

(2021) 09 BOM CK 0063
In the Bombay High Court
Case No : Second Appeal No.52 Of 2010

August Furtado And Others	Vs	APPELLANT
Minguel Antonio Rodrigues And Others		RESPONDENT

Date of Decision : 30-09-2021

Acts Referred:

Citation : (2021) 09 BOM CK 0063

Hon'ble Judges : M. S. Sonak, J

Bench : Single Bench

Advocate : A. D. Bhobe, K. Govenkar, C. A. Coutinho

Final Decision : Dismissed

Judgement

M. S. Sonak, J

1. Heard Mr. A. D. Bhobe with Ms. K. Govenkar, learned counsel for the Appellants, and Mr. C. A. Coutinho learned counsel for the Respondents.

2. This appeal was admitted on 22.10.2010 on the following substantial questions of law.

(i) Whether in the absence of relief of recovery of possession of an area alleged to have been encroached by the appellants, respondents could maintain the suit against the appellants?

(ii) Whether both the Courts below could have granted relief of injunction in favour of the respondents after refusing to grant mandatory injunction as sought by the respondents holding that the respondents had failed to prove the encroachment as alleged by them?

3. The Appellants are the original defendants and the Respondents are the original plaintiffs in Regular Civil Suit No. 182/99/D instituted in the Court of the Civil Judge Junior Division, Margao. The plaintiffs filed a suit seeking a permanent injunction to restrain the defendants from interfering with the suit

property which was described in the plaint and also for mandatory injunction to remove the barbed wire fencing erected in the suit property bearing survey No.44/26. The trial Court decreed the suit by granting a permanent injunction but rejected the prayer for mandatory injunction. The First Appellate Court has dismissed the appeal and upheld the judgment and decree made by the trial Court. Hence, the present Second Appeal on the aforesaid substantial questions of law.

4. Mr. Bhohe submits that there were clear pleadings in the plaint about the defendants having encroached upon the portion of the suit property bearing survey No.44/26. He, therefore, submits that the decree for a permanent injunction could not have been granted without there being any prayer for recovery of possession of the encroached portion. He submits that the substantial questions of law as framed are therefore liable to be answered in favor of the Appellants herein.

5. Mr. Coutinho defends the concurrent judgments and decrees based on the reasoning reflected therein. He submits that there are concurrent findings of fact that the plaintiffs were in possession of the entire suit property and therefore, the relief of mandatory injunction was quite superfluous. He submits that the pleadings are being misconstrued by the Appellants and this is a case where the encroachment was attempted by the defendants.

6. The rival contentions now fall for determination.

7. To evaluate the rival contentions, a reference can be usefully made to the averments made in paragraphs 14 and 17 of the plaint which read as follows :

"14. That on 7.3.99 the defendants came to the suit property with some persons and have put up some cement poles by encroaching into the suit property. The encroachment is such that the entire holding survey No.44/26 is made out to be part of the property of the defendants.

17. The plaintiffs state that thereafter they lodged a complaint with the Village Panchayat of Colva in respect of attempt to encroach into his property by the defendants. The Panchayat therefore issued a show cause notice dated 31.3.99 and another show cause notice dated 17.4.99 to the defendant no.1. However, the panchayat has failed to take further action on the show cause notice."

8. The Appellants herein filed a written statement and their response to the averments in paragraphs 14 and 17 are to be found in paragraphs 9 and 12 of the written statement which read as follows:

"9. Contents of para 14 are denied and the Plaintiffs are put to strict proof thereof. It is submitted that the poles have been in existence having been put in the property of the defendants on the western end, at the time that the Mamlatdar of Record of Rights inspected the properties, in the year 1975.

12. Regarding para 17 of the plaint, it is submitted that the defendants replaced

only two poles, when the Engineer S. N. Bhende inspected the property of the defendants on 25 - 3 - 99; it is submitted that as per the Inspection Report of the said Engineer, the property surveyed under no. 44/20 admeasured 534 sq. mts., while the area as per the survey records of the same survey no. is 550 sq. mts. Annexed hereto is the Xerox copy of Form I and XIV of Survey no. 44/20, and the same is marked as Exhibit D."

9. There is no substantial clarity from the pleadings of both the parties as to whether the act of encroachment was complete or whether the suit was filed at the stage of encroachment was attempted or rather whether some poles were put in the portion of the suit property by encroaching into it. The pleadings conspicuously do not refer to the barbed wire fencing at all though there is a reference to the same in the prayer clause.

10. Now despite the lack of clarity in the pleadings, it does not appear that any of the parties have been seriously prejudiced. This is because the evidence was led on the aspect of possession and there are concurrent findings of fact that it is the plaintiffs who were in possession of the entire suit property. The trial Judge, in paragraphs 29 and 31 of the judgment has referred to this evidence which includes inter alia an admission on the part of DW1 as well. There is no case made out in this Second Appeal that the finding on the aspect of plaintiffs being in possession of the suit property is perverse or otherwise not sustainable from the evidence on record. Having regard to such concurrent findings of facts, the substantial questions of law now sought to be pressed in this Second Appeal are rendered quite irrelevant. In the facts of this case, there was no necessity of seeking any mandatory injunction and even assuming that such mandatory injunction was sought for but was rejected that does not vitiate the impugned judgments and decrees made by the two Courts.

11. Besides in this case the relief of mandatory injunction was declined firstly because of the findings on possession and secondly because the learned trial Judge felt that there was no clarity in the pleadings or for that matter in the evidence. The trial Judge also pointed out that the sketch required to be filed was not filed along with the plaint. Therefore, this is not a case where the trial Court and the First Appellate Court accepted that this was a case of some completed encroachment on account of which the defendants were in settled possession of encroached portion and thereafter declined to grant relief of mandatory injunction. From this perspective as well the concurrent judgments and decrees are not liable to be interfered with based on the substantial questions of law as framed at the time of admission of this appeal.

12. For the aforesaid reasons, this appeal is liable to be dismissed and is hereby dismissed. There shall be no order as to costs.