

Santosh

**IN THE HIGH COURT OF BOMBAY AT GOA
SECOND APPEAL NO. 7 OF 2022**

DININO FERNANDES (DEC) REP.
THR.HIS LRS. AND ANRAPPELLANTS.

Versus.

PERRY C. GOES REP. THR.
ATTORNEY GEORGE GOES AND
ANRRESPONDENTS.

**Mr J.E. Coelho Pereira, Senior Advocate, with Mr Sagar
Rivankar, Advocate *for the Appellants.***

Mr Zeller de Souza, Advocate *for Respondent No.1.*

CORAM : M. S. SONAK, J.

DATE : 5th January 2023

ORAL ORDER: -

1. Heard Mr J.E. Coelho Pereira, learned Senior Advocate, who appears along with Mr Sagar Rivankar for the Appellants and Mr Zeller De Souza for Respondent No.1.

2. This Appeal is directed against the concurrent judgments and decrees made by the Trial Court and the First Appellate Court, decreeing and upholding the decree in Regular Civil Suit No. 255/2009/G instituted by Respondent No.1-Plaintiff.

3. Plaintiff instituted the suit claiming to be the owner of the suit house bearing No. 20F-A, along with the backside portion of the said part of the house and the well. Plaintiff also alleged that the Defendants, *i.e.* the present Appellants were rank trespassers. The Defendants filed a written statement claiming to be the owners by adverse possession. The Trial Court, upon evaluating the evidence, decreed the suit by rejecting the defence of adverse possession. The First Appellate Court dismissed the Defendants' Appeal. Hence, the present Second Appeal.

4. Mr Pereira, the learned Senior Advocate for the Appellants, urged admission of this Second Appeal on the following questions, which according to him, are substantial questions of law :

(i) The impugned judgment and decree is rendered in violation of the mandate of Order XLI Rule 31 of the CPC inasmuch as the point for determination formulated at para 10 of the impugned judgment and decree is not in the touchstone of the mandate of Order XLI Rule 31 of the Code of Civil Procedure?

(ii) The impugned judgment and decree is rendered in disregard to the mandate of the law laid down by the Hon'ble Supreme Court in the case of Santosh Hazari v. Purshottam Tiwari 2001 3 SCC 171 inasmuch as the impugned Judgment and Decree facially discloses that the learned First Appellate Court has not gone into the close corners of evidence and has not addressed the

material issues which ought to have been formulated in terms of Order XLI Rule 31 and decided by the Trial Court.

(iii) Whether the First Appellate Court could uphold the finding of the learned Trial Judge that Defendants No. 1 (a) to (e) and 2 were rank trespassers without considering the evidence on record when ex-facie the Defendant No. 1 (a) - (e) and 2 were in settled possession of the part of the suit house?

(iv) Whether the learned Judge could decide the Appeal on the basis of written arguments giving a go-by to the provisions of Sections 33 of CPC read with Order 18 Rule 2(3A) of the Civil Procedure Code?

5. At the outset, if the pleadings in the written statement are perused, then no firm case of adverse possession can be said to have been pleaded by the Defendants. Be that as it may, the two Courts have considered and evaluated the evidence on record and arrived at concurrent findings about the Defendants being the rank trespassers. There is no perversity in the record of such concurrent findings of fact to give rise to any substantial question of law. Even otherwise, the two Courts have adequately considered the evidence on this aspect before recording the concurrent findings.

6. The Appeal Court, in purported compliance with the provisions of Order XLI, Rule 31 of the CPC, framed an

omnibus point for a determination as to whether the impugned judgment and decree of the Trial Court was correct and legal. Mr Pereira would, normally, be justified in his criticism on this aspect. However, in the peculiar facts of the present case, no prejudice whatsoever has occasioned the Defendants on this score. From a perusal of the Appellate Court's judgment and decree, it is apparent that it has addressed the main point which arose for determination in this matter, viz., whether the plea of adverse possession raised by the Defendants was made good. As it is, there was no dispute about the title of the Plaintiff. The First Appellate Court, on considering not only the evidence on the record but also the reasoning of the Trial Court, chose to affirm the findings that the Defendants failed to make good the plea of adverse possession. Accordingly, the first question of law proposed in this matter does not arise.

7. In so far as the following question based upon the decision of the Hon'ble Supreme Court in *Santosh Hazari v. Purushottam Tiwari* - (2001) 3 SCC 179 is concerned, a perusal of the Judgment and Decree of the First Appellate Court indicates the First Appellate Court did come close quarters with the reasoning of the Trial Court. Besides, this is a case of affirmance and it is not as if the First Appellate Court has

mechanically affirmed the findings recorded by the Trial Court. On the contrary, the First Appellate Court has not only independently assessed the evidence on the record but also approved the findings recorded by the Trial Court based upon the assessment of such evidence by the Trial Court. Accordingly, there is no breach of the *Santosh Hazari v. Purushottam Tiwari* (supra) principle.

8. The following proposed question is not even a question of law, much less a substantial question of law. The question seeks reappraisal of the evidence, which is typically not the exercise to be undertaken while deciding a second appeal. In any case, both Courts have duly considered and evaluated the evidence on record and arrived at concurrent findings. There was no perversity demonstrated.

9. In so far as the question, based upon the provisions of Section 33 of CPC, read with Order 18, Rule 2(3A) of the CPC, is concerned, the record bears out that both parties chose not to advance any oral arguments. However, they filed written arguments. Accordingly, the First Appellate Court, after considering the written arguments, evidence on record, and the reasoning of the Trial Court, dismissed the Appeal. This is not a

case where one of the parties insisted upon oral arguments, and such an opportunity was denied.

10. Order 18, Rule 2(3A) of the CPC, which relates to hearing of the suit and examination of witnesses, *among other things*, provides that any party may address oral arguments in a case and shall, before he concludes the oral arguments, if any, submit if the Court so permits, concisely and under distinct headings written arguments in support of his case to the Court and such written arguments shall form part of the record. Thus the Parties have the option to address oral arguments. But the parties can also choose not to and rely only on the written arguments as was done in the present case. Accordingly, the Court did not deprive any parties of the opportunity to argue the matter orally. There is no breach of the provision cited. Not even a whisper of any prejudice is heard.

11. The decision in the case of *Rukhana Associates, Mumbai vs. E-Square Leisure Pvt. Ltd., Mumbai* [2010(5) Mh.L.J. 202] relied upon by Mr Pereira operates in a distinct factual situation. There, the Judge who had heard the oral arguments was transferred before pronouncing the judgment or, for that matter, writing the judgment. The Division Bench held that in such a situation, the new Judge had no option but to hear

the oral arguments afresh and only after that pronounce the judgment. In these peculiar facts, the Division Bench observed that the fact that the parties have already filed their written submissions or gist of oral arguments advanced before the predecessor Judge would be of no avail. Therefore, the parties should have been allowed to argue the case orally.

12. Considering the above position, even the question based upon the provisions of Section 33 of the CPC, read with Order 18, Rule 2(3A) of the CPC, does not arise or, in any case, will have to be answered against the Appellants.

13. For all the above reasons, no case is made out for admission of this Appeal. Accordingly, this Appeal is dismissed.

14. There shall be no order for costs.

M. S. SONAK, J.