

Niti

IN THE HIGH COURT OF BOMBAY AT GOA

**MISCELLANEOUS CIVIL APPLICATION NO.2527 OF 2022,
790 OF 2018 & 618 OF 2016,
STAMP NUMBER (APPLN.) NO.121 OF 2018
AND
STAMP NUMBER MAIN NO.2840 OF 2015**

LAXMAN GANESH
GAONKAR (SINCE
DECEASED THR. LRS) & ORS.APPLICANTS/
APPELLANTS

Versus

KISHORI SHARAD
GAITHONDE & ORS.RESPONDENTS

**Mr Ryan Da Piedade Menezes, Advocate for the
Applicants/Appellants.**

CORAM: M. S. SONAK, J.

DATE : 2nd DECEMBER 2022

ORAL ORDER :

- 1.** Heard Mr Ryan Menezes for the applicants/appellants.
- 2.** Although service is yet to be completed in the several miscellaneous applications, including those seeking condonation of delay in recalling the order dismissing the main appeal or rather the application for condonation of delay in the main appeal for non-prosecution, there is no point in not allowing the

applications for condonation of delay or restoring the application for condonation of delay in instituting the Second Appeal. This is because even after allowing the miscellaneous applications, there appears to be no case made out to admit the Second Appeal on merits.

3. Mr Ryan Menezes was requested to address on the merits because substantial time has been spent in only effecting service or rather for want of effecting service upon the respondents in the civil applications. If, after all this exercise, it were to be found that there was no merit in the Second Appeal, then there was no purpose in going through this entire process.

4. Mr Menezes submitted that though two Courts have concurrently held against the appellants/defendants, the impugned decrees warrant interference because the respondents/plaintiffs had primarily failed to identify the suit property. He pointed out that PW1 deposed in the matter, stating that he could not close precisely to the suit property's boundaries. He submitted that since the suit was for a permanent injunction, the plaintiffs identified the suit property without any ambiguity. He offered that the Plaintiff's suit must stand or fall on its own feet and cannot rely upon the weakness in the defendant's case.

5. Mr Menezes proposed the following questions as substantial questions of law, which according to him, arise in the main appeal:

(a) Whether in view of the clear admission of PW-1 that he was unable to specify the boundaries of the properties which were the subject, matter of the suit, while PW-2 offers no evidence to bear out the claims of the Plaintiff, the Hon'ble Courts below erred in accepting his evidence to come to the conclusion that the Plaintiff were owners of the said property and the Defendants had interfered with the Plaintiff's possession thereof?

(b) Whether in the view of the clear admission of PW-1 that the predecessors of the Appellants were tenants of the portions of the entire (suit) property, and in inability to specify which these portions were, or to lead any evidence to demonstrate the same, the Hon'ble Courts below erred in accepting his evidence to come to the conclusion that the Plaintiff were owners of the said property and the Defendants had interfered with the Plaintiff's possession thereof?

(c) Whether in the absence of any link certificate/material/evidence to demonstrate that the properties referred to in documents relied upon by them, corresponded to and/or were the same as the survey numbers which the Plaintiff alleged them to be, and that these properties were the suit properties, the Hon'ble Court's

erred in accepted the case of the Plaintiff and granting the decree sought by her?

6. From the perusal of the concurrent decrees, it is evident that the issue of identity was never raised before the Trial Court. In fact, no such case was even raised in the pleadings by the appellants. Instead, the appellants claimed that they were owners in possession of the suit property, and the plaintiffs had no right to the same. There was also a plea of adverse possession raised by the appellants/defendants. In the absence of any issue about identity, the Trial Court was not required to lay any undue emphasis on the issue of identification.

7. Even though PW1 may have at one point stated that he was unable to specify the boundaries or that predecessors of the appellants were tenants of some specified portions, that by itself makes not much difference to the concurrent findings recorded by the two Courts about the plaintiffs having the suit property and the defendant's claim of adverse possession being found to be wanting.

8. Incidentally, the suit was not in respect of the portions the plaintiffs had admitted tenancy of some of the predecessors in title of the defendants. Yet, the appellants/defendants came with a

clear case that they were not the tenants of the suit property or any other properties but that they were the owners in possession of the suit property. As noted earlier, they also claimed ownership by adverse possession.

9. The First Appellate Court has also dealt with the issue of identification. The First Appellate Court has held that the defendants had never denied, disputed, or challenged the identity or allegation of the suit property as pleaded by the plaintiffs in their plaint. Therefore, because one of the plaintiffs' witnesses could not precisely identify the boundaries in loco, the plaintiffs' case need not fail. Accordingly, after detailed consideration of the evidence on record, the First Appellate Court has held that it was not as if PW1 completely failed to identify the suit properties but only failed to identify the precise boundaries in loco at this point in time.

10. The First Appellate Court has also adverted to the evidence of PW2 on the issue of identification and has devoted considerable reasoning to the assessment based only on identification.

11. In my judgment, this is a matter of appreciation of evidence. Suppose the two Courts have concurrently appreciated

the evidence and chosen not to non-suit the plaintiffs for want of proper identification of the suit property. In that case, that will not give rise to any question of law, much less a substantial question of law.

12. The contention about the absence of a link between the title documents produced by the plaintiffs and the suit property cannot be accepted. The two Courts have concurrently held that the title documents pertain to the suit property. In the case of old title documents, it is quite natural that the description of the boundaries may not precisely correspond with the description presently in loco. Based upon such minor discrepancies, Plaintiff could not have been non-suited and was not correctly non-suited by the two Courts.

13. Since there is no merit in the Second Appeal, no useful purpose would be served in pending the several miscellaneous applications filed. However, it must be noted that the explanations offered in the miscellaneous applications duly supported even by the affidavit of the Advocate could generally have been accepted and restoration ordered or provided if there was some merit in the main appeal.

14. Therefore, miscellaneous applications are formally allowed without prejudice to the rights of the unserved Respondents. Still, upon considering the Second Appeal, the same fails and is dismissed for the reasons discussed above.

15. The appeal and the miscellaneous applications are disposed of in the above terms without any order for costs.

16. There shall be no order for costs.

M. S. SONAK, J.

NITI K
HALDANKAR

 Digitally signed by NITI K HALDANKAR
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