

Niti

IN THE HIGH COURT OF BOMBAY AT GOA

SECOND APPEAL NO.84 OF 2010

1. Mr. Sree Yeshwant Morajkar,
Alias Mr. Sreedhar Yeshwant Morajkar,
(since deceased) through his legal heirs

1.1. Smt. Janki Hiru Gadekar,
Aged 68 years,

1.2 Shri. Kiran Hiru Gadekar,
Aged 40 years,

1.3 Smt. Kanaksha Kiran Gadekar,
Aged 32 years,

1.4 Shri. Suraj Hiru Gadekar,
Aged 40 years,

1.5 Smt. Susmita Suraj Gadekar,
Aged 31 years,

All resident of H. No. 161, Udaiwadi,
Maimollem, Vasco-da-Gama, Goa.

1.6 Smt. Laxmi Laxman Parsekar,
Aged 42 years,

1.7 Shri. Laxman Dhondur Parsekar,
Aged 49 years,

All residents of H. No. 336,
Canca, Khalap Wada, Mapusa,
Bardez - Goa.

... Appellants

Versus

Mrs. Pushpa Mandrekar alias aria Telma
Teles, Major in age, Resident of H. No.
169/C, Opp. Chowgule Colony,
Maimollem, Mangor Hill,
Vasco-da-Gama - Goa.

....Respondent

Mr Shivan Desai, Advocate for the Appellants.

Mr M. Fernandes, Advocate for the Respondent.

CORAM: M. S. SONAK, J.

DATE : 1st DECEMBER 2022

ORAL JUDGMENT :

1. Heard Mr Desai for the appellants and Mr M. Fernandes for the respondent.

2. The appellants are the legal representatives of Sree Yeshwant Morajkar, the original Defendant in Regular Civil Suit No.59/2003/C instituted in the Court of Civil Judge, Junior Division at Vasco (Trial Court). The respondent is the original plaintiff in the said suit. Therefore, for convenience, the appellant will be referred to as the Defendant, and the respondent will be referred to as the plaintiff.

3. The plaintiff instituted the suit for a mandatory and permanent injunction regarding the suit property described in the plaint. The description of the two rooms in respect of which a

mandatory injunction for demolition and consequently restoration of possession was applied for is found in paragraphs 6 & 8 of the plaint, which reads as follows :

"6. Few years back the Defendant undertook the illegal construction of two rooms towards south and west of the said barrack under chalta no.139 of P.T. Sheet no.130. It is shown with green colour and referred to as the suit encroached portion.

8. On 28/5/03 the Defendant undertook the illegal construction by trespassing upon the said property towards west of the barrack under chalta no.13 and opening the pit for the construction of the Septic tank, the said pit is shown with red colour in the sketch and it is in the property under chalta no.139."

4. In addition to the above description, the plaintiff annexed to the plaint a sketch in which the two rooms/structures towards the South and West of the barrack in chalta no.13 of P.T. Sheet no.130 were clearly shown. There are pleadings that the two structures in respect of which mandatory injunction was applied are in the property under Chalta no.139.

5. Defendant filed a written statement, and from the perusal, it is apparent that there were no serious issues raised about identification or the location of the two rooms/structures.

Instead, vague denials claimed that the defendants had not extended or constructed any rooms as alleged in paragraph 6 of the plaint. In the context of pleadings in paragraph 8 of the plaint, the defendants submitted that the structure was a sulabh shauchalaya constructed by the Public Works Department. However, in the entire written statement, there was no claim that the two rooms/structures fall within the property surveyed under chalta no.13 of the P.T. Sheet where the barrack is situated. The defendants also took a plea that the property where the toilet was constructed belongs to the Comunidade of Mormugao in possession of the defendants for over the last 44 years.

6. The Trial Court, by its judgment and decree dated 12.11.2008, partly decreed the plaintiff's suit. The operative order reads as follows:

"O R D E R

The suit filed by the plaintiff stands partly decreed.

Consequently, the Defendant, his agents, or anyone acting on his behalf are hereby restrained from doing any developmental work or in any way interfering in the said property with exception of the property under Chalta No.13 of P.T. Sheet No.130 of City Survey, Vasco da Gama.

Decree shall be drawn accordingly.

Pronounced in the open Court.

Proceedings closed."

7. The Trial Court declined relief of mandatory injunction in respect of the two rooms/structures by simply observing that the plaintiff had proved by cogent and trustworthy evidence as to when and how the defendants constructed the two rooms to the existing house and what the extent of encroachment done by the defendants in the said property. The Trial Court, however, found that the plaintiff has succeeded in establishing her title to the property bearing chalta nos.13 to 17 and 139 of P.T. Sheet no.130 of City Survey, Vasco da Gama. Accordingly, the suit was decreed only partly.

8. The plaintiff and the defendants appealed the Trial Court's judgment and decree dated 12.11.2008 to the extent it affected them. The first appellate Court dismissed the defendants' Regular Civil Appeal No.2/2009 by judgment and order dated 29.08.2009. As against this dismissal, the defendants have not instituted any Second Appeal. However, the first appellate Court allowed the plaintiff's Regular Civil Appeal No.154/2008 vide judgment and decree dated 29.08.2009, thereby granting a mandatory injunction for demolishing the two rooms/structures. It is as against this judgment and decree that the defendants have instituted the present Second Appeal.

9. This Second Appeal was admitted on 14.02.2011 on the following substantial questions of fact:

(i) Whether the appellate Court erred in law in granting mandatory injunction although the respondent had not complied with Order VII, Rule 7 of C.P.C.?

(ii) Whether the appellate Court erred in placing reliance upon the plan which was marked 'X' for identification without being proved in accordance with law?

10. Mr Desai, learned Counsel for the defendants submits that the identification of the two structures in the plaint was vague and unspecific. He invited my attention to the Affidavit in evidence of Mrs Pushpa Mandrekar alias Maria Telma Teles (PW1) to submit that paragraph 3 of the Affidavit in evidence has further compounded the confusion as to the identity of the two rooms/structures. He submitted that the Trial Court correctly declined to admit the sketch annexed to the plaint evidence for want of adequate proof. He submitted that this sketch was only marked as 'X' for identification but not as an Exhibit in Order XIII Rule 4 of C.P.C. read with paras 523 and 524 of the Civil Manual. In short, he submitted that there was no compliance with the mandatory provision of Order VII Rule 7 of C.P.C. and Order VII Rule 3 of C.P.C. He submitted that no mandatory

injunction could be issued in the absence of compliance with the statutory provisions and given the failure to identify the two rooms/structures.

11. Mr Desai also submitted that the sketch was not proved in accordance with the Evidence Act 1872. He submitted that the pleadings and the evidence on record were too sketchy and ambiguous, based upon which no relief of mandatory injunction could ever have been granted. He also submitted that the evidence suggests that the two rooms/structures form a part of chalta no.13 of P.T. Sheet no.130. Based on this, he submitted that no relief of mandatory injunction could have been granted after the Trial Court and the appellate Court affirmed the findings that the defendants were tenants in possession of the property under chalta no.13 of P.T. Sheet no.130.

12. Mr. Desai relied upon *Omprakash V/s. Ramesh Ramnivas Soni*¹, *Usha Bai, W/o. Sharadchandra Bannore V/s. Wasudeo, S/o. Baliramiimehare*², *Subray Narayan Prabhu Dessai V/s. Govt. of Goa*³, *Conceicao Fernandes and Ors.*

¹ MANU/MH/0871/2003

² 2003 SCC Online Bom 1085

³ MANU/MH/0723/2014

*V/s. Basilio Fernandes*⁴ and *Mahalaxmi Samiti & Ors. V/s. Manikrao Dessai*⁵ in support of his contentions.

13. Mr Fernandes countered the submissions of Mr Desai. He submitted that there was clarity in the pleadings, which the defendants did not even effectively deny. He submitted that a sketch consistent with the requirement in Order VII Rule 3 of C.P.C. was attached to the plaintiff and the same was duly proved. He submits that there was no breach of provisions of Order VII Rule 7 or Order VII Rule 3 of the C.P.C. He submits that the plaintiff proved her case consistent with the provisions of the Evidence Act. He submits that the Trial Court had erred in simply marking the sketch 'X' for identification purposes. He submits that since the document was proved in accord with law, the same should have been admitted in evidence as was finally done by the first appellate Court. He submits that the questions of law as framed do not arise; in any case, they are not substantial questions of law.

14. For all the above reasons, Mr Fernandes submitted that this appeal may be dismissed.

⁴ SA No.107/2013
decided on 27.01.2014

⁵ SA No.151/2013
decided on 08.04.2021

15. Mr M. Fernandes relied upon *Shri Mohna Kashinath Naik & Anr. V/s. Shri Prakash Gajanan Sukthankar (since dec.) through L.R. 's*⁶.

16. The rival contentions now fall for determination.

17. As noted, at the outset, the plaintiff has clearly pleaded to the description and identification of the two rooms/structures in respect of which the relief of mandatory injunction was applied. In the pleadings, it is admitted that the two rooms are towards the South and West of the barrack in chalta no.139 of P.T. Sheet no.130. There are no pleadings about the two structures being in the property bearing chalta no.139 of P.T. Sheet no.130.

18. In paragraph 6, it is pleaded that one of the rooms is shown in green colour in the sketch annexed to the plaint and referred to as the suit encroached portion. In paragraph 8 of the plaint, there is a reference to the structure/room towards the west of the barrack shown in red colour in the sketch. Again, it is pleaded explicitly that this structure is in chalta no.139.

19. As against these clear and specific pleadings, the response in the written statement is, at best vague and evasive. There is no

⁶ SA No.69/2017

decided on 25.01.2018

positive contention about the two rooms/structures forming part of the property surveyed under chalta no.139 of P.T. sheet no.130, as was now contended by Mr Desai in this Second Appeal. There are also no denials about the two rooms/structures falling within the property surveyed under chalta no.139. The reference to the barrack in Chalta no.139 of P.T. sheet no.130 in the pleadings only indicates that the two rooms/structures were towards the South and West of the said barrack.

20. Similarly, the Affidavit in evidence of Mrs Pushpa Mandrekar alias Maria Telma Teles is consistent with the clear and cogent pleadings on the subject of description or identification of the two rooms/structures. This is evident from paragraph 3 of the Affidavit in evidence.

21. As if all this was insufficient, the plaintiff, consistent with the provisions of Order VII Rule 3 of C.P.C., attached a sketch to the plaint showing the location of the two rooms/structures in respect of which encroachment was alleged and a decree of mandatory injunction claimed. Despite all this, the Trial Court, by adopting a hyper-technical approach and without focusing upon the pleadings and evidence on record, chose to deny the relief of mandatory injunction to the plaintiff by simply observing that the plaintiff had failed to prove what was the extent of

encroachment done by the defendants in the said property. This finding, or rather an observation, was vitiated by perversity because such finding or observation was made looking into the state of pleadings and evidence on record.

22. The first appellate Court, usually the final Court when it comes to recording evidence of fact, quite correctly interfered with the Trial Court's finding/observation on the issue of identification or description of the two rooms/structures in respect of which mandatory injunction was claimed. The discussion of the first appellate Court on the subject of identification or description is in paragraph 25 of the impugned judgment and decree, which reads as follows:

"25. The learned Trial Court however while denying the relief prayed for to the plaintiff to demolish illegally constructed structure held that plaintiff has not proved by cogent and trustworthy evidence as to when and how the Defendant constructed two rooms to the existing house and what is the extent of encroachment done by the Defendant in the said property. In fact the Plan on record marked X for identification clearly shows the illegal construction carried out by the Defendant in green colour and red colour in the sketch in the property under Chalta no.139. The pleadings of the plaintiff to that effect in paras 6, 8 and 11 are not disputed by the plaintiff specifically, nor it is the case of the Defendant that

the Plan is fabricated. The said Plan in my considered opinion meets the requirement of Order VII Rule 3 of C.P.C. which mandates upon the plaintiff to place on record a Sketch in case of encroachment showing as approximately as possible the location and extent of encroachment be to be filed alongwith the plaint. The plaintiff has annexed the said sketch alongwith the plaint. Defendant did not join issue with the said sketch. Therefore there is substantial identity of the extent of encroachment done by the Defendant in the said property. The plaintiff in his evidence and in para 3 of his Affidavit made it clear that it is on 16.05.2003 the Defendant had taken up the construction of toilet however on 28.05.2003 towards the west of barrack in Chalta no.13 the pit for the construction of the septic tank was open. Hence plaintiff has furnished the period when the Defendant has taken illegal construction encroaching upon the property of the plaintiff thereby establishing that the Defendant has trespassed into the suit property."

23. In this case, there is compliance with the provisions of Order VII Rule 7 and Order VII Rule 3 of the C.P.C. The relief claimed was specifically stated, and to that extent, there was no breach of provisions of Order VII Rule 7 of C.P.C. Similarly, a sketch sufficient to identify the suit property or the encroached portion was annexed to the plaint. In addition, there were pleadings in the plaint giving adequate descriptions to identify

the encroached portion. Thus, there was compliance with provisions of Order VII Rule 3 of C.P.C.

24. The evidence of PW1 was more than sufficient to prove the sketch. Therefore, the Trial Court was not justified in marking the sketch as 'X' for identification purposes. The appeal Court has correctly held that the sketch was proved and admitted the same in evidence.

25. Therefore, the two substantial questions of law framed in this appeal must be decided against the defendants. Mr M. Fernandes is justified in contending that the questions, in the context of the pleadings and evidence on record, relate more to the issue of appreciation of evidence.

26. In *Omprakash* (supra), the issue was about the presumption of the accuracy of the maps and the burden on the party who produced them. The context in which such observations were made are not comparable to the pleadings with the evidence in the present case. In any case, the evidence of PW1 is more than sufficient to discharge the burden.

27. *Usha Bai w/o Sharadchandra Bannore* (supra) refers to the proposition as in *Omprakash* (supra). Therefore, even the same

does not assist the defendants' case considering the state of pleadings and evidence in this matter.

28. *Subray Narayan Prabhu Dessai* (supra) explains the object of Order VII Rule 3 of C.P.C. The object, in this case, was duly fulfilled by annexing the sketch to back the clear and cogent pleadings and other evidence on the issue of description and identification.

29. *Conceicao Fernandes & Ors.* (supra) lays down that if in the suit encroachment is not identified by a sketch in terms of Order VII Rule 3 of C.P.C., no relief can be granted on the cause of action based on alleged encroachment.

30. In the present case, as noted earlier, not only was a sketch in terms of Order VII Rule 3 of C.P.C. annexed to the plaint, but the pleadings and the evidence on record were sufficient to establish the encroachment.

31. Finally, *Mahalaxmi Samiti & Ors.* (supra) provides that the contents of the documents have to be proved in Section 61 of the Evidence Act, and the marking of the document does not dispense with its proof. This requirement of proof stands fulfilled

in the present case considering the evasive denials in the pleading and the evidence of PW1 on the subject.

32. In *Mohna Naik* (supra), this Court relying upon *Prathiba Singh & Anr. V/s. Shanti Devi Prasad & Anr.*⁷ has held that substantial compliance with the provisions of Order VII Rule 3 of C.P.C. would be sufficient if identification of the property can be said to have been established based on the evidence on record. It was held that mere non-compliance with Order VII Rule 3 of C.P.C. would not preclude the Court from granting a decree if the property was otherwise well identified.

33. In *Shri Mohna Naik* (supra), this Court held that even if there is an irregularity in compliance with the requirement of Order VII Rule 3 of C.P.C., the same is curable. Based upon the said irregularity, a successful plaintiff should not be deprived of the fruits of the decree. Further, this Court, relying upon *Prathiba Singh* (supra) has held that a defendant should object to a plea to any error or any alleged error in the sketch or the description.

34. In the present case, as noted earlier, the two rooms and the encroached portion were clearly described in the plaint. The

⁷ AIR 2003 SC 643

denials, if at all, were quite sketchy. In any case, neither was any objection raised to the sketch nor was any complaint made of prejudice on account of the alleged lack of particulars or some confusion in identification. Thus, following the law in *Shri Mohan Naik* (supra) and *Pratibha Singh* (supra), the contentions based upon Order VII Rule 7 and Order VII Rule 3 of C.P.C. will have to be rejected.

35. For all the above reasons, this appeal is liable to be dismissed and is hereby dismissed.

36. Apart from referring to the two rooms/structures, the impugned decree also directs the defendants to restore to its original condition the suit property. If this means the demolition of a sulabh shauchalaya/toilet, then the plaintiff should consider whether it is in her interest to insist upon such a demolition. The record bears out that the defendants are in occupation of the barrack in chalta no.13 of P.T. sheet no.130 from 1965. Mr Desai states that the defendants stay in the said barrack. If this is correct, it is only reasonable that they have a toilet facility. Therefore, it would be appropriate if the plaintiff, while executing the rest of the decree, considers the issue of the sulabh shauchalaya/toilet, *inter alia*, humanitarian consideration. However, it is clarified that this is not a positive direction of the

Court but only an appeal to the decree-holder to see if some compromise can be reached on the toilet issue.

37. Subject to the above, this appeal is dismissed.

38. There shall be no order for costs.

M. S. SONAK, J.

NITI K
HALDANKAR

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