

Suchitra

IN THE HIGH COURT OF BOMBAY AT GOA

SECOND APPEAL NO.34/2011

SHRI ANTONIO CRECENCIO
LUIS DOURADO, son of late
Lourenceo Dourado, major of age,
Indian National, residing at House
No.385/B, Bhorbhat, Taleigao,
Tiswadi-Goa.

... APPELLANT

Versus

SHRI MOTIRAM DHARMA
PRABHU, son of Dharma
Prabhu, major of age, Indian
National, residing at Bhorbhat,
Taleigao, Tiswadi-Goa.

... RESPONDENT

Mr Joaquim Godinho, Advocate for the Appellant.

CORAM: M. S. SONAK, J.

Reserved on: 21st March 2023

Pronounced on: 23rd March 2023

JUDGMENT:

1. Heard Mr Joaquim Godinho for the appellant.
2. This Second Appeal was admitted on 16.12.2011 on the following substantial question of law:-

(I) Whether the Courts below have come to a perverse finding of fact that the disputed nullah is not existing at the

site despite of the documentary evidence on record namely the documents of purchase of the appellant and the respondent and the survey records?

3. The appellant is the original plaintiff, and the respondent is the original defendant in Regular Civil Suit No.161/2000/A/C instituted in the Court of the Civil Judge, Junior Division at Panaji, Goa.

4. The appellant's case is that he is the owner in possession of the property surveyed under No.101/3 of Taleigao Village, bounded on the West by a nullah or sangria and to the North by the property surveyed under No.101/2 belonging to the respondent. The appellant's case is that even the respondent's property is bounded on the West by a nullah or sangria and on the East by Panaji-Taleigao road.

5. The appellant's case further was that the nullah on the property's western boundary, though shown in the 1983 sale deed by which the appellant purchased his property and in the survey plan, was no longer existing on the loco at the time of such purchase. But the nullah or the sangria shown in the purchase document or survey plans of the respondent's property was very much existing. However, by putting up a construction above this

existing nullah, the respondent has closed the nullah, thereby affecting the appellant's enjoyment of his property.

6. Based on the above pleadings, the appellant sought the following two substantive reliefs in the plaint:-

(a) To order the defendant to demolish the compound wall to the height permitted by Municipal Laws;

(b) To order the defendant to open the nalla shown as the western boundary of his property and in the survey plan.

7. Mr Godinho, learned counsel for the appellant, submitted that given the substantial question of law on which this Appeal was admitted, the Appeal is now restricted to the relief in terms of prayer clause (b) above.

8. Mr Godinho submitted that the purchase documents and the survey records concerning the respondent's property depict the existence of nullah on the western boundary. Further, the evidence shows that the west boundary was indicated as nullah when the respondent applied for permission to construct on his property. Given this documentary evidence, the Trial Court and

the First Appellate Court's finding about the non-existence of the nullah at the site is vitiated by perversity.

9. To appreciate Mr Godinho's contention, some reference is necessary to the appellant's pleadings in his plaint. Firstly, the appellant admitted having purchased his suit property surveyed under No.101/3 of Taleigao Village by a 1983 sale deed. This sale deed explicitly states that the appellant's property is also bounded on the West by a nullah or a sangria. So also, the appellant has pleaded that the respondent's property surveyed under No.101/2 is bounded on the West by a nullah in terms of the 1992 sale deed by which the respondent purchased the property surveyed under No.101/2.

10. Thus, the sale deeds of the appellant and the respondent show that a nullah or sangria bounds their respective western boundaries. The evidence on record shows that even the survey plans reflect these boundaries and the position about the western boundaries being a nullah or a sangria. Permissions were typically applied based on the sale deeds and survey plans. Therefore, even the parties' applications for licenses to the local authorities reflect the western boundaries of the two plots as a nullah or a sangria. Therefore, if we have to go strictly by the documents on record, then the existence of a nullah on the western boundary of the

appellant's property and the respondent's property cannot be seriously disputed.

11. However, the appellant has pleaded in the plaint that notwithstanding what was reflected in the sale deed or the survey plans, the nullah or the sangria on the western boundary of the appellant's property no longer existed. The appellant has explained about the difference in levels and how the nullah was covered at some point and eventually disappeared. However, the respondent's explanation of the similar effect is unacceptable to the appellant.

12. Both the parties lead evidence in the suit. PW1/plaintiff deposed that the nullah shown on the appellant's western boundary had vanished and no longer existed. He deposed having applied to the Deputy Collector and the Sub-Divisional Officer to inspect the site. Upon such inspection, even the two authorities accepted the position about the nullah on the western boundary of the appellant's property having vanished.

13. DW1/defendant examined himself and deposed that the nullah shown on the western boundary of his property was not in existence at the site; therefore, there was no question of filling up of the same. He admitted that when he submitted the plans for

approval for the construction of his house, the western boundary was indicated as a nullah. However, he deposed that revised plans were later submitted in which the nullah was shown on the far end of the respondent's property. The respondent produced on record the original plan, the revised plan, and the occupancy certificate.

14. Based on the evidence on record of the two witnesses and also other witnesses examined by the parties, the two Courts concluded that just as the nullah shown on the western boundary of the appellant's property had vanished over a period of time, so also the nullah shown on the west boundary of the respondent's property was no longer in existence. Therefore, the Trial Court had reasoned why it is unbelievable that the continuous nullah could not be said to have vanished only when it came to the appellant's western boundary.

15. The Trial Court also held that the municipal authorities approved the revised plans. Further, upon completion of the construction, an occupancy certificate was issued to the respondent based on the revised plans. The Trial Court noted that such revised plans or the occupancy certificate were never challenged. There was evidence that the revised plans and the occupancy certificate were issued after the municipal authorities

verified the position at the site. Based upon all this, the Trial Court concluded that the respondent's version was most probable and dismissed the suit.

16. The appellant appealed, and the First Appellate Court dismissed this Appeal. The First Appellate Court has discussed the evidence on record and agreed with such findings after coming into close quarters with the findings recorded by the Trial Court. The First Appellate Court held that if the nullah existed, it would exist on the western boundary of the appellant's and the respondent's properties, given the location of the two properties. The First Appellate Court found it inequitable to hold that the nullah by the side of the appellant's property got filled up even though the documentary evidence on record showed the existence of such nullah but the nullah by the side of the respondent's property continued to exist. The First Appellate Court emphasized upon admission from the evidence of the appellant and, based upon the same, concurred with the findings recorded by the Trial Court.

17. The findings recorded by the Trial Court and the First Appellate Court concurrently suffer from no perversity. The two Courts have applied the same yardstick the appellant sought to the documentary evidence concerning the appellant's property. As

noted earlier, the documentary evidence clearly showed the existence of a nullah on the western boundary of the appellant's property. But the appellant himself deposed that this nullah, as shown in the sale deed and the survey plan, got filled up and vanished over time. Logically, such a position could also extend to the nullah shown on the western boundary of the respondent's property. The other evidence on record shows the nullah to be continuous, at least on paper. Therefore, if the appellant's version about vanishing the nullah was to be believed, then even the respondent's version could not have been discarded.

18. On evaluating the evidence on record, the two Courts have recorded concurrent findings of fact, including that the municipal authorities revised the respondent's construction plans by excluding the nullah and issued the occupancy certificate. Such findings cannot be said to be vitiated by perversity. Such findings have been recorded after adequate consideration of the documentary evidence on record and the explanations offered by both parties. Moreover, the two Courts have correctly applied the standard of preponderance of probabilities in this matter.

19. Accordingly, it is difficult to hold that the findings recorded by the two Courts are either based on no evidence or contrary to the weight of the evidence on record. The appellant's pleadings

and evidence accepted that there could have been a variation between what is recorded in the documents like the sale deed or the survey plans on the one hand, and the position of the terrain at loco. Once this position was accepted by the appellant himself, there is no question of perversity when it comes to the application of the same position *qua* the respondent since other evidence on record supported the respondent's version.

20. For the above reasons, the substantial question of law will have to be decided against the appellant. This Second Appeal is accordingly dismissed. There shall be no order for costs.

M. S. SONAK, J.

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