

IN THE HIGH COURT OF BOMBAY AT GOA

SECOND APPEAL NO.44 OF 2010

MRS. CRISTINA MARQUES,
r/o Church Waddo,
St. Estevam, Tiswadi - Goa.

...Appellant

Versus

1. LILY DIAS @ LILIA DIAS TOSCANO
@ LILY DIAS TOSCANO,
widow of late Mr. Trifanio Aleixo Estevao,
major in age, residing at H. No. 1039,
St. Estevam, Ilhas Goa.

2. Master JOHN PAUL TOSCANO,
son of late Mr. Trifanio Aleixo Estevao,
aged 13 years, student, residing at
H. No. 1039, St. Estevam, Ilhas - Goa.
Through his natural guardian and next
friend Appellant No. 1 above identified.

3. Mrs. JOSEPH PHILOMENA SILVEIRA,
major in age, housewife,
residing at Polvado,
St. Estevao, Tiswadi - Goa.

4. Mr. JOHN FERNANDES (deceased)
through his legal representatives:
a) MR. ELIDIO GERNANDES,
major in age, residing at 12,
Asha Sadan, Opp. St. Charles Covent,
Vakola, Santa Cruz,
Bombay - 400 055.

b) MELVILLA FERNANDES,
major in age, residing at 12,

Asha Sadan, Opp. St. Charles Covent,
Vakola, Santa Cruz,
Bombay - 400 055.

c) VIRISTINHO V. DIAS,
major in age, residing at
Marcela, Tonca - Goa.

d) MONORA DIAS,
major in age, residing at
Marcela, Tonca – Goa.

e) MISS PERPETUA FERNANDES
major in age, residing at 12,
Asha Sadan, Opp. St, Charles Covent,
Vakola, Santa Cruz,
Bombay - 400 055.

5. ANNA CECILIA MARQUES,
major in age, residing at
Dandowado, Nerul, Bardez - Goa.

6. SHRI JOSE PLACIDO FERNANDES,
major in age, residing at
Dandowado, Nerul, Bardez - Goa.

7. MISS TESSY MATRA MARQUES,
major in age, residing at
near the Church, St. Estevao,
Tiswadi - Goa.

8. Mrs. ASSUMPTA MARQUES,
major in age, residing at
BIT Chawl No. 10, Room No. 37,
First Floor, Agripada,
Bombay - 400 011.

9. Shri MANUEL AGUSTO GOMES,
major in age, residing at
BIT Chawl No. 10, Room No. 37,

First Floor, Agripada,
Bombay - 400 011.

...Respondents

Mr. Nigel da Costa Frias with Ms. B. Kunkalkar, Advocates for the Appellant.

Mr. M.B. D'Costa, Senior Advocate along with Ms. K. Betquecar, Advocate for the Respondent No.1.

Coram:- M.S. SONAK, J.

Dated:- 21st January 2021

ORAL JUDGMENT

Heard Mr. Nigel da Costa Frias for the appellant and Mr. M.B. D'Costa learned Senior Advocate for respondent no.1.

2. After this matter was argued for some time, it became apparent that the impugned judgment and decree made by the First Appellate Court on 19.07.2007 will have to be set aside and the matter restored to the file of the First Appellate Court for disposal of Regular Civil Appeal No.78 of 2005 afresh on its own merits and in accordance with the law.

3. This order will have to be made in this Second Appeal quite reluctantly and the brief reasons for the same are now set out hereafter.

4. The appellant is the original defendant no.2 and respondent no.1 is the original plaintiff in Regular Civil Suit No.24/96/C. In the

suit the plaintiffs had prayed for the following reliefs:

“(a) Suit may please be decreed with costs. Defendants, their servants and agents be restrained by permanent injunction from obstructing the Plaintiff from completing the construction of the suit house.

(b) The defendants be directed by Mandatory injunction to remove forthwith all the obstruction i.e. the compound walls put by them blocking the right of way on the Suit way of the plaintiffs to and around the suit house two meters in width from the suit house and from the compound wall of Cadastral Survey no. 12.

(c) This Hon'ble Court be pleased to declare that the persons occupying the suit house have easementary right over the suit way through the property bearing Cadastral Survey numbers 15 and 16 to enter the house and move around the house.

(d) The costs of this Suit be awarded to Plaintiff.”

5. The aforesaid reliefs were claimed *inter alia* on the basis that the plaintiffs have an easementary right of 2 meters from over the property of the appellant herein and in any case, the plaintiffs have a right of way over this 2 meters access in terms of Sale Deed dated 09.06.1921.

6. The Trial Court vide judgment and decree dated 30.04.2005 dismissed plaintiffs' suit. The First Appellate Court by the impugned judgment and decree dated 19.07.2007 has allowed the appeal. In doing so, the First Appellate Court has agreed with the finding of the learned Trial Judge that the plaintiffs have failed to establish a case of easement of necessity. However, the First Appellate Court, held that

the plaintiffs have been able to establish that they have a customary right over this two meters access under Deed of 1921.

7. Mr. Costa Frias, has quite correctly pointed out that in the entire plaint there were no pleadings about any customary right. He has pointed out that since there were no pleadings, naturally, there was no evidence led on the aspect of customary rights. He pointed out that this issue of customary rights was not even argued by the original plaintiff before the First Appellate Court. He submits that in the name of moulding of relief, the First Appellate Court exceeded jurisdiction in granting relief on some ground which was neither pleaded nor proved by the original plaintiffs. He relies on the provisions of Section 18 of the Easement Act, 1882 to elaborate on the concept of a customary easement. He also relies on the decision of the Hon'ble Supreme Court in *Bachhaj Nahar v. Nilima Mandal & Ors. - AIR 1009 SC 1103* in which the Hon'ble Supreme Court has set out principles as to when a case not specifically pleaded by a party can nevertheless be considered by the Court. For all these reasons he submits that the substantial questions of law that are framed in this matter may be answered in favour of the appellant and against the respondents.

8. Mr. M. B. D'Costa, learned Senior Advocate for the original plaintiff submits that the suit access was clearly reserved in favour of the original plaintiff by the Deed of 1921. He submits that there is ample evidence on record to establish the use of this access. He

submits that even the ingredients of easement of necessity were made out but in any case, relief was due to the original plaintiff based on the Deed of 1921 itself.

9. Mr. D'Costa submitted that it is possible that the First Appellate Court was confused between the concept of customary easement and right of way based upon a specific stipulation or reservation in a document of ancient vintage. He pointed out that the original plaintiff had pleaded to the user of the said access for over 100 years *inter alia* through their predecessors in title. He, therefore, submits that the reference to the customary easement in the impugned judgment and decree made by the First Appellate Court may be read and construed as a reference to a right of way based upon the Deed of 1921. For all these reasons he submits that this appeal is liable to be dismissed.

10. The rival contentions now fall for determination.

11. This Second Appeal was admitted on 20.10.2010 on the following substantial questions of law:

“(a) Whether the suit filed by the respondents which was for declaration simplicitor was maintainable in the absence of a prayer for declaration of their easementary rights ?

(b) Whether the appellate Court was legally justified in considering the suit of the respondents which related to easements by prescription and necessity under Sections 13 and 15 of the Indian easements Act, 1882 as one relating to a

customary easement in the absence of pleadings and prayers to that effect in the suit ?”

12. Insofar as the substantial question of law at (a) is concerned, it is not as if there was no declaration claimed in respect of easementary rights. In fact, in prayer clause (c) of the plaint, the original plaintiff had sought a declaration that the persons occupying the suit house have easementary right over the suit way through the property bearing Cadastral Survey Nos.15 and 16 to enter the house and move around the house. Thus, based upon the substantial question of law at (a) it may not be necessary to interfere with the impugned judgment and decree made by the First Appellate Court.

13. However, insofar as the substantial question of law at (b) is concerned, there is merit in the submissions of Mr. Costa Frias that in the absence of any pleadings whatsoever about the customary easement, the First Appellate Court was not justified in reversing the impugned judgment and decree made by the Trial Court by holding that the case of a customary easement has been made out by the original plaintiff. As noted earlier, on the perusal of the plaint or its construction in entirety it cannot be said that any case of the customary easement was pleaded or made out by the original plaintiff. The plaintiffs had based their claim on the easement of necessity or in any case on their right of way in terms of the Deed of 1921. Therefore, the First Appellate Court was required to consider whether both or either of these two claims were established by the original

plaintiff based on the evidence on record. There was no question of adverting to the aspect of customary easement which was not a case pleaded by any of the parties.

14. Section 18 of the Indian Easements Act, 1882 provides that an easement may be acquired in virtue of a local custom and such easements are called as customary easements. On perusal of the plaint, it is apparent that there were no pleadings about customary easement but rather pleadings were concerning the easement of necessity and/or right of way based upon the Deed of 1921.

15. The First Appellate Court, appears to have confused itself with the claim based upon the Deed of 1921 and customary easement merely because there were pleadings in the plaint that such right of way was used for more than 100 years in the past. Mr. Costa Frias is quite justified in his submissions that the parties whom he represents were taken by surprise because this issue of the customary easement was decided in the absence of any pleadings and even in the absence of any arguments on this issue.

16. In the aforesaid circumstances, despite being conscious that this is an old matter, there is no option than to set aside the impugned judgment and decree dated 19.07.2007 made by the First Appellate Court and to remand the Regular Civil Appeal No.78/2005 to the file of the District Judge at Panaji-Goa with directions to dispose of the

said appeal afresh, on its own merits and in accordance with law.

17. Accordingly, this appeal is allowed and the impugned judgment and decree dated 19.07.2007 is set aside. The matter is remanded to the Court of the District Judge, Panaji-Goa by restoring Regular Civil Appeal No.78/2005, to its file. Learned District Judge at Panaji-Goa to dispose of the said appeal afresh, on its own merits and in accordance with the law without in any manner being influenced by any observations in the impugned judgment and decree dated 19.07.2007. Similarly, the learned District Judge need not be influenced by any of the observations in this order as well since the observations were only in the context of the order of remand which is presently made. This clarification does not mean that the parties have the liberty to argue the appeal by raising the issue of the customary easement once again.

18. Since this is an old matter, it is only appropriate that directions are issued to the District Judge to dispose of the appeal within four months from the date of filing of the certified copy of this order. The issuance of the certified copy is expedited.

19. The parties to appear before the District Judge, Panaji-Goa on 15.02.2021 at 10.30 a.m. and produce a certified copy of this order. The learned District Court to dispose of the Regular Civil Appeal No.78/2005 as expeditiously as possible and in any case within four

months from the date of filing of such certified copy.

20. All contentions of all parties on the merits are kept open for the determination of the learned District Judge, Panaji-Goa.

21. The Registry to transmit the records to the Court of the learned District Judge, Panaji-Goa as soon as possible and in any case on or before 10.02.2021.

M. S. SONAK, J.