



Maria S.

**IN THE HIGH COURT OF BOMBAY AT GOA
SECOND APPEAL NO. 15 OF 2010**

Shri Shashikant Monju Porob Dessai,
major, landlord, r/o Gauthan, Cottombi,
Quepem-Goa.

... Petitioner

Versus

Shri Domingos Mascarenhas, major,
widower, service, r/o House No.123,
Laundyabhat, Cottombi, Quepem-Goa.

...Respondent

Mr. R. G. Ramani, Senior Advocate with Mr Pranav S.S.
Kakodkar, Advocate for the Petitioner.

Mr. Vledson Braganza, Advocate with Mr Sagar Rivonkar and
Mr Jeet Volvoiker, Advocates for the Respondent.

CORAM: BHARATI H. DANGRE, J.

DATE: 17th March, 2025

ORAL JUDGMENT:

1. Being aggrieved by the judgment passed by the District Court, South Goa, Margao in Regular Civil Appeal No.1/2009, thereby allowing the Appeal and rejecting the cross-objections, when the District Court had declared the suit of the Plaintiff to be dismissed by

setting aside impugned judgment dated 11.11.2008, the Appellant who was the original Plaintiff has approached this Court.

2. I have heard learned Senior Counsel Mr R. G. Ramani for the Appellant and Mr Parikshit Sawant, learned Counsel for the Respondent.

The Appellant who is the /Plaintiff filed civil suit bearing Regular Civil Suit No.52/1993/B against the Respondent in the Court of the Civil Judge, Junior Division at Quepem by specifically pleading that he is the co-owner and in joint possession and enjoyment of the property “Borod Sorvo” also known as 'Molla Vello Sorvo” situated at Village Cottombi in Quepem Taluka, enrolled in Land Revenue Office at Quepem under Matriz No.No.287 and surveyed under No.7/1. As far as the defendant is concerned, it was pleaded that he is the grandson of one Rosalina Fernandes, who was residing in a small house of about less than 50 sq.mts, which after her death and the death of her daughter was occupied by the Respondent in the capacity as her son. Pleading that the Respondent is creating nuisance and harassment to the Appellant in

peaceful enjoyment of the property as he had set on fire one of the coconut trees in April 1993 and also dumped construction material and obstructed water channels for supplying water as well as he dug foundations on the southern side of the old house covering an area of 75sq.mts, without seeking permission from the concerned Authorities, he filed the suit specifically praying for the following reliefs:

`a) By the judgment and decree of this Hon. Court in the nature of permanent injunction the defendant his family members, agents, servants, workers, or any person acting or claiming through the defendant be restrained permanently from doing or carrying on, or erecting or constructing any construction, structure, building or house, in the said property or interfering in any manner with the said property of the plaintiff, survey No.7/1, village cottambi in Quepem taluka.

b). That by judgment and decree in the nature of mandatory injunction the defendant be directed to remove and demolish the foundation of the new construction and to keep the land and property to its original position.'

3. During the pendency of the suit, the plaint was amended on 15.03.2005, giving reference to the order passed by the Additional District Judge South Goa Margao in Miscellaneous Civil Appeal

122/1993, dated 08.02.1995, an order restraining from extending the plinth area of the house beyond 76.50sq.mts which was existing at the relevant time and further restraining any further construction in the suit property. It was also pleaded that that the Plaintiff had filed an application under Order 39 Rule 2A of the CPC and the same was dismissed on the ground that the proceedings are to be treated in a different manner. In addition, an additional prayer was also inserted in the plaint which reads thus:

“And also to demolish, dismantle and remove the new illegal construction carried out in an area of 76.50sq.metres area and the two huts of palm leaves roofing and a pigsty constructed at a distance of about 15 meters from the said new illegal construction.”

4. The suit was contested by the defendant by filing a written statement and by pleading that there exists a mundkar and bhatkar relationship between the Plaintiff and the defendant and hence the Court had no jurisdiction to entertain the suit. The defendant also pleaded that the Plaintiff had visited the site in the last week of April

1993 and gave a proposal to the defendant that he should purchase the mundkarial area in respect of the suit dwelling house admeasuring 323 sq.mts at a total amount of Rs.25,000/- and when he approached along with the Advocate to effect the payment, the Plaintiff changed his mind and refused to live up to this commitment.

Additional written statement was filed by the defendant stating that at the time of renovation of his house in the year 1976-77 its existing plinth was 81.00sq.mts however, the at the time of reconstruction of the suit dwelling house in 1993, the defendant had reduced the existing plinth area from 81.00 sq.mts to 76.50sq.mts. He also specifically pleaded that at the time of renovation of the suit dwelling house, there existed easements such as pigsty cum firewood storing hut, open toilet at a distance of about 10 to 15 meters from the eastern wall of the suit dwelling house and the roof of the same is covered with palm leaves. It was pleaded that these easements had been in existence since the time of his ancestors for more than 50 years. It was also pleaded that there was one shed (bagel) close to the eastern wall

and the same is covered with palm leaves on all sides and which is used for domestic purposes, and which is also in existence since the time of his ancestors.

5. In the wake of the rival pleadings, the trial Court framed six issues to the following effect:

'Issues

1. *Whether the plaintiff proves that he is owner in possession of survey n. 7/1, situated at village Cotombi, Quepem taluka?*
2. *Whether the plaintiff proves that defendant is ran trespasser has encroached and constructed a structure admeasuring 75 square meters in the suit property?*
3. *Whether the plaintiff proves that defendant is trying to disturb the plaintiff's possession in the rest of survey no.7/1?*
4. *Whether the defendant proves that he is mundkar in the said structure existing in survey no.7/1? [Deleted]*
5. *Whether the plaintiff proves that he is entitled for relief of Permanent injunction against the defendant in survey no.7/1?*
6. *Whether the plaintiff is entitled for relief of Mandatory injunction of removal of the structure?*
7. *Whether the Court has jurisdiction to grant the relief of mandatory injunction?'*

Apart from this, the following additional issue was also framed:

- `1. Whether the plaintiff proves that after filing of the suit, the defendant has constructed a new illegal structure admeasuring 76.50 square metres, 2 huts of palm leaves*

roofing and a pigsty at a distance of about 10 to 15 metres from the illegally constructed new house?'

6. The plaintiff examined himself along with two more witnesses and defendant also entered into the witness box.

On due consideration of the pleadings and the evidence placed before the Court, the suit came to be partly decreed and the relief claimed in the plaint for mandatory injunction and the direction to the defendant to remove and demolish foundation of the new construction and also remove the new illegal construction carried out in the area of 76.50sqmts was rejected and the reasoning to that effect is to be found from paragraph no.26 and paragraph no.27.

Specifically recording that the plaintiff has failed to prove that the illegal construction is carried out by the defendant around the old house on north-east and west and since it could not be demonstrated through the plan and since the plaintiff specifically pleaded to demolish the illegal structure, a finding was recorded that he had failed to prove the construction of altogether new house on the southern side and with a

specific finding rendered to that effect the issue was answered in the negative and the relief was refused to the plaintiff.

'As said herein above the sketch produced on record at exbt. P-58 does not shown any independent new structure on the southern side not only that it even does not show an extension or for that purpose any type of construction on the southern side of old house. Even assuming that by illegal construction plaintiff wishes to say that it is the construction shown in green colour and blue colour i.e. construction done as per approved plan, than also as the said construction covers only an area of 47 sq.mtrs same cannot co-exists with the pleadings wherein it is alleged illegal construction of 75.50 sq.mtrs. It is nowhere case of the plaintiff in the plant that illegal construction alleged to have been done by the defendant is around old house on north, east and west. However, the plan produced on record shows the construction on all above three sides. The construction shown in the plan and the construction pleaded in the plaint contradict each other and cannot co exists. Plaintiff wishes the court to demolish and remove the new illegal construction carried out in an area of 75.50 sq.mtrs. Alleged to have been raised on the southern side of the old house. Plaintiff however, failed to prove the construction of altogether new house on the southern side. In fact the plan on record does not show any independent construction admeasuring 75 sq.mtrs. Being so, issue no.6 deserves to be answered in negative accordingly answered as not proved by the plaintiff. Plaintiff through failed to prove entitlement of mandatory injunction to remove illegal structure of 75.50 sq.mtrs., he succeeded in proving interference in the suit property on the part of defendants, plaintiff also succeeded in proving his ownership title in the suit property being so, I hold that plaintiffs succeeded in proved issue no.5 as prayed accordingly answered in affirmative along with issues 2 and 3.'

7. As far as the second point of consideration before the Court was for demolition of two huts of palm leaves and pigsty constructed at a

distance of about 10-15 mtrs from the new construction as shown by the plaintiff in Exhibit P-58, the same was ordered to be removed and dismantled and the defendant was directed to restore the land to its original position.

In addition, the trial Judge ordered that the defendant, his family members, agents, servants, workers or any other person acting or claiming through defendants are restrained from doing or carrying any construction, structure, building or house in the suit property surveyed under survey no.7/1 of village Cotombi, Quepem taluka beyond existing house of 76 sq.mts.

8. Being aggrieved by the aforesaid relief granted in favour of the plaintiff, the defendant approached the appellate Court by filing Regular Civil Suit No.1/2009 by stating that on appreciating the oral and documentary evidence, the learned Judge had erred in partly allowing the suit holding that the evidence was sufficient to decree the suit. The application was also filed by the appellant under Order 41

Rule 27 so as to bring on record additional evidence to be taken into consideration in the appeal.

The appellate Court thereafter formulated four issues which included a issue that the Civil Judge has erred in holding that the plaintiff had failed to prove that in 1993 the defendant had raised an illegal construction, as well as whether the appellant has made out a ground for allowing his application under Order 41 Rule 27 CPC. As far as the issue which had directed demolition of the palm sheds and pigsty, a specific issue no.4 was framed to the effect whether the Civil Judge has erred in holding that the defendant had raised pigsty and palm shed in the suit property in 1995. As far as the three issues are concerned, they were answered in the negative, but the 4th issue as regards the palm shed and pigsty, was answered in the affirmative thereby reversing the finding of the trial Court on the said aspect as a result of which the suit of the plaintiff in its entirety came to be dismissed by the appellate Court.

9. Learned Senior Counsel Mr Ramani, while inviting my attention to the finding rendered by the appellate Court in paragraph 30 to 35, has pointed out that the said finding is completely in contrast to the evidence that has been brought on record and in fact was appreciated by the trial Court, by specifically recording that there was no reference to easement of shed and pigsty in the written statement which was filed by the appellant which contained the mention of only one house alleged to be constructed by the grandmother of the defendant 50 years before having plinth area of 81.00sqmts as in 1976-77. The trial Judge had specifically recorded that had all these easements existed, the defendant ought to have mentioned them in the written statement but since there is no whisper about these structures, when the written statement was filed in the year 1993, there existed no such structure.

In addition, reference is also made to a NC complaint which is placed on record which is of the year 1993 where there is a reference of an appeal and it cannot be believed that the shed and pigsty came to be

constructed in the year 1995 after passing of the order by the Additional District Judge, Margao.

The appellate Court however, cast a burden on the plaintiff where the plaintiff had to prove that the structures were not existing prior to 1995 and because the defendant had specifically pleaded that the structures were constructed by his grandmother and continued to stand on the property, therefore, this observation is clearly in ignorance of the findings rendered by the trial Judge.

10. The order passed in Miscellaneous Appeal No.92/1993 by the Additional District Judge on 08.02.1995, when the injunction application filed by the plaintiff, in respect of Boro Sorvo was dismissed specifically recording the case of the plaintiff and accepting that the plaintiff/appellant is owner of the suit property and the Mamlatdar had decided Smt Angelina Mascarenhas as Mundkar of the dwelling house but without mentioning the area of the dwelling house, it is recorded that she was having an area of 50sq.mts as a Mundakar. The defendant had obtained a licence from the Village Panchayat showing a total plinth

area of 76.50sqmts but has not proved as to how his dwelling house has this area, when the survey plan show that the area of the dwelling house is only 50sq.mts. Based upon the aforesaid findings, by recording that the defendant has completed the construction of the house and he was in occupation of it, the order was passed directing the respondent to refrain from carrying out any construction beyond the area of 76 sq.mts and not to interfere with the possession of the suit property of the plaintiff.

This order being passed on 08.02.1995 clearly establish that the structure was recent and did not exist as was claimed by the defendant right from the time his mother and grandmother were occupying the premises.

11. Learned Counsel for the defendant has vehemently asserted that that the declaration of the defendant that the issue is pending before the Mamlatdar and therefore he is entitled for the area of 300sq.mts has no bearing on the issue as the finding rendered by the trial Court is not based upon the claim of the defendant as being entitled as a Mundkar

but the finding has been rendered clearly on the basis that the structure was newly constructed and not one which existed when his grandmother and mother were occupying the premises.

Since there was violation of the injunction order issued by the Court even contempt proceedings were initiated by the Court refraining from entering into the said arena.

In any case the finding of the appellate Court is not borne from the record and the evidence of the structure which include a plinth area was filed before the Sarpanch of Cotombi on 08.04.1993, when the plaintiff complained that one house is being illegally and unlawfully being constructed without her permissions and the Sarpanch was specifically informed that Mr Domingo Mascarenhas (defendant) has brought construction material and dumped the same in the property. In addition, there is a complaint made to the PSI, Quepem Police Station against him for carrying out such illegal activity is also placed on record. The aforesaid documents which were pleaded before the trial Court clearly established that the construction from the aforesaid premises was

undertaken in the year 1993 and this belies the case of the defendant in his written statement that the said structures existed from the very beginning when his mother and grandmother were in occupation of the premises.

12. In the wake of this, the reversal of the finding of the trial Court regards the structure of the pigsty and two palm leaves sheds, which is reversed by the appellate Court cannot be sustained. As a result, the judgment passed by the appellate Court dated 05.11.2019 to that extent is set aside.

13. As far as the operative part of the judgment of the appellate Court is concerned, it has set aside judgment dated 11.08.2008, with the result that the restraint order against the defendant granted by the Civil Judge Junior Division, Quepem restraining the defendant, his family members, agents and workers or any other person from carrying or carrying on, or erecting or constructing any construction, structure, building or house, in the said property or interfering in any manner with the said property of the plaintiff, survey No.7/1, village Cottambi in

Quepem taluka beyond the existing house of 76.50sqmts is also ultimately wiped out. In any case, the order of the appellate Court has reversed the finding as regards the two huts of palm leaves and pigsty but no finding is rendered as regards permanent restraint on the defendant and his family members. The order passed by the District Judge ought to have restricted only to that aspect, instead the District Judge has wrongly declared the suit of the plaintiff to be dismissed. The order, therefore, stands revoked to the effect by declaring that the finding rendered as regards the demolition of two huts of palm leaves and pigsty directed as against the finding of the trial Judge to be erroneous, is set aside. With this result, the appeal is partly allowed.

14. Decree to be drawn accordingly.

BHARATI H. DANGRE, J.