

(2008) 07 BOM CK 0158

In the Bombay High Court

Case No : Second Appeal No. 62 of 2008

Jose Santan Lobo (since Deceased) Represented By his Legal Representatives, Kum. Maria Lobo, Smt. Bertha Silveira and Shri Johny Silveira APPELLANT

Vs

Mr. Domnic George Lobo, (Since Deceased) Represented By His Legal Representatives, Mr. Francis Lobo and Others RESPONDENT

Date of Decision : 16-07-2008

Acts Referred:

Citation : (2008) 07 BOM CK 0158

Hon'ble Judges : N. A. Britto, J

Bench : Single Bench

Advocate : Nigel Da Costa Frias, for the Appellant;

Final Decision : Dismissed

Judgement

N. A. Britto, J.—Heard Mr. Nigel Da Costa Frias, learned Counsel on behalf of the Appellants. This is Plaintiffs' Second Appeal arising from R. C. S. No. 16/1992/F which was filed by the Plaintiffs for permanent injunction to restrain the Defendants from carrying out any construction and for mandatory injunction directing the Defendants to remove the septic tank constructed by them.

2. The Plaintiffs and the Defendants have a long standing dispute as regards the boundary of their properties. The Plaintiffs' property adjoins a road on the western side and bears survey No.182/11. The Defendants property is on the eastern side of the said property of the Plaintiffs and bears survey No.182/12. The property of the Plaintiffs as per survey records admeasures 350 sq. meters and the property of the Defendant as per survey records admeasures 325 sq. meters. Both the properties have a footpath on the northern side. It appears that they also have a dispute regarding a coconut tree, which both claim is in their respective possession.

3. In connection with the said boundary dispute the Plaintiffs filed a Civil Suit

No.226/82 which was dismissed on or about 15-1-1988. Thereafter, the Plaintiffs approached the Deputy Collector for demarcation of their property which case was registered under No.6/238/1991, and, pursuant to the orders passed therein, when a surveyor came to demarcate the property of the Plaintiffs, he was obstructed by the Defendants and thereafter the case was not followed up by the Plaintiffs.

4. The Plaintiffs then filed the suit from which this Second Appeal arises and in support of their claim they examined five witnesses out of which there were two surveyors. The Plaintiffs had sought for appointment of a Commissioner to demarcate the respective properties but that relief was not pursued by the Plaintiffs before the trial Court. At the stage of appeal against injunction order, a Commissioner by name Shri Dessai was appointed and the said Commissioner had opined that there was no encroachment. Plaintiffs had filed objections to the report of the said Commission Shri Dessai.

5. After Suhas Naik/PW3, a surveyor was examined on 7-2-2002, the Plaintiffs appointed Shrikant Shiva Sutar/PW4 who prepared a report on 4-3-2002. Needless to state and as rightly observed by the first Appellate Court the Plaintiffs got the second surveyor appointed because the first surveyor did not support their case.

6. Be that as it may, the learned trial Court after assessing the evidence produced by both the Courts below came to the conclusion that there was an encroachment by the Defendants into the property of the Plaintiffs without specifying what was the area of the said encroachment. Admittedly, neither Suhas Naik/PW3 nor Shrikant Shiva Sutar/PW4 had measured the area of the road or the area of the Defendants property and in fact the surveyor Shrikant Shiva Sutar had opined that the property of the Plaintiffs was 354 sq. meters when in fact it was their case that it was 350 sq. meters. The learned first Appellate Court has discussed the evidence of Suhas Naik/PW3 in para 23 of the Judgment and that of Shrikant Shiva Sutar/PW4 in para 24 of the Judgment. The learned first Appellate Court, referring to the evidence of Suhas Naik/PW3 has observed that it is not in line with the evidence of PW1. Further, the learned first Appellate Court observed that Suhas Naik/PW3 does not state that any part of the septic tank is falling in the property of the Defendants and that it was seen from his evidence that on 7-8-2001 he was engaged to do some survey work but he had stated that the plan was drawn by him in January, 2001 and thus it was clear that he had prepared the plan even before carrying out the inspection of the suit property. The said surveyor Suhas Naik/PW3 had also stated that when the road was widened a part of the property was surveyed under No. 182/11(of the Plaintiffs) utilized for the same and this went to show that the portion of the property of the Plaintiffs was utilized for road widening and which area Suhas Naik/PW3 did not highlight. For the aforesaid and other reasons, the learned first Appellate Court rejected his evidence. As far as Shrikant Shiva Sutar/PW4 is concerned the learned first Appellate Court observed that he had not stated that

the property of the Plaintiffs was utilized for the purpose of road widening. One of the flaws found in his evidence is that he had found more area than the one claimed by the Plaintiffs. Being so, the learned first Appellate Court was fully justified in coming to the conclusion that no reliance could be placed on the evidence of the said two experts to prove that there was an encroachment by the Defendants upon the property of the Plaintiffs surveyed under No.272/11. The onus to prove encroachment was entirely upon the Plaintiffs. In fact, the Plaintiffs in a case of this nature ought to have got a Commissioner appointed but such an exercise was abandoned by the Plaintiffs before the trial Court and the report submitted before the first Appellate Court, *prima facie*, went against the Plaintiffs. The evidence of both the experts, examined by the Plaintiffs, for reasons already indicated by the learned first Appellate Court, could not be relied upon. Thus, it is the Plaintiffs who had failed to prove that there was any encroachment by the Defendants and in particular by building the septic tank. It is rather too late in the day to appoint a Commissioner as submitted by the learned Counsel for the Plaintiffs to find out the extent of encroachment by the Defendants into the property of the Plaintiffs.

7. Although, the learned first Appellate Court has held that *res judicata* was not applicable, the fact remains that both suits were regarding the boundary of the property. The first suit was filed because the Defendants obstructed the Plaintiffs while the Plaintiffs were carrying out the construction of the compound wall. This suit was because the Defendants encroached upon the property of the Plaintiffs by constructing the septic tank.

8. As already stated, the Plaintiffs first abandoned R.C.S. No.226/82 and then the case before the Deputy Collector and then the appointment of the Commissioner. In view of the above, I find that no substantial questions of law are involved in this appeal either as framed by the Plaintiffs or otherwise and therefore this appeal deserves to be dismissed in limine.