

(2014) 01 BOM CK 0067
In the Bombay High Court
Case No : Second Appeal No. 27 of 2006

Pedro Gomes Viegas	Vs	APPELLANT
Agostinho Fernandes		RESPONDENT

Date of Decision : 10-01-2014

Acts Referred:

Citation : (2014) 01 BOM CK 0067

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

Bench : Single Bench

Advocate : Iftikhar Agha, Advocate for the Appellant

Final Decision : Partly Allowed

Judgement

F.M. Reis, J.—Heard Shri I. Agha, learned Counsel appearing for the Appellant. None for the Respondents though served.

2. The above Appeal has been admitted on the following substantial questions of law :

(a) Whether the Appellate Court failed to consider that the Defendants have not filed cross objections or cross appeal and therefore the decree of demolition by the Trial Court in respect of the first structure had attained finality.

(b) Whether the decree of demolition passed in respect of second structure is vague and not specific as to the time when option to be exercised.

3. Shri I. Agha, learned Counsel appearing for the Appellant, during the course of his submissions, has pointed out that the suit was filed by the Appellant, inter alia to demolish the structure which is a cow shed which is situated at 12 metres from the existing house and a pig sty illegally constructed by the Respondents. The learned Counsel pointed out that the learned Trial Judge has partly decreed the suit directing the demolition of the cow shed and refusing to allow the demolition of the pig sty. Learned Counsel further pointed out that the Appellant preferred an Appeal before the lower Appellate Court with regard to the dismissal

of the suit in connection with the pig sty. The Respondents did not file any cross appeal and/or cross objections. But, however, by the impugned Judgment, the Lower Appellate Court whilst setting aside the Judgment of the learned Trial Judge refusing the relief for demolition of the pig sty, has also refused the relief granted by the learned Trial Judge with regard to the cow shed. Shri I. Agha, learned Counsel further pointed out that the lower Appellate Court was not justified to pass the impugned Judgment as, admittedly, the Respondents had not filed any cross appeal and/or cross objections. Learned Counsel further pointed out that such cow shed was located at a distance of 12 metres from the existing house occupied by the Respondents and such area is beyond the dwelling house wherein the Respondents have no right to put up any construction. Learned Counsel further pointed out that this Court has held that any such structures of the Mundkar are to be located within the dwelling house and considering that such structure of the cow shed is admittedly beyond the dwelling house, the question of refusing relief would not arise. Learned Counsel further pointed out that the impugned Judgment be quashed and set aside to the extent of the refusal of the relief to demolish the cow shed be set aside.

4. I have carefully considered the submissions of the learned Counsel. I have also gone through the records. This Court whilst disposing of Writ Petition no. 395 of 2012 by Judgment dated 07.08.2012, has, inter alia, come to the conclusion that any such structures put up by a Mundkar have to be located within the dwelling house. The said Judgment of this Court has been upheld by the Division Bench of this Court in Letters Patent Appeal no. 7 of 2012, disposed of by Judgment dated 04.12.2012. In view of the said Judgments of this Court, it is no longer res-integra that any structure by the Mundkar has to be located within the dwelling house as defined under the Goa, Daman and Diu Mundkars (Protection from Eviction) Act, 1975. In the present case, though it is sought to be contended by Shri Agha, learned Counsel, that the said structure is located at a distance of 12 metres, nevertheless, this aspect would have to be considered by the fact finding Court on merits. It would not be appropriate for this Court to re-appreciate the evidence. Apart from that, Shri Agha, learned Counsel, pointed out that the Respondents have not even filed any cross appeal or cross objections challenging the relief granted in favour of the Appellant to demolish the cow shed. This aspect will also have to be re-examined by the Lower Appellate Court on its own merits.

5. Considering the facts and circumstances of the case and in view of the said Judgments of this Court, I find it appropriate to partly allow the above Appeal and direct the Lower Appellate Court to re-examine the dispute in respect to the said cow shed as claimed by the Appellant in the suit. It is made clear that as far as the demolition of the pig sty is concerned, the findings arrived at by the Lower Appellate Court stand concluded and confirmed.

6. In view of the above, I pass the following :

ORDER

(I) The Appeal is partly allowed.

(II) The Regular Civil Appeal is restored to the file of the Lower Appellate Court.

(III) The Lower Appellate Court shall determine afresh the reliefs sought by the Appellant with regard to the said cow shed only in the light of the observations made herein above in accordance with law.

(IV) Considering that the Respondents have not appeared, no date is fixed for appearance of the parties. Nevertheless, the Lower Appellate Court shall fix the date for the appearance of the parties and dispose of the said Appeal as expeditiously as possible.

(V) Appeal stands disposed of accordingly.