing for the respondent No.1 has placed much emphasis on the same. At the outset, it is necessary to appreciate that the said judgment was rendered in the context of the plaintiff therein raising a claim that the defendant had trespassed into the suit property. On the basis of the pleadings in the said case, this Court proceeded on the basis that when the defendant claimed adverse possession in the backdrop of an allegation of trespass, the central question was about identity of the property. It is in this backdrop that this Court confirmed the order of the Appellate Court on the necessity to appoint an expert to identify the suit property. This Court found that when the identity of the suit property was the central question, the Appellate Court had not committed an error in remanding the matter with a direction to appoint a Commissioner. It is in such factual backdrop that this Court held that in the interest of justice only one point was required to be considered by the Appellate Court while remanding the matter to the Trial Court. Similarly, in the case of **Ruben Vasco Da Gama and Anr v/s. Cannon Fr. Santana Jacinto Dos Remedios Faleiro and 8 ors.** (supra), this Court in the facts of that case held that remanding the matter to the Trial Court was justified in the interest of justice.

25. Therefore, this Court is of the opinion that the Appellate Court erred in concluding that the central dispute in the present case pertained to the identity

of the property and not to the rival claims of the ownership or possession made by the rival parties in the suit property. Consequently, this Court is of the opinion that the direction to appoint a Commissioner was wholly unnecessary in the facts and circumstances of the present case. The application filed by the respondent no.1 for appointment of Commissioner could not have been allowed. The Appellate Court ought to have proceeded on the basis of the pleadings, evidence and material on record to decide the correctness or otherwise of the judgment of the Trial Court.

26. Insofar as the application filed by the respondent No.1 under Order XLI Rule 27 of the CPC is concerned, the learned Senior Counsel appearing for the respondent No.1 is justified in contending that if the Appellate Court found that such documents were necessary for it to pronounce the judgment, such application could certainly be allowed. But, in the present case, the documents sought to be brought on record, as noted above, were judgment in the case of an earlier suit i.e. Regular Civil Suit No.61/1989/D filed by the mother of the appellants, copy of the plaint pertaining to the said suit and copy of the survey plan. The said suit was filed by the mother of the appellant against some third party and the respondents were admittedly not parties to the said suit. In paragraph 22 of the impugned judgment, the Appellate Court itself rendered a finding that the said judgment passed in Regular Civil Suit No.61/1989/D, would not be binding on the respondent No.1- original plaintiff. Having rendered such a finding, it is difficult to understand as to how such documents were necessary for the Appellate Court to pronounce judgment on the appeal filed by the appellants against the judgment and decree of the Trial Court. Therefore, the finding rendered by the Court on the application filed under Order XLI Rule 27 of the CPC is also found to be erroneous.

27. The Appellate Court evidently ignored the above quoted observations of this Court while disposing of Second Appeal No.82 of 2007 and misdirected itself by proceeding on the basis that the dispute centered around the identity of the property in the present case.

28. In view of the above, the substantial questions of law are answered in favour of the appellant and against the respondents. As a consequence, the impugned judgment and order passed by the Appellate Court is found to be unsustainable and liable to be set aside. The appeal needs to be heard afresh by the Appellate Court in the light of the above quoted observations of this Court in its judgment and order dated 17/01/2014 passed in Second Appeal No.82 of 2007.

29. Accordingly, the appeal is allowed. The impugned judgment and order is quashed and set aside. The matter is remanded to the Appellate Court for consideration of Regular Civil Appeal No.51 of 2006 afresh in the light of the observations made hereinabove.

30. The parties shall appear before the Appellate Court on 04.10.2021.

MANISH PITALE, J.

MEENA
VISHAL BHOIR

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