

Suchitra

IN THE HIGH COURT OF BOMBAY AT GOA

SECOND APPEAL NO.117/2005
WITH
MISC. CIVIL APPLICATION NO.1657 & 1658/2021 (F)
IN
SECOND APPEAL NO.117/2005

1. Raghuvir Kashinath Kerkar, Major, married, service, Indian national, R/o Bagwada, Morjim, Pernem Goa.
 2. Smt. Vilasini Raghuvir Kerkar, Major, married, housewife, Indian national, Resident of Bagawada, Morjim Pernem Goa.
 3. Smt. Laxmi Kashinath Kerkar (deceased)
 4. Smt. Kashi Tilu Bagkar, D/o Kashinath Kerkar, Major, married, housewife, Indian national, R/o Bagwada, Morjim, Pernem Goa.
 5. Shri. Tilu Babaji Bagkar, Major, married, agriculture, Indian national, R/o Bagwada, Morjim, Pernem Goa.
 6. Miss. Shasikala Kashinath Kerkar, Major, spinster, unemployed, Indian national, R/o Bagwada, Morjim, Pernem Goa.
- ... APPELLANTS

Versus

Smt. Drakshayani Vishwanath Kerkar
(since deceased) thr. LR's:

1a) Shri Shansundar Vishwanath Kerkar,
son of late Smt. Drakshayani V. Kerkar,
major of age,

1b) Smt. Deepa Shamsundar Kerkar, wife
of Shri Shamsundar Kerkar, major of age,

Both residing at H.No.1152, Bhagwada,
Morjim, Pernem – Goa.

... RESPONDENTS

Mr Nigel da Costa Frias with Ms Barbara Andrade, Advocates
for the Appellants.

Mr Deep Shiroadkar, Advocate for the Respondents.

CORAM:

M. S. SONAK, J.

Reserved on:

29th September

Pronounced on:

2023

05th October 2023

JUDGMENT:

1. Heard Mr Nigel da Costa Frias with Ms Barbara Andrade for the appellants and Mr Deep Shiroadkar for the respondents.
2. The appellants are the original defendants and the respondent is the original plaintiff in Regular Civil Suit No.11/2002 instituted in the Court of the Civil Judge, Junior Division at Pernem Goa. Accordingly, in this Second Appeal, the parties will be referred to by their description before the Trial Court.
3. The plaintiff's case in the suit is that he purchased the suit property measuring 520 sq. mtrs. vide registered sale deed dated 26.12.1977 from defendants no.1 and 3 to 6. In this registered sale deed, the suit property was described as bearing Survey No.97/1. Based on this sale deed, the

plaintiff, in the year 1997, applied to the Talathi of Morjim for mutation in the survey records. The Talathi, on perusing the records, informed the plaintiff that the defendants had partitioned the suit property before the execution of the sale deed dated 26.12.1977, and the suit property sold to the plaintiff was now surveyed under No.97/1-B. Accordingly, the plaintiff called upon the defendants to execute a rectification deed by indicating the survey number of the suit property sold vide the sale deed dated 26.12.1977 as 97/1-B in place of 97/1. Since there was no response from the defendants, the plaintiff caused a legal notice dated 20.11.2001 to be served upon the defendants and, after there was no response to this legal notice as well, instituted Regular Civil Suit No.11/2002 on 05.03.2002. The prayer in the suit is for a decree to direct the defendants to rectify the Survey Number of the suit property in the sale deed dated 26.12.1977 by executing the necessary rectification deed.

4. The defendants filed their written statement, in which there is neither any specific denial nor any defence to resist the plaintiff's claim for rectification of the survey number in the registered sale deed dated 26.12.1977. However, the defendants pleaded that the plaintiff illegally constructed a laterite stone wall without intimation or permission from the defendants, thereby covering an additional adjoining area of the defendants to the extent of about 34 sq. mtrs. Over and above the 520 sq. mtrs. sold by the defendants to the plaintiff vide the registered sale deed dated 26.12.1977. Based upon these pleadings, the defendants raised a counterclaim and sought a mandatory injunction to direct the plaintiff to remove the said portion of the compound wall and restrict the compound wall to the rectangular portion of the plot measuring 520 sq. mtrs. which was sold by the defendants to the plaintiff.

5. The Trial Court vide Judgment and Decree dated 25.03.2004 dismissed the suit mainly on the ground that the plaintiff obtained knowledge about the necessity of rectification on 08.01.1997, but the suit was presented only on 05.03.2002. Consequently, the Trial Court decree seems to suggest that the suit was barred by limitation even though the Trial Court framed no specific issue of limitation in the suit.

6. From the perusal of the Judgment and Decree dated 25.03.2004, it is apparent that the Trial Court cast issues and even answered the issues concerning the counter claim against the defendants. However, the operative portion of the Judgment and Decree refers only to the dismissal of the suit without explicitly recording the dismissal of the counter claim.

7. The plaintiff, aggrieved by the dismissal of Regular Civil Suit No.11/2002 by the Trial Court, instituted Regular Civil Appeal No.76/2004 before the Additional District Judge at Mapusa (First Appellate Court). Upon receipt of the notice of filing of this appeal, the defendants did not file any cross-objections regarding the dismissal of their counterclaim by the Trial Court within the limitation period prescribed.

8. However, the defendants filed Misc. Civil Application No.330/2004 in Regular Civil Appeal No.76/2004 seeking condonation of delay of over five months in filing cross-objections. By order dated 10.12.2004, this application seeking condonation of delay was dismissed by the First Appellate Court. The defendants took out no further proceedings regards the order dated 10.12.2004 during the pendency of Regular Civil Appeal No.76/2004.

9. The First Appellate Court allowed Regular Civil Appeal No.76/2004 vide Judgment and Decree dated 05.05.2005, and decreed the plaintiff's suit. Even though the First Appellate Court, vide order dated 10.12.2004, had already dismissed the application for condonation of delay in filing the cross-objections to question the dismissal of the defendants' counter claim by the Trial Court, still, the First Appellate Court considered the defendants' arguments concerning the counter claim and after rejecting them, confirmed the dismissal of the defendants' counter claim by the Trial Court.

10. Aggrieved by the impugned Judgment and Decree dated 05.05.2005, the defendants have instituted this Second Appeal to challenge the impugned Judgment and Decree dated 05.05.2005 made by the First Appellate Court in Regular Civil Appeal No.76/2004.

11. In the memo of the Second Appeal, neither was any substantial question of law raised with regard to the First Appellate Court's order dated 10.12.2004 nor was any relief sought to set aside the said order. The Second Appeal was admitted by this Court vide order dated 08.08.2006, only on the following substantial question of law:-

“Whether the Lower Appellate Court could decide the matter when the original suit itself was barred by limitations?”

12. However, when the matter was taken up for final hearing, Mr Costa Frias handed in a pursis urging the formulation of four additional substantial questions of law. Out of these, the fourth substantial question of law concerns the order dated 10.12.2004 by which the Misc. Civil Application No.330/2004 came to be dismissed.

13. The defendants/appellants also filed Misc. Civil Application No.1658/2021 (F) seeking amendment of the appeal memo inter alia to challenge the order dated 10.12.2004, by which the Misc. Civil Application No.330/2004 came to be dismissed by the First Appellate Court. The defendants also filed Misc. Civil Application No.1657/2021 (F) urging the appointment of Commissioner to conduct inspection of the property bearing Survey No.97/1-B of Village Morjim and to submit a report on the issue of the plaintiff encroaching upon an area of about 34 sq.mtrs. belonging to the defendants.

14. In the pursis handed in by Mr Costa Frias, he urged formulation of the following four additional substantial questions of law:-

“1. Whether Ld. Trial Court ought to have appointed a Commissioner under Order 26 Rule 9 of the Code of Civil Procedure, 1908, in order to demarcate the area of 520 sq.mts of the property bearing Survey No.97/1-B of Village Morjim, purchased as per sale deed dated 26.12.1977.

2. Whether the First Appellate Court has committed a jurisdictional error in failing to appreciate that the Ld. Trial Court required to decide the Counterclaim either independently or along with the suit as per Order 8 Rule 13 and 20 of the Code of Civil Procedure (Bombay High Court Amendment).

3. Whether the First Appellate Court in its Judgment and Order dated 05.05.2005 in Regular Civil Appeal no.76/2004 erred in holding that the impugned decree dated 25.03.2004 in so far as it dismissed the Counterclaim of the Respondent/defendant is

confirmed when there was no such Judgment and Order dismissing the said Counterclaim on merits by the Civil Judge Junior Division at Pernem in Regular Civil Suit bearing no. 11/2002.

4. Whether the Ld. Addl. District Judge Mapusa in its Judgment and Order dated 10.12.2004 in Civil Misc. Application No.330/2004 in Regular Civil Appeal no.76/2004 erred in dismissing the application for condonation of delay in filing cross objections by the Appellants against the Judgement and Order dated 10.12.2004 passed by the ld. Addl. District Judge Mapusa in Regular Civil Appeal no.76/2004.”

15. Mr Costa Frias submitted that the suit was clearly barred by the law of limitation because the plaintiff acquired knowledge about the necessity to seek rectification of the survey number from 97/1 to 97/1-B in the registered sale deed dated 26.12.1977 on 08.01.1997, when informed about the error by the Talathi. Mr Costa Frias points out that still the suit was instituted only on 05.03.2002, which was beyond the prescribed period of limitation. He submitted that the Trial Court, justifiably dismissed the suit as barred by limitation. He therefore submitted that no appeal lay against a decree in a suit which was instituted beyond the prescribed period of limitation. He submitted that the First Appellate Court had no jurisdiction to decide the appeal since the suit from which the appeal arose was ex-facie barred by law of limitation. Mr Costa Frias therefore submitted that the substantial question of law as framed by this Court in its order dated 08.08.2006 must be answered favouring the appellants.

16. Mr. Costa Frias submitted that the Trial Court failed to decide the counterclaim raised by the defendants/appellants. There is no clear order

about the dismissal of the counterclaim. In any case, the procedure adopted by the Trial Court was contrary to the provisions of Order 8, Rules 13 and 20 of the Code of Civil Procedure (Bombay High Court Amendment). For this reason, Mr Costa Frias urged that the impugned decree is liable to be set aside and, if necessary, the matter remanded to the Trial Court for fresh adjudication of the counterclaim raised by the defendants/appellants.

17. Mr. Costa Frias submitted that the delay of about five months in instituting cross-objections was sufficiently explained in Misc. Civil Appeal No.330/2004 in Regular Civil Appeal No.76/2004. Still, the First Appellate Court committed an error apparent on the face of the record in dismissing the said Misc. Civil Application vide order dated 10.12.2004. He, therefore, submitted that the additional substantial question of law regarding this order must be answered favouring the defendants/appellants.

18. Mr. Costa Frias submitted that the Trial Court had not explicitly dismissed the defendants' counterclaim. Accordingly, the First Appellate Court erred in upholding the Trial Court's non-existent order dismissing the defendant's counterclaim. Accordingly, he submitted that the additional substantial question of law now proposed in this regard must also be answered favouring the defendants/appellants.

19. Finally, Mr Costa Frias submitted that since the counterclaim concerned the issue of encroachment, both the Trial Court and the First Appellate Court were duty-bound to appoint a Commissioner under Order 26 Rule 9 of the Code of Civil Procedure to demarcate whether there was indeed any encroachment as alleged in the counterclaim and the plaintiff was occupying an area of approximately 554 sq. mtrs. when by the

registered sale deed dated 26.12.1977, an area of only 520 sq. mtrs. was sold to the plaintiff by some of the defendants. He relied on *Vasant Tukaram Prabhu v/s. Xalinibai Borcar alias Shalinibai Borkar – 2014 (5) Mh.L.J. 382*, *Sudhakar Baburao Kulkarni v/s. Gorabai Thansing Marag & Ors. - 2019 (6) Mh.L.J. 287*, *Pedro Anthony Lopes v/s. Nazareth F. Lopes and Ors. - Writ Petition No.722/2013 decided on 27.08.2014* and *Haryana Waqf Board v/s. Shanti Sarup & Ors. - (2008) 8 SCC 671* in support of his contentions.

20. Mr Costa Frias submitted that the appellants, out of inadvertence failed to challenge the order dated 10.12.2004 in Misc. Civil Application No.330/2004 in Regular Civil Appeal No.76/2004 in the memo of Second Appeal. Accordingly, he submitted that the application for amendment of the memo of the Second Appeal ought to be allowed in the interest of justice and for determining the real questions in controversy in this Second Appeal.

21. Mr Costa Frias submitted that a Commissioner can be appointed even in a Second Appeal, as was observed in some of the decisions cited by him above. Accordingly, he submitted that the application for the appointment of a Commissioner should also be allowed in case this Court was not inclined to set aside the impugned decree and remand the matter to the Trial Court for fresh adjudication after the appointment of the Court Commissioner.

22. Mr. Deep Shirodkar, learned counsel for the respondent/ plaintiff, defended the impugned Judgment and Decree based on the reasoning reflected therein. He submitted that the Misc. Civil Applications filed by the defendants/appellants were entirely misconceived and only to delay the

hearing in the Second Appeal. He submitted that the law of limitation barred the challenge to the order dated 10.12.2004, and in any case, despite the said order, the First Appellate Court considered the issue of dismissal of the defendant's counterclaim and, on merits upheld such dismissal.

23. Mr Shiroadkar submitted that the counterclaim, apart from being false, was barred by limitation though the original suit was well within the prescribed period of limitation. He submitted that the compound wall was constructed in terms of the boundaries in the registered sale deed and after the boundary marks were ascertained and indicated by the defendants. He submitted that even assuming that there was any discrepancy between the area and the boundaries, it is the boundaries that ought to prevail.

24. Mr Shiroadkar submitted that the Trial Court framed no issue of limitation, and in any case, the Trial Court's finding about the suit being delayed or barred by limitation was ex-facie perverse. He submitted that the First Appellate Court, upon a detailed consideration of this aspect, has reversed the Trial Court. He submitted that no substantial question of law was framed on the aspect of limitation either originally or in the additional substantial questions now proposed by Mr. Costa Frias.

25. Mr Shiroadkar objected to formulating of any additional substantial questions of law, amending the memo of appeal or appointing Commissioner at this stage. He submitted that such motions must be dismissed. Mr Shiroadkar submitted that there was virtually no defence on the aspect of rectification which the defendants were bound to carry out. He submitted that the counter claim was raised only to resist the relief of rectification which the defendants could not refuse. Mr Shiroadkar relied on

Union of India & Ors. v/s. West Coast Paper Mills Ltd. & Anr. - (2004) 2 SCC 747 and *Shakti Bhog Food Industries Limited v/s. Central Bank of India & Anr. - (2020) 17 SCC 260* in support of his contentions.

26. For all the above reasons Mr Shirodkar submitted this this appeal and the Misc. Civil Applications may be dismissed.

27. The rival contentions now fall for my determination.

28. Regards the only substantial question of law framed by order dated 08.08.2006, Mr Costa Frias's argument that the First Appellate Court had no jurisdiction to entertain the appeal because according to him, the suit instituted by the plaintiff was barred by limitation, cannot be accepted. No doubt, the Trial Court, without framing any issue on limitation denied the relief to the plaintiff on the sole plea that the plaintiff had knowledge about the suit property being surveyed under Survey No.97/1-B instead of Survey No.97/1 on 08.01.1997 when the Talathi apprised him of this position. The Trial Court based upon this singular circumstance and without even bothering to refer to any provisions of the Limitation Act or the articles in the schedule of the Limitation Act proceeded to dismiss the suit.

29. The plaintiff, before the First Appellate Court, challenged the Trial Court's decision to dismiss the suit on the above ground. Such a appeal was very much maintainable. In such an appeal, the plaintiff had the right to urge before the First Appellate Court how the finding and approach of the Trial Court was not consistent with the law. Even if the Trial Court were to have non-suited the plaintiff on the ground of bar of limitation, that circumstance does not preclude the plaintiff from challenging the Trial

Court's decree and convincing the First Appellate Court how the Trial Court erred on the issue of limitation. This is precisely what the plaintiff in the present case did before the First Appellate Court. The First Appellate Court upon due consideration of facts, circumstances, the evidence and law on the subject found that the Trial Court had erred in dismissing the suit on the ground that the same was either delayed or otherwise barred by the law of limitation.

30. Therefore, Mr Costa Frias's submission that the First Appeal was either not maintainable or should not have been allowed because the Trial Court had dismissed the suit on grounds of delay or on account of the bar of limitation, cannot hold. Mr Costa Frias then submitted that the Trial Court's finding about plaintiff's knowledge as of 08.01.1997 was a correct finding. He submitted that the suit seeking rectification should have been instituted within three years from such date. He submitted that since the suit was instituted almost five years after this date, the same was barred by the law of limitation.

31. The First Appellate Court has discussed in some details how the Trial Court erred in non-suiting the plaintiff on the ground of delay and/or the bar of limitation. The discussion in paragraphs 18, 19 and 20 of the impugned Judgment and Decree dated 05.05.2005 is the basis for reversing the Trial Court's finding about delay or bar of limitation. The First Appellate Court has applied the correct principles and held that cause of action accrued to the plaintiff, only after the defendants refused to rectify the obvious error that had crept into the registered sale deed dated 26.12.1977. There is documentary evidence how the plaintiff first moved the Talathi for mutation in the survey records. There is both documentary as well as oral evidence to show how the plaintiff orally and in writing

pursued the matter with the defendants for executing the rectification deed. It is only after the defendants avoided or refused that the suit was instituted. All this while, admittedly, the plaintiff continued in possession of the suit property in pursuance of the registered sale deed dated 26.12.1977. There is no error in the reasoning of the First Appellate Court, and in fact, the First Appellate Court was entirely justified in reversing the Trial Court on this issue of delay or bar of limitation.

32. Mr Shirodkar pointed out that the limitation in the present case was governed by the residuary Article 113 and not by Article 58 which concerns relief of obtaining any other declaration. He pointed out that Article 113 prescribed limitation of three years when the right to sue accrues. He was at pains to point out that Article 113 does not use the expression “when the right to sue first accrues”. This submission deserves to be accepted.

33. In *Union of India v/s. West Coast Paper Mills Ltd. & Anr. (supra)*, the Hon’ble Supreme Court explained that in terms of Article 58, period of three years has to be counted from the date when “*right to sue first accrues*”. However, in terms of Article 113, the period of limitation would be counted from the date “*when the right to sue accrues*”. The Court held that the distinction between Article 58 and Article 113 is thus apparent inasmuch as the right to sue may accrue to a suitor in a given case at different points of time, and, thus whereas in terms of Article 58 the period of limitation would be reckoned from the date on which the cause of action arose first, in the latter the period of limitation would be differently computed depending upon the last day when the cause of action therefor arose.

34. Accordingly, for all the above reasons the substantial question of law framed by order dated 08.08.2006 will have to be answered against the defendants/appellants.

35. The four additional substantial questions of law proposed by Mr Costa Frias by simply filing a pursis, do not deserve to be entertained. Firstly, such questions are not raised in the manner provided under Section 100 (5) of the Code of Civil Procedure. The mode adopted by or on behalf of the appellants is not consistent with the law laid down by the Hon'ble Supreme Court in *Suresh Lataruji Ramteke v/s. Sau. Sumanbai Pandurang Petkar – 2023 SCC OnLine SC 1210*. Secondly, the questions proposed can neither be said to be involved nor can they be said to be the substantial questions of law warranting consideration under Section 100 of the Code of Civil Procedure. However, notwithstanding the above, it is proposed to consider the questions proposed by Mr Costa Frias, lest the appellants get the impression that these issues were not considered by the Second Appellate Court.

36. The questions (2), (3) and (4) as proposed vide the above pursis concern the counter claim filed by the defendants. The first grievance was that there was no formal order or decree made by the Trial Court to dismiss the counter claim raised by the defendants.

37. If the Judgment and Decree of the Trial Court is perused, then it is apparent that the Trial Court not only framed issues concerning the counter claim but proceeded to answer these issues against the defendants. This is evident from the discussion in paragraph 13 on issue nos.(4), (5) and (6) in the Trial Court's Judgment and Decree dated 25.03.2001. However, in the operative order and in the decree, the learned Trial Judge

omitted stating that the counter claim was dismissed. From the context, this was an inadvertent error which could have even been rectified under Section 152 of the Code of Civil Procedure. Order 20, Rule 6 of the Code of Civil Procedure provides that the decree shall agree with the judgment and shall specify clearly the relief granted or other determination of the suit. As pointed out earlier the Judgment discusses the issues concerning the counter claim but answers the same against the defendants. Therefore, merely because there is no line to the effect that the counter claim has been dismissed neither means that the counter claim was not considered by the Trial Court nor that the counter claim was allowed by the Trial Court.

38. In any case, upon the meaningful reading of the Trial Court's Judgment and Decree, it is more than evident that the Trial Court considered defendants' counter claim and rejected the same. If a relief prayed for is not specifically granted, then, it can be deemed to be rejected. This is not a case where the relief claimed by the party i.e. the defendants was not at all considered. The relief has been considered after an issue was framed regards the counter claim. The Trial Court upon consideration of the oral and documentary evidence on record returned the finding that the defendants had not proved the counterclaim. Therefore, only because there was an inadvertent omission in the operative portion of the order or in the decree, no grievance can be made that the Trial Court did not consider the counterclaim at all, as was sought to be initially portrayed.

39. The second grievance is that the First Appellate Court erred in dismissing the application for condonation of delay filed by the defendants in the context of cross-objections to question the dismissal of the counterclaim. Having perused the order dated 10.12.2004, no error or perversity is found. The First Appellate Court, upon considering the cause

shown, found that the same was not sufficient. Accordingly, discretion was not exercised for condonation of delay. Such an issue does not ordinarily give rise to a substantial question of law. This is possibly the reason why the defendants/appellants did not even challenge the order dated 10.12.2004 in the memo of the Second Appeal. It was only after eighteen years when the matter was to be taken up for final hearing, the misc. the application was moved seeking leave to amend the memo of appeal and challenge the order dated 10.12.2004.

40. On perusing Misc. Civil Application No.1658/2021, it is seen that though this is an application seeking leave to amend the memo of Second Appeal and challenge the order dated 10.12.2004 was filed almost sixteen years after institution of the Second Appeal, there is no explanation for the inordinate delay. All that is stated is that this remained to be done due to inadvertence. Even if full latitude is shown to the appellants and the amendment is allowed, still, there is no case made out to interfere with the order dated 10.12.2004. The cause shown was far from sufficient. The discretion was not exercised by the First Appellate Court either perversely or capriciously. Therefore, there is no case made out to interfere with the order dated 10.12.2004.

41. Another significant consideration for not interfering with the order dated 10.12.2004 is because despite this order, the First Appellate Court duly considered the defendants' challenges to the dismissal of the counter claim by the Trial Court. Upon due consideration of such challenges, and by adverting to the oral and documentary evidence on record, the First Appellate Court upheld or rather confirmed the dismissal of counter claim by the Trial Court. Thus, the defendants suffered no prejudice whatsoever due to the order dated 10.12.2004. Despite this order, their challenges to

the counter claim were considered but rejected by the First Appellate Court.

42. The contention about independent consideration of the counter claim by referring to the provisions of Order 8, Rules 13 and 20 of the Code of Civil Procedure is misconceived. The Trial Court framed the issue concerning the counter claim and, based upon the evidence on record, answered the same against the defendants. Similarly, the First Appellate Court considered the issue of dismissal of counter claim on merits, and confirmed the dismissal of the counter claim by the Trial Court. Thus, there are concurrent findings recorded by the Trial Court and First Appellate Court on the issue of dismissal of the counter claim. The defendants have not even made out any case of perversity in the record of such findings of fact.

43. For all the above reasons the additional questions (2), (3) and (4) as proposed by Mr Costa Frias neither arise nor can the same be styled as any substantial questions of law. In any case, upon due consideration of such questions, no case is made out for answering these questions in favour of the defendants. This is nothing but an attempt on the part of the defendants to delay the matter and avoid executing a rectification deed by linking it with the issue of alleged encroachment.

44. The last question urged by Mr. Costa Frias concerns the appointment of a Commissioner under Order 26, Rule 9 of the Code of Civil Procedure in order to demarcate the area of 520 sq. mtrs. and see whether there is encroachment to the extent of 34 sq. mtrs. as claimed by the defendants.

45. The Trial Court dismissed the counterclaim. The cross-objections to question the dismissal of the counterclaim were filed with a delay of over five months. The appeal court dismissed the application seeking condonation of delay. No case was made out to interfere with the order dated 10.12.2004 dismissing the application seeking condonation of delay. Therefore, technically, there is no question of considering any arguments in relation to the counterclaim. Nevertheless, in the interest of justice, even this question, as proposed by Mr. Costa Frias, is now taken up for consideration. Mr Costa Frias bases his arguments on the decisions in *Vasant Tukaram Prabhu v/s. Xalinibai Borcar alias Shalinibai Borkar (supra)*, *Sudhakar Baburao Kulkarni v/s. Gorabai Thansing Marag & Ors. (supra)*, *Pedro Anthony Lopes v/s. Nazareth F. Lopes and Ors. (supra)* and *Haryana Waqf Board v/s. Shanti Sarup & Ors (supra)*.

46. The decisions relied upon by Mr Costa Frias hold that when there is a dispute regarding boundaries or encroachment, the Court must, in the exercise of its powers under Order 26, Rule 9 of the Code of Civil Procedure appoint a Commissioner. However, none of these decisions hold that the appointment of Commissioner is a must in all circumstances or that the decrees made would have to be invariably set aside because no Commissioner was appointed.

47. Besides, in the present case, plaintiff's defence to the counter claim was that the compound wall constructed based upon the boundaries in the sale deed dated 26.12.1977. The Appeal Court has adverted to the plaintiff's evidence (PW1) in which she stated that the plot was measured by the defendants and given to her. She stated that peg stones were placed based on the measurements carried out by the defendants. She clarified that the compound wall was constructed aligning with the peg stones except the

portion which goes to the well. The Appeal Court noted that except for the bare suggestion that the plaintiff constructed the compound wall after encroaching in the defendants' property, there was no evidence about either encroachment or the construction of the compound wall beyond the boundaries set out in the sale deed.

48. The First Appellate Court has observed that no suggestions were put to the plaintiff regards when the compound wall was constructed and accordingly, there was nothing elicited from the plaintiff on the aspect of encroachment. The First Appellate Court has referred to the evidence of defendant no.5 Tilu (DW1) who simply deposed that the compound wall was illegally constructed and there was encroachment to the extent of 34 sq.mtrs. However, Tilu produced no documents to establish the claim of encroachment. He admitted that even though, according to him there was an encroachment, no complaints were filed before any authorities regards the complaint. This witness also admitted that there was no plan enclosed with the sale deed and the sale deed mentioned that half of the well was sold to the plaintiff.

49. The First Appellate Court also referred to the evidence of Kishore (DW2) who admitted that he did not know what was the total area of the survey holding 97/1 or 97/1-B which was the subject matter of the sale deed. This witness admitted that the structure in the plot sold as also the compound wall was over twenty to twenty-five years old. This admission supported the case of the plaintiff that the compound wall was constructed soon after the purchase of the suit plot in 1977. Accordingly, the First Appellate Court concluded that even the evidence of this witness supported the plaintiff's case than the defendants' case.

50. Based on the defendants' evidence, it does appear and therefore, the First Appellate Court correctly concluded that the compound wall was constructed in 1977-78 or thereabouts soon after the purchase of the suit plot vide sale deed dated 26.12.1977. The counter claim seeking demolition was filed only in 2002. The First Appellate Court therefore felt that the counter claim, unlike the suit was barred by limitation. Even the Trial Court did not find favour with the defendants' case and the issues concerning the counter claim were answered against the defendants. Thus, there are concurrent findings of fact favouring the plaintiff and against the defendants on the issue of counterclaim.

51. As noted earlier, the plaintiff's defence was not only that the compound wall was constructed based upon the demarcations carried out by the defendants but further the compound wall was constructed consistent with the boundaries reflected in the sale deed dated 26.12.1977. There is evidence about the compound wall being constructed consistent with the boundaries in the sale deed. At least the findings in this regard cannot be held to be based on no evidence or contrary to the weight of the evidence on record. The findings are concurrent and therefore, it is not for the Second Appellate Court to interfere with such findings.

52. In *Palestine Kupat Am Bank Co-operative Society Ltd. v/s. Government of Palestine and others – AIR 1948 PC 207*, the Privy Council has held that whenever a property is described based on measurements and boundaries and any discrepancy is observed between the two, then the description as given by the boundaries would prevail. This principle was accepted by the Bombay High Court in *State of Maharashtra through the Secretary, Revenue and Forest Department and Ors. v/s. Nathuji Lotan Dhakate – (2003) 105 (4) Bom LR 1*. In *Subhaga & Ors.*

v/s. Shobha & Ors. – (2006) 5 SCC 466 the Court held that a property can be identified either by boundaries or by any other specific description. Once boundaries identify the property, even if there is any discrepancy, normally, the boundaries should prevail. The above principle was also recently accepted by the Hon'ble Supreme Court in *Ramisetty Venkatanna And Anr. v/s. Nasyam Jamal Saheb and Ors. – 2023 SCC Online SC 521* in which, after referring to the Privy Council decision in *The Palestine Kupat Am Bank Co-operative Society Ltd. (supra)* and *Subhaga & Ors. v/s. Shobha & Ors. (supra)*, the Hon'ble Supreme Court held that there cannot be any dispute with respect to the proposition of law laid down in the said two decisions.

53. Therefore, applying the above principles, no case is made out to interfere with the impugned Judgment and Decrees of the Trial Court and the First Appellate Court dismissing the counterclaim.

54. *Vasant Prabhu v/s. Xalinibai Borcar (supra)* was a case where the Appeal Court remanded the matter to the Trial Court for the appointment of a Commissioner. A perusal of this decision would show that this Court felt that appointment of a Commissioner was called for in the facts of the said case and therefore found no error in the First Appellate Court remanding the matter to the Trial Court with direction to appoint a Commissioner. This is not the situation in the present case.

55. In *Sudhakar Kulkarni v/s. Gorabai Thansing Marag & Ors. (supra)*, the Court Commissioner was appointed by the Trial Court, but this Commissioner carried out measurements of only the plaintiff's land. Therefore, this report was set aside after observing that the Commissioner should have carried out the measurements of the lands of both parties.

Therefore, this is not an authority for the proposition suggested by Mr. Costa Frias.

56. *Pedro Lopes v/s. Nazareth Lopes & Ors. (supra)* is also a matter where the Court felt that the appointment of a Commissioner would assist the Court in arriving at a proper decision in the matter. In *Haryana Waqf Board v/s. Shanti Sarup & Ors. (supra)* the controversy between the parties was regarding the demarcation of land because the parties had adjacent lands. On facts, it was found that there was no specific denial by the respondents to the appellant's averments that the appellant's lands had been encroached upon. In these circumstances, the Hon'ble Supreme Court held that a local Commissioner ought to have been appointed for the demarcation of land. In the present case, the plaintiff has nowhere admitted encroachment. Instead, her case is that the construction of the compound wall was consistent with the boundaries in the sale deed, and further, these boundaries were demarcated at the site by the defendants.

57. In *Mahadev Sitaram Sinai Kakodkar (since deceased) thr. LR's and Ors. v/s. Conservator of Forests, Government of Goa and others – 2021 SCC Online Bom 7990* a similar request for appointment of Court Commissioner at the Second Appellate stage was turned down by this Court after observing that both parties had full opportunity to produce whatever evidence they deemed appropriate and both parties had availed such opportunities. It was only on evaluation of such evidence that two Courts have recorded concurrent findings of facts; therefore, at the Second Appellate stage, it would not be appropriate to appoint a Court Commissioner. Accordingly, the application for appointment of a Commissioner is also disposed of.

58. Accordingly, even the additional question proposed by Mr. Costa Frias in the context of the appointment of a Court Commissioner would have to be answered against the defendants/appellants. Similarly, for the reasons discussed earlier, no case is made out for the appointment of a Court Commissioner in the facts of the present case. The Misc. Application No.1657/2021(F) for the appointment of the commissioner deserves to be dismissed.

59. As noted earlier, the application seeking amendment of the Second Appeal does not deserve to be allowed at this stage. Nevertheless, the challenge in the proposed amendment to the First Appellate Court's order dated 10.12.2004 was duly considered. Upon consideration, no merit was found in the said challenge. Moreover, the said challenge did not even give rise to any substantial question of law. Accordingly, Misc. Civil Application No.1658/2021 (F) stands disposed of.

60. For all the above reasons, this Second Appeal is dismissed. The Misc. Civil Applications No.1657/2021 (F) and No.1658/2021 (F) are also disposed of. There shall be no order for costs.

M. S. SONAK, J.

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