

(2011) 12 BOM CK 0004
In the Bombay High Court
Case No : S. A. No. 102 of 2005

Nilconta Gangadhar Sinai Amonkar and Another	APPELLANT
Vs	
Joao Francisco Cruz Mendes (since Deceased) Through LRs. Conrad Mendes and Others	RESPONDENT

Date of Decision : 13-12-2011

Acts Referred:

Citation : (2012) 4 ALLMR 877 : (2012) 4 MhLj 76

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

Bench : Single Bench

Advocate : N. Sardessai, for the Appellant; V. Menezes in Respondent Nos. 1 to 4 and M. Salkar, Government Advocate in Respondent Nos. 11 and 12, for the Respondent

Judgement

F. M. Reis, J.—The above Second Appeal came to be admitted by order dated 26-9-2006 on the following substantial questions of law.

(1) Whether the reason for disbelieving the case of the plaintiff based on the portion of the Commissioner's testimony be sustained in law, when the Commissioner's report and the testimony on the matter in issue/dispute was ignored all together?

(2) Whether the findings rendered by the Appellate Court that the plaintiff has failed to prove the western boundary of the suit property, by holding that there was variance in the pleadings and proof be sustained in the eyes of law when the said findings were rendered by ignoring the amended pleadings?

(3) Whether the findings of the Appellate Court that the northern boundary of the plaintiffs' property as per the sale deed is not as per the boundary on loco, be said to be legal, when the same has been arrived at by ignoring the material evidence on record and more particularly the deposition of PW-2?

The appellants filed the suit for demarcation of their property. It is the case of the appellants that they are the owners in possession of the property known as

"Colombaticanavoril Mordi" as described in para 1 of the plaint and the said plot belonging in possession and ownership of the appellants having an area of 545 square metres. It is further their contention that the respondents No. 1 to 4 had mischievously got a portion of the southern side of the suit property wrongly included in the plot belonging to the respondents No. 1 to 4 and surveyed under No. 4/12 and the remaining plot of the suit property has been included in the plot surveyed under No. 4/16 is shown jointly in the name of Pundolik Tucoba Naik and the appellant Nilkanth Gangadhar Amonkar. It is further their case that the area shown in the said Survey No. 4/16 has been wrongly shown as 1,000 square metres, which according to them ought to have been 1,090 square metres. It is further their case that respondents No. 1 to 4 own the property bearing Land Registration No. 26251 having the same name which plot is bounded as per the boundaries stated in para 3 of the plaint. It is further their case that pursuant to two sale Deeds dated 17-4-1952 and 26-9-1961 the vendors of the appellants purchased 1,093 square metres from Mr. Ambrosio Nicolau Dantas. It is further their case that despite of the fact that the whole property is 1000 square metres, nevertheless, the survey records show that such property admeasures only 1,425 square metres. It is further their case that respondents No. 1 to 4 have started encroaching upon the land of the appellants from the southern side and they have not respected the dividing line between the two properties belonging to the appellants and the respondents towards the southern boundary. It is further their case that they appointed an expert to ascertain encroachment and found that the area of 130 square metres has been wrongly included in the survey holding No. 4/12 recorded in the name of the respondents. Considering that there is a short fall of 90 square metres with regard to the area of the appellants the suit came to be filed for demarcating boundary line towards south northern side with that of the property of respondents in order that survey records are in accordance with the title of the appellants.

2. The respondents filed the written statement disputing the claim put forward by the appellants. It is further their case that their property has been surveyed under No. 4/12 and that they have been lawfully in possession of the said portion of the property and that somewhere in the year 1975, the appellants have built a house in the property standing towards the north of the property belonging to the said respondents. It is further their case that there is no encroachment carried out by the respondents and that the dividing line as shown in the survey records is in accordance with the title of the respective parties. It was further the contention of the respondents that the appellants had included the property of the respondents an area to the extent of 2 metres. As such, according to the respondents there is no reason for any further demarcation of the property and prayed that the suit may be rejected. Respondents No. 11 and 12 have also filed their joint written statement as well as filed their counter-claim.

3. The learned Judge framed the issues on the basis of the pleadings of the parties and by judgment and decree dated 16-2-2004, dismissed the suit filed by

the appellants. A counter-claim by respondents No. 11 and 12 also came to be dismissed. The learned Judge while appreciating the evidence on record has come to the conclusion that the appellants have partly established that they are the owners in possession of the property registered under Land Registration No. 24509 and inscribed in matriz record under No. 57 admeasuring an area of 545 square metres. The learned Judge has further come to the conclusion that the appellants have failed to establish that any portion of the property belongs to the appellants admeasuring an area of 545 square, metres forms part of the survey No. 4/12 of village of Kakoda. Learned Judge further came to the conclusion that the appellants have failed to establish that an area of 37 square metres shown as a nullah was wrongly included in the property surveyed under No. 4/16. The learned Judge further found that an area of 130 square metres claimed by the appellants was lying towards the western side of the plot was rightly included in the property surveyed under No. 4/12 of village of Kakoda. For the other reasons stated in the judgment passed by the learned trial Judge, the suit came to be rejected.

4. Being aggrieved by the said judgment and decree, the appellants have preferred an appeal before the learned Additional District Judge, South Goa at Margao being Regular Civil Appeal No. 29/2004. By judgment and decree dated 4-4-2005, the learned Additional District Judge dismissed the appeal preferred by the appellants. Being aggrieved by the said judgments and decree passed by the Courts below the appellants have preferred the above Second Appeal which came to be admitted on the aforesaid substantial questions of law. By the said judgment, cross-objection filed by the respondents No. 11 and 12 also came to be rejected.

5. Shri Sardessai, learned Counsel appearing for the appellants has assailed the impugned judgment and pointed out that the Courts below while appreciating the evidence on record have failed to consider that the appellants amended the plaint to disclose that the western boundary of the property of the appellants was "Marotigol". Learned Counsel further pointed out that in case the western boundary of the property as "Marotigol" is accepted, the claim of the appellants to the effect that respondents have encroached into the property of the appellants has to be accepted. Learned Counsel further pointed out that the document of the respondents does not disclose the western boundary as "Marotigol", but on the contrary it discloses that the western boundary is belonging to one Balkrishna Suryaji Sinai Cakodkar. Learned Counsel has taken me through the plan of the survey records and pointed out that the property of Balkrishna Suryaji Sinai Cakodkar does not extend beyond the boundary as claimed by the appellants towards the southern side. Learned Counsel has taken me through the plan at Exhibit 75 which was duly exhibited by the Court Commissioner and pointed out that the property of the appellants corresponds to the property as shown as A, B, C, D, E and I to A. The learned Counsel has further pointed out that the property of "Marotigol" towards the western side extends up to southern part of the property of the appellants as depicted by

letters in plan at Exhibit 75. Learned Counsel has taken me through the document of title produced by the appellants at page 249 of paper book at Exhibit 124 and pointed out that the boundaries shown therein clearly correspond to the boundaries as depicted in the said plan at Exhibit 75 in accordance with the claim of the appellants and that to that extent the learned Judge has misconstrued the document on record and has erroneously come to the conclusion that the appellants have failed to establish their claim over the property.

6. On the other hand, Shri V. Menezes, learned Counsel appearing for respondents No. 1 to 4 has supported the impugned judgment. Learned Counsel pointed out that the southern boundary line as shown by letters E, H, D in Exhibit 75 is the dividing line between the property of the appellants and the respondents. Learned Counsel further pointed" out that according to the respondents the appellants have infact encroached into the property of the respondents. Learned Counsel further pointed out that the survey records clearly disclose the boundary line between the property of the appellants and respondents and, as such, the question of carrying out any demarcation at the site does not arise at all. Learned Counsel has taken me through the impugned judgment as well as the pleadings of the parties and the findings of the Courts below and pointed out that the Courts below have rightly appreciated the evidence on record and pointed out that the appellants have failed to establish their claim. Learned Counsel, as such, submits that the substantial questions of law deserve to be answered in favour of the respondents.

7. Dealing with the substantial questions of law framed by this Court, by consent, the first substantial question of law does not require any decision by this Court at this stage. With regard to the second and third substantial questions of law, I find that Shri Sardessai is justified to contend that the Courts below while appreciating the evidence on record have failed to consider the amended plaint filed by the appellants. If the amended plaint was considered the Courts below would have taken into consideration the western boundary as "Marotigol" which was in conformity with the documents of title produced on record. The learned Judge without going through the amended plaint has erroneously discarded the evidence on the ground that the evidence was beyond the pleadings of the appellants. In view of the misreading of the plaint filed by the appellants the learned Judge has erroneously come to the conclusion that the appellants have failed to establish their claim in the suit in accordance with the claim in the suit.

8. On perusal of the plaint as stated hereinabove, the suit filed by the appellants is essentially for demarcating the boundary line located towards the southern side of the property of the appellants. It is the case of the appellants that a portion of their property is included in the property surveyed under No. 4/12. On the other hand, it is the contention of the respondents that the whole property is surveyed under No. 4/12 belonging to the respondents, but however, considering the Sale Deed produced by the respondents which is at Exhibit 126, the eastern

boundary of the property of the respondents is the road. If one considers the said road as shown at Exhibit 75 the same establishes that the property of the respondents cannot go beyond the road towards the northern side. Apart from that, the western boundary of the property of the respondents as shown in the said title documents as the property of Cakodkar and not "Marotigol". In case the boundaries as claimed by the respondents are to be accepted, the western property also has to be "Marotigol". Apart from that the document of title produced on record in respect of the property of the appellants discloses that the western boundary is "Marotigol". Hence, I find on the basis of record that the dividing line of the property of the appellants and that of the respondents is not the line as depicted in the Survey Record. Taking note of the boundary as shown hereinabove, a portion of the property of the appellants is included in the property surveyed under No. 4/12 of Kakoda village. The title documents of the respondents produced by the appellants disclose that the property admeasures total 1,000 square metres. It is not in dispute that the property surveyed under No. 4/12 admeasures 1425 square metres. Hence, there is an excess area of 425 square metres with the respondents. Admittedly, on the basis of the title documents produced by both the parties, the appellants' property has not been described. Article 2340 gives a right to adjoining owners of the property to seek for demarcation of the boundary of their respective properties. Under Article 2341 of the Portuguese Civil Code, the demarcation of the property should inter alia firstly be carried out on the basis of title documents and in their absence on the basis of possession of such respective owners of the properties. Article 2342 of the Portugal Civil Code provides that to avoid further controversy, in cases in which demarcation cannot be carried out on the basis of the title documents or possession or any other means the disputed portion is to be divided into two equal halves. Taking note of the fact that the boundaries cannot be constituted on the basis of title document nor the parties have been able to establish their respective possession of the respective portion of the properties, I find it appropriate that taking into consideration the provisions of Article 2342 of the Portuguese Civil Code the disputed portion is to be divided into two equal halves between the appellants and the respondents.

9. In the present case, it is not disputed by both the parties that disputed portion is marked as H, G, E, I in Exhibit 75. In view of the said provisions of law, the said disputed portion is to be divided into two halves. As such, the demarcated line between the property of the appellants and respondents should be a line to be drawn in east west direction dividing the said disputed portion shown by letters H, D, E, F, I into two halves as shown at Exhibit 75. Considering the above, the demarcating line between the property towards the southern side of the property of the appellants there should be a line dividing the disputed portion H, D, E, F, I into two equal halves. To that extent, the impugned judgment deserves to be modified. The concerned Authorities will have to act on the basis of such declaration in the above proceedings. The substantial questions of law are answered accordingly. In view of the above, I pass the following order:

H, D, E, F, I Correction carried out as per order dated 14-2-2012 in M.C.A. No. 188/2012.

ORDER

(i) The appeal is partly allowed.

(ii) The impugned judgment and decree passed by the trial Judge date 16-2-2002 and the lower Appellate Court dated 4-4-2005 are quashed and set aside.

(iii) The suit filed by the appellants is partly decreed.

(iv) It is declared that the demarcating line between the property of the appellants and the respondents is a line from east to west dividing into two equal halves the portion of the property depicted by letters H, D, E, F, I at plan at Exhibit 75.

(v) The appeal stands disposed of accordingly with no order as to costs.