

Niti

IN THE HIGH COURT OF BOMBAY AT GOA

**SECOND APPEAL NO.97 OF 2017
WITH
CIVIL APPLICATION NO.215 OF 2017
AND
STAMP NUMBER (APPLN.) NO.3278 OF 2019**

SERA D'SOUZA ALIAS
SERAFINA D'SOUZA AND ANR. APPELLANTS

Versus

ALICE FAUSTINA
SANTAMARIA FILIPE, THR.
HER ATT., DR. LUCIA
BERNARDETE D'SOUZA RESPONDENTS

Mr. Sudesh Usgaonkar with Ms. R. Pereira, Advocate for the Appellants.

Mr. S.S. Kantak, Senior Advocate with Mr. Amay Arjun Phadte, Mr. Kher Simoes and Ms. Neha Kholkar, Advocates for the Respondent.

CORAM: M. S. SONAK, J.

DATE : 23rd SEPTEMBER 2022

ORAL ORDER :

1. After this matter was argued for some time, it transpires that the same can be disposed of considering certain subsequent developments as also the statements made by Mr. Kantak, learned

Senior Advocate appearing on behalf of the respondent (original plaintiffs).

2. The decree, in this case, requires the appellants to restore the encroached area to the original plaintiffs. One of the contentions of the appellants was that there was no encroachment as such and the Courts below should have appointed a Commissioner to ascertain whether there was any encroachment.

3. This Court appointed a Commissioner, who has made a report dated 24.10.2018 together with a plan which is annexed to the report.

4. Both the parties have filed their objections to the Commissioner's report. According to Mr. Usgaonkar, the report shows that the columns do not encroach into the original plaintiffs' portion. Mr. Kantak, however, submits that though the column may not *prima facie* encroach but the footings on which such columns are based clearly encroach into the original plaintiffs' property. The objections to the report are pending and have not been considered by this Court.

5. Mr. Kantak, on instructions and without prejudice, states that the original plaintiffs will have no objection if the appellants

apply for construction permissions from the concerned authorities and put up construction in their own property, in terms of such permissions. This statement is also accepted. Mr. Kantak, on instructions, further states that the original plaintiffs no longer object to or press the allegation about one of the columns touching common wall of the house.

6. Considering the above developments, there is no necessity of admitting this appeal. If the original plaintiffs maintain that the encroachment continues, it is for them to take out appropriate execution proceedings to execute the decree and achieve the restoration. If such execution proceedings are indeed taken out then the Commissioner's report dated 24.10.2018 along with the objections to the same will have to be considered by the Executing Court. If the Executing Court is satisfied that yet another Commissioner has to be appointed to find out whether there is encroachment caused by the footings, the Executing Court to consider such appointment. All these matters are best examined by the Executing Court if approached. All contentions of all parties on this issue of encroachment are expressly kept open.

7. Accordingly, this appeal is disposed of with liberties as aforesaid.

8. There shall be no order for costs.
9. Miscellaneous applications do not survive disposal of the appeal. Accordingly, the applications are also disposed of.

M. S. SONAK, J.