

Suchitra

IN THE HIGH COURT OF BOMBAY AT GOA

SECOND APPEAL NO.87/2019

1. SHRI YOGIRAJ TULASKAR,
married, major of age, presently residing
at C/o. Shri Vasudev Bablo Tulaskar,
PistaWada, Nanora, Latambarcem,
Bicholim, Goa.

2. SMT. NUTAN YOGIRAJ
TULASKAR, wife of Yogiraj Tulaskar,
major of age, presently at PisteWada,
Nanora, Latambarcem, Bicholim, Goa.

... APPELLANTS

Versus

SMT. INDIRA RAMCHANDRA
MARATHE, widow of Shri Ramchandra
Marathe, major of age, housewife, resident
of House No.903, Nanora, Latambarcem,
Taluka Bicholim, Goa represented by
power of attorney, Shri Jayant Vishnu
Marathe, married, Priest, resident of
House No.468/2, Bhoutawada, Assagao,
Bardez Goa.

... RESPONDENT

Mr. Shivan Desai, Advocate *for the Appellants.*

Mr. Gaurish Agni, Advocate *for the Respondent.*

CORAM: M. S. SONAK, J.

DATED: 6th October 2022

ORAL JUDGMENT:

1. Heard Mr. Desai for the appellants and Mr. Agni for the respondent.
2. This appeal takes exception to the Judgment and Decree dated 10.11.2017 made by the First Appellate Court in Regular Civil Appeal No.92/2016.
3. The appellants are the original defendants, and the respondent is the original plaintiff in Regular Civil Suit No.40/2010/C. In the Suit, the plaintiff had applied for a permanent injunction restraining the defendants from interfering with the suit property and a mandatory injunction to remove the structure the defendants had illegally and unauthorisedly put up in the suit property.
4. The Trial Court, by Judgment and Decree dated 10.08.2016, granted the decree for a permanent injunction but declined the relief of mandatory injunction. This relief was denied on the grounds of alleged failure on the part of the plaintiff to identify the structure in question.
5. The appellants-defendants did not appeal the Trial Court's decree. This means they accepted the decree of permanent

injunction restraining them from interfering with the suit property. However, the original plaintiff appealed the denial of relief of mandatory injunction.

6. The First Appellate Court, vide the impugned decree, granted the decree for mandatory injunction. Hence the present Second Appeal.

7. Mr. Desai proposed the following substantial questions of law:-

(I) Whether in light of the ratio laid down in the case of "Bento Antonio vs. Rosario Carneiro" (2014) 4 MLJ 366, it was incumbent upon the Appellate Court to exercise powers under Order XXVI, Rule 9 of CPC and appoint a commissioner before partly reversing the Judgment and Decree of the Trial Court and granting mandatory injunction of demolition of alleged encroachment, more particularly in the background of the fact that the Plaintiff/Respondent had failed to identify the Suit property vis-a-vis the title documents?

(II) Whether the Appellate Court can exercise relief of mandatory injunction when the Plaintiff/Respondent had

failed to establish title in respect of the suit property and the relief of permanent injunction was granted to the Plaintiff/Respondent primarily on the basis of the entry of the Plaintiff/Respondent in the mutation records and the presumption arising therefrom from Section 105 of the Goa Land Revenue Code?

8. Insofar as the first substantial question of law is concerned, the same does not arise in this matter. The entire suit property was adequately described in the plaint. The structure in respect of which mandatory injunction was applied was the structure in the suit property that was adequately described. Accordingly, the Trial Court was not justified in declining the relief of mandatory injunction after concluding that the original plaintiff was entitled to a decree of permanent injunction restraining the appellants-defendants from interfering with the suit property. This was more so after the Trial Court assessed the evidence on record and found that the structure in question was illegal and unauthorised. The Trial Court also noted that the Panchayat had issued a stop work order when the construction of this structure was in progress. Having done all this, the Trial Court was not justified in declining mandatory injunction relief. The facts in *Bento Antonio (Supra)* were entirely different. There was a serious issue of identification of the subject matter.

9. The First Appellate Court has considered the matter from the proper perspective and, after answering all the contentions raised by and on behalf of the parties, decreed the Suit in its entirety and issued the mandatory injunction. Further, even the Appellate Court has, in paragraphs 36, 37 and 38, adverted to the aspect of patent illegality of the structure put up by the appellants. Both the Trial Court and the Appeal Court have referred to the admission on the part of the appellants about the structure being illegal in the sense that any permissions from any authorities did not back the same.

10. Both the Courts considered but rejected the appellants' defence about the activity being nothing but a renovation of the existing structure. Both Courts noted that there was no evidence of any existing structure. These are pure findings of fact adequately backed by evidence on record. Even before this Court, the learned Counsel did not urge any ground of legality of the structure but merely suggested that the illegality was not the foundational plea in the plaint. However, the pleadings refer to the patent illegality that the Appellants did not even contest. The parties led evidence on this aspect, and even admissions were elicited from the Appellants that the structure was indeed illegal. The decree of mandatory injunction was, thus, proper in such proven circumstances.

11. Even on the issue of identification, the First Appellate Court noted in paragraph 39 that the identity of the illegal construction is pleaded in the plaint by giving its dimensions, and the plaintiff also proved its location and measurements in evidence. The structure, as noted earlier, is also identified by the documents in the form of complaints to the police and Panchayat authorities. Even the Panchayat had issued a stop work order regarding this very structure. Accordingly, the decree issued by the First Appellate Court cannot be faulted based upon some confusion that is unnecessarily sought to be created by the Appellants.

12. Even the proposed second substantial question of law does not arise in this matter, particularly since the appellants did not appeal against the decree of permanent injunction granted by the Trial Court. Consequently, after accepting this decree of permanent injunction, it is not open to question the further decree of mandatory injunction on the alleged ground of failure to identify the structure in question. As found earlier, there was more than adequate identification. This is more so because the structure was illegal and unauthorised.

13. No other question was proposed, or argument urged. No question of law, much less any substantial questions of law, arise in this matter.

14. For all the above reasons, this appeal is liable to be dismissed and is hereby dismissed. Accordingly, there shall be no order for costs.

M. S. SONAK, J.

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