

Niti

IN THE HIGH COURT OF BOMBAY AT GOA

**SECOND APPEAL NO.102 OF 2019
AND
CIVIL APPLICATION NO.233 OF 2019**

**LAXMAN JAYWANT
GAUDE AND ANR.**

....APPELLANTS

Versus

**VIJAY DATTARAM
JADHAV AND 4 ORS.**

....RESPONDENTS

Mr Dinesh E. Naik, Advocate *for the Appellants.*

Mr J. Godinho, Advocate *for Respondent No.1.*

CORAM: M. S. SONAK, J.

DATE : 3rd FEBRUARY 2023

ORAL ORDER :

1. Heard Mr Dinesh Naik for the appellant and Mr J. Godinho for respondent no.1.

2. The appellant challenges concurrent decrees made by the Trial Court and the First Appellate Court decreeing Regular Civil Suit No.8/2006/A instituted by respondent no.1 (plaintiff) seeking restoration of an area of about 47 sq. mtrs., which according to the plaintiff, was encroached upon by the appellant.

3. Mr D. Naik, learned Counsel for the appellant, submits that the concurrent findings recorded by the two Courts are vitiated by perversity because the findings are de hors the pleadings and, in any case, are based on a misreading of material documentary evidence. He submitted that it is a settled position in law that if there is a conflict between area and boundary, then the boundaries will prevail.

4. Mr Naik, based on the above submissions, handed in a set of several substantial questions of law which, according to him, arise in this appeal. The same are transcribed below for the convenience of reference:

a. Whether the oral evidence can replace the documentary evidence contained in registered documents i.e Deed of Sale, Deed of Rectification, Form I & XIV and Survey records and plans?

b. Whether the Courts below was erred in decreeing the Suit based on oral evidence of the plaintiff and misreading and misinterpreting the documentary evidence brought on record by the defendant No. 1 & 2/appellants herein thereby arriving at perverse findings?

c. Whether the Ld. Trial Court and the 1st appellate Court based its findings purely on conjectures and surmises?

d. Whether the learned Trial Court Judge justified in decreeing the suit in favour of the plaintiff although it was clearly observed in the judgment that the defendant No. 1 & 2 (appellants herein) have proved

that they are the Owners in possession and enjoyment of the plot No. 2 admeasuring 500 sq. mtrs and the plaintiff does not have any right in the same.

e. Whether possession of the appellants/defendant No. 1 & 2 did not deserve protection once finding was rendered that there was overwhelming documentary evidence in proof thereof that they are the lawful owners of plot bearing No. 2 admeasuring 500 sq. mtrs bearing Survey No. 95/2-D?

f. Whether the learned Trial Court Judge erred in decreeing the suit in favour of the respondent No. 1 (original plaintiff) even after clearly making observation that the these appellants/defendant No. 1 & 2 are the owners and in physical possession of the plot bearing No. 2 admeasuring 500 square meters having independent Survey no. 95/2-D and also name of the appellants are mutated in the land revenue records Form I & XIV of the Survey bearing No. 95/2-D.

g. Whether there is perverse approach of the Trial Court and the 1st appellate Court in arriving findings dehors of pleadings ?

h. Whether it is fit case for remand the matter to the Trial Court with a direction to appoint Court commissioner since there is dispute of encroachment and boundary dispute?

5. Mr Godinho, learned Counsel for the original plaintiffs, submits that the findings of fact concurrently recorded by two Courts suffer from no perversity whatsoever. The findings are based on oral as well as documentary evidence. Further, he points out that the

appellant rectified the original Sale Deed to facilitate encroachment. The two Courts have duly considered all these aspects, and no questions of law, much less, any substantial questions of law arise in this appeal.

6. The Hon'ble Supreme Court in the case of *State of Rajasthan & Ors. V/s. Shiv Dayal & Anr.*¹ relied upon by Mr Naik has held that though the concurrent finding of fact is usually binding on High Court while hearing Second Appeal, this rule of law is subject to certain exceptions. Where a concurrent finding of fact is recorded dehors the pleadings, or is based on no evidence or misreading of material documentary evidence, or is recorded against any provision of law, or the decision is one which no Judge acting judicially could reasonably have reached, such grounds will constitute a substantial question of law within the meaning of Section 100 of CPC.

7. Mr Naik's contention about lack of pleadings or that the findings of fact concurrently recorded by the two Courts are dehors the pleadings cannot be accepted. The plaint is quite clear since it alleges encroachment of the precise area of 47 sq. mtrs. There is a reference to how such encroachment was carried out by erecting poles, etc. Full details have been pleaded, and both the oral and the documentary evidence align with the pleadings. Therefore, the contention about findings of fact being dehors the pleadings cannot be

¹ (2019) 8 SCC 637

accepted and based thereon, the concurrent findings cannot be styled as perverse findings.

8. Mr Naik then submitted that the two Courts had misread the evidence on record. He proposed that the two Courts have ignored the registered sale documents, partition deeds, etc. and instead focused on the oral evidence led by the parties. He submits that such an approach renders the findings perverse.

9. The two Courts have considered the registered documents produced by the appellant and the original plaintiff. The registered documents, particularly the Sale Deeds based on which the parties claim their title and possession, refer to the correct areas. This means that the plaintiff's Sale Deed refers to purchasing an area of 152 sq. mtrs. On the other hand, the appellant's Sale Deed executed on 13.05.1997 refers to the area of 500 sq. mtrs. However, the record bears out that the two Courts have considered that the appellant got executed a Deed of Rectification on 07.07.2000. This Deed of Rectification acknowledges a disconnect between the boundaries indicated in the plan annexed to the original Sale Deed dated 13.05.1997 and the position at loco. Based on this, the Rectification Deed was executed. The finding, on a preponderance of probabilities, about the self serving rectification to justify the encroachment, cannot be styled as perverse.

10. The two Courts have evaluated the oral as well as the documentary evidence on record. Both the parties had examined surveyors and their evidence was vital. Upon appreciation and evaluation of the evidence, the two Courts concluded that there was indeed encroachment by the appellants to the extent of 47 sq. mtrs. thereby reducing the size of the Plaintiff's plot from the purchased 152 sq. mtrs. to 105 sq. mtrs. This encroachment was facilitated by the belated Deed of Rectification by claiming that there was some discrepancy in the plan.

11. Thus, this is not at all a case of misreading of evidence but instead, this is a case of evaluation and appreciation of evidence. No perversity is pointed out or at least made out in such appreciation or evaluation.

12. The principle that boundaries will prevail in case of a conflict between the area and the boundaries is well settled. However, based on self-serving documents like a Deed of Rectification if boundaries are altered, such boundaries cannot ordinarily prevail. It is not as if the two Courts were not alive to this position and as noted earlier, this is mainly a case of appreciation and evaluation of both oral and documentary evidence on record. Since the concurrent findings of fact are based on appreciation and evaluation of both appellant's oral as well as documentary evidence no case of perversity as contemplated in *Shiv Dayal's* case (supra) is made out.

13. The questions proposed by Mr Naik do not arise in this matter. The questions, though styled as questions of law, are nothing but an invitation to re-appreciate or re-evaluate the oral and documentary evidence on record. The Second Appellate Court would exceed jurisdiction if it were to re-appreciate and re-evaluate the oral and documentary evidence on record after concluding that the concurrent findings of fact recorded by the two Courts were not perverse.

14. Several efforts were made by this Court to see whether an amicable solution was possible. However, learned Counsel for the parties ultimately reported that no such settlement is possible.

15. For all the above reasons, this appeal is dismissed. Accordingly, there shall be no order for costs.

16. The civil application does not survive the dismissal of the appeal. Accordingly, the same is also disposed of.

M. S. SONAK, J.

NITI K
HALDANKAR

Digitally signed by NITI
K HALDANKAR
Date: 2023.02.06
13:04:36 +05'30'