

(2011) 11 BOM CK 0002
In the Bombay High Court
Case No : Second Appeal No. 100 of 2010

Mr. Ernesto Caetano Lobo	Vs	APPELLANT
Mrs. Maria Angelina Rebello E VAZ		RESPONDENT

Date of Decision : 14-11-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100

Citation : (2011) 11 BOM CK 0002

Hon'ble Judges : F.M. Reis, J

Bench : Single Bench

Advocate : Sudin M.S. Usgaonkar, for the Appellant; P.P. Singh, for the Respondent

Final Decision : Dismissed

Judgement

F.M. Reis, J.—Heard Shri Sudin M. S. Usgaonkar, learned Counsel appearing for the appellant and Shri P. P. Singh, learned Counsel appearing for the respondent. The above appeal challenges the judgments passed by the

Courts below whereby the suit filed by the respondent to demolish the compound wall claiming to be existing in the property belonging to the respondent surveyed under No. 189/2 of village Verna was ordered to be demolished.

2. Shri Sudin M. S. Usgaonkar, learned Counsel appearing for the appellant has assailed the impugned judgment and pointed out that the Courts below have arrived at a perverse finding of fact to the effect that the appellant has encroached into the property belonging to the respondent surveyed under No. 189/2, when according to the learned Counsel there is a specific averment in the written statement at paras 9 and 11 to the effect that the compound wall constructed by the appellant does not encroach into the property of the respondent surveyed under No. 189/2. The learned Counsel further pointed out that the Courts below have relied upon the Commissioner's report which is at Exhibit 44 to come to the conclusion that there was an encroachment in the

property of the respondent, when on the contrary the Commissioner's report cannot be relied upon as the Commissioner has not at all depicted the alleged encroachment on the basis of the survey plan. Learned Counsel has further taken me through the plan produced by the Commissioner depicting the alleged encroachment which according to the learned Counsel does not even tally with the line separating the property belonging to the appellant which is surveyed under No. 189/1 and the property of the respondent surveyed under No. 189/2 of the said village. Learned Counsel further took me through the judgments passed by the Courts below and pointed out that the Courts below have erroneously appreciated the evidence on record and have relied upon the Commissioner's report which stands vitiated as it is not in accordance with the demarcating lines in the survey records. Learned Counsel, as such, pointed out that the impugned judgment deserves to be quashed and set aside.

3. On the other hand, Shri P.P. Singh, learned Counsel appearing for the respondent, at the outset, pointed out that the property of the respondent is surveyed under No. 189/2 and the respondent has no claim about any encroachment with regard to the property surveyed under No. 189/1. Shri Singh, learned Counsel further pointed out that there is no dispute between the parties about the dividing line separating the property surveyed under nos.189/1 and 189/2 shown in the promulgated survey records. The learned Counsel, in fact, produced a copy of the said survey plan depicting both the said survey numbers namely 189/1 and 189/2 and pointed out that according to the respondent, the appellant has encroached into the property of the respondent surveyed under No. 189/2. Learned Counsel further pointed out that in view of the fact that the Courts below have come to the conclusion that the compound wall constructed by the appellant is located in the property surveyed under No. 189/2 the question of any interference by this Court does not arise at all.

4. Upon hearing the learned Counsel and on perusal of the records, there is no dispute between the parties that the property belonging to the appellant is surveyed under No. 189/1 and the property belonging to the respondent is surveyed under No. 189/2. Taking note of the contentions of the learned Counsel appearing for the respondent Shri P.P. Singh to the effect that the respondent has no grievance about the disputed compound wall in the property surveyed under No. 189/1 and that the respondent does not dispute the correctness of the dividing lines between the property surveyed under nos.189/1 and 189/2 as shown in the survey plan, I find that the contention of Shri Usgaonkar to the effect that the appellant would have to demolish the compound wall if the same is located in the property surveyed under No. 189/1 which is in accordance with the boundary as shown in the survey record would not survive. Appellant would have to demolish any part of the compound wall which is located in the property surveyed under No. 189/2 beyond the boundary line separating the property surveyed under nos.189/1 and 189/2 as shown in the survey plan.

5. Considering the said aspect the apprehension of Shri Usgaonkar to the effect

that the respondent may under the guise of the impugned judgments may demolish the compound wall which is located within the boundary line of the property surveyed under No. 189/1 as shown in the survey plan does not subsist. The Courts below have in fact not considered that the depiction made by the Commissioner is not on the basis of the promulgated survey records separating the two survey numbers though there is no dispute with regard to the boundary line separating the property surveyed under nos.189/1 and 189/2. Taking note of the submissions of the learned Counsel referred to herein above and in view of the clarification fairly pointed out by Shri Singh, learned Counsel appearing for the respondent, I find that the apprehension of the appellant to the extent contended by Shri Usgaonkar would not survive and the appellant would have to demolish any part of the compound wall located in the property surveyed under No. 189/2 beyond the boundary line as depicted in the survey record. Both the Counsel further pointed out that in case of any dispute to ascertain as to whether the existing compound wall is beyond the boundary line as depicted in the survey records such dispute can always be raised before the Executing Court. Subject to the above clarification, I find that there is no substantial question of law which calls for interference by this Court u/s 100 of the Civil Procedure Code. Hence, the appeal stands dismissed accordingly.