

Amrut

IN THE HIGH COURT OF BOMBAY AT GOA

SECOND APPEAL NO. 62 OF 2019

JULIO D'SILVA AND ANR.

... Appellants

Versus

CAJETAN D'SOUZA, REP. BY POA,
NORMA CAIRO AND 3 ORS.

... Respondents

Mr A. D. Bhobe and Ms V. Pokre, Advocates for the Appellants.
Mr J. Godinho, Advocate for the Respondents.

CORAM: M. S. SONAK, J.

DATED : 16th FEBRUARY 2023

P.C.:

- 1.** Heard Mr A. D. Bhobe, learned counsel for the Appellants and Mr J. Godinho, learned counsel for the Respondents.
- 2.** The Appellants, who are the original plaintiffs, challenge the concurrent judgments and decrees made by the trial Court and the Appellate Court dismissing their Regular Civil Suit No.52/2003/A in which they had alleged encroachment by the Respondents (defendants) into the suit property to the extent of 9 and 18 square metres respectively.

3. The records show that initially, the trial Court, by judgment and decree dated 28.03.2014, had dismissed the suit and the counterclaim raised by the defendants. In Regular Civil Appeal No.47/2014 and the cross objections therein, the First Appellate Court, by judgment and decree dated 31.08.2015, set aside this decree and remanded the matter to the trial Court with liberty to the parties to seek the appointment of Commissioner.

4. After the remand, two applications were filed, one for the production of additional documents and the second for the appointment of a Commissioner. The trial Court dismissed both applications. The Application for appointment of Commissioner was filed belatedly, and this was one of the grounds for dismissal of such an application. The Appellants also filed another application under Order XVIII Rule 2, 17A of the Civil Procedure Code to produce additional documents. The trial Court dismissed even this. Ultimately, the trial Court dismissed the suit and the counterclaim by judgment and decree dated 23.09.2016.

5. The Appellants appealed vide Regular Civil Appeal No.114/2016. By the impugned judgment and decree dated 14.02.2018, the First Appellate Court has dismissed the Appeal and affirmed the decree made by the trial Court dismissing the suit.

6. Mr Bhobe, learned counsel for the Appellants, pointed out that even the First Appellate Court, in paragraph 30 of the impugned judgment and decree, had observed that the dispute between the

parties could have been sorted out had a Court Commissioner been appointed.

7. Accordingly, Mr Bhobe proposed the following substantial questions of law.

(i) Whether when the Appellate Court having concluded that appointment of a Commissioner would have established and resolved the dispute in the proceedings, the Appellate Court ought to have appointed a Court Commissioner so as to finally adjudicate the dispute between the parties?

(ii) Whether when the Appellants had established their case with documentary evidence supported by oral testimony, the Courts below were right in concluding that the Appellants had failed to establish the encroaching made by the Respondents?

8. Mr Godinho, however, pointed out that the appointment of a Court Commissioner was entirely irrelevant considering the evidence on record and its concurrent appreciation by the two Courts. He pointed out that the two Courts had correctly concluded that the Appellants had failed to establish any correspondence between the property purchased by the Appellants vide the 1957 sale deed and the property under Survey No.110/26. He further pointed out that the two Courts, based on evidence on record, had concluded that there could be no encroachment on the plaintiffs' western boundary as alleged in the plaint because, between the west boundary of the plaintiff's property and the eastern boundary of the defendants'

property, there was a drain and property/house of the heirs of Albuquerque. He submitted that this finding is based on the evidence on record, and based upon the same, two Courts were justified in dismissing the suit.

9. The rival contentions now fall for determination.

10. On perusal of two judgments and decrees and the other material on record, it is apparent that two Courts have recorded concurrent findings of fact. These findings of fact are supported by evidence on record, and therefore, not even a ground based on perversity was quite correctly proposed.

11. Mr Bhobe's contention was based upon the observations in paragraph 30 of the judgment and decree made by the First Appellate Court to the effect that the encroachment issue could have been established had a Court Commissioner been appointed. Though such an observation was made in paragraph 30, such observation can hardly be regarded as the basis for the dismissal of the Appellants' Appeal and the confirmation of the trial Court's judgment and decree.

12. The two Courts have concurrently held that to establish the encroachment on the western boundary of the plaintiff's property, the plaintiffs had first to show that the suit property "Predio Urbano", which the plaintiffs had purchased vide 1957 sale deed indeed corresponded to the property surveyed under No.110/26. Both parties have led evidence on this issue, and the trial Court concluded that no

such correspondence was established after a detailed consideration of the evidence on record and after applying appropriate tests.

13. Secondly, the trial Court also recorded a finding of fact that between the western boundary of the plaintiff's property and the eastern boundary of the defendants' property, there was a water drain and the property/house of the heirs of Albuquerque. Based on such a finding duly supported by evidence on record, the trial Court concluded that the encroachment was impossible. In any case, the same was not established.

14. The First Appellate Court, after coming into close quarters with the reasoning of the trial Court has assessed the evidence on record afresh and affirmed the two findings. But, again, despite the opportunity, the records show that the Appellants were not quite diligent on the issue of the appointment of a Court Commissioner. In any case, even if the Court Commissioner were to be appointed, considering the findings of fact duly supported by the evidence on record, the execution of the Commission would have made no significant difference to the ultimate conclusions arrived at by the two Courts concurrently.

15. Accordingly, the two substantial questions of law proposed by Mr Bhobe do not arise or, in any case, will have to be answered against the Appellants.

16. For the above reasons, this Appeal is dismissed. Accordingly, there shall be no order for costs. Misc. Civil Application, if any, does not survive the disposal of the Second Appeal, and the same is also disposed of accordingly.

M. S. SONAK, J.

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