

Jose

IN THE HIGH COURT OF BOMBAY AT GOA

SECOND APPEAL NO.117 OF 2004

1. Shri. Salvador D'Silva
aged about 50, married
landlord;

2. Shri. Anthony D'Silva,
aged about 37, unmarried,
agriculturist;

Both resident of Bondumol,
Molem, Sanguem, Goa

... Appellants.

Versus

1. Shri Kautu Gaonkar,
aged about 60, agriculturist,
resident of Duklem, Molem,
Sanguem; (Deceased),
through his L.R's.

[1a. Smt. Gopika Kautu Gaonkar,
widow;]

[Deleted as per order
dated 14.09.05 passed
in MCA 644/05]

1b. Shri Babani Kautu Gaonkar,
son;

1c. Smt. Prema Babani Gaonkar,
daughter-in-law

1d. Shri. Datta Kautu Gaonkar,
son;

1e. Shri Vithoba Kautu Gaonkar;
son;

1f. Smt. Shashi Vithoba Goankar;
daughter-in-law;

1g. Shri. Vishwas Kautu Gaonkar;
son;

1h. Shri. Sada Kautu Gaonkar,
son;

1i. Neeta Dattu Gaonkar,

1j. Ashwini Vishwas Gaonkar,

All residents of Duklem, Molem.

2. Shri Anant Fatti Gaonkar,
Aged about 40, agriculturist,
Resident of Duklem Molem,
Sanguem

[Deceased]

(a) Smt Jayanti Anant Gaonkar,
Widow of Respondent No.2.

[Amended as per order
dated 07.10.2005]

(b) Kum Botler alias Fati Anant Gaonkar,
minor child of Respondent No.2,
Both residents of Duklem, Molem,
Sanguem – Goa.

3. Shri Narayan Kusta Gaonkar,
(expired suit abates)
aged about 45, agriculturist,
resident of Duklem, Molem,
Sanguem;

[suit dismissed/
abated against R. No.3
as per order dated
02.08.2006 passed in
MCA 794/05]

4. Smt Yessu Ganesh Gaonkar,
aged about 60, housewife,
resident of Bondumol, Molem,
Sanguem;
(dismissed vide Order
dated 18.12.1992)

[suit dismissed/
abated against R. No.4
as per order dated
02.08.2006 passed in
MCA 794/05]

5. Shri Sanvlo Kerkar,
(expired, suit abates)
aged about 65,
agriculturist,
resident of
Cansauli, Molem,
Sanguem.

[suit dismissed/
abated against R. No.5
as per order dated
02.08.2006 passed in
MCA 794/05]

... Respondents.

Mr Parag Rao with Mr Akhil Parrikar, Ms Sowmya Drago and Mr
Ajay Menon, Advocates for the Appellants.

Mr Sudesh Usgaonkar with Ms Marie Rosette Pereira, Advocates
for Respondents No.1(a) to 1(i) and 2(a) and 2(b).

CORAM: VALMIKI SA MENEZES, J.

DATED: 31 October, 2023

ORAL JUDGMENT:

1. This Second Appeal was admitted by order dated 20.11.2006 on the following substantial questions of law:-

- (1) Whether the reliance placed by the Ist appellate Court on the deposition of DW.4 as 'cogent and clinching' is erroneous inasmuch as his evidence was hearsay evidence and consequently inadmissible?
- (2) Whether the learned Ist appellate Court erred in believing that the suit land was partitioned in the middle by wooden fencing, despite noting that there is no whisper in the written statement about the same, by merely relying on the deposition beyond pleadings and more particularly when it was the definite case of the respondents that they were in joint possession of the suit land along with the appellants?

2. This appeal arises from Regular Civil Suit No.53/1992 instituted before the Civil Judge Junior Division at Sanguem wherein the Appellant herein was the original Plaintiff. In the suit, the sole relief which was sought was one for a decree of permanent injunction against five Defendants arraigned on the plaint. The permanent injunction sought against Defendants was to restrain them from interfering with the suit land which bears Survey No.6/5 of Mollem Village, Sanguem Taluka or from causing any damage to the plantation or disturbing the possession of the Plaintiffs therein.

This suit was instituted on a cause of action which is pleaded in para 7 of the plaint. The cause of action, as stated in the plaint as against Defendant No.4 was when he trespassed into the suit land on 11.08.1991 and destroyed some banana trees. The cause of action as stated in the plaint against Defendants No.1, 2 and 4 arose on 02.10.1992 when they trespassed upon the suit land and threatened the Plaintiff to destroy the trees standing thereon. Clearly, as stated in the plaint, the cause of action for seeking the relief for permanent injunction was specifically against the four Defendants seeking their restraint.

3. From the record, it appears that Defendants No.3, 4 and 5 expired during the pendency of the suit and the cause is held to have abated against these three Defendants. Going by the statements on the cause of action and the reliefs sought against these three Defendants in the suit, the cause for injunction itself would not survive on their demise.

4. The suit seems to have proceeded against Defendants No.1 and 2 and was partly decreed by granting the Plaintiff an order of permanent

injunction against Defendants No.1 and 2, restraining them from interfering or entering upon the eastern half of the suit property bearing Survey No.6/5.

5. As against this decree, the original Plaintiffs/Appellants herein filed a first appeal bearing Regular Civil Appeal No.98/2002 before the District Court. In that appeal, surprisingly, the legal representatives of Respondent No.1, who by then had expired were arraigned as Respondents. Clearly, in terms of Order 22 of the Code of Civil Procedure, the cause of action against Respondent No.1 could not have survived upon his demise since the suit for permanent injunction simpliciter sought a decree *in personam* against that Respondent, and the cause would not survive against his legal representatives. In that view of the matter, bringing on record the legal representatives of Respondent No.1 would be of no avail as the original cause itself died on the demise of Respondent No.1.

Nevertheless, the First Appellate Court proceeded to hear the appeal with the legal representatives of Respondent No.1 on record, though the suit itself abated against Respondent No.1, and dismissed the appeal with the impugned judgment and decree dated 29.06.2004.

6. Though no second appeal was maintainable as against the legal representatives of Respondent No.1, for the reasons set out above, nevertheless, this Second Appeal was filed by the original Plaintiffs challenging the Judgment and Decree of the District Court which was admitted by this Court on 20.11.2006 on the aforesaid substantial questions of law. As on the date of admission of this case, the appeal at most could be said to be maintainable as against Respondent No.2.

However, Respondent No.2, who was the only surviving Defendant had in fact, as seen from the record of MCA No.697/2005 also expired on 07.10.2005, prior to the admission of this matter. Though no further cause survived against any of the original Defendants in the suit as on the date of the institution of this Second Appeal, this fact was not noticed and the above-referred MCA No.697/2005 came to be allowed with an order dated 07.10.2005 and the legal representatives of deceased Respondent No.2 were added as parties.

7. In my opinion, based upon the provisions contained in Order 22 CPC, in a suit simpliciter for injunction where the cause of action pleaded in para 7 of the plaint was personally against the Defendants, none of whom survived the First Appeal, the Second Appeal itself would not be maintainable. Though this was the position as on the date of the institution of the Second Appeal, this factual position was not noticed or taken into consideration by this Court at the time of admission of the appeal. However, since this is the factual position that prevails before me, I am of the considered opinion that none of the substantial questions of law that were framed on 20.11.2006 by this Court and on which this matter was admitted, would arise as the original proceedings themselves would not survive. In that view of the matter, I hold that none of the substantial questions of law as framed would arise and the appeal itself is required to be dismissed for the reasons stated above.

Hence, Second Appeal No.117/2004 is dismissed.

8. Needless to state that if the original Plaintiffs/Appellants herein if so advised, choose to file any proceedings either for declaration or for

injunctive reliefs against the survivors of the Original Defendants, they are at liberty to take such proceedings which may be permissible at law. In view of the dismissal of the Second Appeal, the interim relief granted by order dated 20.11.2006 stands vacated.

9. Draw up a decree accordingly.

VALMIKI SA MENEZES, J.

JOSE
FRANCISCO
DSOUZA

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FRANCISCO DSOUZA
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