

Amrut

IN THE HIGH COURT OF BOMBAY AT GOA

SECOND APPEAL NO. 2 OF 2023

VENCESSLINA P. ARAUJO
(DECEASED, THR. LRS)

... Appellants

Versus

COMUNIDADE OF LOUTOLIM,
THR. THE ADMINISTRATOR, AND
11 ORS

... Respondents

Mr. Shailesh Redkar, Advocate for the Appellants.

CORAM: M. S. SONAK, J.

DATED : 16th FEBRUARY 2023

P.C.:

1. Heard Mr Redkar, learned counsel for the Appellants.
2. This appeal is directed against the concurrent decrees made by the trial Court and the First Appellate Court dismissing the Appellants' Regular Civil Suit No.279/2004/III seeking a declaration of ownership and to effect consequential changes in the record of rights.
3. The suit was based upon a registered sale deed dated 11.04.1979 in which the suit property was described. However, since

the parties felt there was some ambiguity, this sale deed was rectified on 15.05.1991 and again on 09.05.1995. Both rectifications were on the issue of the precise identity of the property, which was the subject matter of the original sale deed.

4. The suit was instituted because, in the survey records, the names of several parties other than vendors appear. Accordingly, a declaration was sought of ownership and consequent changes in the survey records.

5. In the suit, therefore, the issue of the precise identity of the property, which forms the subject matter of the sale deed dated 11.04.1979, was crucial. No proper evidence was led on this aspect. Such evidence was necessary, mainly because the vendors to the sale deed chose to remain ex-parte. Based upon the relief applied for in the suit, the Appellants/Plaintiffs desire to delete the names of other defendants in the survey records. The other defendants had raised a serious dispute on the identity of the suit property. They had claimed that the property in respect of which their names were entered was not the subject matter of the sale deed, which was rectified on two occasions.

6. Mr Redkar submits that an application had been made for the appointment of Commissioner, and such an application was allowed by the trial Court. He submits that, for some reason, the commission could not be executed. He, however, submits that the trial Court and the First Appellate Court committed jurisdictional error by ignoring

the order dated 06.11.2017 made by the trial Court on Exhibit 114, i.e. application for appointment of Commissioner.

7. Based on the above submission, Mr Redkar urged to formulate only the following substantial question of law.

(i) Whether the Ld. Trial Court as well as Ld. Lower Appellate Court was committed an jurisdictional error by ignoring the order dated 06.11.2017, passed by the trial Court at Exb. 114, allowing application for appointment for Commissioner, where in surveyor from land survey department was appointed to do work of re-survey of the plaintiff's property and to identify their properties in terms of survey records?

8. From the perusal of concurrent judgments and decrees, it is evident that two Courts have considered the material on record and concluded that the plaintiffs failed to establish the precise identity of the suit property. Accordingly, the Courts have held that the plaintiffs failed to prove that the property which formed the subject matter of the twice rectified sale deed was the property in respect of which the survey entries included the names of other defendants.

9. Even though the trial Court in its order dated 06.11.2017, had allowed the application for the appointment of Commissioner, it is doubtful whether the issue involved in the suit could have been suitably resolved on the execution of the commission. The record also establishes without doubt that the sale deed was rectified twice precisely on the issue of the identity of the properties. If, despite such

rectifications, the parties could not describe the property precisely, then the inference that two Courts have concurrently drawn can hardly be styled as perverse.

10. Besides, there is yet another significant circumstance due to which the substantial question of law as proposed does not arise or, in any case, will have to be answered against the Appellants.

11. The First Appellate Court has answered the issue of non-execution of the commission by making the following observations in para 54:

"54. As far as the arguments of the Id. Advocate for the plaintiffs that the Commissioner be appointed to identify the property in view of the catena of decision of the Hon'ble High court and the Apex Court, it is seen from the records of the Id. Trial Court that the application under Order 26 Rule 9 CPC was filed by the plaintiffs at exhibit 114 and the Id. Trial Court after hearing both the parties passed an Order dated 06-11-2017 appointing a surveyor from the land survey department to do the work of resurvey of the plaintiffs property and to identify their properties in terms of the survey records. The records of the Id. Trial Court reveals that although the plaintiffs deposited the amount for appointment of the Commissioner before the Nazir of the Id. Trial Court, the plaintiffs did not take any steps in order to get the resurvey done from the surveyor appointed by the Id. Trial Court. The roznama of the Id. Trial Court dated 28-09-2018 shows that all the Id. Advocates had consented to fix the matter

for final arguments which implies that the plaintiffs did not want an independent surveyor to survey their property and since they did not press for it the arguments of plaintiffs that Commissioner needs to be appointed in the appeal cannot be accepted".

12. The Appellants, through their counsel, did not even press the execution of the commission in terms of the order dated 06.11.2017. Firstly, no steps were taken for the execution of the commission. Secondly, not even an application was filed for an extension of time to execute the commission. Thirdly, most significantly, the trial Court's roznama dated 28.09.2018 shows that the counsel for the Appellants consented to fix the matter for final arguments implying thereby the Appellants (original Plaintiffs) did not want an independent surveyor to survey the property. Finally, the point now sought to be pressed was not even raised before the trial Court. All these reasons are sufficient to hold that the proposed substantial question of law was not involved in the matter or was correctly decided against the Appellants.

13. For the above reasons, this appeal is dismissed.

14. There shall be no order for costs.

M. S. SONAK, J.