

Niti

IN THE HIGH COURT OF BOMBAY AT GOA

**SECOND APPEAL NO.12 OF 2022
AND
CIVIL APPLICATION NO.9 OF 2022**

URSULA RENHA
RUMALDINA SOARES AND
ANR.

... APPELLANTS

Versus

ROSARINHO M.
FERNANDES AND ANR.

... RESPONDENTS

**Mr Nigel Da Costa Frias with Mr Vishal Sawant, Advocate for
the Appellants.**

**Mr Ivan Santimano Jose Reis with Mr Anthony D'Silva,
Advocates for the Respondents.**

CORAM: M. S. SONAK, J.

DATE : 20th OCTOBER 2022

ORAL ORDER :

1. Heard Mr Nigel Da Costa Frias for the appellants and Mr Jose Reis for the respondents.

2. This appeal is directed against concurrent decrees made in Regular Civil Suit No.222/2015/C and Regular Civil Appeal No.115/2018 directing the appellants – defendants to demolish the illegal enclosing and covering of open terrace admeasuring 48

sq. mtrs. on the second floor of the building and also enclosing the cantilever balcony of the hall. Accordingly, a declaration and a mandatory injunction have been issued to this effect by the two Courts.

3. Mr Costa Frias submits that the suit was barred by limitation because the alleged deviations, if any, were made in 2001 and the suit was instituted only in 2015. He submits that the trial Court wrongly assumed that denials in the written statement were evasive or that the provisions of Sections 17 and 22 of the Limitation Act applied. He submits that the engineer, who is alleged to have informed the plaintiffs about the illegalities and the deviations only in the year 2014, was also not examined as a witness. He submits that the material on record establishes that the suit was barred by limitation.

4. Mr Costa Frias submits that, in any case, there was no cause of action for instituting this suit because the plaintiffs failed to demonstrate how he was affected by the so-called deviations. Furthermore, Minguelina Fernandes, the owner of the plot where the building is constructed or the developer, were also not impleaded as a defendant in the suit. Accordingly, Mr Costa Frias submits that all these factors are sufficient to vitiate the decrees made.

5. Mr Costa Frias submits that the first appellate Court erred in relying on the report of the Civil Engineer Sujit Prabhudessai (PW2) when this engineer admitted that he had not visited the building in question and had not seen its interiors.

6. Based on the above submissions, Mr Costa Frias submitted that the following substantial questions of law arise for determination in this appeal:

(a) Whether the suit of the respondents was barred by limitation?

(b) Whether the first appellate Court could have placed reference on the report of Civil Engineer Mr Sujit Prabhudessai (PW-2) as regards the effect of the alleged illegal construction carried out by the appellant on the structural stability of the building when admittedly he had not visited the building in question and not seen its interiors.

(c) Whether the suit was bad for non-joinder of necessary parties namely Mrs Minguelina Fernandes the owner of the plot on which the building Sumati Apartment is constructed and the developer Mr Shabi Kanolkar?

7. Mr Reis, learned Counsel for the respondents (original plaintiffs), defended the impugned decrees based on the reasonings reflected therein. He pointed out that the property

originally belonged to the plaintiffs. The plaintiffs own the properties in the neighbourhood. He referred to the evidence on record, including the report of the appellants' witness, Chartered Engineer Pascoal Barbosa Noronha (DW3). He submitted that even the appellants' expert had confirmed that there were illegalities and deviations in the appellants' apartments. Finally, Mr Reis referred to the decision of this Court in *Fatima Joao V/s. Village Panchayat of Mercers*¹ to submit that a neighbour has the locus standi to challenge construction without a licence or contrary to the terms and conditions of the licence. Mr Reis presented that Sections 17 and 22 of the Limitation Act were also applicable in this case. For all these reasons, Mr Reis submitted that this appeal raises no substantial questions of law and must therefore be dismissed.

8. The rival contentions now fall for my determination.

9. On the aspect of limitation, the two Courts record concurrent findings of fact. No perversity is demonstrated in the record of such findings of fact. In a Second Appeal, there is no scope to merely re-appreciate or re-evaluate the evidence. The evidence, even otherwise indicates, by a preponderance of probabilities, that the plaintiffs acquired knowledge of the

¹ 2000 (2) GLT 341

deviations and the illegalities in the appellants' flat sometime in 2014. The suit was instituted in the year 2015. Therefore, the limitation issue, in this case, does not give rise to a substantial question of law.

10. The Trial Court has invoked the provisions of Sections 17 and 22, and the appeal Court has endorsed this line of reasoning. Even without going to these provisions of the Limitation Act, on facts, the plaintiffs have established that they acquired knowledge about the illegalities and deviations sometime in the year 2014. Section 22 speaks about the continuous cause of action.

11. Since the factum of illegal construction or deviation is amply proved, it is possible to say that even provisions of Section 22 of the Limitation Act might be attracted. Patently unlawful construction does not get legalized in this manner, mainly when there are findings that such construction poses a danger to the stability of the entire building. However, even dehors the provisions of Section 22, on facts, it is established that the suit was instituted within limitation.

12. The appellant's construction of Mr Prabhudessai's deposition may not be proper. However, in this case, even if Mr Prabhudessai's evidence is excluded from consideration, the

evidence of the appellant's expert, Mr Pascoal Barbosa Noronha, stares the appellants in the face. His evidence could not be ignored. This expert, with much candour, has stated in his report that there were deviations from the approved plan. However, this witness proceeded to state that there were deviations in the entire building, rendering the building unsafe.

13. The two Courts could not have passed a decree in respect of the entire building because the other occupants were not parties. But at the same time, the two Courts were justified in relying upon the appellants' expert witness and holding that there were deviations from the approved plan in enclosing and covering the open terrace of the hall or the balcony portion created by a cantilever in the hall. Again, the concurrent findings in this regard are supported by the evidence on record, including the evidence of the appellant's expert. Accordingly, even the second substantial question of law as proposed does not arise.

14. Minguelina Fernandes or the developer were not necessary parties to this suit. True, the plaintiffs had sold the property to Minguelina. Further, Minguelina had engaged a developer Mr Shabi Kanolkar to construct the building where the appellants' flat is situated. However, developer Shabi Kanolkar was only the agent of Minguelina. Therefore, there was no relief claimed

against the said persons. But the genuine grievance was against the deviations from approved plans and the benefit of the illegal constructions that the appellants enjoyed.

15. *Fatima Joao* (supra) supports the plaintiffs' locus standi to institute a suit of this nature. There is evidence about the unlawful constructions posing a danger to the entire building. Moreover, both Courts have given cogent reasons for how the plaintiffs were affected by the illegal construction put up in this matter. Therefore, the third substantial question of law as proposed does not arise or will have to be answered against the appellants.

16. At this stage, Mr Costa Frias states that the appellants had not done the illegal construction, but the developer has done it. He says that there is evidence to this effect. However, even assuming this is so, the appellants are the beneficiaries of the illegal construction. The appellants are presumed to have purchased the apartment after inspecting the approved plans and consequently realizing that the construction was in deviation from the approved plan. Therefore, assuming that the developer deviated from the approved plans and put up the illegal structures would not be sufficient to upset the concurrent findings made by the two Courts.

17. For all the above reasons, this appeal is dismissed. However, there shall be no order for cost.

18. The civil application does not survive the dismissal of the second appeal and is therefore dismissed.

M. S. SONAK, J.

NITI K
HALDANKAR



Digitally signed by NITI K HALDANKAR
Date: 2022.10.21 10:04:36 +05'30'