

Suchitra

IN THE HIGH COURT OF BOMBAY AT GOA

SECOND APPEAL NO.53/2010

SHRI. SURESH VITHAL
NASNODKAR ALSO KNOWN
AS VITHAL NAIK
NASNODKAR, Son of late Vithal
Govind Naik, Major of age,
Resident of House no. 133,
Chinchwada, Chimbhel, Tiswadi
Taluka Goa.

... APPELLANT

Versus

1. SMT. RADHABAI VASSANT
KAMBLI, (since deceased)

a.) Smt. Rajani Vassant Kambli
(Daughter) Alias Rajani Pundalik
Pednekar And her Husband;

b.) Shri. Harishchandra Pundalik
Pednekar, both residing at
'Adaranjali Building', House No. C-
16/242/1, near Pandurang Temple,
Vodlebhat, Taleigao, Tiswadi-Goa.

c.) Smt. Rekha Vassant Kambli
(Daughter) Alias Rekha Ashok
Virdikar, And her Husband;

d.) Shri. Ashok Virdikar, Both
residing at Calconda, Margao,
Salcete-Goa.

2. SHRI. GOVIND VASSANT
KAMBLI (since deceased)

(a) Rohit Govind Kambli, (Son),
20 years of age, unmarried,
Residing at H.No. 603, Igorgewado,
Sao Jose De Areal, Margao, Salcete,
Goa.

... RESPONDENTS

Mr J. P. Mulgaonkar, Senior Advocate, with Ms Rupa Banaulikar, Advocate for the Appellant.

CORAM: M. S. SONAK, J.

Reserved on: 21st March 2023

Pronounced on: 23rd March 2023

JUDGMENT:

1. Heard Mr J. P. Mulgaoankar, learned senior counsel who appears along with Ms Rupa Banaulikar for the appellant. Mr Ivan Santimano, learned counsel who used to appear for respondents no.1 and 2 stated that he had no instructions to appear for the legal representatives of deceased respondents no.1 and 2.

2. This second Appeal was admitted on 22.12.2010 on the following substantial questions of law:-

(I) Whether the failure of the defendants to prove that the area of their property under survey no.17/5 is wrongly shown in the survey records as concurrently found by the

trial and appellate court was not by itself sufficient proof of plaintiffs case that the defendants have encroached on their property under survey no.17/4 ?

(II) Whether the First Appellate Court was not wrong to assume that in the suit involving purely a boundary dispute between the adjoining properties, the title of the properties was also in issue and the area of the property given in the title documents was the determining factor ?

3. The appellant is the original Plaintiff, and the respondents are the original defendants in Regular Civil Suit No.25/2000/C instituted in the Court of the Civil Judge, Junior Division at Panaji. Accordingly, the appellant shall be referred to as the Plaintiff and the respondents as the defendants, even for this Appeal.

4. The Plaintiff's case was that he was the owner in possession of a property surveyed under No.17/4 of Chimbél Village purchased by his father by a 14.09.1957 sale deed. The Plaintiff's case was that there was a boundary dispute with the defendants, and therefore the Plaintiff applied to the Survey Authorities for demarcation. By Judgment and Order dated 15.11.2005, the

Deputy Collector/Sub-Divisional Officer (SDO) ordered demarcation.

5. In terms of the demarcation order, the area of the property surveyed under No.17/4 was shown as 720 sq. mts. Plaintiff's case is that the defendants, by encroaching upon the suit property surveyed under No.17/4, constructed a compound wall therein. Hence, the Plaintiff applied for a permanent injunction to restrain the defendants from continuing with the attempted encroachment and for a mandatory injunction to remove the construction of the compound wall and restore the suit property surveyed under No.17/4 to the Plaintiff.

6. By filing a written statement, the defendants denied the Plaintiff's case. The defendants maintained that the construction of the compound wall after obtaining permission from the local authorities was within their property. The defendants alleged that the Plaintiff took the law into his own hands and illegally demolished a portion of the compound wall. Based on this, the defendants raised a counterclaim seeking damages of ₹25,000/-. The defendants also pleaded that the survey records incorrectly stated the area of the property surveyed under No.17/5 as 419 sq. mtrs. when the correct area was 462 sq. mtrs. A counterclaim was raised seeking correction of the survey records by enhancing the

area of property surveyed under No.17/5 from 419 sq. mtrs. to 462 sq. mtrs.

7. The defendants also alleged that the Plaintiff had illegally constructed a water tank and a septic tank in the property surveyed under No.17/5. Accordingly, the defendants sought relief to demolish these structures and restore the defendants' property surveyed under No.17/5 to the defendants.

8. The Trial Court, by its Judgment and Decree, dated 30.11.2007, partly decreed the suit. The Trial Court restrained the defendants from further digging or constructing in the suit property and ordered the defendants to remove the encroached portion of the compound wall constructed in the suit property. At the same time, the Trial Court also allowed the defendants' counterclaim partly and directed the Plaintiff to pay damages of ₹10,000/- to the defendants.

9. The defendants appealed the Trial Court's decree in the suit, and the Plaintiff filed cross-objections to question the Trial Court's decree in the counterclaim. The First Appellate Court, based on the pleadings and documents on record, framed the following points for determination:

1. Whether the Plaintiff proves that the defendants have done digging and have constructed the compound wall, illegally encroaching on the Plaintiff's property surveyed under no.17/4, on 8/2/2000 and 11/2/2000 ?

2. Whether the defendants prove that the Plaintiff has encroached the property of the defendants by constructing a water tank and a septic tank in May, 1997?

10. The First Appellate Court answered the first point for determination in the negative by holding that the Plaintiff had failed to prove that the defendants had encroached upon the Plaintiff's property by constructing a compound wall in the Plaintiff's property surveyed under No.17/4. The First Appellate Court answered the second point for determination favouring the Plaintiff by holding that there was no case for awarding any damages.

11. Aggrieved by the First Appellate Court's answer to the first point for determination, the Plaintiff has instituted this Second Appeal on the above substantial questions of law.

12. Mr Mulgaonkar learned Senior Counsel for the Plaintiff, submitted that the two courts have concurrently held that the

defendants failed to prove that the area of their property surveyed under No.17/5 was 462 sq. mtrs. and not 419 sq. mtrs. He submitted that given these concurrent findings, which the defendants did not even challenge by instituting a Second Appeal, the First Appellate Court could not have concluded that the defendants had not encroached upon the Plaintiff's property surveyed under No.17/4. He submits that this finding of the First Appellate Court suffers from perversity and constitutes a contradiction in terms.

13. Mr Mulgaonkar submitted that the suit was based on possession, and the First Appellate Court was not justified in going by the title documents when both parties' titles were not in issue. He submitted that the First Appellate Court did not give adequate credence to the Judgment and Order dated 15.11.2005 made by the Deputy Collector/SDO, Tiswadi (demarcating authorities), who had demarcated Plaintiff's and defendants' properties. Mr Mulgaonkar submitted that based upon this demarcation order, which the defendants did not even challenge, the factum of encroachment by constructing a compound wall was evident. He, therefore, submitted that even the substantial question of law must be answered favouring the Plaintiff.

14. To appreciate Mr Mulgaonkar's contention, reference will have to be firstly made to the pleadings in the plaint. The plaint refers to the 14.09.1957 sale deed by which the Plaintiff's father purchased the suit property now stated to be surveyed under No.17/4, Chimbél, Tiswadi-Goa. The sale deed, quite naturally, does not refer to the survey numbers because such a survey was undertaken much later. Therefore, Plaintiff did rely on this sale deed, and the Appeal Court could not be faulted for referring to the same.

15. The sale deed, which is on record as Exh.PW1/B Colly does not indicate the precise area purchased by Plaintiff's father. The sale deed only states that the vendor was the owner, possessor and legitimate holder of the right to 1/3rd part of the property described entirely in the Land Registration Office under No.17410 at page 68 of Book B-46 (New), inscribed the same right to 1/3rd part in favour of Maria Arcangela (vendor). The sale deed also notes that the said property entirely admeasured 2000 sq. mtrs. and was registered in the Matriz Records under No.404 with the denomination of urban property with an outhouse.

16. Thus, the sale deed produced on record by the Plaintiff either indicates that the Plaintiff's father purchased the property from the vendor Maria Arcangela who had 1/3rd rights in the

larger property without specifying the precise $1/3^{\text{rd}}$ portion which she sold to the Plaintiff's father or that the Plaintiff's father purchased from said Maria Arcangela a specified portion corresponding to $1/3^{\text{rd}}$ of the entire property admeasuring 2000 sq. mtrs.

17. Given this ambiguity, the minimum expected of Plaintiff was to plead precisely in the plaint about the area purchased by Plaintiff's father under this sale deed of 14.09.1957. However, the plaint is silent about the precise area purchased by Plaintiff's father. The plaint is merely based upon the survey description and demarcation order made by the Revenue Authorities.

18. Suppose the version that a specified area or portion was sold by said Maria Arcangela to the Plaintiff's father is to be believed and accepted. In that case, this portion will correspond to an area of approximately 666 sq. mtrs. i.e. the $1/3^{\text{rd}}$ of the total property area of 2000 sq. mtrs. Therefore, it was for Plaintiff to explain how the area purchased by his father could be taken as 720 sq. mtrs.

19. The Judgment and Order dated 15.11.2005 was made by the demarcation/survey authorities. When the defendants attempted to raise the issue of the area reflected in Plaintiff's

father's sale deed, the revenue/demarcation authorities did not permit the defendants to do so by observing that the issues of title or title deeds cannot be gone into by the revenue/ demarcation authorities. Now, the Plaintiff seeks to base his entire case on the Judgment and Order made by the surveying/demarcating authorities by once again urging that the issue of title deed is entirely irrelevant and the matter will have to be decided based upon the factum of possession as reflected in the demarcation order made by the surveying/demarcating authorities.

20. Possibly because Plaintiff had no clear answer to the legitimate inferences from his father's sale deed, the area of the suit property was never pleaded by Plaintiff in the plaint. Such pleading was necessary to demonstrate that there was indeed encroachment by the defendants. The burden of establishing encroachment was firstly upon Plaintiff. Plaintiff could not have aspired to take advantage of the weakness, if any, in the defendants' case based upon the relief to enhance the areas of the survey holding No.17/5. Therefore, it was incumbent upon the Plaintiff to have pleaded the area of the property purchased by his father and then pleaded and demonstrated that such area was reduced due to the encroachment undertaken by the defendants in such purchased property.

21. This was not a question of title *per se*. The defendants admitted the Plaintiff's title. Similarly, even the Defendant's title was recognised by the Plaintiff. The question was the extent and areas of the two properties purchased and owned by the Plaintiff and defendants. Therefore, in the plaint, Plaintiff should have pleaded about the area and extent with some degree of precision. Admittedly, there are no pleadings about the precise area or extent. The Plaintiff, upon whom the burden lay, cannot take advantage of his failure to plead this crucial aspect.

22. Mr Mulgaonkar, however, referred to the provisions of Order 7, Rule 3 of the Code of Civil Procedure (CPC) and submitted that since the survey number was mentioned, there was sufficient compliance. The survey number was possibly adequate to identify the location of the suit property. However, since Plaintiff claimed ownership under the sale deed of 1957, it was incumbent upon Plaintiff to have pleaded the area Plaintiff's father acquired under the sale deed. By not pleading or resorting to vague pleadings, Plaintiff could not seek demolition of the compound wall constructed by the defendants.

23. The two Courts, for various reasons including non-joinder of necessary parties, dismissed the defendants' counterclaim about enhancing the area of the property surveyed under No.17/5 from

419 sq. mtrs. to 462 sq. mtrs. However, this dismissal of the counterclaim cannot straight-away benefit Plaintiff. The Plaintiff had to stand or fall by his own case and not the weakness of the Defendant's case. The burden was upon Plaintiff to prove precisely or at least with some degree of approximation to the area of the property purchased by his father under the 1957 sale deed. From the document itself, the area would not exceed or be around 666 sq. mtrs. The so-called encroachment is on the fringes.

24. Therefore, based only on the demarcation order made by the surveying/demarcating authorities, the Trial Court was not justified in concluding encroachment or ordering demolition. Upon appreciation of this position, the appeal court reversed the Trial Court and set aside the decree for demolishing the compound wall based on the premise that the compound wall was constructed by encroaching into the Plaintiff's property.

25. The First Appellate Court has considered both oral and documentary evidence on record. Therefore, it would not be appropriate to hold that merely because the counterclaim of the defendants was rejected, the same was sufficient to conclude encroachment by the defendants. That circumstance alone would not constitute adequate proof of encroachment into the Plaintiff's

property. Therefore, the first substantial question of law must be answered against Plaintiff.

26. Regarding the second substantial question of law, as noted above, even assuming that this was only a boundary dispute, it is not as if the title documents of the parties are irrelevant or extraneous for resolving such a dispute. The parties, in this case, claim right, title and interest to their respective properties based upon the title documents. The title documents, in this case, refer to the area. But there was some ambiguity in this aspect. Therefore, if the encroachment had to be established, the Plaintiff had to plead and prove precise or at least reasonable approximate area of the property purchased by his father by the 1957 sale deed. By avoiding pleading so and relying entirely on the demarcation order, the decree of demolition of the compound wall could not have been made.

27. As noted earlier, during the demarcation proceedings, the defendants had precisely raised the contention about the Plaintiff's property area not exceeding 666 sq. mtrs. However, the surveying/demarcating authorities did not consider this contention because such an argument concerned title issues best sorted out in a Civil Court. Therefore, in the Civil Court, at least, the defendants cannot be non-suited when the title documents of

the Plaintiff do not fully support the encroachment theory. Accordingly, even the second substantial question of law will have to be answered against Plaintiff.

28. For the above reasons, this Appeal is liable to be dismissed and is hereby dismissed. Accordingly, there shall be no order for costs.

M. S. SONAK, J.

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