

Santosh

IN THE HIGH COURT OF BOMBAY AT GOA

SECOND APPEAL NO. 39 OF 2019

NECESSIDADE GOMES (DEC.)

THR. LRS.

....APPELLANTS.

Versus.

MOHAMMED SAYED KADER.

....RESPONDENT

**Mr. S.D. Lotlikar, Senior Advocate with Ms. Sailee Keny,
Advocate for the Appellants.**

Ms. Amira Abdul Razaq, Advocate for the Respondent.

CORAM : M. S. SONAK, J.

DATE : 2nd December 2022

ORAL ORDER: -

1. Heard Mr S.D. Lotlikar learned Senior Advocate who appears along with Ms Sailee Keny for the Appellants and Ms Amira Razaq for the Respondent.

2. This second Appeal challenges the concurrent decrees made by the Trial Court, and the First Appellate Court dated 29/9/2017 and 24/10/2018, respectively. Accordingly, both the Courts have enjoined the Appellants-Defendant from interfering with the suit property described in the plaint as Plot No.62, situated in Chalta No.1 of P.T. Sheet No.118 of City Survey of Margao.

3. Mr Lotlikar submits that the two Courts have travelled beyond the pleadings and the case set out by the Respondent/Plaintiff before the Trial Court. He submitted that the Appellants were declared as the mundkars in respect of their dwelling house, which includes the property totally admeasuring 200 sq. meters. He submits that the Survey Authorities have confirmed the Appellants' possession over an area of 218 sq. meters. He submits that both the Courts have not recorded a clear finding that the area of 200 sq. meters purchased by the Appellants or the 218 sq. meter in possession of the Appellants does not overlap the suit plot No.62. He submits that in the absence of any such clear finding being recorded by both the Courts, version about such overlap, should have been accepted. He submits that the Respondent-Plaintiff claims right and title based only on the sub-division plan. In contrast, the Appellants claim right and possession under the provisions of the Mundkar Act, and such a right or possession would, therefore, have a statutory primacy over some private document between the developer and the Plaintiff. He submits that since the two Courts have not considered these vital aspects, the decrees, though concurrent, are required to be set aside.

4. Mr Lotlikar proposes the following substantial questions of law which, according to him, arise in this Appeal:

1. Whether the Impugned Judgments and Decrees passed by the Courts are vitiated having been passed on the basis of a case not pleaded in the plaint and by letting in evidence which was beyond pleading?

2. Could the Courts below have granted to the Plaintiff a permanent injunction without recording a clear finding of possession in favour of Plaintiff/Respondent, particularly in the face of confirmation of an area of 218 sq. mtrs in favour of the Appellants in the city survey records?

3. Whether the finding on the cause of action in favour of the Respondent is perverse in view of the pleadings in the plaint and based on misreading of evidence?

4. Whether in view of absence of clear plea that the area of 200 sq mtrs purchased by the Appellants under the Mundkar Act did not clash with the suit plot by the Plaintiff, the suit of the Plaintiff could be decreed?

5. Ms. Razaq submits that the questions which are now proposed, are not even questions of law, much less substantial questions of law. She points out that initially, the Appellants sought to purchase an area of 262 sq. metres based on a plan

submitted before the Mamlatdar in mundkarial proceedings. The Mamlatdar permitted them to do so. By Judgment and Order dated 23/8/1999, however, this order was set aside in Appeal by the Deputy Collector. Ultimately, the Appellants were restricted to an area of only 200 sq. meters, which is even otherwise the entitlement under the Mundkar Act. She submits that out of this area of 200 sq. metres purchased by the Appellants, only an area of 156 sq. metres was in the property bearing Chalta No.1(Part), P.T. Sheet 118. She points out that even suit plot No.62 is in property bearing Chalta No.1(Part), P.T. Sheet 118. She submits that from this it is evident that no part of this 156 sq. meters, even remotely, overlaps the suit plot.

6. Ms Razaq submits that the Appellants are trying to take undue advantage of the certification by the Survey Authorities about an area of 218 sq. meters. She submitted that the Appellants approached the Survey Authorities by submitting the earlier plan for purchasing 262 sq. metres when, in fact, this plan was duly set aside in Appeal by the Deputy Collector, and the Appellants were restricted to purchase area of only 200 sq. metres. She, therefore, submits that no reliance could have been placed upon such a survey plan, which raises only a presumption and nothing further.

7. Considering the rival contentions and perusing the material on record, including the concurrent decrees made in this matter, I think no substantial questions of law, as proposed or otherwise, arise in this matter.

8. The pleadings of the Plaintiff are quite clear. The suit plot has been described in the plaint in plot No.62 in Chalta No.1, of P.T. Sheet No.118, and even the boundaries have been stated. The southern boundary is plot No.64, in a portion of which is found the mundkarial house of the Appellants. In paragraph 2 of the plaint, precise dimensions have been pleaded. The plaint pleads the cause of action as the attempt on the part of the Appellants to interfere with the suit plot by removing part of the stone boundary wall and the barbed wire fencing existing on the southern side of the suit plot. Even the precise location of the interference was shown in the plan in red colour line. After assessing the evidence, the Courts have recorded the concurrent findings on attempted interference.

9. The case of the Appellants is somewhat ambiguous. On the one hand, they claim possession; on the other hand, they claim that they were only repairing the boundary wall or wire fencing. Be that as it may, after a detailed evaluation of the

evidence on record, the two Courts have recorded a concurrent finding of fact which suffers from no perversity.

10. The Appellants' prime document is and has to be the purchase order under the Mundkar Act, by which they were initially permitted to purchase 262 sq metres of land. But, later, this area was reduced to only 200 sq. meters. There is a further record that this 200 sq. meters of land comprises an area of 156 sq. meters in Chalta No. 1 (part) of P.T. Sheet 118, and the balance of 44 sq. meters of land is in Chalta No.32 (part) of P.T. Sheet 131. Ms. Razaq made it clear that the Respondent-Plaintiff has no concern about Chalta No.32(part), P.T. Sheet 131. However, she correctly emphasized that in terms of the purchase order, the Appellants had only 156 sq. metres in Chalta No.1 (part), P.T. Sheet 118.

11. Again, the two Courts below have evaluated the evidence on record, which includes the Commissioner's Report. Based upon such evaluation, they have concluded that this portion of 156 sq. meters does not overlap with the suit plot.

12. The Appellants' reliance on the survey plan showing there that *prima facie* they were in possession of an area of 218 sq meters would have ordinarily assisted the Appellants in the absence of other superior evidence to rebut the presumption. The

material on record suggests that before the Survey Authorities, the Appellants produced the plan in terms of which they were initially permitted to purchase an area of 262 sq. metres. However, the record bears out that this order enabling them to purchase 262 sq. metres was set aside in the Appeal, and the area they were permitted to buy was brought down to 200 sq. metres. This plan, about the purchase of 200 sq. meters, which would have included bifurcation of the area of 156 sq. meters in Chalta No.1 (part), P.T. Sheet 118, and an area of 44 sq. meters in Chalta No.32 (part) of P.T. Sheet No.131, was never produced before the Survey Authorities. Based on this, the Survey Authorities certified the Appellant's interest over an area of 218 sq. meters instead of 200 sq. mtrs. This apparent error was rightly noted by the two Courts.

13. Mr Lotlikar, in the context of the Civil Court's findings, was emphatic that such findings must yield to the findings by authorities under the Mundkar Act. Applying the same logic, the findings, and that too findings reached without reference to the right plan by survey authorities, cannot stand against a purchase order by a Mamlatdar under the Mundkar Act. Thus, the presumption, if any, arising out of the survey record has been substantially rebutted by substantive documentary evidence.

14. This is not a case of the two Courts travelling beyond the pleadings. The pleadings are quite clear and in support of the pleadings, both parties led the evidence. The Courts have only discussed and evaluated such evidence. Even the finding of the two Courts are quite clear and they have looked through the confusion that was sought to be created based upon the survey plan. This is not a case of either misreading the evidence or perversity. Clear findings are recorded by both Courts, which entirely support the Respondent/Plaintiff's case.

15. For all the above reasons, none of the questions proposed by Mr Lotlikar either arise or can be styled as substantial questions of law.

16. For all the above reasons, this Appeal is liable to be dismissed and is, hereby, dismissed. There shall be no order for costs.

M. S. SONAK, J.

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