

Santosh

IN THE HIGH COURT OF BOMBAY AT GOA

SECOND APPEAL NO.125 OF 2011

1. Shri. Sagun Babuli Naik, Son
of late Babuli Sagun Naik, Major
in age, married agriculturist.

2. Shri. Lavu Babuli Naik, Son
of late Babuli Sagun Naik, married
agriculturist, Since deceased
through his Legal Representatives

2.a. Laxmi Lavu Naik (deceased)

2.b. Sitaram Lavu Naik,

2.c. Sheila Lavu Naik,

2.d. Leela Lavu Naik,

2.e. Kiran Lavu Naik,

2.f. Babuli Lavu Naik,

2.g. Shyam Lavu Naik,

2.h. Ram Lavu Naik,

All resident of H.No. 83, Nagzar,
Curti, Ponda, Goa.

Legal Representatives of Appellant
No.2A already on record as
Appellant Nos. 2.b. to 2.h.

..... Appellants.

Versus

1. Shri Kantu Nilu Naik,
son of Nilu Naik, (deceased)

1. a. Mr. Santosh Kantu Naik Son
of deceased No.1

1.b. Mrs. Savita Santosh Naik
Daughter-in-law of deceased No.1

both resident of Nagzar, Curti
Ponda Goa, Near Pratham School

1.c. Mr. Naresh Kantu Naik,

Son of deceased No.1
 1.d. Mrs. Chaya Naresh Naik
 Daughter-in-law of deceased No.1
 both resident of Flat No. M-K 1,
 Amrai Nagar, Housing Board Colony.
 1.e. Mr. Santosh Noni Naik
 Son of deceased No.1
 1.f. Mrs. Nayan Santosh Naik
 Daughter-in-law of deceased No.1
 both resident of Paunwada Kavle,
 Near Eshwar General Store,
 Ponda Goa.
 1.g. Mrs. Shanti Sudesh Naik
 Daughter-in-law of deceased No.1
 1.h. Mr. Sudesh Rama Naik
 Son of deceased No.1
 Both residents of Mapa
 Paunchwadi Bhatgal, Ponda-Goa

2. Smt. Satyawati @ Salu Kanti Naik,
 wife of Kantu Nilu Naik,
 major in age, housewife, resident of
[H.No.](#) not known,
 Nagzar, Kurti Ponda. Goa.

.... Respondents.

Mr. Valmiki Menezes, Advocate for the Appellants.

Mr. A.D. Bhobe, Advocate for Respondents No.1(a), 1(b), 1(c), 1(d)
 and 2.

Coram : M.S. Sonak, J.

Dated : 25th February, 2021.

ORAL JUDGEMENT:

Heard Mr. Valmiki Menezes for the Appellants and Mr.

A.D. Bhobe for the Respondents No.1(a), (1)(b),1(c) and 1(d).

2. This Second Appeal was admitted on 12th October, 2011, on the following substantial question of law :

“Having reversed the finding of the Trial Court holding that the plaintiffs had proved title to, and extent of the suit property, and having accepted that the plan produced by PW1, Sagun Naik in evidence, depicted all the encroachments, whether the Appellate Court committed a grave error in refusing to exercise its jurisdiction while dismissing prayer clause (a) of the suit”.

3. The Appellants are the original Plaintiffs and the Respondents are the original Defendants in Regular Civil Suit No.47/2001/B, seeking mandatory injunction and damages in the context of the encroachments made by the Defendants into the property claimed by the Plaintiffs. The encroachments, as alleged, pertain to extensions of a portion of the residential house of the Defendants, a hut and a toilet block.

4. The Civil Judge, Junior Division at Ponda (Trial Court) dismissed the Plaintiffs' suit by holding that the Plaintiffs had failed to establish that they were the owners in possession of the suit property surveyed under No. 106/1(part) of Curti Village, as described in paragraphs 3 and 3(a) of the plaint. The Trial Court held that some third party was the owner of this property and, therefore, the Plaintiffs could not complain of any encroachments on the suit

property.

5. The Judgment and Decree made by the Trial Court by dismissing the Plaintiffs' suit was appealed by the Plaintiffs instituting Regular Civil Appeal No.39/2009 before the District Judge-3, North Goa, at Panaji.

4. The District Judge-3, Panaji (First Appellate Court) quite correctly took cognizance of the Decree obtained by the Plaintiffs as against the third party establishing that the Plaintiffs were indeed the owners of the suit property. The First Appellate Court, therefore, held that the Plaintiffs were indeed the owners of the suit property and had right to question the encroachments on the suit property.

5. The First Appellate Court, however, dismissed the Regular Civil Appeal No.39/2009 by holding that the identity of the encroachments was not properly established by the Plaintiffs by leading cogent evidence.

6. Mr. Menezes, the learned Counsel for the Plaintiffs pointed out that the encroachments were described in sufficient details both, in the plaint, as well as on the plans annexed with the plaint. He pointed out that evidence was led in respect of the encroachments and it is not the law that in every case some expert has

to be examined to prove the plans. He submits that there was no serious contention raised as regards the identity of the encroachments and, therefore, the First Appellate Court erred in dismissing the Regular Civil Appeal No.39/2009, after having held that the Plaintiffs were indeed the owners of the suit property. He, therefore, submits that the substantial question of law is required to be answered in favour of the Plaintiffs.

7. Mr. Bhobe, the learned Counsel for the Defendants defends the impugned Judgments and Decrees based on the reasoning reflected therein. He points out that in the absence of proof as to the identity of the alleged encroachments, no effective Decree could ever have been made and, therefore, there is no case made out to interfere with the impugned Judgments and Decrees.

8. The rival contentions now fall for my determination.

9. The records indicate that the Trial Court dismissed the Plaintiffs' suit by recording finding that the Plaintiffs had not established title/ownership to the suit property and, therefore, were not the proper relators to complain about any alleged encroachments in the suit property.

10. Now, the issue of title/ownership of the Plaintiffs has been

settled in Regular Civil Suits No.35/2002 and 36/2002 produced in evidence before the First Appellate Court. Based thereon, the First Appellate Court has quite correctly rendered a finding that the Plaintiffs were indeed the owners of the suit property and, therefore, had right to question the encroachments, if any, on the suit property.

11. The only question was whether the First Appellate Court was right in non-suiting the Plaintiffs on the ground that the identity of the encroachments was not cogently established by the Plaintiffs.

12. In the plaint, this is what the Plaintiffs have pleaded in the context of the encroachments :

“7. That some where in the first week of June, 1998 the defendants who have no right, title or interest in the suit property carried out illegal construction and extension to their house and also constructed an illegal hut so that part of illegal extension of the house and the hut falls in the suit property. The plaintiffs herein relies on the map showing the illegal constructions and extension carried out by the defendants which forms part of the suit property.

9. That the plaintiffs not being economically sound could not approach before this Hon'ble Court to redress their grievances against the defendants. But the defendants, who are in the habit of grabbing the property of the plaintiffs few days back i.e. on 16/05/2001 have carried out illegal fencing outside the extended area in the suit property and also the waste/garage water from his house has let to follow in the suit property. Photographs showing said flow are relied upon. The said waste/garbage water have caused

health hazards and mosquitoes. The said illegal extension of the house admeasures 5.00 sq. mts. and that of the hut alongwith the fencing around it admeasures 80.00 sq. mts.

9(a) The plaintiffs state that somewhere in the year 2005, the defendants also constructed a toilet illegally alongside the said hut and in the encroachment done with the wooden fencing.”

13. Apart from the pleadings in the plaint, even a plan was annexed which gave very clear indication of the identity and extent of the encroachments. Even the dimensions were pleaded in the plaint and indicated on the plan. The written statement does not appear that there was any serious dispute raised on either the identity or the dimensions of the encroachments. No doubt, it was the case of the defendants that the Plaintiffs were not the owners of the suit property and, therefore, had no right to complain about any alleged encroachments.

14. Even, the issues framed by the Trial Court on 6/2/2002 did not raise any issue about the identity or extent of the encroachments. The issue was whether the suit property indeed belonged to the Plaintiffs and further, whether any encroachments were at all undertaken by the Defendants.

15. In the course of evidence as well, the identity and the extent of the encroachments has been proved by the Plaintiffs. In a matter of

this nature where one of the encroachments bears an area of 5.62 sq. metres and the other encroachment bears an area of 7 sq. metres, there was no necessity of examining some expert. The First Appellate Court was obviously not right in non-suiting the Plaintiffs on the ground that the identity of the encroachments or the extent of encroachments had not been proved by the Plaintiffs. The Records indicate that there was ample proof both, on the issue of the title of the Plaintiffs, as also the identity and extent of the encroachments and, therefore, the suit, as instituted, was required to be decreed.

16. Now, from the material on record, it is apparent that the encroachments are of the following nature :

- (a) The Defendants, whilst constructing their house in their own property, have encroached to the extent of 5.62 sq. metres into the suit property owned by the Plaintiffs; and
- (b) The Defendants, by encroaching in the suit property to the extent of 7 sq. metres, have put up a toilet block and fencing as depicted in the plan on record.

17. In so far as the encroachment to the extent of 5.62 sq metres is concerned, Mr. Menezes, on instructions from one of the Plaintiffs who is present in the Court, states that no demolition will be pressed for taking into account that the demolition may affect the residential house of the Defendants. This statement is accepted, as

well as appreciated.

18. In so far as the encroachment by way of putting up of a toilet block, fencing, etc, is concerned, the Plaintiffs are entitled to a decree of mandatory injunction, as prayed for. Now that it is established that the suit property belongs to the Plaintiffs, there is no reason why the Plaintiffs should be made to suffer this type of encroachments. As it is, the First Appellate Court had partly decreed the suit in terms of prayer clauses (b) and (c). This means that there is also a decree, declaring the Plaintiffs as the owners of the suit property and, further, there is an injunction restraining the Defendants from letting out the waste water/garbage into the suit property. If the decree in terms of prayer clause (c) is to be given effect, it is only appropriate that the toilet and other constructions in the encroached portion to the extent of 7 sq. metres, are also removed by the Defendants.

19. The substantial question of law is, therefore, answered in favour of the Plaintiffs. The Judgment and Decree made by the First Appellate Court is also modified to the aforesaid extent.

20. The Appeal is partly allowed. There shall be no order as to costs.

M.S. Sonak, J.